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Jane C. Murphy

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

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REVITALIZING THE ADVERSARY SYSTEM IN FAMILY LAW

Jane C. Murphy*

Mercy, detached from Justice, grows unmerciful.

—C.S. Lewis¹

I. INTRODUCTION

The way families resolve disputes has dramatically changed over the last decade. Scholars have focused on a number of substantive law changes that have contributed to this transformation. These include the changing definitions of marriage,² parenthood,³ and families.⁴ But less attention has been paid to the enormous changes that have taken place in the processes surrounding family dispute resolution.⁵ These changes

* Professor of Law, University of Baltimore School of Law; B.A. 1975, Boston College; J.D. 1978, New York University School of Law. I wish to thank Professors Theresa Glennon, Wallace Mylniec, Bill Richman, Matthew Fraidin, and Leigh Goodmark for their comments on earlier drafts of the Article. Many thanks to Jana Singer whose insights from our collaboration on an earlier work about the issues addressed here are reflected throughout this Article. I also thank Megan Beechener and Sarah Hale for their excellent research assistance and the University of Baltimore Educational Foundation for its financial support. Earlier versions of this Article were presented at the American Association of Law Schools 2007 Annual Meeting and the 30th International Congress on Law and Mental Health (University of Padua, June, 2007). Finally this Article is dedicated to the many judges, masters, and lawyers who labor in the family courts.

1. C.S. Lewis, *The Humanitarian Theory of Punishment*, in THEORIES OF PUNISHMENT 301, 308 (Stanley E. Grupp ed., 1971).

2. See, e.g., Nancy J. Knauer, *Same-Sex Marriage & Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421 (2008).

3. See, e.g., Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006); Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105 (2007); Sheelagh McGuinness & Amel Alghrani, *Gender and Parenthood: The Case for Realignment*, 16 MED. L. REV. 261 (2008).

4. Mellisa Holtzman, *Definitions of the Family as Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 LAW & SOC. INQUIRY 1 (2006) (discussing the changing definition of family); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (analyzing the changing composition families and the reliance on more than parents to care for children); Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569 (1996) (discussing the changing patterns in marriage and divorce and how these impact family structure).

5. But see AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 6–11 (2002) (embracing alternative dispute resolution as a tool for resolving parental disputes after divorce); see also RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN

have been even more comprehensive and have “fundamentally altered the way in which disputing families interact with the legal system.”⁶ Both the methods and goals of legal intervention for families in conflict have changed. The roles of judges and lawyers are fundamentally different and less important in this new regime where dispute resolution has largely moved out of the courtroom to “problem solving”⁷ teams. Taking a “holistic” approach,⁸ these interdisciplinary teams seek to address both legal and nonlegal problems facing the families that come to courts seeking legal remedies.

These developments have profound implications for the family justice system. They also reflect a broader jurisprudential shift away from the traditional values of the adversary system in both civil⁹ and criminal justice.¹⁰ In many ways, the debate about the relative virtues of the structured procedures of the adversary system versus the informality and flexibility of the new family courts reflects the same values clash in the law versus equity debates of sixteenth-century England; many of the same questions and tradeoffs are present.¹¹ Is the adversary system a

LAW INSTITUTE’S PRINCIPLES OF THE LAW AND FAMILY DISSOLUTION 409–24 (Robin Fretwell Wilson ed., 2006).

6. RESOLVING FAMILY CONFLICTS xiii (Jana B. Singer & Jane C. Murphy eds., 2008).

7. Symposium, *Problem Solving Courts: A Conversation with the Experts*, U. MD. J. RACE, RELIGION, GENDER, & CLASS (forthcoming 2010) [hereinafter *Problem Solving Courts*] (defining problem solving courts as “an alternative court structure in which all participants work together to solve the chronic behavioral issues often underlying the criminal or civil offense.”); see also GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE (2005).

8. See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 807 (1997).

9. See, e.g., DANA KRALSTEIN, CTR. FOR CT. INNOVATION, A COMPREHENSIVE COMMUNITY JUSTICE MODEL (2007), http://www.courtinnovation.org/_uploads/documents/Baltimore_Eval.pdf (a report documenting the efforts to create problem solving courts to address a range of civil matters).

10. See, e.g., MICHAEL REMPEL ET AL., CTR. FOR CT. INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS (2003), http://www.courtinnovation.org/_uploads/documents/drug_court_eval.pdf (discussing alternative criminal courts for drug offenders). The shift in the criminal area also has its critics. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008) (discussing the drug courts’ failure to rehabilitate the genuine addicts but only allow volitional users to game the system); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 26–27 (2006); Mae C. Quinn, *Anna Moscovitz Kross and the Home Term Part: A Second Look at the Nation’s First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733 (2008); Mae C. Quinn, *Women as Perpetrators of Crime: Revisiting Anna Moscovitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665 (2006) (compares the early twentieth-century New York City Women’s courts with today’s Midtown Court find both fail to address the problems of prostitution and may jeopardize the due process rights of defendants.).

11. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 18 (1969); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 29–31 (Boston, Little, Brown, and Co. 1877) (analyzing and explaining the British roots of

source of rigidity or protection for family law litigants? Does the new system permit the flexibility needed to tailor decisions to the needs of vastly different families? Or does the new regime's broad discretion jeopardize fundamental fairness with informal, inconsistent, and unreviewable decisions?¹²

The proliferation of problem-solving courts around the country has gained widespread media attention.¹³ Policymakers have also offered commentary on their efficacy in addressing a wider range of social ills.¹⁴ But there has been little critical analysis of the broader question of whether this profound shift in our justice system is sound. If, as many concede, the adversary system fails families in variety of ways, do we address its deficiencies or dramatically change its mission? In their zeal to address the social problems that bring people to court, have the reformers given appropriate weight to the values underlying the traditional legal system? And have they adequately explored the risks of the new paradigm, particularly on low-income litigants?

This Article addresses these questions and reframes the debate about problem-solving courts by evaluating the relative benefits of the therapeutic and adversarial approaches in resolving family conflicts.

the American courts of equity); see also Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N. C. L. REV. 209 (1991).

12. See generally *Problem Solving Courts*, supra note 6. The debate about the constitutionality of problem solving courts has just begun to reach the courts, primarily in the context of due process challenges to drug courts hearing criminal cases. The cases decided thus far have just begun to explore the issue. See, e.g., *Brown v. State*, 971 A.2d 932 (Md. 2009) (refusing to address the challenge that Maryland's drug courts violate due process because issue not properly preserved); *Evans v. State*, 667 S.E.2d 183 (Ga. Ct. App. 2008) (holding state had a rational basis for excluding defendant from drug court); *State v. Rogers*, 170 P.3d 881 (Idaho 2007) (vacated lower court's ruling because defendant did not receive his due process rights when terminated from the drug court program); *State v. Filer*, 771 So.2d 700 (La. Ct. App. 2000) (upheld a guilty plea induced on promise of entrance into a drug court program but defendant was ineligible due to prior convictions); *State v. Cassill-Skilton*, 94 P.3d 407 (Wash. Ct. App. 2004) (vacated drug conviction because of lack of due process when defendant terminated drug court program). Constitutional challenges to the new regime have also been raised in the context of mandatory mediation for certain family disputes. See e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 590 n.42 (1997).

13. See, e.g., Henri E. Cauvin, *Public Defender Calls Venues Unconstitutional*, WASH. POST, Apr. 3, 2009, available at, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203732.html>; Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES, Apr. 26, 2005, available at <http://www.nytimes.com/2005/04/26/nyregion/26courts.html>; Erik Eckholm, *Courts Give Addicts a Chance to Straighten Out*, N.Y. TIMES, Oct. 15, 2008, available at http://www.nytimes.com/2008/10/15/us/15drugs.html?_r=1.

14. See, e.g., Douglas B. Marlowe et al., *A Sober Assessment of Drug Courts*, 16 FED. SENTENCING REP. 153 (2003); C. WEST HUDDLESTON, III ET AL., NAT'L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (2008), http://www.ojp.usdoj.gov/BJA/pdf/12902_PCP_fnl.pdf.

Part One of this Article describes the changes that have contributed to this paradigm shift in family law. Part Two explores the profound ways the shift alters the traditional adversary system and the risks presented by these shifts. Finally, this Article concludes that before we fundamentally alter the mission and structure of the justice system we must address the deficiencies in the adversary system. It offers proposals to strengthen the adversary system in family law while incorporating selected elements of the problem-solving courts to design a justice system that serves all families.

II. A PARADIGM SHIFT¹⁵

An overarching theme of family law reform efforts is that the adversary system is ill-suited to resolving disputes involving children.¹⁶ The primary critique by reformers begins by noting that traditional child access proceedings embody adversarial norms intended to minimize direct communication between parties and maximize the courts' role in decisionmaking. Divorce or custody actions are initiated by a lawsuit naming a plaintiff and a defendant, and settlement negotiations are conducted in the "shadow of the law."¹⁷ Parties, if represented and advised by lawyers, reach agreements by making difficult predictions about who will "win" at trial. Under prevailing legal standards, the party who prevails is the parent who most successfully depicts the other parent as unfit, or who can most effectively assign blame for the parties failed relationship. Reformers accurately note that the acrimony between parents engendered by this system harms children. Social science research over the last two decades has made a strong case that children's well-being following parental breakup depends upon their parents' behavior during and after the separation process.¹⁸ Much of the research concludes that the higher the levels of parental conflict to which children are exposed, the more negative the effects of family

15. Portions of this Part are based on the Introduction to *RESOLVING FAMILY CONFLICTS*, *supra* note 6.

16. See Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 *FAM. CT. REV.* 203(2004).

17. The phrase "bargaining in the shadow of the law" has become part of the language of negotiation and dispute resolution and refers to the role the law might play in reminding parties of a predicted court outcome and thus encouraging settlement. Similarly, where the law is indeterminate and has no predictive value, the law does little to promote settlements. The term was first introduced in a seminal article by Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

18. See ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 205 (1994).

dissolution.¹⁹

All of these circumstances have led to a call by reformers to abandon the adversary paradigm, in favor of more informal approaches with the goal of encouraging parents to develop positive post-divorce co-parenting relationships. Nonadversary dispute resolution approaches adopted in newly developed family courts range from relatively well-established court-connected mediation in divorce-related custody cases²⁰ to family group conferencing and other problem-solving approaches in child welfare proceedings.²¹ Some lawyers have embraced the new approaches through “collaborative lawyering” in which lawyers pledge at the outset of their representation not to take a client’s case to trial.²² As two leading reformers recently stated, “in the last quarter century, the process of resolving legal family disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room.”²³

Another element of the paradigm shift is the reconception of family disputes from legal events to social and emotional events.²⁴ These recharacterized family disputes, reform advocates argue, require “collaborative,” “holistic,” and “interdisciplinary” interventions rather than zealous advocacy.²⁵ Lawyers have become less central in the new

19. *Id.*; Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 93–94 (2006); Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L. Q. 97, 104 (1995); Andrew Cherlin, *The Effect of Children on Marital Dissolution*, 14 DEMOGRAPHY 265 (1977).

20. *See, e.g.*, ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY 57 (2004) (describing the widespread use, structure, and function of mediation in child custody disputes).

