A FAMILY SYSTEMS PARADIGM FOR LEGAL DECISION MAKING AFFECTING CHILD CUSTODY

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INTRODUCTION

Sarah, a twelve-year-old child, was raped by the boyfriend of her mother, Ms. P.[1] Ms. P. denied the rape. After an investigation, the state's department of human services filed a petition in juvenile court alleging that Sarah was dependent and neglected in that her mother failed to protect her from the perpetrator. The judge appointed a lawyer for Ms. P. and a separate Guardian Ad Litem ("GAL") lawyer to represent Sarah's "best interests." Despite Sarah's insistence that she wanted to remain with her mother, the judge ordered that Sarah be removed from Ms. P.'s home and placed in state custody.

The state agency caseworker placed Sarah in the home of Sarah's maternal aunt and uncle and enrolled her in individual counseling, which Sarah reluctantly attended for a brief period. Sarah's individual counselor never spoke with Ms. P.

Meanwhile, the state purportedly was providing services to Ms. P. to assist her in achieving the goal of reunification with Sarah. At the ninety-day review hearing, the caseworker stated that she had stopped making efforts with Sarah's mother because Ms. P. was "hostile" towards her. The judge ordered the caseworker to continue assisting Ms. P. to achieve reunification but did not specify how this should be accomplished.

During the next year, Sarah's placement with her relatives fell apart, and she experienced a series of emergency temporary placements and foster homes. Sarah spent a month, including Christmas, in a locked inpatient psychiatric unit for children and adolescents, where she refused to eat or participate in activities. The hospital staff labeled Sarah as se-

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[1] This scenario is based upon an actual case. The names of the individuals involved have been changed for purposes of confidentiality.

verely depressed and attempted to give her anti-depressant medication, which Sarah refused to take. After being released from the hospital, where the staff admitted they were not helping her, Sarah was placed in an emergency shelter for thirty days. The shelter's staff also attempted to medicate Sarah with anti-depressants against her will.

Throughout these months, Sarah insisted she was not "crazy" and that she just wanted to be with her mother. She was virtually cut off from her family, except for limited telephone contact. Meanwhile, the caseworker (who acknowledged that she had placed Sarah in the hospital and shelter because she did not know what to do with her) was struggling to find a foster home for Sarah. When the caseworker finally did find a foster home, the arrangement failed within a week. Sarah's second foster home also failed within a short time. Meanwhile, the state still provided no services to Ms. P. and Sarah to facilitate reunification.

At the eighteen-month permanency hearing,[2] the judge discovered that Ms. P.'s seven-year-old daughter Rachel was living with her.[3] The judge expressed shock and concern that the state agency had never intervened in any manner on Rachel's behalf. Ms. P. and Rachel were homeless at this point, and Rachel was not attending school on a regular basis, but Ms. P. and Rachel were not receiving any assistance from the state. The judge ordered that Rachel also be placed in foster care. In the months following the permanency hearing, the family's situation finally began to improve. Sarah's third foster home turned out to be a supportive environment. Her new foster mother understood the importance of Sarah and Ms. P.'s relationship and also accepted Sarah's sister Rachel into her home.

Moreover, the agency overseeing the foster home arranged for a family therapist to become involved with this family. Through family therapy, the family members were able to work through their unresolved feelings, and Ms. P. was able to re-establish her role as the mother of the family. The agency also offered assistance to Ms. P. with finding hous-

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[2] The permanency hearing is a special hearing required under federal and state law. *See* Mary Lee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980, in* FOSTER CHILDREN IN THE COURTS 575, 582-83 (Mark Hardin ed., 1983) (citing Social Security Act § 475(5)(B), 42 U.S.C.A. § 675(5)(B) (West Supp. 1981 reunification)); *see, e.g.*, TENN. CODE ANN. § 37-2-409 (1991) (Tennessee code provision requiring judge or referee to hold hearing within eighteen months of foster care placement to determine necessity of continued placement, extent of compliance with foster care plan, extent of progress, and future plan for child and family). At the hearing, the court is supposed to make special efforts to ensure that a child achieves a permanent resolution of her situation as soon as possible, be it through reunification with the biological family, adoption, or some other permanent arrangement.

