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## Judicial Leadership in Family Court: A Cautionary Tale

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ARTICLE

**JUDICIAL LEADERSHIP IN FAMILY COURT: A  
CAUTIONARY TALE**

*By: Jane M. Spinak\**

*Charles Miller Endowed Lecture  
University of Tennessee College of Law*

For the past 35 years I have been practicing in, teaching, and writing about the Family Court. The problem-solving court movement in the last two decades – with its proliferation of drug courts, mental health courts, and veterans courts, to name a few – renewed my interest in the historical roots of the family court because of the parallels between the original juvenile court and the recent problem solving court movement. One of the key elements—perhaps the defining element—in both is the role of the judge as the leader of the court. That is what I want to focus on today. I’ve called this talk a cautionary tale; what I mean is that the idea of judicial leadership as it developed in the juvenile and family court historically, and as it is still being applied in those courts and in the newer problem solving courts today, is based on an idealized conception of the judge that has never been true and is unlikely ever to be true. Consequently, building a court around this idealized notion of the judicial leader is a dangerous proposition.

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\* Edward Ross Aranow Clinical Professor of Law, Columbia Law School. I would like to thank the faculty, staff, and students of the University of Tennessee College of Law for their warm welcome last April to Knoxville, especially Professors Wendy Bach and Valerie Vojdik for inviting me, Professor Penny White for asking to publish this lecture, and Dean Doug Blaze for facilitating such interesting conversations during my visit.

We'll begin with the words of a contemporary family court leader. Judge Leonard Edwards received the 2004 William H. Rehnquist Award for Judicial Excellence, bestowed each year by the National Center for State Courts to a state court judge who "exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics."<sup>150</sup> Judge Edwards, a distinguished and dedicated family court judge from California, is the first and only juvenile or family court judge to receive the award, a testament to his national leadership on behalf of these courts. Here are his words:

Judges in the juvenile court are charged with keeping children safe; restoring families; finding permanency for children; and holding youth, families, and service providers accountable . . . We have to convene child- and family-serving agencies, schools, and the community around the problems facing our most vulnerable and troubled children . . . The role of the juvenile court judge is unlike any other. In the traditional judicial role, deciding a legal issue may complete the judge's task; however, in deciding the future of a child or family

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<sup>150</sup> Leonard P. Edwards, Remarks of Judge Edward P. Leonards at the Presentation of the William H. Rehnquist Award for Judicial Excellence (Nov. 18, 2004), *in* 5 J. CENTER FAM. CHILDREN & CTS. 169, 169 (2004).

member, the juvenile court judge must, in addition to making a legal decision, be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate.<sup>151</sup>

Judge Edwards is proud that the family court judge is not limited to the traditional judicial role of legal decision-maker, but instead given broad responsibility for children and families, which requires each judge to be an administrator, collaborator, convener and advocate. Judge Edwards' award was presented in the Great Hall of the United States Supreme Court and Judge Edwards took the opportunity to remind his august audience of the critical work done by his colleagues throughout the country while also lamenting how infrequently the Court has acknowledged that work. Judge Edwards carefully sidesteps the severe chastisement that the Court had delivered in several of its most famous juvenile cases, such as *In re Gault* and *Mckeiver v. Pennsylvania*, where the Court criticized the work of many of his colleagues as it struggled to define the proper role of the juvenile court judge, expressing uncertainty whether the multiplicity of roles that Judge Edwards heralds can be filled by the mere mortals who become family court judges.

These multiple roles are a departure from the impartial, restrained and objective judge in the common law tradition and shift judicial responsibility from individualized legal determinations to a broader conception of judicial leadership. As the ultimate authority in the courtroom, judges in all trial courts today assume a leadership role to make sure the case moves along

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<sup>151</sup> *Id.* at 170.

expeditiously, that due process protections are upheld, and that everyone in the courtroom is doing his or her job. Professor Judith Resnik calls this modern decision-maker the “managerial judge.”<sup>152</sup> The family court judge, however, is given a different managerial role. As defined in the New York Family Court Act, the family court judge is given “a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it.”<sup>153</sup>

As the myriad proceedings concerning families have become increasingly consolidated into a single court system – a unified family court in many states – the role of the judge as the leader inside and outside the courtroom has intensified. The trajectory toward unification and greater judicial authority over all aspects of family conflict within a single judicial decision-maker raises significant questions about the ability of the judge to balance his or her ability to make impartial and fair determinations while using the extensive discretion granted to the court to “fit the particular needs of those before it.”<sup>154</sup> The family court unification movement, which began in earnest in the middle of the twentieth century and continues today, is the most important development since the juvenile court’s creation. The movement, however, has resisted the historical lessons of judicial leadership in its predecessor courts, which provide a cautionary tale against consolidating too much power in one judge. Even in Tennessee, where a unified system has not been adopted, juvenile court jurisdiction extends to dependency, status offenses, delinquency, custody, termination of parental rights, paternity, support and other related issues. Without unification, judges with juvenile court jurisdiction here have tremendous authority over the intersecting issues that

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<sup>152</sup>Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>153</sup> N.Y. FAM. CT. LAW § 141 (McKinney 2008).

<sup>154</sup> *Id.*

bring families before them. Later, I will distinguish between the administrative advantages of unification and the disadvantages of situating too much power within a single decision-maker. First, let us look at the similarities between Judge Edwards' description of his role and the words used by some of the founders of the juvenile court to understand better the historical underpinnings of the judge's role.