21. *See, e.g.*, Susan M. Chandler & Marilou Giovannuci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216 (2004); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

22. Collaborative lawyering has been defined as having the unique element of a participation agreement with clients which prohibits the lawyer from representing the client in court if an agreement is not reached but promises vigorous legal assistance as part of a team negotiating an agreement. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004); *see also* Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL L. 141, 141–54 (2008) (arguing for greater ethical standards in collaborative lawyering agreements); John Lande & Forrest S. Mosten, *Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. DISP. RESOL. 347 (2010) (an analysis of the risks of collaborative lawyering to divorcing parties).

23. Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006).

24. *See, e.g.*, Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 407 (2000).

25. *See* Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation,*

regime and the role of mental health professionals and nonprofessional court staff has become more prominent. A related development is the change in goals and ambitions for family court proceedings. The goal of granting parties legal remedies such as custody, divorce, and financial support has been supplanted by the goal of providing families before the court a “holistic assessment of the family’s legal and social needs . . . to devise more comprehensive legal remedies.”²⁶

Many of these developments may hold promise for families in conflict who seek legal remedies to disputes. Using the legal system to assign fault for divorce or to resolve child access disputes using indeterminate standards like “best interests of the child” often results in flawed decisions that take too much time and, if they can afford lawyers and other litigation expenses, costs families too much money.²⁷ And, as I have argued elsewhere, the traditional adversary system will continue to fail most parties as long as they are without lawyers or legal advice, given family law’s complex system of procedural rules and broad discretionary standards.²⁸

The new paradigm offers an alternative to the flawed adversary system for families who must resort to the court for legal remedies. But important questions should be explored before we fully embrace the new reforms. In a system where fully half of family law litigants are unrepresented in court, have we fully tested the effectiveness of the adversary system to resolve family conflicts?²⁹ What values embedded in the adversary system must be maintained in any family justice system to preserve the basic procedural and substantive fairness we require of our legal system?³⁰ And what impact would it have on low-income families to embrace some or all of the elements of the “therapeutic regime”?³¹ Is there an alternative to the new family court’s ambitious

and Evaluation: Reflections on a Survey of Unified Family Courts, 37 FAM. L. Q. 333, 347 (2003).

26. RESOLVING FAMILY CONFLICTS, *supra* note 6, at xv (quoting Babb, *supra* note 8, at 807).

27. See, e.g., Shepard & Bozzomo, *supra* note 25, at 341 (arguing that the risks of “overreaching and incompetent judge[s]” in a unified family court “pale[] by comparison” to the “chaos created for families” when family disputes are resolved in the traditional adversary system); Claudia Wright, *Representation of Children in a Unified Family Court System in Florida*, U. FLA. J.L. & PUB. POL’Y 179, 180 (2003) (claiming that troubled “families may spin from courtroom to courtroom caught in a process that depletes time, money, and energy, and yet never really addresses the core of the problem.”); SHEPARD, *supra* note 20, at 4 (describing why the “underlying philosophical premises [of the traditional adversary system] were incompatible with the needs of most children”).

28. Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (1993).

29. See *infra* note 167 and accompanying text.

30. For an in-depth discussion of the essential elements of a legal system in a democracy see CHRISTOPHER J. PETERS, *A MATTER OF DISPUTE: AN ACCOUNT OF DEMOCRACY UNDER LAW* (forthcoming 2010).

31. See *infra* subpart III.D.

agenda that will improve the adversary system's ability to perform its essential dispute resolution function? The remainder of this Article addresses these questions.

III. THE CAUTIONARY TALE

Although the dramatic shifts in family dispute resolution have been underway for over a decade, scholars and family policymakers have engaged in little critical analysis of the risks and potential negative consequences of such change. This subpart explores these concerns by examining the limits of courts' institutional competence, the surrender of fact-finding and decisionmaking to individuals without legal training, and the disjunction between alternative dispute resolution and established legal norms.

A. Do Family Courts Have the "Institutional Competence" to Achieve the Goals of Reformers?

Institutions called "family courts" began appearing as early as the 1900s,³² and a Standard Family Court Act was circulating in the 1950s.³³ But the new model of a unified family court with expanded services and programs for both child welfare and divorce and child access cases did not begin to be established around the country in significant numbers until the 1990s.³⁴ As a result, there is limited empirical data, positive or negative, of these courts' impact on the families they serve. But a few observations about how these courts operate in both theory and practice, how families experience these courts, and the impact of economics on that experience are possible at this time.

32. Developments in the Law, *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2103 (2003); Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 334-40 (2002) (providing a brief history of the family court movement); Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 261-62 (2008) (providing a history of the family courts and the changes to the family courts during the twentieth century).

33. *An Act to Establish a Family Court, Prescribing Its Jurisdiction, Powers, and Duties, and Regulating Procedure Therein*, 5 NAT'L PROBATION & PAROLE ASS'N. J. 105 (1959).

34. See generally Developments in the Law, *supra* note 32. INDIANA FAMILY CT. PROJECT, THE FIRST FOUR YEARS 47-58 (2004), <http://www.ai.org/judiciary/family-court/docs/2004-report/2004-report.pdf>; Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct A Unified Family Court*, 71 S. CAL. L. REV. 469, 482-90 (1998); *Unified Family Site Update*, UNIFIED FAM. CHRON., May 1997, at 1; see also Patricia G. Barnes, *It May Take A Village . . . Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, at 22. But see Spinak, *supra* note 32, at 334, 364 (providing a brief history of the family court movement and noting the cyclical nature of reform efforts); Boldt & Singer, *supra* note 19, at 91 (analyzing the new Unified Family Court movement as an "outgrowth of the juvenile court movement of the early twentieth century").

Although families may benefit from the capacity-building and problem-solving approaches embraced in the new paradigm, most courts are not competent to provide these services. Court-based procedures have historically been designed to determine facts and enforce norms. The model family court movement has sought to expand this function with a complex, ambitious agenda to address both the legal and nonlegal problems of families who come before them seeking dispute resolution. While the goals of the court system have expanded substantially, the structural changes contemplated in even the ideal courts may not be sufficient to meet the ambitious agenda and transform courts' traditional functions.³⁵ Courts with their "limited remedial imaginations, may not be the best institutional settings for resolving" the nonlegal issues proponents wish to place within their authority.³⁶ As a result, the restructured family courts may be incapable of achieving the formidable task of "provid[ing] coordinated holistic services . . . to address the physical and mental needs of the family."³⁷

In addition to problems adjusting to the proposed change in goals and function, state court dockets, particularly the family law docket, continue to grow and resources continue to decline.³⁸ Recruiting,

35. The ideal unified family court has been defined as having the following components: (1) comprehensive subject-matter jurisdiction over family-related legal matters; (2) a "one family, one team" assignment system, designed to ensure that all matters affecting a family are handled by a single judge or judicial team; (3) an emphasis on interdisciplinary training and collaboration; and (4) the provision and coordination of a comprehensive range of court-connected family services. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 15 (1998); see also PATRICIA A. GARCIA, A.B.A., UNIFIED FAMILY COURTS: JUSTICE DELIVERED (2001) (summarizing the characteristics of unified family courts).

36. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 7 (1996) (arguing that the current adversary system is inadequate for satisfying many important goals of a dispute resolution system) (internal quotations omitted) (footnote omitted).

37. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm With Caution*, 40 FAM. CT. REV. 435, 437 (2002).

38. CT. STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2007: A NATIONAL PERSPECTIVE FROM THE COURT STATISTIC PROJECT 30-37 (2008), http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007%20-%206%20-%20Domestic.pdf (finding a 5% increase in domestic relation caseloads from 1997 to 2006 for the states represented with a general jurisdiction and 14% increase over the same time period for state courts of limited jurisdiction); Connie Cass, *Overflowing Dockets, Lack of Social Services Frustrate Foster Care Judges*, MIDWEST NEWS, July 1, 2004, available at <http://e-magazine.adoption.com/issue/20Jul04.html> (quoting family court judges saying that because of overcrowded dockets "[y]ou wind up giving minutes to a case when you should give it several hours and you just don't have the hours to give"); Wendell Large, *The Cost of Justice*, 21 ME. B. J. 119 (2006) (discussing Maine's State Court's need for increased funding); Margery Gordon, *Roadblocks to Reform*, MIAMI DAILY BUS. REV., May 17, 2005, at 1 (referencing the Florida's Supreme Court warning that the lack of funding for a UFC system may "imperil" the efforts to create such a system). Of course, the economic crisis beginning in September 2009 has only increased the crisis in state court funding. See,

training, and retaining appropriate judicial and nonjudicial staff for the multiple functions contemplated or, in some cases, statutorily mandated in these courts would challenge even a well-financed, broadly committed effort. As one commentator has noted:

The Family Court model court movement is barely five years old, and these courts are just beginning to realize the complexity of their endeavor. Reading what the courts engaged in this experiment say about themselves reveals a mixture of shock and optimism: shock at how hard change is to accomplish, and optimism after seeing real differences in outcomes for families and children. It is also apparent that some of their earliest efforts were procedurally-oriented just to get them started. Those steps have resulted in administrative restructuring and procedural mechanisms for problem-solving that can now be applied to the substantive mandates of the model court movement, an even harder task to accomplish.³⁹

Asking a court system to take on these tasks may detract from its fundamental role as a forum for fair and authoritative dispute resolution.⁴⁰ Scarce resources would be spread even more thinly and some courts may have difficulty meeting both basic conflict resolution functions and the broader and more ambitious goals of the new family courts.⁴¹ A recent study examining the impact of establishing family divisions in one state demonstrates the difficulty in delivering the promised services to more than a small percentage of litigants before the court.⁴² And, as more fully explained below, making good on the broad promise of reform for even a handful of parties may come at a

e.g. State Justice Institute, *State Court Budget Shortfalls*, http://www.sji.gov/article-state_court_budget.php (last visited Mar. 25, 2009) (reporting how state courts are suffering significant budget losses due to the recent economic situation). ELIZABETH MCNICHOL & NICHOLAS JOHNSON, *CTR. ON BUDGET AND POL'Y PRIORITIES, RECESSION CONTINUES TO BATTER STATE BUDGETS; STATE RESPONSES COULD SLOW RECOVERY 1* (2010), <http://www.cbpp.org/files/9-8-08sfp.pdf> (reporting forty-one states are experiencing budget shortfalls with severe fiscal problems likely to continue).

39. Spinak, *supra* note 32, at 374–75.

40. See Geraghty & Mlyniec, *supra* note 37, at 441.

41. *Id.*; John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213 (2006) (discussing the budgetary drawbacks of the judiciary system); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993) (arguing that certain judicial programs, such as ADR, which have not been shown to reduce costs, should be cut due to budgetary restraints).

42. THE WOMEN'S LAW CTR. OF MD., INC., *FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND* 49–50 (2006), <http://www.wlcmd.org/pdf/FamiliesInTransition.pdf> (finding the Family Division did not provide evaluative services in 75% of the cases involving child custody and that Maryland should develop and implement a tracking system for services provided to family law litigants to ensure greater allocation of services).

substantial cost to long held values of due process, family privacy, and autonomy.