[3] The mere fact that the judge was unaware of Rachel's situation is perhaps the best evidence of the problems that are created by the individual-based approach traditionally taken by our legal system in its handling of these cases. Under a family systems approach, as demonstrated below, this fact would have been known from the beginning, and Rachel's needs would have been addressed much earlier.

ing. Soon thereafter, Ms. P. got a job that she was able to maintain. Finally, after nearly three years of hearings and numerous foster placements, Ms. P. and her daughters were reunited.

The family approach eventually taken in this case reflects a paradigmatic[4] shift that has occurred during the latter half of this century—from an "individual" orientation to a "systems" orientation.[5] The corollary to this change in the mental health field has been the emergence of "family systems" theory.[6] Family systems theory has influenced mental health scholars and practitioners throughout this country.[7] This shift in the mental health field is consistent with recent policy developments, such as the concept of family preservation, which has been incorporated into federal and state laws.[8]

Nevertheless, many courts[9] and advocates[10] have lagged behind in this process. A key reason for this judicial lag is that individual thinking fits better with traditional legal institutions. The legal system emphasizes individual rights and remedies and provides for individual representation. The individual approach also fits with the traditional medical model, which courts historically have relied upon in legal proceedings.[11] Further, courts have interpreted the "best interests" standard which gov-

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4 "A paradigm is a coherent tradition or framework shared by a given scientific community. It refers to a whole realm of experience, including beliefs, values, and methodology, subscribed to by members of that community." RAPHAEL J. BECVAR & DOROTHY STROH BECVAR, SYSTEMS THEORY AND FAMILY THERAPY: A PRIMER 2 (1982) (citing Thomas S. Kuhn, *The Structure of Scientific Revolutions* 10 (1970)).

5 BECVAR & BECVAR, *supra* note 4, at 3.

6 *See* Edward P. Mulvey, *Family Courts: The Issue of Reasonable Goals*, 6 LAW AND HUMAN BEHAVIOR 50, 54 (1982) (describing the movement toward family systems theory as a shift in paradigms). Edward Mulvey is a Professor of Psychology at the University of Georgia.

7 The family systems approach is a well-developed theoretical framework that has achieved wide acceptance in the mental health fields of social work, psychology, and psychiatry. Family systems theory is not a monolithic set of ideas, but rather is a considerable body of literature developed by numerous scholars and practitioners. However, a unified family systems perspective is discernible, along with a set of concepts and terms. JASON MONTGOMERY AND WILLARD FEWER, FAMILY SYSTEMS AND BEYOND 11 (1988). As used in this Article, family systems theory refers to this unified perspective and the concepts and terms commonly found in family systems literature. Many of these concepts have been attributed to what is known as the "structural" or "structural-strategic" school of family systems theory. For a detailed discussion of structural family systems concepts, *see* SALVADOR MINUCHIN, FAMILIES AND FAMILY THERAPY 1 (1974).

8 *See, e.g.*, 42 U.S.C.A. § 629 (West Supp. 1993) (also known as the Family Preservation and Support Act of 1993).

9 "Courts" in this context refers to judges, referees, and other judicial officers who hear and decide matters affecting child custody. In this article, the terms "court" and "judge" are used interchangeably.

10 "Advocates" in this context denotes individuals who have traditionally represented the child's "best interests" in proceedings involving issues related to child custody, such as a Guardian Ad Litem ("GAL") or a Court Appointed Special Advocate ("CASA").

11 Mulvey, *supra* note 6, at 53.

erns all legal decision making regarding child custody by using an individual, psychoanalytic approach. Courts and advocates thus cling to an individual orientation toward children despite the fact that this approach does not reflect the larger scope of current professional knowledge about children and families.

This Article describes family systems theory and demonstrates its consistency with certain laws and policies already in place. It posits a new standard, consistent with the best interests of children, that courts and advocates should apply to all legal decisions affecting child custody: *the least destructive arrangement to the continuity of family relationships.*[12] The Article goes on to outline specific guidelines stemming from this standard. It then revisits this opening case scenario, describing how the case would have progressed had the judge applied family systems theory throughout the proceedings.