In his remarks Judge Edwards said: "We are the legal equivalent of an emergency room in the medical profession. We intervene in crises and figure out the best response on a case-by-case, individualized basis."<sup>155</sup> At the beginning of the 20<sup>th</sup> century, juvenile court judges were similarly described as "doctor-counselors" or "judicial therapists" who "[are] specialists in the art of human relations."<sup>156</sup> The judge's task was to "get the whole truth about a child" like "a physician searches for every detail that bears on the condition of a patient."<sup>157</sup> The medical metaphor is in stark contrast to a judge who is being asked to determine whether a child committed a crime or a parent is neglectful. Those determinations rely on evidence of acts and intent rather than what the best response to those acts might be. Judge Harvey Humphrey Baker, the first judge of the Boston juvenile court, uses medical metaphors to explain why the juvenile court doesn't "confine its attention to just the particular offense which brought the child to its notice."<sup>158</sup> Judge Baker believed "it is helpful to think of [court officials] as physicians in a dispensary,"<sup>159</sup> referring to both the physical arrangement of a juvenile

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<sup>155</sup> Edwards, *supra* note 150 at 170.

<sup>156</sup> Anthony M. Platt, *THE CHILD SAVERS* 142 (1969).

<sup>157</sup> *Id.* at 142-43.

<sup>158</sup> Harvey H. Baker, *The Procedure of the Boston Juvenile Court*, in HARVEY HUMPHREY BAKER, *UPBUILDER OF THE JUVENILE COURT* 114 (1910).

<sup>159</sup> *Id.* at 109.

court but also to the way in which the court conducts its business:

In determining the disposition to be made of the case the procedure of the physician is very closely followed . . . The judge and probation officer consider together, like a physician and his junior, whether the outbreak which resulted in the arrest of the child was largely accidental, or whether it is habitual or likely to be so; whether it is due chiefly to some inherent physical or moral defect of the child, or whether some feature of his environment is an important factor; and then they address themselves to the question of how permanently to prevent the recurrence.<sup>160</sup>

Even Judge Baker knew the limitations of the analogy, recognizing that a child did not come voluntarily to the court as a patient comes to a dispensary. And while a doctor may have a duty to minimize pain, the judge and probation officer “from time to time deliberately cause the child discomfort, because the discomfort of punishment affords in some cases an indispensable stimulus or moral tonic which cannot be supplied in any other way.”<sup>161</sup>

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<sup>160</sup> *Id.* at 114.

<sup>161</sup> *Id.* at 116.

This medical metaphor does not fit well into the common law tradition where the judge's "sole duty is to determine under the law and the facts the questions presented."<sup>162</sup> Some judges at the time suggested that the juvenile court seemed better suited to the investigative tradition of civil law countries.<sup>163</sup> Judge Willis B. Perkins, a prosecutor and later a Michigan Circuit judge early in the 20<sup>th</sup> Century, urged adoption of the inquisitorial tradition of the civil law courts of continental Europe to allow the judge to scrutinize deeply into the family's life. Judge Perkins said:

The judge of a family court must have larger powers than these. He must be at liberty to investigate or cause to be investigated every anti-social or abnormal act growing out of family disturbances. His duties must necessarily be inquisitorial rather than accusatory . . . To empower a judge to act on his own initiative immediately and without pleadings; to authorize him to become the general supervisor and mentor of the home and its several occupants, will be a new thing in our jurisprudence.<sup>164</sup>

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<sup>162</sup> Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 380 (1919).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 381.

Judge Perkins was nevertheless concerned that society would not tolerate these “tyrannical methods unless they are fruitful of good results,” so he set the standard for this new kind of judicial officer very high:

It is apparent, therefore, that a judge who is given these extraordinary powers must be a man well versed in the law, of large experience, unswerving firmness, broad sympathies, and clear, quick and accurate judgments. Wanting in any of these elements, his work must fail.<sup>165</sup>

The tension between setting extraordinary high standards for judges implementing this foreign, even tyrannical, process and worrying that they will fail to meet those standards pervades the history of the court.

Julian W. Mack, a founder of the juvenile court and one of its most famous jurists, put it this way:

I know – and the other judges have told me the same thing – that the good people of the community think that every judge of the juvenile court must necessarily be a fine fellow, filled with the wisdom of the ages, capable of dealing with all the

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<sup>165</sup> *Id.*

children that come before  
him.<sup>166</sup>

Like Judge Edwards nearly a century later, Judge Mack conceived:

[T]he duty of the juvenile court judge [is] to go out into his community, if not into the larger community of the country at large, and stimulate and arouse the people to a sense of their obligation to the wards who come into his immediate care, as it is to sit daily on his bench and deal with those individual children.<sup>167</sup>

Both Judge Mack and Judge Edwards fulfilled those duties, lecturing widely, writing about their experiences, sitting on local and national commissions and serving as models of great jurists. With hindsight, Judge Mack admits that this fine fellow is less perfect than the community thought:

That sort of a genius does not exist. He may in the course of time, through unusual experience and opportunity, gain considerable wisdom . . . But few judges are really temperamentally fitted, and few are so eminently

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<sup>166</sup> Julian W. Mack, *The Chancery Procedure in Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 313 (1925).

<sup>167</sup> *Id.* at 316.

endowed as to be able to do the juvenile work and the probation work and all the other work that must be done if the court is to be really successful.<sup>168</sup>

Judge Mack made this observation only twenty-five years after the juvenile court was founded and only a few years after Judge Perkins' comparable reflection. Yet, the narrative of this extraordinary judicial creature is undiminished in Judge Edwards' remarks almost a century later. This may be, in part, because Judge Edwards embraces a version of the judge who is rightly more constrained by statutory limitations and constitutional due process protections today and therefore not quite the same "fine fellow" the early court employed.<sup>169</sup> Even so, the judge's role as a leader continues to define the court today, even as the medicalized juvenile court evolved into a family court more tethered to the law. This evolution began in earnest in the middle of the 20<sup>th</sup> Century. I would like to use the example of creating the unified family court in New York to illustrate the enduring power of judicial leadership 50 years after the juvenile court was founded before turning to its enduring power today.

In 1953, Alfred Kahn published what was called a "controversial and provocative" report, *A Court for Children*, about the New York City Children's Court.<sup>170</sup> Dr. Kahn received the first doctorate in social welfare issued in New York State by writing a dissertation that would later become this report. He taught at the Columbia School of Social Work for 57 years and became world

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<sup>168</sup> *Id.* at 313.