B. The Surrender of Fact-Finding and Decisionmaking to Nonlawyers

The new paradigm for family law decisionmaking contemplates a substantial change in the roles of lawyers and judges. Some commentators see a different, but expanded, role for these players in the new system.⁴³ But most commentary and much of the change already implemented endorses the significantly expanded role of nonlegal staff rather than lawyers in the new family court. Such staff “manage cases,” provide court-connected services, and assist fact finders and decisionmakers in reaching settlements or decisions.⁴⁴ One family court proponent has described the need for an expanded role for these new players in the system to provide:

[A] high level of administrative organization both to manage cases and to coordinate services. The court management system, including nonjudicial personnel, must aim to resolve disputes in a timely manner, to supply and to coordinate efficiently the necessary resources or services, and to network appropriately with other courts in the system to share information about families that allows for consistent judicial decisionmaking.⁴⁵

Nonlegal and, in many instances, nonprofessional staff have always exercised enormous influence on the outcome of child welfare proceedings where the state has intervened after allegations of child abuse or neglect.⁴⁶ But the role of such staff, particularly case managers and mediators, has expanded in both child protection and divorce and

43. Andrew Shepard and Forest Mosten see an expanded role for lawyers under the new paradigm. See SHEPARD, *supra* note 20, at 125–37; Forrest S. Mosten, *Emerging Roles of the Family Lawyer: A Challenge for the Courts*, 33 FAM. & CONCILIATION CTS. REV. 213, 213–33 (1995). These commentators include the following tasks for lawyers in an “enlightened” family justice system: “pro se coach,” dispute resolution manager”, “consultant during mediation”, and “preventative legal health care provider.” *Id.* Although there are efforts underway to improve legal education to prepare lawyers for such roles, lawyers receive little training in tasks such as counseling those experiencing emotional problems or acting as financial advisor. See, e.g., Jennifer Rosato, *Reforming a Traditional Family Law Professor*, 44 FAM. CT. REV. 590 (2006).

44. Babb, *supra* note 34, at 521.

45. *Id.*

46. See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family and Criminal Law*, 83 CORNELL L. REV. 688, 707 (1998) (concluding that child protective service workers who may have little or no experience or specialized education make most of the decisions in this arena. “These workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty.”).

child access proceedings in the new model courts. In terms of child protection cases, expanded use of nonlegal personnel can be attributed to two trends prevalent in such courts. First, there has always been “a subtle dynamic” that:

arises on a day-to-day level in these cases, due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist.⁴⁷

Second, the family court movement has contributed to the expansion of informal, nonadversarial alternative dispute resolution mechanisms in child welfare cases.⁴⁸ As a result, social workers, child protection staff, and other nonlegal actors play a central role in decisions about removal and placement of children where abuse or neglect is alleged. As discussed more fully in subpart III.D *infra*, the danger for families, primarily poor, involved in these proceedings is that disregard for statutory and constitutional norms will result in extensive state involvement in family life by nonjudicial personnel before any judicial determination of abuse or neglect justifying such involvement. And decisions will be made in informal settings based on the evaluations, however flawed, of staff with few standards guiding these decisions and little or no opportunity for review.

The model family court has also expanded the role of nonlawyers in private family disputes where the state is not a party, particularly those involving divorce, child custody, and visitation. The nonlegal personnel in these cases include expanded roles for professional staff drawn from mental health and social work backgrounds with relatively established roles such as mediators and custody evaluators.⁴⁹ They also include staff with new titles and somewhat less established roles such as “parenting coordinators,”⁵⁰ “early neutral evaluators,”⁵¹ and “family law

47. Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 343–44 (1999).

48. Lisa Merkel-Holguin, *Sharing Power with the People: Family Group Conferencing as a Democratic Experiment*, 31 J. SOC. & SOC. WELFARE 155 (2004).

49. Mary Kay Kisthardt & Barbara Glesner Fines, *Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes* 43 FAM. CT. REV. 229 (2005). For a discussion of the “elements” of custody evaluation in one jurisdiction, see Jeanne Allegra, *Elements of Custody*, FAMILY L. NEW 12, 13 (February 2009) (describing her job as “making recommendations about custody/visitation . . . when at least one litigant questions the other’s psychological stability and therefore, ability to be an effective parent.”).

50. Christine A. Coates et al., *Parenting Coordination For High-Conflict Families*, 42 FAM. CT. REV. 246 (2004); Jacqueline W. Silberman, *Child Custody in Contested Matrimonials*, 80 N.Y. ST. B.J., Jan. 2008, at 16, 17.

51. See, e.g., Jordan Santeramo, Student Note, *Early Neutral Evaluation in Divorce Cases*, 42

facilitators.”⁵² Finally, the new family court, at least as experienced in some court systems, continues a pattern well entrenched in its predecessor courts, of vesting enormous power in nonprofessional staff such as clerks, custody investigators, case managers, and, in many cases, mediators.⁵³

As early as the late 1980s, a few commentators were beginning to recognize the shift in both the rhetoric and decisionmaking in family disputes, particularly in the child access area. Martha Fineman, in an early and much cited article,⁵⁴ noted that the “professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric. It now defines the terms of contemporary discussions about custody and effectively excludes or minimizes contrary ideologies and concepts.”⁵⁵ She attributed this shift, in part, to the willingness of judges and lawyers to cede authority because of their feelings of inadequacy to make judgments about the best interests of children—the existing legal standard in child custody decisions.⁵⁶

Recognizing the problems associated with leaving child access cases to an adversarial system making decisions under a best interests standard, Professor Fineman nonetheless cautioned against “turn[ing] over the decisionmaking task to another professional group.”⁵⁷ Though these nonlegal professionals are considered neutral, in her view, they have a bias in favor of joint custody, regardless of the case’s circumstances.⁵⁸ Judicial deference to agreements or recommendations from these processes poses risks to primary parents and their children.

FAM. CT. REV. 321 (2004); Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-conflict Divorcing Families and their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453 (2000).

52. Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 422 (2003).

53. Timothy Lohmar et al., *Student Projects a Survey of Domestic Mediator Qualifications and Suggestions For a Uniform Paradigm*, 1998 J. DISP. RESOL. 217, 218 (1998); Joan B. Kelly & Janet R. Johnston, *Commentary on Tippins and Wittmann’s “Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance”*, 43 FAM. CT. REV. 233 (2005);

54. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

55. *Id.* at 730.

56. *Id.* at 740.

57. *Id.* at 729.

58. *Id.* at 730–31. (“[S]ocial workers and other members of the helping professions . . . present themselves as neutral, nonadversarial decisionmakers in contrast to attorneys, whom they characterize as both adversarial and combative. Yet social workers are not neutral; they have a professional bias in favor of a specific substantive result. That result benefits their profession by creating the need for mediation and counseling. It is this bias and self-interest that makes the process one for political consideration. The bias inherent in mediation is different from, but no less suspect than, the bias that can result from overt favoritism of one party over another.”).

Instead, she argued for a return to a legal model in custody cases that protects and recognizes the role of the parent assuming care for the child and proposed the “primary parent” rule to implement this goal.⁵⁹

Other more recent critiques of growing reliance on nonlegal personnel to make custody decisions raise concerns about the bases for such “expert” opinions. Tippins and Whitman, a family law attorney and a psychologist, argue that while forensic psychological assessments⁶⁰ are often “pivotal documents” that form the basis of judicial decisions on child access, they fail to meet ethical and scientific standards of both psychology and law:

Indeed, there is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious. Besides lacking scientific validity, such opinions have often been based on clinical data that are, on their face, irrelevant to the legal questions in dispute. Indeed, whatever position one might take on the ultimate issue rule with respect to other species of expert testimony, such opinions by mental health witnesses on the ultimate question of a child’s best interest ought not to be allowed. . . . The best interests standard is a legal and socio-moral construct, not a psychological construct. There is no empirically supportable method or principle by which an evaluator can come to a conclusion with respect to best interests entirely by resort to the knowledge base of the mental health profession.⁶¹

59. *Id.* at 770–74. For further discussion of this idea of a “primary caretaker standard,” see *infra* notes 152–53 and accompanying text. See also Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 37 (1985); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 180–82 (1984) (arguing for a presumptive rule in favor of the primary caretaker); *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981). *Garska* has been modified by recent statutory changes in West Virginia that continue to instruct judges to allocate custodial responsibility for children based upon past caretaking responsibilities, but do not create a presumption in favor of the primary caretaker. See W. VA. CODE § 48-9-206 (2008) (directing the court to take into account the past caretaking responsibilities when deciding custody sharing instead of solely on past responsibilities); John D. Athey, *The Ramifications of West Virginia’s Codified Child Custody Law: A Departure from Garska v. McCoy*, 106 W. VA. L. REV. 389 (2004). For a full discussion of the merits of the primary caretaker rule, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527–38 (1984) (recommending a rule favoring the primary caretaker for children five and under). As discussed *infra* at note 155, the ALI Principles have created some renewed interest in this approach to custody decision making. No state expressly follows a primary caretaker presumption today. A number of states weigh findings about who is the primary caretaker as a factor in child custody determinations. See, e.g., Michigan Child Custody Act of 1970, MICH. COMP. LAWS § 722.23 (2009). In other states, the primary caretaker inquiry is a creature of common law. *Kjelland v. Kjelland*, 609 N.W.2d 100 (N.D. 2000).

60. Matthew T. Huss, *What is Forensic Psychology? It’s Not Silence of the Lambs!*, EYE ON PSI CHI, Spring 2001, http://www.psichi.org/pubs/articles/article_58.asp (defining forensic psychology as the intersection of mental health and the law through the practice of clinical psychology).

61. Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 214–15

Others have noted that this critique can also be applied, perhaps more forcefully, to the range of nonlegal and nonprofessional staff who often conduct custody investigations and assist courts in reaching custody decisions:

[C]ustody evaluators are more likely to make inferences and recommendations from unsubstantiated theory, personal values and experiences, and cultural and personal biases. Our own observations and reviews of evaluations over several decades lead us to the same conclusion. Common examples include unexamined strong beliefs in the primacy of mothers (or essentiality of fathers) regardless of the circumstances, biased perception of their clients derived from their own negative marital and divorce experiences, or a conviction that joint physical custody benefits (or harms) all children.⁶²

Criticism of increased reliance on nonjudicial personnel also stems from the often unclear ethical standards that govern such personnel's behavior. While nonlawyer mediators may be bound by court rules or statutes requiring mediator confidentiality, prohibiting testimony in court, or ex parte contacts with judges about mediation sessions,⁶³ not all states have such rules. Indeed, some state statutes authorize mediators to make recommendations to the court if mediation fails.⁶⁴ The ethical obligations of staff with roles such as "custody evaluators" or "parenting coordinators" are even less clear. Commentators have raised concerns about the practices of such staff in both obtaining information about parties and sharing such information with judges and others.⁶⁵ These concerns exist when parties are represented by counsel and court personnel do not appropriately consult with counsel before giving "advice" to parties or seeking information from them⁶⁶ These concerns are even greater when parties are unrepresented and have little understanding of the relative authority of various players in the family court system.⁶⁷

(2005) (internal quotations omitted) (citations omitted).

62. Kelly & Johnston, *supra* note 53, at 233; see also Kisthardt & Fines, *supra* note 49, at 229–32; Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference of Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 461 (2008) (noting the wide range of education and training among court personnel screening family cases for mediation and other services).