I. FAMILY SYSTEMS THEORY

A family is a living system, an entity, whose members are its interacting parts. Throughout this Article, the term "family" is defined as interaction characterized by intimacy or attempts to gain intimacy.[13] A family, therefore, includes individuals who share or seek to share intimate relationships with each other. This definition includes biological parents, even if the parents have had little or no contact with their child, so long as they seek to form an intimate relationship with the child. It also encompasses foster parents and stepparents, as well as certain neighbors or friends, so long as they truly have a relationship of intimacy with a child.[14]

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[12] GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, DIVORCE, CHILD CUSTODY AND THE FAMILY 88 (1980); Jack C. Wall & Carol Amadio, *An Integrated Approach to Child Custody Evaluation: Utilizing the "Best Interest" of the Child and Family Systems Frameworks*, 21 JOURNAL OF DIVORCE AND REMARRIAGE 46 (1994). In 1980, a consortium of mental health scholars and practitioners, known as the Group for the Advancement of Psychiatry ("GAP"), articulated a standard and set of guidelines very similar to those proposed in this Article. The Article diverges from the GAP, however, on a fundamental premise of its work: the GAP specifically limits its recommendations to custody situations arising in the context of divorce and expressly excludes custody situations arising in the context of foster care and adoption. According to the GAP, in foster care and adoption situations, the ideas of Goldstein, Freud, and Solnit apply. *Id.* at 77 ("[t]he proposals advanced in their work appear valid, as they apply to adoption and foster care."). In contrast, this Article supports the application of the proposed standard and guidelines to all legal decisions involving child custody. For further discussion of the proposals of Goldstein, Freud and Solnit, *see infra* notes 63-68 and accompanying text.

[13] MONTGOMERY & FEWER, *supra* note 7, at 106.

[14] This definition of family is intentionally inclusive, to the extent that a child's family should include all individuals with whom a child has an existing attachment or a future interest in an attachment. The latter category specifically includes biological parents and close relatives, such as siblings, even if the child is unfamiliar with them at birth or in early childhood. *See* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal*

The individual is a part of the whole, not simply a whole unto herself.[15] According to family systems theory, the only way to understand a person fully is to look at that individual in the context of her family and to understand the family's interaction.[16] In contrast with the study of individuals, which focuses on the inner workings of the human mind, family systems theory focuses on the dynamics of interpersonal relationships and their contexts.[17] Another way to conceptualize this contrast is that while individual approaches attempt to understand people from the inside out, family systems theory attempts to understand them from the outside in.[18]

An important feature of family systems theory is that it departs from a linear cause-and-effect type of thinking. Instead, the systems perspective moves to a notion of mutual interaction.[19] It is not just that A influences B, but B influences A.[20] Responsibility is therefore a shared phenomenon.[21] Mutual interaction and shared responsibility mean that every member of the family system is important in terms of understanding a particular problem or condition. The problem "belongs" to the family and not to any particular individual. The concept of shared responsibility goes to the heart of the family systems perspective, inasmuch as it places responsibility on *all* family members for observed behaviors, regardless of which family member exhibits the behavior.

These notions of mutual interaction and shared responsibility are difficult to grasp in our society, which places great emphasis on singular causation and individual responsibility. Moreover, to appreciate these concepts, one must depart from a judgmental framework. Stating that everyone in the family system in some way contributes to the family's condition does not involve attaching blame to any member of the family, unlike many legal processes. Full acceptance and integration of a family systems perspective would therefore require a fundamental rethinking and restructuring of the legal system. These critical differences in approaches may go a long way toward explaining why courts and advocates have not integrated family systems thinking.[22]

Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 904-05 (1984); Carol Amadio and Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59, 82-83 (1983-84).

15 STEPHEN J. SCHULTZ, FAMILY SYSTEMS THERAPY: AN INTEGRATION 13 (1984) (citing SALVADOR MINUCHIN, FAMILIES AND FAMILY THERAPY 9 (1974)).

16 BECVAR & BECVAR, *supra* note 4, at 6.

17 *Id.*

18 SCHULTZ, *supra* note 15, at 58.

19 BECVAR & BECVAR, *supra* note 4, at 6-7.

20 *Id.*

21 MONTGOMERY & FEWER, *supra* note 7, at 37-40.

22 *Id.*

Another key principle of family systems is that the whole is greater than the sum of its parts.[23] Thus, the family system has properties not found in any single member.[24] Since the family system is an entity with properties of its own, those properties may be described and analyzed as a means of understanding the family system and, ultimately, as a means of helping the family function more effectively.