<sup>169</sup> Leonard P. Edwards, *Improving Juvenile Dependency Courts*, 48 JUV. & FAM. CT. J. 1 (1997).

<sup>170</sup> Alfred J. Kahn, *A COURT FOR CHILDREN* (1953).

famous for his work on children and families. Kenneth Johnson, then Dean of the Columbia School of Social Work, wrote in the Foreword of Kahn's report that "[i]t gives us facts which are not sugarcoated and which are not pleasant to take."<sup>171</sup> The following year, the Association of the Bar of the City of New York issued a special report, *Children and Families in the Courts of New York City*, written by another Columbian, Professor Walter Gellhorn.<sup>172</sup> Gellhorn incorporated some of Dr. Kahn's research and insight into his own report and recommendations. Both Dr. Kahn and Professor Gellhorn were at the end of their careers by the time I came to Columbia and long past thinking about family court, but I knew them both and admired them immensely. As I've worked on a book about family court, of which this talk is part of a chapter, I feel their ghosts hovering about my shoulders, urging me along.

By the time their reports were written, courts for children and families had moved far beyond the original juvenile court, addressing various issues of family functioning including neglect and abuse, termination of parental rights, and all aspects of domestic relations. Some states continued to separate delinquency from other areas of jurisdiction but many combined family issues within specialized courts or court divisions.<sup>173</sup> By 1949, the national model Standard Juvenile Court Act recommended that courts for children and families should have jurisdiction over all family issues.<sup>174</sup> Gellhorn's report agreed with that recommendation, ultimately concluding that New York families would be better served by a unified

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<sup>171</sup> *Id.* at vii.

<sup>172</sup> WALTER GELLHORN ET. AL., *CHILDREN AND FAMILIES IN THE COURT OF NEW YORK CITY* (1954).

<sup>173</sup> *Id.* at 27; Khan, *supra* note 170 at 22.

<sup>174</sup> *Id.* at 27; NATIONAL PROBATION AND PAROLE ASSOCIATION, *A STANDARD JUVENILE COURT ACT* (1949).

family court.<sup>175</sup> His recommendation was adopted by a special City Bar Committee and led, in part, to the passage of the 1962 New York Family Court Act, which combines most, but not all, family proceedings in one unified Family Court.<sup>176</sup>

Despite Gellhorn's strong belief in unifying jurisdiction over family matters in the new court, he resisted recommending that the highly successful "school part" of the Children's Court merge into the unified court. Gellhorn was impressed with the expertise of the four school part judges and with the fact that children did not seem to feel stigmatized by attending the school part. He feared that the helping functions that seemed so successful in the school part were not sufficiently understood nor implemented by the bench in the rest of the Children's Court. Gellhorn concluded that the school part should remain a separate entity until the community supported — and the bench fully embraced—the helping function of the new court that he saw exemplified by the judges of the school part.

When Gellhorn conducted his study in the early 1950's, his conclusion that the disjointed ways in which child and family problems were parsed out to at least six different courts and several divisions of those courts led easily to a conclusion this was not a productive way to get the work done. For Gellhorn, who is credited as one of the creators of modern administrative law and who cared deeply that fairness and due process were imbedded into administrative processes, a unified Family Court was necessary for that job. Efficiency was a by-product of his conclusions or, as he puts it more artfully, "[t]here is more to this suggestion than a mere aesthetic impulse to create an orderly pattern. It rests on the solid proposition that

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<sup>175</sup> Gellhorn, *supra* note 172 at 390.

<sup>176</sup> *Id.* at 12-16; Family Court Act of 1962 §115, N.Y. FAM. CT. ACT §115 (McKinney 2012).

familial controversy can best be handled by judges who specialize in the family.”<sup>177</sup>

A comprehensive family court would allow the judge to provide an opportunity for the family to address their problems in a constructive (rather than punitive) way while using “skills drawn from the social and biological sciences.”<sup>178</sup> Staff would be trained in these skills and judges would have to be willing to adopt this approach. Judges should not be assigned to the court unless they are “particularly understanding of the methods it must employ” and if assignments to the court were to be rotated among judges, they need enough stability to learn this methodology and to develop relationships with the other staff.<sup>179</sup>

Gellhorn’s point, throughout the study, is that the many courts that address family issues are not set up to do this well. He also has no doubt that many judges in the courts he reviewed are not suited for the unified family court he is proposing. Gellhorn does not doubt, however, that suitable judges can be found and trained to do the work. He remains optimistic that combining the right organizational structure with the right personnel will produce an effective court where “modern methods are brought to bear on modern problems.”<sup>180</sup> Within ten years, the New York State Family Court had been created, shifting most jurisdictional authority over family issues into one unified court system. The Family Court Act also addressed what Gellhorn had earlier proposed: “that legal training and experience should be required before any person may assume the office of family court judge... [and] Judges of the family court should also be familiar with areas of learning and practice that often are not supplied by

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<sup>177</sup> Gellhorn, *supra* note 172 at 382.

<sup>178</sup> *Id.* at 384.

<sup>179</sup> *Id.* at 388.

<sup>180</sup> *Id.* at 390.

the practice of law.”<sup>181</sup> Like the judges of the Children’s Court school part, judges so trained would be the judicial leaders that Gellhorn envisioned for the new court. Gellhorn was very careful to minimize his concerns about the quality of the judges he was observing in his report. He needed all the allies he could get for his ultimate unification recommendations. His goal was to change the structure of the system and, by doing so, he believed he would also change the quality of the judiciary. Modern interdisciplinary education and better organization would make better judges.