63. See, e.g., MD. R. PROC. § 17-109; GA. SUP. CT. MEDIATION R. 7(a)–(b); PA. R. CIV. PRO. 1940.2; U.S. DIST. CT. R. W.D. VA. 83.

64. See, e.g., CAL. ALAMEDA CTY. UNIF. SUPER. CT. R. 10.1.11; Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1803 (2001).

65. See Merkel-Holguin, *supra* note 48, at 161.

66. Chase, *supra* note 52, at 423.

67. *Id.*

C. The Disjunction Between Alternative Dispute Resolution and Legal Norms

A centerpiece of the new paradigm in family decisionmaking is the expanded use of alternative dispute resolution and, in particular, mediation. The use of mediation in divorce and related child access disputes is relatively established but has grown exponentially as court-mandated family mediation has spread in the new family courts.⁶⁸ Most recently, use of mediation or “family conferencing” has spread into child welfare cases.⁶⁹ Encouraged by judges and court administrators who welcome both the reduction of cases on their dockets and relief from making difficult child placement decisions, mediation continues to grow throughout the family court system.

It is difficult to underestimate the sea change in family dispute resolution when moving from the courtroom to the mediation room. Like many of the reforms, mediation presents both possibilities and risks as an alternative to a legal system suffused with the norms of traditional advocacy. There is no fact finder or decision maker apart from the parties in mediation. Rather, a mediator “facilitates” the parties in resolving their own disputes.⁷⁰ Mediating parties “may address any issue they wish, not limited to legal causes of action; they may bring in any information they wish, not limited by rules of evidence and procedure to probative evidence, relevant to legal causes of action and meeting evidentiary requirements for authenticity and accuracy.”⁷¹ Even in court-based programs, the sessions are private and informal with few rules governing the scope of discussions or exchange of information, other than mediator-developed rules of courtesy. Legal norms play a very limited role. While laws regarding child support formula may be mentioned, in mediation of child access issues, and to some extent, marital property and alimony, parties are encouraged to generate their own norms that guide the resolution to their dispute.⁷²

In appropriate cases, mediation can empower parties, enhance their ability to work together in the future, and promote flexible and creative

68. DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 3–22 (Jay Folberg et al. eds., 2004); see also JANE C. MURPHY & ROBERT RUBINSON, FAMILY MEDIATION: THEORY AND PRACTICE 10–12 (2009).

69. See Merkel-Holguin, *supra* note 48.

70. See, e.g., MURPHY & RUBINSON, *supra* note 68, at 12.

71. Jonathan M. Hyman & Lela P. Love, *If Portia Were A Mediator: An Inquiry Into Justice in Mediation*, 9 CLINICAL L. REV. 157, 161 (2002).

72. Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 708 (1997); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 534 (1997).

problem-solving. It has particular value in family disputes where strengthening, rather than harming relationships in the dispute resolution process is important because of the need for ongoing relationships to co-parent children after family breakup.⁷³ But participation in mediation also poses a serious risk that parties may waive important legal rights or enter agreements that exacerbate conflict. This is particularly true when mediators are ill-equipped or poorly trained.⁷⁴ Bad mediators can do great harm—especially to vulnerable parties—when the “empowering” promise of mediation can instead become an exercise in coercion and arm-twisting.⁷⁵ This risk is particularly acute without appellate review, a public record, or established grievance procedures that, at least in theory, provide a check on the risk of “bad” judging.

The risks of mediation increase when parties are encouraged or ordered to participate in mediation and lack information about legal norms. Attorneys have not traditionally played a central role in mediation. Unless confronted with a court order for mediation, attorneys rarely mention mediation as an option for clients facing family breakup, either through divorce or child welfare proceedings.⁷⁶ Although some quickly recognized the important role attorneys can play in both preparing clients for mediation, and in the mediation sessions themselves,⁷⁷ the prevailing view is that attorneys have little or no role to play in mediation.⁷⁸ Some proponents of mediation not only see

73. Ann Milne, *Mediation—A Promising Alternative for Family Courts*, 42 JUV. & FAM. CT. J. 61 (1991) (arguing that mediation is particularly well-suited to resolving disputes among family members because agreements, rather than a public adversarial proceeding, are less destructive to family relationships, particularly parent-child ties).

74. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 429–78 (1994).

75. For a discussion of the damage that poor mediators can wreak in family law mediation, see, for example, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1603 (1991); Penelope Eileen Bryan, *Reclaiming Professionalism: the Lawyer's Role in Divorce Mediation*, 28 FAM. L. Q. 177 (1994). For a rare instance where an alleged bad mediator was subjected to judicial scrutiny, albeit unsuccessfully, see *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (plaintiffs alleged that mediator coerced settlement).

76. In response to this concern, the American Bar Association added language to its Comments to Model Rule 2.1 Scope of Advice suggesting that lawyers may be obligated to advise clients about the availability of alternative dispute resolution. See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2002) (noting that “when a matter is likely to involve litigation, it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”).

77. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (analyzing a study of lawyer participation in divorce mediation in Maine and concluding that such participation protects clients and otherwise improves the quality of the mediation process).

78. Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing The Role of “Outside Counsel”*, 12 MEDIATION Q., June 1986, at 17, 27 (“For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client’s interests contradicts the very essence of mediation and can produce inequitable

attorneys as having a limited role, but actively discourage their participation. Without rules of procedure and evidence or governing substantive law they argue, parties can navigate the process of mediation themselves. Attorneys have little or no role under this conception of family mediation.

But the risk of loss of rights in the mediation process is significantly greater for unrepresented parties.⁷⁹ Even if the attorney does not attend the mediation, the represented party has far greater access to an expert source of information about judicial proceedings, each party's legal rights and remedies, and the parties' chances of success in court. The unrepresented party has no comparable source of information when a "neutral" mediator facilitates an agreement. One scholar described his view of the potential harm for unrepresented litigants in court-sponsored mediation programs:

From a mediator's point of view, the [neutral role of mediator] flows naturally from the concept of mediation, a process voluntarily selected by the parties as a means of dispute resolution different from an adversarial trial. From an unrepresented litigant's point of view, however, the effect of the rules can be devastating. The pressure exerted by courts to send cases to mediation and the lack of explanation of the mediation process raise serious questions about the "voluntary" nature of the decision to mediate. Once in mediation, the pressures on mediators to obtain settlements are immense. With a large number of unrepresented litigants, this pressure guarantees that mediators will rarely, if ever, exercise the option to terminate the mediation due to the incapacity of an unrepresented litigant to participate. . . . In mediated settlements, the routine waiver of rights by unrepresented litigants flows from presumptions that the choice to mediate is voluntary and informed; that the litigant has a realistic opportunity to obtain counsel and chooses to forego counsel; that the litigant has access to independent advice; and that the litigant appears in mediation aware of her legal rights and capable of participating in mediation. . . . In theory, judges could provide a check on the dangers identified above in mediation, because mediated agreements are usually sent to them for approval. In reality, judges typically rubber-stamp agreements reached in mediation.⁸⁰

results."); see UNIF. MEDIATION ACT § 10 (2001); see also MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION 3 (2000), available at <http://www.afcnet.org/pdfs/modelstandards.pdf>.

79. For a discussion of the substantial numbers of unrepresented parties in family court cases, see *infra* notes 96, 123, and 126.

80. Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2010–11 (1999) (footnotes omitted) (arguing for changing the role of mediator when one or both parties are unrepresented to include

The risks of mediation are also heightened when one party is less powerful than the other.⁸¹ Lack of formal procedures; confidential, private setting; focus on the parties' "needs" rather than "rights" under substantive family law; and virtual lack of review of both the process and outcome of mediation create a setting where the more powerful may dominate, and bias and prejudice are unchecked.⁸² Power imbalances may exist where only one party is represented by an attorney or may result from race, gender, class, sexual orientation, and cultural differences in mediation.⁸³

The most disabling power imbalance in mediation may be where domestic violence has taken place. In these cases, there has already been a severe abuse of power and the consequent power imbalance can make mediation impossible. A consensus has emerged that cases involving family violence need special treatment in mediation, reflected in both standards for mediators⁸⁴ and mediation statutes and rules.⁸⁵

providing legal information); *see also* Waldman, *supra* note 72 (proposing a "norm educating" or even "norm advocating" role for mediators in some situations, including certain types of family mediation). But the vast majority of mediators reject such a role. *See e.g.*, Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

81. One of the earliest articulations of this position is the often-cited article by Trina Grillo, *supra* note 75. Of course, some mediators argue that just opposite is true: mediation is particularly appropriate for relationships marked by power imbalances, particularly gender. They argue that the hierarchical, "winner takes all" approach of a still white, male dominated adversary system further disempowers and silences the less powerful. The delays, expense, complexity, and inflexibility of litigation make it particularly well-suited to resolving family law disputes. Mediation, on the other hand, with its emphasis on listening, relationships, and problem-solving has greater potential to "heal" and "hear" all voices. Further, mediation's focus on permitting participants to express emotions and articulate needs may be better suited to women than men. Its procedural informality, lack of reliance on substantive rules of law, and lower cost might make it more accessible to those who cannot afford lawyers and are not well versed in the American justice system. *See, e.g.*, Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 815 (2007); Anne K. Subourne, *Motivations for Mediation: An Examination of the Philosophies Governing Divorce Mediation in the International Context*, 38 TEX. INT'L L.J. 381, 382-83 (2002); James R. Holbrook, *The Effects of Alternative Dispute Resolution On Access to Justice in Utah*, 2006 UTAH L. REV. 1017, 1021-25 (2006); Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 22-37 (2005). Elizabeth Ellen Gordon, *What Role Does Gender Play in Mediation of Domestic Relations Cases?*, 86 JUDICATURE 134 (2002).

82. Michael Lang, *Understanding and Responding to Power in Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* *supra* note 68, at 209, 213-15.

83. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

84. The Model Standards of Practice for Family and Divorce Mediation, endorsed by among others, the American Bar Association and the Association of Family and Conciliation Courts, include provisions defining domestic violence, requiring domestic violence training for mediators, screening, and setting forth steps to ensure safety during mediation. *Model Standards of Practice for Family and Divorce Mediation*, 39 FAM. & CONCILIATION CTS. REV. 121, 127 (2001). The Model Standards also recognize that some cases should not be mediated "because of safety, control, or intimidation issues." *Id.* at 132. "A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic

Despite this consensus, there is evidence that the new family courts, in which mediation plays such a central role, still order couples who have experienced domestic violence to mediate family law disputes with little or no particularized examination of the couples' circumstances.⁸⁶

Perhaps an even more troubling example of risks posed by mediation in the face of a disabling power imbalance is family conferencing in child welfare cases. While these cases may involve more attorneys than private family disputes,⁸⁷ the attorneys' role in family conferencing is as ill-defined and limited as in divorce and custody mediations.⁸⁸ And these cases are often marked by intimate partner violence⁸⁹ and parties with limited education and resources.⁹⁰ All these circumstances create risks that a parent, most often the mother, will "suppress[] her point of view in order to achieve agreement," and not benefit from available statutory or constitutional protections.⁹¹ As Amy Sinden has described:

[I]nformal procedures are unlikely overall to be as successful as formal ones in meeting the outcome and process goals of due process. The substantial power disparity between the parties, the emotionally charged nature of the subject matter, and the lack of a shared set of interests and values between the parties all tend to distort the decision making process. Traditional formal adversarial processes have mechanisms that, while far from perfect, are designed to combat the distortion caused by such

abuse throughout the mediation process." *Id.* Another group of distinguished academics, judges and practicing lawyers, the American Law Institute (ALI), has also addressed mediating family disputes where domestic violence is present. In its Principles of the Law of Family Dissolution, the ALI takes the position that the risks of coercion and intimidation in mediation for victims of domestic violence require that all mediation programs be voluntary. AM. LAW INST., *supra* note 5, § 2.07(2).