The conceptual framework of family systems describes a family's properties using structural characteristics and roles commonly found in families. One such structure is the "subsystem," which would include a "coalition." Coalitions consist of two or more family members and may promote unity and harmony in a family or may be divisive.[25] A stable coalition between parents, as well as other generationally based coalitions, may be helpful for effective parenting.[26]

On the other hand, coalitions may be destructive forces, particularly when they engage in "triangulation." Triangulation occurs when two members of a system are in conflict and each tries to make an ally of another family member in an attempt to avoid true resolution of the conflict. A typical scenario is when parents who are in conflict vie for the alliance of the same child. The child who is triangulated may either become the scapegoat, or possibly the tyrant, by being given the power to play one parent against the other.[27] Thus, coalitions often become destructive when families blur generational lines.

Another set of structural characteristics relates to how families manage new information, both externally (i.e., adaptability to new circumstances) and internally (i.e., ability to share information among members, reflecting the level of intimacy).[28] A family must be able to receive new information effectively such that it maintains its distinctness from its external environment but is still able to accept useful information. The amount of information entering and leaving a family reflects its relative "openness."[29] Families that are too open lack cohesion, while families that are too closed become overly rigid.[30]

The way information enters and leaves a family system is through its "boundaries".[31] The relative permeability of a family's boundaries is another way to refer to its relative openness or closedness. "Boundaries" also refers to communication within families. Families with unclear or

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23 *See* SCHULTZ, *supra* note 15, at 56-57.

24 MONTGOMERY & FEWER, *supra* note 7, at 106.

25 *Id.* at 107, 110.

26 *Id.* at 108 (citing SALVADOR MINUCHIN, FAMILIES AND FAMILY THERAPY (1974)).

27 *Id.* at 109.

28 *Id.* at 110-117.

29 *Id.* at 117.

30 BECVAR & BECVAR, *supra* note 4, at 11.

31 *Id.*

diffuse boundaries are often described as "enmeshed," while families with very rigid boundaries are described as "disengaged."[32] Members of highly-enmeshed families are unable to differentiate their thoughts and feelings from each other. Such families will resist any efforts by individual members to separate or initiate change.[33]

Yet another important set of properties relates to how systems deal with stability and change.[34] Families, like other systems, strive to maintain stability and integration and at the same time must adapt to many types of change, such as changes in membership, context, and relationships. As families interact over time, their internal dynamics become more patterned, while their identity becomes more distinct from the systems around them (e.g., the community, the larger society).[35] A healthy family system is able to change as the characteristics of its members and their relationships evolve, without disrupting the essential continuity of the system.[36]

A tendency towards too much stability or too much change may be dysfunctional.[37] Although stability may promote a sense of identity and predictability, too much stability may lead to a family repeating ineffective or even destructive patterns that weaken the functioning of the family or its members.[38] Change is healthy when it revises inappropriate patterns, but too much change or change that is misdirected may be disruptive to a healthy family, such as when a family triangulates a child to deflect marital discord.[39] Generally, the degree of openness or closedness of a family system determines whether it will tend toward stability or change.[40] A relatively open and thoughtfully creative family can act in new ways that are completely independent from its beginnings.[41] Closed families, on the other hand, will tend toward repeating limited behaviors and patterns that were set when the system was created.[42] The former process is known as "equifinality," while the latter is known as "ordinality."[43] Healthier family systems move towards equifinality, meaning that their ends are not determined by their beginnings.[44]

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32 MONTGOMERY & FEWER, *supra* note 7, at 29-30.

33 LYNN HOFFMAN, FOUNDATIONS OF FAMILY THERAPY: A CONCEPTUAL FRAMEWORK FOR SYSTEMS CHANGE 72 (1981).

34 MONTGOMERY AND FEWER, *supra* note 7, at 121.

35 *Id.* at 124.

36 *Id.* at 130.

37 *Id.* at 156-57.

38 *Id.* at 130-31.

39 *Id.* at 131.

40 BECVAR & BECVAR, *supra* note 4, at 17.

41 MONTGOMERY & FEWER, *supra* note 7, at 145.

42 *Id.*

43 *Id.*

44 *Id.*; BECVAR & BECVAR, *supra* note 4, at 15.

The notion of equifinality de-emphasizes a historical perspective, which other psychological theories view as essential for successful therapeutic intervention.[45] Family systems thinking focuses more attention on understanding "what is"—describing current functioning, as opposed to "why"—past history and the need for insight.[46] The manner in which the family is presently interacting provides the therapist or other helping individual with sufficient information to intervene effectively.[47] The idea of focusing on the current functioning fits with notions of mutual interaction and shared responsibility because the therapist can observe these qualities through the interactions that take place in her presence. This concept is also consistent with a non-judgmental approach insofar as the need to understand why a particular behavior exists is often accompanied by attaching blame to a particular individual.