Dr. Kahn, the social scientist, was less convinced that structural change was the main impediment to an effective family court judge. He certainly agreed that judges with specialized knowledge in a better-structured and resourced court would do a better job. Kahn could not avert his eyes, however, from how judges use the jurisdictional authority that they’ve been given. His core concern is that “in too many instances, consciously or by implication” many Children’s Court judges “see themselves as *the Court*.”<sup>182</sup> Moreover, the litigants see the judge as *the Court*: “For the majority of parents and children, the significance of the entire court is largely decided on the bench.”<sup>183</sup>

Kahn wants to hold onto the idea of the juvenile court, but he portends Justice Fortas’ concerns in *Gault* about the lack of due process by more than a decade.<sup>184</sup> Kahn believed that the judge lacks the legitimacy to enter into the dispositional phase of a proceeding unless the adjudicative phase incorporates the basic due process protections of a common law court. Informality has its

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<sup>181</sup> N.Y. FAM. CT. ACT §141 (McKinney 2012).

<sup>182</sup> Kahn, *supra* note 170 at 269.

<sup>183</sup> *Id.* at 98.

<sup>184</sup> *See In re Gault*, 387 U.S. 1 (1967).

place in making families more comfortable in the court and in integrating the opinions of the social service or mental health experts involved, but informality is not a substitute for fairness at either the adjudicative or dispositional phases of hearings; nor is the judge's innate sense of what to do. As Kahn bluntly writes: "Judges are prone to a major occupational hazard – the feeling that they can readily appraise a situation and regularly make wise decisions not subject to question."<sup>185</sup> A court with few lawyers, press oversight or regular appellate review "lends itself particularly to such hazards."<sup>186</sup> Kahn finds these hazards throughout his study: he recounts stories of judges chiding children for bad spelling; for not going to church or learning the Ten Commandments; of chastising parents for their clothes or demeanor; and for issuing orders that will change peoples' lives without ever looking up from the bench. One story recounts the judge calling a young boy into the courtroom to introduce him for the first time to his putative father and then sending him home to live with him! These stories don't include the various punishments judges regularly meted out to their young charges.<sup>187</sup> Kahn recognizes these occupational hazards and urges restraint on the use of the court's power:

It is clear that, even within a juvenile court concerned with arranging treatment, the process which considers intervention (judicial steps) must be carefully separated procedurally from treatment planning (disposition) since

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<sup>185</sup> *Id.* at 115.

<sup>186</sup> *Id.* That these changes have not resulted in a significantly improved system is for other chapters.

<sup>187</sup> *Id.* at 98-123.

the court properly should assert jurisdiction only in clearly defined situations and not simply because a judge considers a particular child to need treatment.<sup>188</sup>

The judge who is given the power to exercise such instrumental authority must understand the grave implications of that power in order to make wise findings and proper dispositional orders. Kahn wants the judge to be the leader of the court team that Judge Edwards described in his 2004 speech, but most of the judges he observes don't define their roles in ways "consistent with the intent of the law" or "fail to implement [the law] successfully."<sup>189</sup> He reluctantly concludes, "[from] the perspective of the aspirations of the juvenile court movement and the expressed goals of court leadership, the accomplishments are outweighed by the inadequacies."<sup>190</sup>

Kahn was not alone in his assessment. A few years after Kahn's New York study was published, the fiftieth anniversary of the juvenile court was commemorated by a conference at the University of Chicago in 1959 and resulted in a book of essays on the court called *Justice for the Child*. Margaret Keeney Rosenheim, a professor and Dean at Chicago's School of Social Services Administration, wrote in her essay contribution that throughout the country, the first few judges to occupy the juvenile court bench were men of outstanding reputation whose prestige enhanced the work of the court staff and guaranteed community interest and support for the new institution. Yet within two decades of its establishment, this promising institution had become the victim of

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<sup>188</sup> *Id.* at 277.

<sup>189</sup> *Id.* at 106.

<sup>190</sup> *Id.* at 273.

criticism and attacks that have, in substance, continued to the present.<sup>191</sup>

Whether those original judges were as outstanding as Professor Rosenheim reminisces a half-century on, by the middle of the 20<sup>th</sup> century the original juvenile court was not fulfilling its founders' aspirations, in large part because of its reliance on a flawed system of judicial leadership. This leads us inevitably toward the question I pose today. If every family court judge can't be Julian Mack, Len Edwards or the four judges in the school part that Walter Gellhorn so admired, what does it mean for judicial leadership to continue to motivate the juvenile court, the family court and the unified family court movement? How can this serve as the foundation of the new problem solving court movement? Why do I recommend caution?

I begin to answer this question with Kahn's conclusion that the family court judge must have a clearly defined basis for legal intervention in family life prior to ever asserting authority over the dispositional phase of a proceeding, something Kahn calls treatment planning. In other words, I start with where we draw the jurisdictional line before a judge can intervene in a family's life. Let's use status offenses, also called unruly children in Tennessee, as an example. These acts are called status offenses because only minors, not adults, can be held responsible for being incorrigible, running away, being truant, not listening to parents or other authorities, using drugs, or getting drunk; what Professor Rosenheim called in the 1970's "juvenile nuisances".<sup>192</sup>

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<sup>191</sup> Rosenheim, JUSTICE FOR THE CHILD, THE JUVENILE COURT IN TRANSITION 10 (1962).

<sup>192</sup> See generally, MARGARET K. ROSENHEIM, PURSUING JUSTICE FOR THE CHILD (Univ. of Chicago Press 1976) (summarizing Ch. 3: Notes on Helping Juvenile Nuisances).

Today, the youth are called CHINS, PINS or JINS; children, juveniles or persons in need of supervision. There has always been significant disagreement about whether the jurisdictional line should be drawn at actual criminal acts or for acts that just really bother or worry us. Bringing a youth to court for robbery or assault is very different than bringing her to court for having sex or underage drinking. States have drawn that line differently at different points in their histories. Where the line is drawn affects when the court is going to begin impacting the life of the child or family.