85. Courts and legislatures have responded to the consensus that domestic violence cases should be given special treatment in mediation by enacting a variety of rules and statutes to achieve that goal. As of 2004, forty two states had enacted statewide statutes or court rules authorizing mandatory, discretionary, or voluntary court-sponsored mediation programs of selected family law disputes. Of the forty-two statutes or rules, twenty-nine create some kind of exception to the court's authority. Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Creating Effective Screens*, 39 FAM. L.Q. 53 (2005).

86. *Id.* (citing studies in California and Maryland's Family Courts in which large numbers of cases involving family violence go to family mediation without being identified and properly screened). *But see id.* at 62–63 (report identifying new procedures for court screening of domestic violence cases prior to referral for court-sponsored mediation in Maryland's family divisions).

87. *See, e.g.* MD. CODE ANN., FAM. LAW § 1-202 (Lexis Nexis 2009); S.C. CODE ANN. § 20-7-110 (2009); N.J. STAT. ANN. § 30:4C-15.4 (West 2009) (example of statutes providing representation of parents and children in child abuse and neglect cases).

88. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1 (2006).

89. Murphy, *supra* note 46, at 711.

90. *Id.*

91. Sinden, *supra* note 47, at 391.

conditions. But informality generally offers no equivalent protections.⁹²

Much of the research evaluating the concerns raised here about mediation is conflicting. The research addressing these concerns in family mediation tends to show different results depending on a number of factors including the type of issues mediated (custody or financial issues), whether process or outcomes are examined, and whether the parties have experienced both litigation and mediation.⁹³ One difficulty in evaluating family mediation is measuring “success.”⁹⁴ Given mediation’s focus on “needs” rather than “rights,” measuring participant “satisfaction” has been the dominant and appropriate measure of success. Minorities and other traditionally less powerful groups may, however, have lower expectations about how well their needs can be met, thus rendering “satisfaction” an inadequate measure for these individuals. “Fairness” in both process and outcome instead of “satisfaction” should also factor into the “success” of these new forms of alternative dispute resolution in child welfare cases.

D. The Impact of the New Paradigm on Low-Income Families

1. The Loss of Legal Rights and Privacy

The previous subparts have discussed a range of concerns about the move from the adversary system to “therapeutic” intervention in family law. Many of the elements of the new paradigm—compulsory mediation of disputes, reliance on nonlegal staff, and relaxation of procedural protections—pose greater risks for poor people. First, there is a risk that the new approach will deprive poor litigants of their legal rights. This risk results from many circumstances. First, these procedures and investigations are largely informal and lack the safeguards built into the adversary system.⁹⁵ The threat of loss of rights is heightened for poor litigants who most often appear without lawyers and therefore lack the protection afforded by lawyers in this uncharted territory.⁹⁶ Further, there is evidence that when these services are

92. *Id.*

93. *Id.* For a summary of some of the research regarding gender and mediation, see DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS, *supra* note 68, at 456–57.

94. Waldman, *supra* note 72, at 765 (finding that the difficulty in measuring “success” is in part because different mediation models place “a different weight and emphasis on the values of fairness, disputant autonomy, social justice, and self-determination”).

95. See *supra* notes 70–71 and accompanying text.

96. See generally Stephen Daniels and Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW, AND DEVIANCE (Rebecca L. Sandefur ed., 2009) (finding that more than half of family law litigants are unrepresented); Steven K.

offered in courts without cost to the indigent, the quality of the mediator or evaluator is inferior to the services available for fees in a private setting.⁹⁷

The most troubling impact on the poor of the new approach to family dispute resolution is the increased loss of family privacy that results from the family court's expanded role. When family disputes are viewed as opportunities for therapeutic and holistic interventions,⁹⁸ increased state interference in family life is inevitable. While this is a potential risk for all parties before the court, poor families are most vulnerable.

Low-income families, particularly mothers, have always been at risk of unjustified or inappropriate state intrusion in the child welfare.⁹⁹ Decisions in this context have been made in informal proceedings under vague standards¹⁰⁰ with resulting limited judicial review. These circumstances, combined with state and federal statutes requiring continuing review and oversight by the court and child welfare

Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L. J. 105, 107–17 (2001) (at least one spouse appearing pro se in 67% of domestic relations cases and 40% of child custody cases); Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 993 (2000) (72% of domestic relations cases involved at least one unrepresented party).

97. Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005). There is growing concern about the risk that mediation will become justice “on the cheap” for the poor. While the “second class” justice concerns usually focus on court-ordered mediation versus litigation, there is growing concern that vast differences in quality may develop between private, voluntary mediation and public, court ordered mediation. To the extent parties have resources, they will tend to choose their own mediators and opt out of court-based programs. The remaining cases sent to mediation from the ever expanding family law docket will be predominately poor, unrepresented litigants who have no choices and will experience the mediation equivalent of the “mass justice” of low-income courts. See also Carol J. King, *Burdening Access To Justice: The Cost of Divorce Mediation On The Cheap*, 73 ST. JOHN'S L. REV. 375 (1999); Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865 (1998). The problem with the education and training of these nonlegal court personnel is discussed *infra* at note 158.

98. See Ross, *supra* note 35, at 13.

99. Murphy, *supra* note 46, at 707–09 (analyzing the treatment of mothers in a range of legal proceedings involving children and noting “[B]ecause mothers overwhelmingly are the custodians and caretakers of children, they are, in most cases, the focus of the state's intervention in cases of allegations of child abuse or neglect. As noted, from their inception, child welfare programs focused on poor children.”).

100. Although there is variation among standards for state intervention, the language of state statutes generally allows intervention based on abandonment; physical, sexual, or emotional “abuse”; or failure to protect a child from abuse or educational or medical neglect. See, e.g., CAL. PENAL CODE § 270–271 (West 2009); D.C. CODE § 16-2301(9)(A)(ii) (2009) (defining a neglected child as one “who is without proper parental care or control . . . necessary for his or her physical, mental, or emotional health”); MASS. GEN. LAWS ch. 119, § 39 (2009); N.M. STAT. 32A-4-2 (2009); VT. STAT. ANN. tit. 33, § 4912 (2009).

bureaucracy,¹⁰¹ have led to well-documented victimization of poor women under this system.¹⁰² The family court movement's increased reliance on informal procedures like family group conferencing¹⁰³ increases the risk of unchecked state intervention, and threatens due process in these cases. One practitioner described these new procedures for resolving allegations of child abuse and neglect:

[I]nformal processes replace the initial factual adjudication of whether acts of abuse or neglect warranting state intervention actually occurred with a free-ranging family therapy session. There is virtually no limit on the topics that can be discussed nor on the people who may be invited to join. Mediation programs typically give discretion to the mediator to invite people who are not parties to the case, including foster parents, extended family members, and members of the "community," such as a local church pastor. Once these people are brought to the table, all become equal participants, entitled to have their "concerns" heard and their "needs" met. Rather than seeking to determine the truth of the allegations of abuse or neglect, the focus of the discussion becomes "[f]inding solutions which meet the competing needs and interests of all parties." Suddenly, the needs and interests of foster parents, aunts, uncles, grandparents, and social workers are placed on an equal footing with those of the parents and children.

But before the family is forced to participate in therapy, the process is supposed to first make a determination as to whether state intervention is warranted. This stage has been skipped. In essence, the mediation session becomes the very state intrusion that the proceeding is supposed to determine whether or not to allow in the first place.¹⁰⁴

The new regime is raising similar concerns for low-income families in proceedings involving divorce and child access. The risk of due process violations and loss of privacy in family life has increased under the new system with more ambitious goals for intervention and the roles of both judges and nonjudicial personnel have changed. As noted, a principle component of the new family court is the goal of having one judge hear all matters involving a single family.¹⁰⁵ This may result in both more informed and more efficient decisionmaking.¹⁰⁶ But it may also result in

101. Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 973-74 (2006).

102. *Id.* at 974-75; see also Murphy, *supra* note 46, at 764-65; Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386 (2002).

103. See, e.g., Merkel-Holguin, *supra* note 48.

104. Sinden, *supra* note 47, at 393 (footnotes omitted) (second alteration in original).

105. Ross, *supra* note 35, at 17.

106. Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 394 (2003).

judges having access to information about a family that would be inadmissible in traditional adversarial proceedings. Judges might also reach decisions in one proceeding based upon conclusions reached in another.¹⁰⁷ In addition, a judge's role in the new "problem-solving" family court has shifted from the more narrow role of resolving disputes to the less defined, and potentially broader, role of using the court's authority "to motivate individuals to accept needed services and to monitor [the parties'] compliance and progress."¹⁰⁸ The latter role creates a greater risk of unwarranted intervention in traditionally private spheres of family life.

In addition to the risk of loss of privacy and due process posed by judges in the new family courts, the wide range of nonjudicial court-sponsored actors and services in these courts pose similar risks. Given the goal of addressing both the perceived legal and nonlegal needs of families, parties seeking remedies like divorce or child support may be required to comply with orders or referrals for parenting classes,¹⁰⁹ substance abuse or mental health evaluations,¹¹⁰ custody evaluations,¹¹¹ family mediation,¹¹² and other similar "services."

Many commentators and practitioners have described bias in the legal system against the poor, particularly in their roles as parents.¹¹³ This may trigger greater scrutiny and intrusion of the kind embraced by this regime—required attendance at parenting education, mental health evaluations, continuing oversight by parenting coordinators, custody evaluators, and other newly created players in the family justice system. The requirement that family members participate in services may even extend to victims of domestic violence seeking protection and other legal remedies in a family court focused on "problem solving."¹¹⁴ To avoid "losing sight of the victim," many of these courts include the

107. Geraghty & Mlyniec, *supra* note 37, at 439.

108. Boldt & Singer, *supra* note 19, at 96 (quoting Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1060 (2003)).

109. See e.g., MD. CODE ANN., FAM. LAW § 7-103.2 (LexisNexis 2009); Alicia M. Hehr, *A Child Shall Lead Them: Developing and Utilizing Child Protection Mediation to Better Serve the Interests of the Child*, 22 *OHIO ST. J. ON DISP. RESOL.* 443, 455 (2007).

110. See e.g., MD. R. 16-204.

111. *Id.*

112. MD. R. 9-205.

113. See also, NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* (1997) (arguing that there is an inherent bias against poor and single parent families in the legal system).