Moreover, a family systems approach emphasizes the identification of a family's strengths rather than its pathology.[48] Family systems theory operates with the philosophy that people have unused or under-used competencies and resources that may be brought forth when constraints are removed. One theorist refers to this approach as "mobiliz[ing] the latent reserves of trustworthiness through the activation of mutual care, consideration, and commitment among family members."[49] Thus, the therapist seeks to help members of the family system reconnect with each other through their dormant sense of mutual trust. Together with the emphasis on current functioning and the non-judgmental approach, the competency-based emphasis of the family systems model allows professionals to empower the family and to build a positive treatment atmosphere.[50]

II. CONSISTENCY WITH CURRENT POLICY

Family systems theory maintains that in order to intervene effectively to help children, one must "treat" the whole family. This approach fits with the family preservation movement, which has had a growing influence on child welfare policies over the past twenty years.[51] In es-

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45 BECVAR & BECVAR, *supra* note 4, at 15.

46 *Id.*

47 Rocco A. Cimmarusti, *Family Preservation Practice Based Upon a Multisystems Approach*, 71 CHILD WELFARE 241, 244 (1992).

48 *Id.* at 246.

49 Ivan Boszormenyi-Nagy, *Contextual Therapy: Therapeutic Leverages in Mobilizing Trust, in* FAMILY THERAPY: MAJOR CONTRIBUTIONS 395, 398 (Robert Jay Green, Ph.D. & James L. Framo, Ph.D. eds. 1981).

50 *Id.*

51 Anthony N. Maluccio et al., *Protecting Children by Preserving Their Families*, 16 CHILDREN AND YOUTH SERVICES REV. 295, 296-97 (1994); Duncan Lindsey, *Family Preservation and Child Protection: Striking a Balance*, 16 CHILDREN AND YOUTH SERVICES REV. 279, 283 (1994).

sence, family preservation believes that "the best way to protect children is to preserve as much of their families as possible."[52] The philosophy of family preservation, consistent with family systems thinking, promotes sustaining family ties with all members of a child's kinship network but does not dictate a particular outcome in every instance. Family preservation means "helping each child to achieve and maintain, at any given time, their optimal level of reconnection—from full reentry into the family system to other forms of contact, such as visiting, that affirm the child's membership in the family."[53]

Family preservation efforts encompass both "reintegration" and "reunification."[54] Reintegration, the physical placement of the child with the biological family, may not always be possible. Reunification, a term that encompasses reintegration as one possibility, refers to the broader idea of return to the community and emotional reconnection with the biological family. Reunification should always be the goal, inasmuch as it allows the family to sustain the emotional attachments among its members.[55]

The values of family preservation and family systems can be maintained in most families, even those in which parents seem least able to care for their children. Both approaches call for flexibility in preserving family bonds by responding to each child and family's individual qualities and needs. They also call for fully respecting human diversity, especially culture, race, and ethnicity. Awareness of and sensitivity to cultural uniqueness is critical, since a disproportionate number of families receiving child welfare services are families of color.

A. CONTRAST WITH INDIVIDUAL APPROACH

Family systems theory and the family preservation movement contrast sharply with an individual approach to children, which has become entrenched in our American legal tradition. The historian Michael Grossberg traces the beginnings of this development to the nineteenth century: "Perhaps the most enduring product of the distinctive domestic relations law hammered out in nineteenth-century America was the legal concept of the family as a collection of separate legal individuals rather than an organic part of the body politic."[56] This individual approach contributed significantly to creating an adversarial view of the family, which has persisted until today in the legal system.

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52 Maluccio et al., *supra* note 51, at 295.

53 *Id.* at 299.

54 Christopher G. Petr & Cindy Entriken, *Service System Barriers to Reunification*, 76 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVICES 523, 524 (1995).