States also distinguish among acts that may constitute neglect, abuse, or a sufficient basis to terminate parental rights. These political and cultural choices are tempered by constitutional mandates protecting individual liberty and family integrity. The United States Constitution prohibits states from intervening in family life without establishing that a family is unable to protect a child from harm, neglect, abuse, or trouble. The Supreme Court has repeatedly held that parents have fundamental rights in raising their children, most recently declaring, “[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>193</sup> Unless a legally defined harm can be established or a person voluntarily seeks the assistance of the court, there is no authority for the judge to intervene in the family’s life because she believes she can make that family better.

The late Judge Robert W. Page, a New Jersey Family Court judge who worked tirelessly for effective family court reform, succinctly described the court’s legal basis to intervene in a comprehensive unified family court plan:

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<sup>193</sup> Troxel v. Granville, 530 U.S. 57, 66 (2000).

A court derives its very existence and the validity of its orders from an initial determination of a legal basis to act. This is true regardless of the substantial needs of those who are affected most by the decision. A good rule of thumb is the more substantial the need for judicial involvement, the more the need to be substantial in finding the legal basis. A legal basis includes the findings of jurisdiction and venue at the onset, full respect of the rights of due process, with reasonable notice and an opportunity for all to be heard and adherence to all statutes, court rules, case precedents and established legal and equitable principles. The family court is no place for either judicial scofflaws or goodwill ambassadors without portfolio.<sup>194</sup>

Once a legal basis is established and supported by sufficient evidence that a youth committed a crime or that a parent abused a child, the judge is then empowered to assert the broad “treatment planning” powers to administer

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<sup>194</sup> Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 84-85 (2005).

so-called “individualized justice,” or determining what is best for a child or a family. When Judge Baker said in 1910, “The court does not confine its attention to just the particular offense which brought the child to its notice,” he was lauding the court’s ability to fix whatever is wrong with the child or his family beyond the child’s misbehavior.<sup>195</sup> Today, judges retain significant dispositional discretion, even if not the same unlimited authority used by Judge Baker. Constitutional protections and statutory requirements limit the freewheeling authority of earlier generations of the court. Nevertheless, within those limitations, the judge retains tremendous authority to craft services and dispositions. How the judge exercises that authority often defines the court and the role it takes in family life.

Most states have created some type of family court as either a separate court or a division of a trial court. The jurisdictional authority granted to these courts, however, continues to vary considerably. Some have comprehensive jurisdiction over a broad range of family law matters and are able to consolidate cases about the same family under one judge or one “team” of court personnel that includes the judge.<sup>196</sup> The administrative impetus for consolidating cases is to make the court more efficient by providing a judicial forum with broad jurisdiction that centralizes court activities and minimizes the need for litigants to appear in multiple proceedings in multiple fora about the same or overlapping issues. The most obvious example is that divorce, custody, support and maintenance issues should be heard in the same court, preferably by the same judge, with

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<sup>195</sup> HARVEY HUMPHREY BAKER, UPBUILDER OF THE JUVENILE COURT 114 (1910).

<sup>196</sup> 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 (1998).

all the judicial officers having access to the same information.

A less clear-cut instance of the need for “one family/one judge” is when a youth is being charged with delinquency and his mother has brought a domestic violence case against her partner. There may be information relevant to whether the judge paroles the youth, such as whether the mother can supervise the youth. On the other hand, the judge might use that information to justify detaining the youth because he doesn’t want the youth to witness domestic violence or live in a home with a lesbian mother and her partner, two reasons for taking away the youth’s liberty that may be irrelevant to the issue of parole.

This administrative impulse for efficiency through unification, seen half a century earlier in Professor Gellhorn’s report, has been attributed to Roscoe Pound’s controversial call for consolidation of trials within a unified trial court in 1906.<sup>197</sup> Pound, the legendary Dean of Harvard Law School, was pursuing efficiency and conserving resources for an inefficient court system. Late in his life, in 1959, Pound applied those same justifications to the family court, hoping to eliminate what he called “the waste of time, energy and money” in addressing multiple family issues in a multitude of judicial and administrative settings.<sup>198</sup> Pound leaves to others “what that court should be or may be, or do,” while he focuses more on the court within his broader goal of eliminating multiple tribunals as part of modern court organization.<sup>199</sup> Pound, nevertheless,

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<sup>197</sup> Andrew Shepard & James Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 337 (2003).

<sup>198</sup> Roscoe Pound, *The Place of the Family Court in the Judicial System*, 5 CRIME & DELINQUENCY 161,168 (1959).

<sup>199</sup> Roscoe Pound, *The Place of the Family Court in the Judicial System*, 10 CRIME & DELINQUENCY 532 (1964).

sees this court as shouldering some of the work previously done by other social organizations, like the church, in deterring bad behavior and encouraging civilized society in an increasingly heterogeneous and urban landscape.<sup>200</sup>

In leaving to others “what that court should be or may be, or do,” Pound sidesteps the second impulse of court unification, the therapeutic role of the court “to make the emotional life of families and children better.”<sup>201</sup> This is the impulse of judicial leadership that I have cautioned against. In the current unification movement, the therapeutic role of the court is manifested in two ways: whether services to litigants are provided within or by the court and in what way does the judge participate in creating or monitoring the impact of any therapeutic intervention.

As part of the court’s statutory responsibilities in a large array of cases, the judge issues orders that include requiring family members to seek or secure assistance to address the problems that allegedly led to court intervention. These requirements could come at the very beginning of a case, when the court sets conditions for a youth’s parole after being charged with delinquency; conditions for unsupervised visits when a child is removed from a parent charged with neglect, or limitations on access to the family home after allegations of domestic violence. A youth could also be ordered to attend an afterschool program as a condition of parole, a parent may be required to comply with drug screening to be permitted visitation, or a spouse may be precluded from the home without a third party present. The court may also be statutorily mandated to send disputing parties to mediation or other dispute resolution mechanisms prior to adjudicating a custody case.