114. Joan Zorza, *Specialty and Problem Solving Courts*, 11 *DOMESTIC VIOLENCE REPT.* 33, 47-48, (critiquing the intrusion and burdens on battered women in the Family Violence Court); Lowell D. Castleton, et al., *ADA County Family Violence Court: Shaping the Means to Better the Result*, 39 *FAM. L.Q.* 27 (2005).

battered parent in orders for counseling and other services.¹¹⁵ “Services” in these contexts require significant disclosure of personal information by family members with few rules or procedures to protect the scope of the information sought or, in some instances, the limits of its dissemination. In some cases, such orders may even undermine the goals of family safety as in the domestic violence context where a batterer may continue control over the victim by bringing contempt actions or otherwise using court orders for victim services as a way to manipulate the victim.¹¹⁶ For all these reasons, court ordered participation in these programs burdens families’ privacy and encroaches upon their autonomy.

Those with resources have opportunities to limit court involvement in family breakup and its consequences. When a court orders mediation, parties may be able to bypass court-sponsored programs. Their attorneys can object to mediation, negotiate directly with opposing counsel, or choose a private mediator.¹¹⁷ Similarly, when parties can pay for services such as custody evaluation, courts will often allow them to substitute their own experts for the court’s staff.¹¹⁸ Further, the parties with attorneys often have negotiated agreements and can present them at the first court proceeding. In this way, they avoid referrals for services and remain “under the court’s radar.” For families who try to navigate the system without lawyers or resources for “outside” experts or services, involvement in the web of interventions in the new family court is almost impossible to avoid if they seek legal remedies, such as custody orders and child support. The following subpart illustrates how these potential risks play out when poor families bring their disputes to the new family courts.

115. Zorza, *supra* note 114, at 47.

116. *Id.*

117. Statistics from one court system support the need for concern that court sponsored “services” are being utilized disproportionately by low-income families. THE WOMEN’S LAW CTR. OF MD., INC., CUSTODY AND FINANCIAL DISTRIBUTION IN MARYLAND: AN EMPIRICAL STUDY OF CUSTODY AND DIVORCE CASES FILED IN MARYLAND DURING FISCAL YEAR 1999, at 21–22 (2004), <http://www.wlcmd.org/pdf/CustodyFinancialDistributionInMD.pdf>; THE WOMEN’S LAW CTR. OF MD., INC., *supra* note 42, at 22–24; *see also* Rubinson, *supra* note 97, at 119 n.98 (noting that “[m]ost of these mandatory [court-based] mediation programs are for family law cases in which the vast majority of disputants are low income.”).

118. Allegra, *supra* note 49, at 12 (as one custody evaluator described the process, “[w]hen [custody evaluation is warranted] the couple might agree to a private Custody Evaluation, performed by a psychologist, retained for this purpose. The clients’ attorneys are often instrumental in helping their clients identify a psychologist, who is experienced in performing this type of evaluation. When there is no agreement to perform a private custody evaluation, but the psychological issue still exists as an impediment to custody–visitation arrangements, the court steps in and orders its own Custody Evaluation”).

2. Maryland's Experience

a. Introduction

Maryland was among a small group of states to explore new ways to handle family law matters by establishing family divisions in its five largest jurisdictions by court rule in 1998.¹¹⁹ Although Maryland did not adopt all components of the model family court,¹²⁰ the courts embarked on an ambitious experiment to approach family law decisionmaking from a “therapeutic, holistic, and ecological” perspective “with the aim of improving the lives of families and children and maximizing the potential positive outcomes of court intervention.”¹²¹ The system was designed by an array of impressive and thoughtful jurists, scholars, and practitioners.¹²² Great care was invested in creating performance standards to measure the new reforms’ impacts. Indeed, some evaluation of the family division has already taken place over the eight years since it was first established and there is every indication the judiciary in Maryland is committed to continuing the system’s evaluation, oversight, and improvement. As such, the Maryland Family Divisions present a particularly good court system from which to draw examples of both the promise and risks of the new paradigm.

As with similar efforts around the country, the planned reforms in the Family Divisions in Maryland have been difficult to achieve. The change that has taken place has come at a cost, particularly regarding family privacy and autonomy for low-income families. The court system has made some effort to evaluate the performance of courts’ components.¹²³ But the negative impact on poor litigants’ privacy and

119. MD. R. 16-204.

120. The Family Division is assigned fairly comprehensive jurisdiction matters including dissolution of marriage, child custody, visitation, alimony, spousal support, child support, establishment and termination of party-child relationship, criminal nonsupport, desertion, name changes, guardianship of minors and disabled person, involuntary admission to state facilities, family legal-medical issues, domestic violence, and some juvenile causes but did not adopt the “one judge, one family” principle. *See id.*; MD. R. 16-202(b)(1).

121. MD. JUDICIARY, PERFORMANCE STANDARDS AND MEASURES FOR MARYLAND’S FAMILY DIVISIONS 48 (2002), <http://www.courts.state.md.us/family/performancestandards.pdf>. The report goes on to describe the mandate of the courts: “[T]he Family Divisions must prove to the public and to Maryland’s policymakers both the therapeutic qualities of the Family Divisions and the wisdom of the family justice system that invests in early intervention, prevention, and treatment as a means to secure the future well-being of Maryland’s children and families.” *Id.* at 53.

122. *Id.* at 46.

123. *See, e.g.*, JOHN M. GREACEN, REPORT ON THE PROGRAMS TO ASSIST SELF REPRESENTED LITIGANTS OF THE STATE OF MARYLAND 3 (2004), http://www.courts.state.md.us/family/evaluations_mdsummary.pdf. (“This summary evaluation is intended to provide an overall assessment of Maryland’s efforts for the benefit of the leadership of the state’s judicial branch.”).

autonomy has not been analyzed and is difficult to capture in such evaluations. Most parties entering the Family Divisions are unrepresented, making them particularly vulnerable to the risk of abuses of power within the court system.¹²⁴ Many of these litigants have no experience with the court system and thus have limited ability to distinguish requests from nonjudicial actors to participate voluntarily in programs from judicial authority to compel action. For those who regularly experience the state social service bureaucracy in other contexts—those who may have experienced the punitive power of child support, welfare, and child protection bureaucracies—the impulse to comply with requests from anyone within the courthouse is strong. Even with counsel, few “offers” for services are declined and judicial or nonjudicial exercises of authority are rarely challenged.¹²⁵ The following examples from two jurisdictions in Maryland illustrate the dangers of this system.¹²⁶

b. Case #1: The Risk of “Post Judgment Monitoring”¹²⁷

Mrs. Tate, a mother of two young children, had been in an extended relationship with her children’s father who physically abused her for two years. She was granted sole physical and legal custody of her children and, in a separate proceeding, obtained a civil order of protection¹²⁸ against the children’s father. Shortly after she obtained the order, her ex-husband was imprisoned for violating the protection order when he went to her home, pushed her onto the floor, and threw some of her

124. See Berenson, *supra* note 96; see also MD. JUDICIARY, ANNUAL REPORT OF THE MARYLAND CIRCUIT COURT FAMILY DIVISIONS AND FAMILY SERVICES PROGRAM 37 (2008), <http://www.courts.state.md.us/family/pdfs/annualreports/annualreport06.pdf>; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2007), <http://www.lsc.gov/JusticeGap.pdf>.

125. The combination of informal action, lack of clear standards, and limited litigant resources have always made judicial review of family court actions rare. See, e.g., Murphy, *supra* note 46, at 706.

126. Both of these examples involve the relatively uncommon situation of a poor litigant who is represented by counsel. LEGAL AID BUREAU, INC., ANNUAL REPORT 2007 (2007), <http://www.mdlab.org/LAB%20docs/annual%20report%202007> (finding Maryland Legal Aid is only able to provide counsel for 20% of those who are financially eligible for the services). I assume many more similar or even more egregious abuses occur daily where unrepresented parties do not know they can object or are unwilling to do so given the vague and unclear exercises of authority vested in all players in the new family court.

127. This case is drawn from the caseload of the University of Baltimore Clinical Program in which the author taught from 1990–2008. See Family Law Clinic File (on file with author); see also University of Baltimore, School of Law, Clinical Law Program, <http://law.ubalt.edu/clinics/index.html> (last visited October 1, 2008). The clinic represents low-income families primarily from Baltimore, in the city’s family court. Although much of what is reported here is a matter of public record in the court file, the names and identifying information have been changed to protect the privacy of the client.

128. MD. CODE ANN., FAM. LAW § 4-506 (LexisNexis 2009).

belongings out the window. Upon his release, he filed a motion to modify custody. An attorney was appointed for the child¹²⁹ and the case was referred for mediation, despite the domestic violence.¹³⁰ The mother's counsel objected to mediation and the motion to modify custody was denied, as the legal standard of a "material change of circumstance[]" had not been met.¹³¹

Despite denying the motion to modify custody, the master¹³² viewed this as a "high conflict"¹³³ family who warranted extended court intervention. He modified the custody order to permit the father more time with the children, on the condition the father attend batterers' counseling.¹³⁴ The hearing examiner also set a series of review hearings, though no legal issues were pending.¹³⁵ At each subsequent hearing, the mother's behavior was scrutinized and the father gained more and more visitation without filing anything new and without complying with the court's previous order that he attend domestic violence counseling.¹³⁶ The repeated hearings gave the father's attorney and the court appointed attorney for the child¹³⁷ the opportunity to argue the father's case over and over again to a series of judicial officers, none of whom fully understood the context of the case.¹³⁸

In the last review hearing, the master doubled the number of

129. *Id.* § 1-202.

130. The Maryland court rules require the court to screen for domestic violence. MD. R. 9-205(b)(2) ("If a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation."). Despite the screening requirement, there is ample evidence many family courts in Maryland have no screening procedures in place. See Murphy & Rubinson, *supra* note 85.

131. Knott v. Knott, 806 A.2d 768, 772 (Md. Ct. Spec. App. 2002) ("The basis for modification of a final order concerning care, custody, or support of a minor child is material change of circumstances, pursuant to FL 12-104" which establishes the appropriate standard).

132. In certain Family Law actions in Maryland, a "master" will hear domestic relations matters and has the power to regulate all proceedings in the hearing. MD. R. 9-208.

133. For a thorough discussion of the "high conflict family," see Coates et al., *supra* note 50. This phrase has become a term of art in family courts. Used in that context, "high conflict" seems to be synonymous with "poor," and triggers greater and more sustained intervention by the courts.

134. Family Law Clinic File, *supra* note 127.

135. *Id.*

136. *Id.* Compliance issues with such orders are substantial, see, for example, Mandy Burton, *Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence in England and Wales*, 20 INT'L J.L. & POL'Y & FAM. 366, 371 (2006) (citing Edward W. Gondolf, *Mandatory Court Review and Batterer Programme Compliance*, 15 J. INTERPERSONAL VIOLENCE 428 (2000)). This study found a significant increase in the number of men who completed court ordered counseling programs for batterers when mandatory court review was implemented in the Pittsburgh Domestic Violence Court. The percentage of no-shows fell from 36% to 6% and total compliance rose by 35 %;

137. MD RULE 9-205.1 (governing appointment of child's counsel).

138. Family Law Clinic File, *supra* note 127.

overnight visitation immediately after the mother expressed her discomfort with the father taking the child to church.¹³⁹ The master also appeared to be sympathetic to the attorney for the child's position that the father should not have to "keep paying for the domestic violence" even though there was evidence of such violence within months of the court hearing and though the father had not participated in batterer's counseling, as ordered by the court. This series of reviews and changes in the existing child access order all happened with no motion pending, no notice of a potential change to the mother, and no evidentiary basis or record from which to seek review.