55 *Id.*

56 MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 305 (1985).

Mary Ann Glendon, Professor of Law at Harvard University, echoes this concern by observing that our present legal system recognizes only the entities of the state and the individual, with nothing in between.[57] The legal image of the family emphasizes the separate personalities of family members rather than the unitary aspect of the family, including a trend toward the diminution of rights of parents and the treatment of children as persons with their own rights.[58] Glendon points out the problematic nature of "rights talk":

> Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground . . . In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependants, young and old.[59]

Glendon recognizes the link between the individual-based approach of the legal system and "rights talk." Legal professionals who have been trained in and who have experienced a legal system deeply entrenched in individual approaches find rights talk attractive. It meshes comfortably with the adversarial approach to dispute resolution that is so well grounded in the legal system. Discussions concerning so-called "children's rights," which often pin them against so-called "parents' rights," have become a fixture in the dialogue among scholars and advocates concerned about child custody matters.

When viewed through the lens of family systems theory, however, this discussion reveals itself to be not only unproductive but misconceived. From a family systems perspective, the rights, as well as the needs and interests of children and parents, are inextricably intertwined. It thus makes no sense to speak of them as dichotomous, or worse, as opposed to each other.

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57 MARY ANN GLENDON, RIGHTS TALK 75, 109 (1991) [hereinafter *Glendon I*]; *see also* GROSSBERG, *supra* note 56, at 305 (noting that as the twentieth century arrived, the family had virtually ceased to exist in the eyes of the law). In a later article, Glendon points out that unlike most European constitutions, our Constitution does not even mention the family. Mary Ann Glendon, *General Report, Symposium: Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 385, 397 (1993).

58 MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 102-03 (1989) [hereinafter *Glendon II*]. *See also* Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 829, 840 (1989) ("[t]he thrust of law concerning the family currently reflects an adherence to the notion that the family is nothing more than a collection of individuals, each with specific individuated and potentially conflicting 'rights.' . . . In fact, family law has begun to reflect an assumption that the family may be harmful to an individual's (economic, emotional, and physical) health").

59 *Glendon I*, *supra* note 57, at 14.

Nevertheless, given this individual orientation, it is unsurprising that the legal system continues to cling to the traditional "best interests of the child standard," despite frequent and sustained criticism of the standard.[60] The traditional best interests standard stems from psychoanalytic theory, which focuses on individual traits and experiences and on internal representations of childhood events.[61] One scholar has described the traditional standard as "uncompromisingly child-oriented, extrapolating to the limit the traditional psychoanalytic emphasis on the individual."[62]

The most renowned champions of this individual approach to best interests have been Joseph Goldstein, Ann Freud, and Albert Solnit, who co-authored a series of books addressing the standard.[63] Indeed, these authors criticized the best interests standard as it was previously being implemented for not focusing sufficiently on the individual child's interests. They claimed that the standard was actually subordinating children's interests to those of their parents.[64] Under their reformulation of the standard, which they called the "least detrimental alternative," they viewed "children's rights" as truly predominating.

Goldstein, Freud and Solnit also emphasized the importance of a permanent custody decision being made as soon as possible, taking into account the child's sense of time and the child's need for a continuous relationship with the "psychological parent."[65] The psychological parent was defined as the one individual to whom the child forms a unique emotional attachment, which the authors posited as essential to the child's healthy development.[66] Goldstein, Freud and Solnit stated that the psychological parent should have sole custody and should have abso-

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60 *See, e.g.*, Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269 (1987) ("the 'best interests of the child' is not a standard, but a euphemism for unbridled judicial discretion"); Hillary Rodham, *Children Under the Law*, 43 HARVARD EDUC. REV. 487, 513 (1973) ("[the best interests standard] is a rationalization by decisionmakers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured"). For a detailed discussion and critique of the best interests standard, *see* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996).

61 Jeffrey P. Wittman, *Family Therapists as Expert Witnesses: Helping Family Court Understand a New Language*, 16 FAMILY THERAPY 227, 232 (1989) (citing M.P. NICHOLS, FAMILY THERAPY: CONCEPTS AND METHODS 1 (1984)).

62 Glenn Miller, *The Psychological Best Interest of the Child*, 19 J. DIVORCE AND REMARRIAGE 21, 27-28 (1993).

63 *See, e.g.*, GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 53-54 (1973) [hereinafter *Goldstein I*]; *see also* GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 3-11 (1979) [hereinafter *Goldstein II*]; GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 90-91 (1986) [hereinafter *Goldstein III*].

64 *Goldstein I*, *supra* note 63, at 54.

65 *Id.* at 53.