The scope of the court’s power to order the litigants to comply with these types of behavioral requirements increases dramatically once the court determines that a

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<sup>200</sup> *Id.* at 539.

<sup>201</sup> Schepard, *supra* note 197 at 339.

youth is guilty, a parent has been neglectful, or domestic violence has occurred. Dispositional orders in these cases could include probation, secure residential placement, foster care, substance abuse or psychiatric treatment, or anger management therapy. While some of these services can only be provided by specialized agencies, many, like substance abuse treatment or testing, parent training or education, mediation or case conferencing, are services that could be provided in-house by court-related or court-directed service systems.

From the very beginning, many of the juvenile court's founders wanted the youth to receive whatever help they needed at the courthouse itself. Probation officers or social workers who were part of the court staff would provide supervision or counseling or other assistance directly to the young person.<sup>202</sup> Some court reformers were uncomfortable with courts being service providers, urging instead a clearer line between the judge's authority to order a service and the provision of that service by an executive branch agency or an independent provider.<sup>203</sup>

Recent calls for a unified family court include centralizing services within the court again, minimizing concern about blurring the boundaries between the court's power to order a disposition and the subsequent implementation of that order.<sup>204</sup> Instead, the proponents focus on reducing multiple locations or service providers for families and on developing a more holistic approach to the families' needs under the court's auspices.<sup>205</sup>

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<sup>202</sup> ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 138 (Univ. of Chicago Press, 2d ed., 1977); DAVID TANNENHAUS, *JUVENILE JUSTICE IN THE MAKING* 33-35, 41, 112-13 (Oxford Univ. Press, 2004).

<sup>203</sup> ALICE SCOTT NUTT, *THE FUTURE OF THE JUVENILE COURT* 160-65 (Natl. Prob. Assn. Yearb. 1939) *reprinted in* PAUL TAPPAN, *JUVENILE DELINQUENCY* 197 (McGraw Hill, 1949).

<sup>204</sup> Schepard, *supra* note 197 at 340-41.

<sup>205</sup> *Id.* at 340-42; Babb, *supra* note 196 at 522.

There are many concerns with the revived model of court-based services. First, there is the traditional objection that a court is not a social services agency and should not act as one. The judge's role is to make the determination that a service is necessary by considering the evidence presented. If the judge determines the service needs to be ordered, it should be. What happens if the service is part of the court itself and then there is a dispute over whether the youth or parent has complied with the service or the service provider has delivered the service? If the service provider is part of the court system the court may be unable to impartially resolve the dispute. This is not theoretical.

Professor Melissa Breger has persuasively applied the social psychology concept of "groupthink" to family court practice. Breger notes that "[g]roupthink may be defined as 'a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.'"<sup>206</sup>

Courts, like all institutions, have a culture; a way of doing things that often separates insiders from outsiders.<sup>207</sup> An extensive study of criminal courts, found, "all [criminal] courts have the same work to do in guaranteeing justice and liberty, but they organize themselves differently to accomplish these goals depending on their culture."<sup>208</sup> Building on the criminal courts study, Professor Breger considers how the culture of family court is especially conducive to groupthink mentality.

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<sup>206</sup> Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lends of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55, 57 (2010).

<sup>207</sup> *Id.* at 63-64.

<sup>208</sup> BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS 39 (2007).

The family court's traditional informality and collegiality, the presence of the same institutional players interacting over long periods of time, and the crisis nature of so many of its cases, can undermine the independence of the various players in the court system. There is tremendous pressure to reach consensus, not to rock the boat by challenging court norms, and, especially, to keep the judge happy.<sup>209</sup> Breger identifies that, "Groups have a predilection to achieve uniformity, which is often embedded in members' subconscious. This desire for uniformity is specifically manifested in the context of a leader who exerts subtle pressure on the group to achieve consensus. In the family court context, this leader is the judge."<sup>210</sup>

Breger's conclusions are directly applicable to the question of whether service providers should be part of the court system or independent. As part of the court system, these providers interact routinely with court staff and the judge. They learn the "rules" of the court, the way things are supposed to work, and may be reluctant to challenge the status quo. Court-based service providers may be more compliant with the court's view of a family than they would if they were establishing an independent relationship. Their opinion about a youth or a parent may be given greater weight with less supporting evidence by a judge who "trusts" the provider she sees everyday and who knows what matters to the judge. This in turn may reinforce a bias against an independent service provider's opinion when another opinion is sought.<sup>211</sup>

Outsiders, even those trying to help the judge make a good decision, may be more loyal to their independent professional obligations toward the litigant than an insider. They may also have a different experience with the client

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<sup>209</sup> Breger, *supra* note 206 at 79-82.

<sup>210</sup> *Id.* at 81-82.

<sup>211</sup> *Id.* at 80.

outside of court, where the client may be more comfortable and less anxious. This leads to the second reason for separating services from the court, a litigant's reluctance to engage in services closely aligned to the court.

Court reformers who want to situate services within the court rarely consider the negative impact this may have on the way family members accept help. Little attention is paid to how family members may feel about the court generally and, specifically here, securing services within the court system. The proponents of the unified family court believe the court serves as a place for families to get help. I do not. People come to the family court either because they have to, such as when the state charges a youth with a crime or a parent with mistreating his children or not paying child support, or because the court is the only or last remaining place to address their unresolved custody, visitation, domestic violence, or paternity issues. If these families could resolve disputes themselves or receive readily available and appropriately crafted assistance in their communities, they would come to court only when they needed a legal judgment. This is because courts, even family courts, are essentially coercive institutions.