*c. Case # 2: The Family Court Services Coordinator with Unlimited Authority*¹⁴⁰

The statewide legal services organization in a small suburban Maryland jurisdiction began to get complaints shortly after the establishment of a Family Division in that court. A new position had been created and filled for a "family court services coordinator." According to a high-ranking legal services lawyer who received reports from field attorneys in that jurisdiction, this coordinator, a nonlawyer with a background in human services, acted as though her position "gave her license to play God" with the lives of the low-income litigants who came before the court in which she served.¹⁴¹ She heard reports that described the coordinator as "terrorizing unrepresented litigants, particularly young mothers, in child access cases."¹⁴² The coordinator was reported as regularly threatening young mothers with loss of their children and, in some cases, making arrangements to take their kids from them and place them with third parties; ordering random drug tests without court order; conducting custody "evaluations" which the parent never saw and testifying about the contents of such evaluations in child access cases; and engaging in *ex parte* contacts with at least one Family Division judge on the merits of family cases. All of these actions were taken without a court order or other express authority.

The court employee may have been well-intentioned in some instances, taking actions she believed were within her general authority

139. *Id.*

140. This illustration is drawn from interviews with a senior staff member at the Legal Aid Bureau of Maryland, a private, nonprofit, law firm providing free legal services to low-income persons statewide in Maryland. Legal Aid serves Baltimore City and Maryland's twenty-three counties from thirteen office locations. *See* Md. Legal Aid, <http://www.mdlab.org> (last visited March 20, 2009).

141. Interview with Hannah Liebermann, Senior Staff Member, Legal Aid Bureau, Inc. (Jan. 3, 2006).

142. *Id.*

to engage in “differentiated case management.”¹⁴³ But for the parents for whom contact with their children was at stake, these actions subjected them to broad violations of their privacy with no practical means to object. While many of the problems in this jurisdiction were connected to a single individual’s inappropriate conduct,¹⁴⁴ they demonstrate the risks when courts embrace ambitious agendas to address problems beyond dispute resolution without clearly designated procedures, grants of authority or, in some cases, the resources to appropriately train or hire professional staff. As the supervising attorney described, “I think [these] stories exemplify a good idea run horribly amuck, and the need to find that often elusive balance between formalized legal procedures, including all of the due process protections we used to expect, and the desire to address the spectrum of issues poor family law litigants often have.”¹⁴⁵

III. REACHING THE GOAL OF A FULLY REALIZED ADVERSARY SYSTEM IN FAMILY LAW

The traditional adversary system has failed many family law litigants, particularly in contested cases involving children. As family court proponents have accurately noted, prevailing legal standards make family court proceedings primarily a backward-looking process, designed to assign blame and, as a result, add to the acrimony between parents. But, perhaps just as problematic, those same indeterminate standards make it difficult for parties to predict outcomes in court, and decrease the likelihood of reaching early and less costly agreements about child access and related issues. Even if agreements are eventually reached in most cases, parties spend enormous resources to lawyers, investigators, and other experts to prove the other parent unfit.

But even more critical, in terms of numbers of families affected and degree of harm, the traditional adversary system leaves vast numbers of unrepresented parties to navigate a court system structured with complex procedural and pleading rules. Often failure to understand these rules prevent access to the courts and a hearing on the merits. Even when such access is obtained, parties’ inability to understand and use technical discovery and evidentiary rules makes it impossible to create a record upon which relief could be granted. If unrepresented parties are able to gather facts and present them in a way admissible in court, the broad

143. MD. JUDICIARY, *supra* note 121, at 15.

144. These problems were eventually reported by the Legal Aid Bureau to Maryland’s Administrative Office of the Courts who responded quickly and appropriately.

145. Interview with Hannah Lieberman, *supra* note 141.

indeterminate standards governing most family law cases make it difficult for parties to discern what might convince a judge to grant access to a child or other remedy.¹⁴⁶ As a result, unrepresented parties are threatened with loss of their children.¹⁴⁷

The problem-solving family court described in this Article is one response to the limits of the adversary system to resolve family cases in today's courts. But the new problem-solving courts do little to address the problems that most significantly contribute to the failure of the adversary system to protect children—indeterminate legal standards that encourage acrimony, delay, and expense for parents and lack of affordable sources of legal information and advice. And, by abandoning the long-held protections afforded litigants in the adversary system, the new courts make many families more vulnerable. The need for flexibility and a range of multidisciplinary actors to make decisions in the new courts creates a risk that some parties will unknowingly give up legal rights. In addition, ambitious efforts to educate, treat, and monitor families in conflict results in loss of privacy for families. The interventions and resultant loss of privacy may be unjustified in many cases. Even where some intervention may be helpful, the damage to family stability from the court's interference may outweigh any therapeutic benefits. And these risks to legal protections and family privacy fall disproportionately on the poor who most often fall under the state's scrutiny, including its courts.

Solutions lie in improving and sharpening the focus of the adversary system so it can better perform its dispute resolution functions, rather than abandoning it for a new one. This involves combining elements from a number of family law reform movements that have been developing independently over the last decade.

A. Improving the Legal Standard for Resolving Child Access Disputes

The legal framework for deciding family law cases has been subject to substantial critique over the last two decades. The most promising effort for improving the adversary system in family law cases is the movement away from broad legal standards to rules.¹⁴⁸ Standards in

146. For a detailed description of the experience of a typical pro se litigant in a family law case in the traditional adversary system, see Murphy, *supra* note 28, at 127–31.

147. See, e.g., *Frase v. Barnhart*, 840 A. 2d 114 (Md. 2003) (describing the plight of an unrepresented mother who had onerous conditions placed on her right to continuing care and custody of her children without a finding of unfitness); see also Stephen H. Sachs, *Seeking a Right to Appointed Counsel in Civil Cases in Maryland*, 37 U. BALT. L. REV. 5 (2007) (providing additional details of the *Frase v. Barnhardt* case from the perspective of the lawyer appealing her custody case).

148. See generally Murphy, *supra* note 11, at 226–31; Jane C. Murphy, *Rules, Responsibility and*

family law for allocating family assets, deciding child custody and visitation, child support, and alimony historically were characterized by broad discretion. But the movement from discretion to rules for grounds of divorce started a trend away from such broad standards.¹⁴⁹ The shift from broad standards to rules is also firmly established for child support¹⁵⁰ and is underway for alimony and property distribution.¹⁵¹ But the most important shift for improving family dispute resolution for children would be to replace the prevailing best interests standard in child access cases with a predictable rule grounded in minimizing conflict at divorce. The first round of efforts in this direction focused on the primary caretaker rule. This proposed rule directed judges to presume children's interests are best served by continuing to live with their primary caretaker after parental breakup.¹⁵² Advocates of the primary caretaker rule argued that it best advanced certainty and predictability while furthering the goal of producing decisions in the

Commitment to Children: The New Language of Morality in Family Law, 60 U. PITT. L. REV. 1111 (1999).

149. See Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, *supra* note 148. Some have argued that the movement away from fault-based divorce has hurt women and children. See, e.g., Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 723 (1997). But most agree that this change has "achieved the goals of reducing acrimony and trauma to families, particularly children, experiencing divorce. Murphy, *supra*, at 1202.

150. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 763 (1998) (describing child support enforcement techniques as having "undergone a revolution in recent decades as a result of federal involvement").

151. A number of proposals emphasize income sharing to equalize the post-divorce standards of living of divorcing couples. For some early articulations of these proposals see Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 563-64, 573, 578-83, 592 (1990); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 159-60 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (proposing a system in which each spouse's interest in post-divorce income would be based on the length of marriage); Kaufman Ctr. for Family Law, Kaufman Alimony Guidelines, <http://www.kaufmanalimonyguidelines.org/> (last visited May 20, 2010) (interactive calculator to assist judges and lawyers in the state of Maryland to develop alimony awards to achieve equitable results). Some of these proposals have made their way into law. See, e.g., MINN. STAT. § 518.58 (2009); MICH. COMP. LAWS ANN. § 552.13 (West 2009); Gregory J.M. v. Carolyn A.M., 442 A.2d 1373, 1377 (Del. 1982); Ball v. Minnick, 648 A.2d 1192, 1196-97 (Pa. 1994). The ALI Principles also contain formulae designed to be predictably and consistently applied to return spouses to their premarital financial position after short marriages and compensate financially vulnerable spouses in longer marriages for their marital investment. AM. LAW INST., *supra* note 5, §§ 5.04, 5.13.

152. As discussed earlier, Martha Fineman offered one of the earliest primary caretaker proposals as a way of reintroducing law as the "dominant discourse" in custody decisionmaking. See *supra* notes 54-59 and accompanying text. Over the last two decades, both courts and commentators have offered variations of this rule. See Cochran, *supra* note 59, at 37; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-82 (1984) (arguing for a presumptive rule in favor of the primary caretaker).

child's best interests. But very few primary caretaker proposals have found their way into law.¹⁵³

More recently, the "approximation standard" has been proposed as an alternative rule that continues to emphasize minimizing trauma by presuming parents will continue prebreakup caretaking roles but promotes an expanded role for the noncustodial parent.¹⁵⁴ This approach, which has been embraced in the ALI Principles,¹⁵⁵ responds to many of the concerns about child custody proceedings in the adversary system under the best interests standard. Its relatively straightforward factual inquiry about parenting behavior should minimize the trauma of family breakup. It should also make court decisions more predictable, thus encouraging informed agreements in mediation and less costly trials when agreement is not reached.¹⁵⁶ For this reason, advocates for healthier and more therapeutic family dispute processes should advocate for its adoption.

B. Make Nonlegal Services Readily Available But Not Mandatory

In addition to substantive law changes, incorporating some elements of the problem solving approach into the adversary structure would improve the family dispute resolution system. Using dispute resolution to offer families needed services—educational, mental health, and financial—is a good idea. But it may be both impractical and

153. See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981). *Garska* has been modified by recent statutory changes in West Virginia that continue to instruct judges to allocate custodial responsibility for children based upon past caretaking responsibilities, but do not create a presumption in favor of the primary caretaker. W. VA. CODE § 48-9-206 (2009) (stating the court shall take into account the past caretaking responsibilities when deciding custody sharing); see also *The Ramifications of West Virginia's Codified Child Custody Law: A Departure from Garska v. McCoy*, 106 W. VA. L. REV. 389 (2004). After its adoption in *Pikula v. Pikula*, 374 N.W.2d 705, 713 (Minn. 1985), the Minnesota Legislature rejected the primary caretaker presumption and restored the best interest standard. See MINN. STAT. § 518.17 (2009); see also Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 428-29 (1990) (concluding Minnesota courts continue to place strong emphasis on the primary caretaker as a factor in the best interest equation).

154. Elizabeth Scott first proposed the "approximation" rule in which the decision maker "focuses (almost) exclusively on the past relationship between parents and child and seeks to approximate as closely as possible the predivorce patterns of parental responsibility in the custody arrangement." Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630 (1992).

155. AM. LAW INST., *supra* note 5, § 2.02; see also Robert J. Levy, *Custody Laws and the ALI's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 5, at 67, 74.