66 *Id.* at 19.

lute discretion over whether the child has contact with any other parental figures.[67]

These author's ideas about the child's sense of time and need for continuity of relationships remain important contributions to courts' and advocates' understanding of the impact of legal proceedings on children and families. However, all of the ideas Goldstein, Freud and Solnit espoused were expressly based on a psychoanalytic, individual-based paradigm of human understanding.[68] Their views take no account of a family systems approach. Yet, probably the majority of courts deciding custody matters continue to embrace the concept of the "psychological parent" as well as this narrow interpretation of the best interests standard, whether or not they understand the theoretical underpinnings of these notions.

The individual psychoanalytic approach fits with the medical model, which has long been an accepted approach in legal proceedings. According to one scholar, the legal system has traditionally relied upon medical diagnostic expertise, and continues to cling to the individual-based medical model which attempts to isolate the cause of family dysfunction and prescribe an appropriate remedy.[69] Although the judiciary has given lip service to a family focus, "true adoption of a family perspective by the legal system will require more than a mere semantic shift."[70]

B. REFORMULATING "BEST INTERESTS" AS THE "LEAST DESTRUCTIVE ARRANGEMENT TO THE CONTINUITY OF FAMILY RELATIONSHIPS"

Under a family systems approach, an adequate custody decision requires an evaluation of the total family and its relationships. "No *single* principle or finding concerning an individual member can determine a 'best' resolution to a custody conflict, since that principle or finding

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67 *Id.* at 38. For a detailed discussion of psychological parent theory, *see* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996). Davis notes that Goldstein, Freud and Solnit urged law reform protecting psychological parent relationships, including insulating such relationships from any contact unwanted by the psychological parent. *Id.* at 347-48. She further attributes these authors with spurring the movement to terminate parental rights quickly, presumably so that children can achieve permanence through adoption. *Id.* at 348. *See also* Jean Koh Peters, *supra* note 60, at 1537-1550.

68 *See Goldstein II*, *supra* note 63, at 4-5 (explicitly stating that these ideas are based on psychoanalytic theory and focus exclusively on the child's [individual] psychological needs).

69 Professor Mulvey wrote in 1982 that the legal system has yet to shift from a medical model to a family systems approach, despite the judiciary's articulated interest in developing more of a "family" approach, such as through the use of family courts. Almost fifteen years later, the legal system still has not made any significant movement in this direction. Mulvey, *supra* note 6, at 53.

70 *Id.* at 50.

turns out to be only a part of the matrix of the whole family."[71] Moreover, unlike the medical model, which identifies the locus of any problem as within the individual, this approach views all conditions as resulting from the interconnected relationships among members of the family system and their larger environments.

In sum, a child's "rights" or "interests" effectively cannot be viewed separately from those of her parent, sibling, grandparent, or anyone else who is part of that child's family system. The true "best interests" of the child therefore cannot be determined apart from determining the best interests of the family system. It has been recognized, however, that use of the term "best" is misleadingly optimistic when applied to most legal decision making affecting children. Realistically then, courts and advocates should try to achieve the least destructive arrangement to the continuity of family relationships.

The theoretical support for this position derives not only from family systems literature but also from psychological literature on attachment. Research and theory support the need to sustain children's attachments to multiple caregivers, including their biological families, even when children no longer live with their biological families. Attachment theorists start with the premise that children form important attachments of different kinds with many individuals, including biological parents and adoptive parents.[72] They argue that a child should continue contact with the biological parent (even after an adoption occurs) in order to enhance the child's healthy development.[73]

The doctrine of family integrity also supports the adoption of the "least destructive arrangement to the continuity of family relationship" as the preferred legal standard. This doctrine derives from a number of Supreme Court cases acknowledging "the right of the family unit to remain together and to function as a family."[74]

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71 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 12, at 83.

72 For a detailed discussion of this literature, *see* Davis, *supra* note 67. Davis states that numerous researchers have consistently found that "even abused or neglected children maintain strong, if insecure and anxious, attachments to their original caregivers." *Id.* at 349 n. 11.

73 Susan L. Brooks, Note, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children With Special Needs*, 66 N.Y.U. L. REV. 1130, 1139 (1991) (citing ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE-SEALED OR OPEN RECORDS: HOW THEY AFFECT ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 219-25 (1984); Linda F. Smith, *Adoption-The Case for More Options*, 1986 UTAH L. REV. 495, 532-33, 540 (1986)). Attachment theory (as well as family systems theory) would also support the continuity of children's relationships with foster families in situations in which children return to their biological families after forming intimate bonds with foster families.