Writing about the family court unification movement in 2002, Professor Wallace Mylniec and Anne Geraghty bluntly summarized their concern:

A court is, at its core, an instrument of social control. What it does best is resolve disputed factual issues at a point when the litigants cannot resolve them by themselves. Courts gain control over these acrimonious situations only through the threat or reality

of coercion. Thus, courts are generally seen as an option of last resort, somewhere for people to go to resolve serious disputes without resort to violence, and a place where society can assert its control over behavior that it considers too egregious to go unpunished. Most people who appear before a court do not wish to be there, and would have chosen another form of dispute resolution had it been possible.<sup>212</sup>

Mylniec and Geraghty focus on the fact that most litigants in family court are indigent and do not view the process as consensual. These litigants understand, instead, that if they do not comply with court-ordered services, the court can apply even more coercive sanctions, including fewer visits with their children, loss of custody, or even jail time.

When Judge Baker waxed eloquent about the medical metaphor of the juvenile court in 1910, he nevertheless acknowledged that court-ordered services had a punitive component that “affords in some cases an indispensable stimulus or moral tonic....”<sup>213</sup> Kahn acknowledged that an improved court incorporating legal safeguards would still be “a refined instrument of social control and treatment...”<sup>214</sup> My colleague, Professor Philip Genty, has written about the need for lawyers to empathize

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<sup>212</sup> Wallace J. Mylniec & Anne H. Geraghty, *United Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 441 (2002).

<sup>213</sup> Baker, *supra* note 195 at 116.

<sup>214</sup> Kahn, *supra* note 170 at 280-81.

with indigent clients' fear of the legal system. This empathy requires "an understanding of the client's deep fear and mistrust of the very legal system upon which the client must rely for a solution to her or his legal problem."<sup>215</sup> This mistrust does not arise in a vacuum.

Most parents and youth begin the court process in communities deeply suspicious of government intervention. When services are in the courthouse, most litigants may find it very difficult to distinguish between the power of the judge to order their compliance with services and the court-related service provider trying to engage the litigant with the service. When the service provider is so closely aligned to the judge, can a parent say to the provider that she thinks the judge's decision was wrong? Will she admit to using drugs even though she has clean urine tests? That she's angry with her child for reporting her to child protective services? That she thinks mediation is a waste of time? The litigant may or may not want to receive help. Yet, if she does not work with the provider, what is the likelihood that the parent will get her children back, her support reinstated, or her order of protection renewed? In short, how else could the parent get or keep the judge on her side?

While no court-ordered service is voluntary, a parent may still feel she has more privacy to discuss these issues with a service provider outside the court system, maybe even someone she chose, or who may work in her community and may be willing to assist her long after the court case is done. She may feel that she has some say about what is reported back to the court by a treatment provider who is not part of "the system." Or, as Kahn noted in 1953, "[C]hildren and parents can better accept

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<sup>215</sup> Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 275-76 (2000).

social services from other agencies than from courts which have called them in on petition.”<sup>216</sup>

These two concerns about court-based services, along with others, raise serious issues about the experiences of litigants that court reformers have mostly ignored. In the end, these concerns are only a structural manifestation of the more fundamental question facing unified courts: how the therapeutic impulse defines the role of the judge. When we look at that impulse what we find is that the medical model of the early 20<sup>th</sup> century juvenile court is transforming into the therapeutic jurisprudence model of the early 21<sup>st</sup> with all its attendant dangers.

Therapeutic jurisprudence, according to its adherents, “looks at law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences.”<sup>217</sup> The way a law is written or a court is organized or a judge acts impacts the well being of the persons involved. The proponents of therapeutic jurisprudence want to raise awareness of the legal system’s potential for good or harm *as a system* and encourage reform efforts that strive to minimize the negative experiences individuals have when they find themselves immersed in legal processes. They want to add therapeutic considerations into the mix of other important considerations about legal processes including “autonomy, integrity of the fact-finding process, and community safety.”<sup>218</sup> In the family law context, “therapeutic justice should strive to protect families and children from present

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<sup>216</sup> Kahn, *supra* note 170 at 274.

<sup>217</sup> Babb, *supra* note 196 at 509 (quoting DAVID B. WEXLER, PUTTING MENTAL HEALTH INTO MENTAL HEALTH LAW: THERAPEUTIC JURISPRUDENCE *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991)).

<sup>218</sup> *Id.* at 511 (quoting DAVID B. WEXLER, JUSTICE, MENTAL HEALTH, AND THERAPEUTIC JURISPRUDENCE *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 714 (David B. Wexler & Bruce J. Winick eds., 1996)).

and future harms, to reduce emotional turmoil, to promote family harmony or preservation, and to provide individualized and efficient, effective family justice.”<sup>219</sup> Creating a unified family court will accomplish that goal. The words of the leading proponents of the movement are unequivocal on that point:

Rather, it is that we seem to be onto something good for children and families, something that helps people secure basic necessities and leaves them with the tools necessary to do so long into their respective futures. This something is a unified family court, the underlying principle of which is the practice of therapeutic justice. Therapeutic justice concentrates on empowering families with skills development, assisting them in resolving their own disputes, enhancing coordination of court events within the justice system, providing direct services to families when and where they need them, and building a system of dispute resolution that is more cost efficient,

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<sup>219</sup> *Id.* (quoting Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 800 (1997)).

user-friendly, and time  
conscious.<sup>220</sup>

I have advocated that UFCs embrace the notions of therapeutic jurisprudence and an ecological, holistic approach to the family's problems. In that vein, I have advocated that specially trained and interested judges address not only the legal issues, such as divorce, custody, child support, and domestic violence, but also that they consider the family's nonlegal needs, such as substance abuse, mental health issues, or domestic abuse. A therapeutic and ecological UFC model allows for the resolution of legal, personal, emotional, and social disputes with the aim of improving the well-being and functioning of families and children.<sup>221</sup>

A UFC has an  
additional and vital goal

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<sup>220</sup> Jeffrey A. Kuhn, *A Seven-year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 1, 68 (1998).