156. Scott, *supra* note 154, at 643.

duplicative to create in-house programs staffed by court personnel for most services. Instead, family courts should coordinate with appropriate state, local, and private agencies to make meaningful referrals to parties who need this assistance. In this way, courts can preserve resources for their essential dispute resolution function.

Further, participation in most services should be voluntary, rather than a condition of receiving a legal remedy to which a party is otherwise entitled.¹⁵⁷ Services such as postjudgment monitoring by a parent coordinator and, in the absence of unfitness, parenting education are more effective and less intrusive if desired by the parties receiving such support. At a minimum, a judicial officer should have to make clearly defined findings before compulsory services are ordered. Those administering such services should be properly trained, credentialed, and have legally defined authority.¹⁵⁸

C. Improve the Quality of Family Mediation

Another element of the problem solving courts that needs to be preserved, but refined, is mediation. While mediation programs predated many family courts, the family court movement has made them a centerpiece of conflict resolution.¹⁵⁹ Mediation, combined with parenting plans,¹⁶⁰ can offer families a private, perhaps less costly,¹⁶¹

157. The imposition of services as a prerequisite to divorce may be subject to constitutional challenge. See *Boddie v. Connecticut*, 410 U.S. 371 (1971) (finding that because the state's regulation of marriage and divorce, in the generic sense, is an assumption of governmental power, the state cannot deny access to its courts for divorce by requiring a court fee from those who cannot pay).

158. The Maryland Rules Committee is currently working on rules to standardize the work of parenting coordinators and custody evaluators. See *Parenting Coordination in Cases Involving Child Custody* (Draft Rules 2009).

159. See *supra* note 68 and accompanying text.

160. Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS*, *supra* note 68, at 53, 55, 57, 59–63, 67–69 (another recent article describing parenting plans especially in connection with mediation); see also Linda D. Elrod & Mildred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 *FAM. L.Q.* 381 (2008).

161. Many claim that mediation improves access to dispute resolution for the participants by giving parties the opportunity to resolve disputes with fewer costs. The process is simple, communication is direct, and the formalities of court are discarded. Parties have more control over the process and can arrive at resolution of their disputes more quickly and without substantial time spent in court proceedings away from work and other responsibilities. See, e.g., FORREST S. MOSTEN, *THE COMPLETE GUIDE TO MEDIATION: THE CUTTING EDGE APPROACH TO FAMILY LAW PRACTICE* 60 (1997); Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 65 (1998) (arguing that the poor should have access to court-sponsored alternative dispute resolution and not be "relegated" to the delays and expense of the adversarial system).

setting to plan for parenting of children after breakup. Mediation helps parties avoid the public acrimony of a trial and focus on common ground, thus preserving family relationships. Mediation might even offer a better alternative than the adversary system for accommodating diverse family traditions. Mediation's informality gives it the potential to address cultural differences in ways litigation may not.¹⁶²

Despite these advantages, the virtually unchecked risk that parties without lawyers will enter agreements without adequate information and advice makes the current widespread and often compulsory mediation of child access disputes troubling. Many of the current programs have no mechanism to ensure that unrepresented parties can obtain legal information or advice before, during, or after mediation. It is, therefore, risky to require low income and unrepresented litigants to use this process as an alternative to litigation to make informed agreements.

Other concerns about the unbridled enthusiasm for mediation of child access disputes include bias toward joint custody among some mediators¹⁶³ and the inadequacy of most court-sponsored programs to screen cases for domestic violence.¹⁶⁴ Responding to these risks and concerns does not require abandoning mediation in favor of trials in all cases. Instead, mediation can exist as an option in the adversary system if we develop a structure that provides resources to ensure individuals receive legal advice when needed during the mediation process. A range of solutions exist to address these issues from reconceiving the role of the mediator as including educating the parties about their legal rights¹⁶⁵ to providing limited legal representation during mediation.¹⁶⁶

D. Guarantee Access to Legal Information, Advice, or Representation

The problem of lack of access to legal information is not limited to mediation, but pervades the family justice system. Judges, advocates, and scholars agree that the primary reason the traditional family justice

162. Harold Abramson, *Crossing Borders Into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 S. TEX. L. REV. 921, 922–37, 942 (2008).

163. See, e.g., Carol Bohmer & Marilyn Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L. Q. 223, 234 (1994).

164. See Murphy & Rubinson, *supra* note 85.

165. Engler, *supra* note 80, at 1989; see also Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV., Jul.-Aug. 2006, at 196; Waldman, *supra* note 72, at 741.

166. See, e.g., Jon Moseley, *Mediation Program Acquires New Partner*, MD. BAR BULL., Jan. 2010, available at http://www.msba.org/departments/commpubl/publications/bar_bult/2010/january/probono.asp (describing the University of Baltimore's Family Mediation Clinic's Pro Bono Representation Project in which parties in child access mediation are afforded free limited representation during court ordered mediation sessions).

system is dysfunctional is that the assumption upon which the system was built—a client and lawyer on each side—is no longer true.¹⁶⁷ The most critical reform, therefore, necessary to fully realize the benefits of the adversary system in cases involving children is access to legal information, advice, and in some cases, full representation. Some necessary supports are already in place. These include developing standardized family law pleadings,¹⁶⁸ establishing court-based pro se projects to provide limited legal advice to unrepresented parties in family law cases,¹⁶⁹ telephone hotlines,¹⁷⁰ educational websites,¹⁷¹ and innovations in the delivery of direct legal services, such as limited representation at critical stages in the dispute.¹⁷²

But even in those jurisdictions where most or all of these programs are available, legal scholars, judges, and advocates have long recognized that such support is inadequate in contested child access cases.¹⁷³ The right to counsel in civil cases affecting fundamental rights—the so called Civil Gideon—has been advanced in the context of a wide variety of issues including the right to housing,¹⁷⁴ health and other government

167. See, e.g., *Judges' Views of Pro Se Litigants' Effect on Courts*, 40 CLEARINGHOUSE REV., July-Aug. 2006, 228 (detailing the ways in which pro se litigants burden the court); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999); MD. ACCESS TO JUSTICE COMM'N, INTERIM REPORT AND RECOMMENDATIONS (2009), <http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf>.

168. See BONNIE ROSE HOUGH, DESCRIPTION OF CALIFORNIA COURTS' PROGRAMS FOR SELF-REPRESENTED LITIGANTS (2003), <http://www.courtinfo.ca.gov/programs/equalaccess/documents/harvard.pdf>.

169. Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV., Mar.-Apr. 1997, at 1178, 1181 n.10 (describing the joint efforts of the University of Baltimore Family Law Clinic and the University of Maryland in establishing the first court-based Pro Se Projects in Baltimore City, Baltimore, Anne Arundel, and Montgomery counties.) For a description of the pro se assistance projects in each of the circuits in Maryland, see Maryland Judiciary, Family Law Self-Help Centers, <http://www.courts.state.md.us/family/selfhelp.html> (last visited May 20, 2010); see also Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1897 (1999); Nathalie Gilfrich et al., *Law Students Assist Pro Se Litigants in Maryland*, 81 JUDICATURE 82 (1997).

170. See, e.g., The Women's Law Ctr. Of Md., Inc., Projects, <http://www.wlcmd.org/projects.html> (last visited March 15, 2009) (maintaining several hotlines, including a Family Law Hotline and a Legal Forms Helpline).

171. See, e.g., Maryland Legal Assistance Network, Family Law Center, <http://www.peoples-law.info/Home/PublicWeb/IndexPages/1390000> (last visited May 20, 2010).

172. See FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000).

173. Gilfrich et al., *supra* note 169; (describing the "most important advice" given by law students staffing pro se offices was to "retain counsel" in cases involving child custody but noting the lack of free representation).

174. See, e.g., Andrew Scherer, *Why People Who Face Losing Their homes in Legal Proceedings*

benefits,¹⁷⁵ and employment and income maintenance.¹⁷⁶ But advocacy for a right to counsel in civil cases has gathered particular momentum in the child access area.¹⁷⁷ Most argue for a right to counsel based on the constitutionally protected right to family privacy¹⁷⁸ or on procedural due process grounds in child access cases brought by the government.¹⁷⁹ Most of these arguments are grounded in federal constitutional claims, but some scholars¹⁸⁰ and courts¹⁸¹ have framed arguments in terms of state constitutional law. Others have advocated for this right on the general principle that equal justice under law cannot exist where some parents are denied meaningful access to the courts because they cannot afford counsel.¹⁸² Whatever the theory for insuring this right, the presence of counsel would have a profound effect in providing meaningful hearings in child access proceedings within the traditional adversary system, particularly if the standards governing child access cases were modified as this Article has proposed.¹⁸³

Must Have a Right to Counsel, 3 CARDOZO PUBLIC L. POL'Y & ETHICS J. 699 (2006); Rachel Klienman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L. J. 1507 (2004); Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988); Frances Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 HOUSING L. BULL. 65 (1987).

175. See Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609 (2004).

176. See Andrew Scherer, *Securing a Civil Right to Counsel: The Importance of Collaborating*, 30 N.Y.U. REV. L. & SOC. CHANGE 675, 676 (2006).

177. John Nethercut, *"This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARING HOUSE REV., Nov.-Dec. 2004, at 481.

178. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV., July-Aug 2006, at 245.

179. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247 (1997).

180. See, e.g., Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81 (2005); James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. SOC. JUST. 383 (2005); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. SOC. JUST. 571 (2004); Earl Johnson Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L.A. L. REV. 249 (1978).

181. Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV., July-Aug. 2006, at 186; Karen J. Coombs, *What Gives You the Right?: Recent Decisions on the Right to Counsel in Custody Cases*, 44 N.H. BAR J., Sept. 2004, at 11.

182. See, e.g., Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, (2009); Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347 (2009).

183. The "Civil Gideon" movement won a substantial victory in October, 2009 when the California became "the first state in the nation to establish a model program providing a right to counsel for low income people in critical civil cases" including child custody, housing, domestic violence and elder abuse. *California Becomes Nation's First State to Assure Lawyers in Civil Cases*, CAL. CHRON., Oct. 13, 2009, available at <http://www.californiachronicle.com/articles/view/123693>. The language of

V. CONCLUSION

Before we reject the adversary system for child access cases, we should evaluate its efficacy with the improvements this Article advocates. Reforming the substantive legal standard governing child access cases will assist parties in focusing on parenting in these proceedings instead of trying to meet the broad definition of unfitness inherent in the best interests standard. Further, the rule-based nature of the approximation or primary caretaker standard will assist parties in predicting outcomes if cases go to litigation, thus making it easier to evaluate agreements proposed in mediation. Making nonlegal services voluntary would limit the interference on family privacy. Finally, offering legal information and advice and, in some circumstances, full legal representation, would permit more informed use of alternative dispute resolution and a properly functioning adversary system. Justice can, indeed, be tempered with mercy if we work to improve, rather than abandon, the family justice system.

the legislation itself recognizes how critical legal representation is to fully realizing the benefits of the adversary system:

The adversarial system of justice relied upon in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles, and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally trained professional. The absence of representation not only disadvantages parties, it has a negative effect on the functioning of the judicial system. When parties lack legal counsel, courts must cope with the need to provide guidance and assistance to ensure that the matter is properly administered and the parties receive a fair trial or hearing.

A.B. 590, 2009-2010 Sess. § 1(i) (Cal. 2009), available at http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf.