<sup>221</sup> Barbara A. Babb, *Unified Family Court: Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230-32 (2008).

beyond simple, efficient umpiring: to make the emotional life of families and children better...The UFC is based on the premise that family members are interconnected emotionally, economically, and spiritually. Any court order about one family member is likely to affect all. Whatever behavioral, mental-health problems, or conflict that brought one family member to court is likely caused or influenced by other family members. The legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court's attention in the first place.<sup>222</sup>

These three descriptions have in common several therapeutic components: the court is capable of intervening in a family's life not just to resolve the legal dispute that brought the family to court but to improve the family's life by addressing the complex social, emotional or psychological issues underlying the dispute; when therapeutic courts intervene in the lives of families, the

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<sup>222</sup> Schepard, *supra* note 197 at 339-40.

outcomes for the families will improve; and, most centrally, the court is a good place to resolve family problems. These basic tenets of the unified family court sound remarkably like the therapeutic justifications for the original juvenile court. Our brief historical review of judicial leadership in the juvenile and family court systems, however, has never found these therapeutic attempts to be successful on a systemic level. Of course, a particular judge or a particular program may work well for a while, such as those school part judges in New York in the 1950's or Judges Mack or Edwards, because they are being run by exceptional, committed judges and have received additional funding and other resources. The few investigations into how unified courts are working now, however, only show that there are some administrative improvements in the way the court works or some improved outcomes from consolidation of court cases, not that a therapeutic approach is effective.<sup>223</sup>

This matters for fundamental reasons. Choosing to create a court based on therapeutic principles means that other principles, such as fairness or due process, may be given less value. A judge being asked to help solve a family's problems may be less concerned about each litigant having legal counsel or following strict evidentiary standards or even reaching a decision based on the evidence.<sup>224</sup> In considering the role of therapeutic jurisprudence in family court, Judge Gerald W. Hardcastle recently wrote:

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<sup>223</sup> Mylniec, *supra* note 212 at fn 102; Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147 (1998); *Unified Family Courts Literature Review*, American Institute for Research (2002).

<sup>224</sup> Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIG., GENDER & CLASS 127-30 (2010) (explaining that the role of the judge should be to be an impartial decision maker and protector against government overreach, rather than the solver of family problems).

Therapeutic justice implies the court system will not only resolve litigants' disputes but also will resolve the underlying dysfunctions existing in the litigants and the families. It also implies the judges know the "right" answer. As a result, the process is not about judicial discretion. In complex social relationships, the judge is charged with finding the right answers and accepts responsibility for finding those answers - keeping the parties before the court until answers are found. It is an arrogant, ambitious task.<sup>225</sup>

Moreover, it is a task that puts at risk the trust that litigants try to have in a fair process. Shifting from a neutral judge to a "healer" or "participant in the process" or a "sensitive, emphatic counselor," can undermine a litigant's understanding of the way a court should operate and a judge should act.<sup>226</sup> A family court judge should be empathetic and respectful, requiring everyone in the courthouse to treat litigants considerately. Civility and respect have, as their end goals, a fair and timely process even if the outcome does not satisfy everyone. As Judge

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<sup>225</sup> Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 90-91 (2005).

<sup>226</sup> *Id.* at 92.

Hardcastle points out, the promise that a court can solve problems is essentially a lie.<sup>227</sup>

Most litigants in family court have complex family issues and are in desperate need of basic human services that might make a difference: employment, decent education and health care, child care and mental health treatment, good housing and safe neighborhoods. Family court judges cannot provide for those complex needs even if they wish they could. As Kahn pointed out in 1953, “In reviewing the Court’s total performance it must be recalled that its task is exceedingly difficult and that many people come to it because of the failings or lacks in other agencies in the community...The basic fact which remains, however, is that many children and parents known to the Court require a complex range of services and facilities, but only a minority are well served.”<sup>228</sup> Myleniec and Gerraghty repeated this “basic fact” fifty years later when they warned that a unified family court cannot solve family problems:

Unified family courts by themselves cannot stem the increase in caseloads. They can have no effect on the life chances of the litigants prior to the time a case is filed. Nor will families face fewer complex problems just because court process and jurisdiction have been unified and the court becomes more efficient. Poor education, dwindling housing stock, mental illness, drug use, crime, and crumbling

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<sup>227</sup> *Id.* at 91-94.

<sup>228</sup> Kahn, *supra* note 170 at 273.

neighborhoods are all beyond the reach of the court. Nor can a court force the executive and legislative branches of government to create more and better services.<sup>229</sup>

Abandoning the therapeutic impulse to solve family problems and improve family well-being does not mean divesting the court of its adjudicative and dispositional responsibilities. It means rethinking them. Juvenile and family court judges have very difficult jobs. They see thousands of litigants each year. These litigants are usually the least favored among us, the poorest and the most fragile. They are disproportionately people of color.

The court cannot solve the problems that bring them there. What the court can do is make the best and fairest decision possible with the resources available. Instead of all the words used by judges who want to have some other job, the litigants have a right to expect an impartial decision-maker, who will listen to the evidence and make a reasoned decision. Processes like hearings and settlement conferences, slow our thinking down and require us to be more deliberative. This is not an easy thing to do. We know from the newest mind sciences that we're not the rational beings we thought we were. We know that judges, like the rest of us, are subject to cognitive biases, but cognitive biases can be challenged by trial procedures subject to accountability standards, open courts and appellate review. They are difficult to challenge in a court where, as Judge Cindy Lederman says, "I'm not sitting back and watching the parties and making a ruling. I'm making comments. I'm encouraging. I'm making judgment

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<sup>229</sup> Mylniec, *supra* note 212 at 445.

calls. I'm getting very involved with families. I'm making clinical therapeutic decisions to some extent, with the advice of experts."<sup>230</sup>

My plea is that Judge Lederman, and those like her, be cautious, learn the lessons of history, mark the words of Judge Hardcastle that therapeutic justice is an arrogant task, and return to the humbler but nobler job of being a judge.

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<sup>230</sup> Matthew I. Fraidin, *Decision-making in a Dependency Court: Heuristics, Cognitive Biases and Accountability*, 60 CLEV. ST. L. REV., 913, 937 (2013).