74 *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (protecting familial right of grandmother, her son and two grandsons, who were not brothers, and striking down as unconstitutional ordinance prohibiting such a living arrangement as impermissible intrusion into protected area of family life); Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977) (reaffirming that family originates and exists apart from state); Wiscon-

Moreover, when properly understood, this standard is consistent with a true understanding of the "best interests" of the child. From a family systems perspective, the two are complementary rather than opposing concepts. The "least destructive arrangement" is a better articulation of what the standard seeks to achieve, however, because it emphasizes the importance of the continuity of family relationships. Framing the standard in the negative (as Goldstein, Freud and Solnit did) also makes sense because once a family becomes entangled in the legal system, it would be a fallacy to suggest that anyone can truly promote a best option for a child.

Perhaps promoting what is "best" is not even a proper role for courts and advocates. It is crucial to respect family autonomy in trying to assist vulnerable children and families. This is truly a situation in which the slogan "do no harm" applies with great force. Unfortunately, children are harmed, albeit with good intentions, by severing their relationships with their families. In considering a child's best interests, the continuity of family relationships therefore must be a priority. By using the least destructive arrangement to the continuity of family relationships as the standard, the child's best interests are placed in the proper perspective—one which views the child as an integral member of the family system.

III. THE GUIDELINES

This new standard translates into five basic guidelines for judges, advocates and other legal decision makers in the area of child custody: (1) identify the members of the family system; (2) consider the mutual interests of all members; (3) maintain family ties and continuity wherever possible; (4) emphasize current status; and (5) focus on family strengths.[75]

First, *identify who makes up the family system.* This task may not be as simple as it might appear. The family system, which is defined by bonds of intimacy, may include the extended family, such as cousins and grandparents, or it may be made up of individuals who have no biological connection to each other.[76] In many instances, it may be a combination of the two. What is important is to look expansively at the attachments of the child and respect all of those attachments. If possible,

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sin v. Yoder, 406 U.S. 205, 213-14 (1972) (affirming the importance of right to create and perpetuate private family culture). For a detailed discussion of the doctrine of family integrity, *see* J. Bohl, *"Those Privileges Long Recognized": Termination of Parental Rights Law, The Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323 (1994).

[75] Wall & Amadio, *supra* note 12, at 46-48.

[76] *See supra* text accompanying notes 13-14.

the entire family system should participate in the court proceedings, but, at a minimum, the entire family system should be included in any determinations or interventions.

Second, *consider the mutual interests of all family members.* This guideline reflects a dramatic departure from the current model.[77] It requires an appreciation of the concepts of mutual interaction and shared responsibility, which are essential to family systems thinking. It also requires a non-judgmental approach that de-emphasizes blame. Under these principles, the court system does not absolve individuals of responsibility, but rather recognizes that all members of the family system play a role in perpetuating destructive patterns and behaviors. Harmful behaviors will persist unless the court addresses them in terms of the entire family system.

Under this guideline, undue weight should not be given to a child's expressed preference. The practice of suggesting that the child express a preference, or worse, of leaving the decision up to the child, places that child in a situation of conflicting loyalties, creating a potentially harmful emotional and psychological burden on the child.[78] Rather, allow the child, as well as the other members of the family system, to express their views, but be clear that determinations related to custody and visitation will be based on many factors.

Courts and advocates unfamiliar with family systems thinking may question this guideline, suggesting that the child's expressed preferences should be the sole consideration in decisions affecting child custody. This way of thinking is misguided and may actually do a disservice to children and families. In the first instance, it assumes that families are merely collections of individuals with distinct bundles of "rights," rather than mutually interacting and interconnected wholes.

Further, it misapprehends the therapeutic goal for many, if not most, families who become involved in the legal system, which is to empower parents and restore them in the proper parental role. Children in such families often have been "parentified"—given too much decision making power in their families. In attempting to protect the child's interests by promoting the child's preferences, the well-intentioned advocate may inadvertently reinforce this dysfunctional pattern.

The legal system itself reinforces the family's dysfunction merely by identifying the child as the subject and object of the proceedings. This approach epitomizes the extent to which the medical model infuses our legal system. In reality, the family system has the problem, even if the child is exhibiting the symptoms. The fact that the child has been

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77 *See supra* text accompanying notes 19-22.

78 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 12, at 96.

victimized in some way means that the family's issues have been displaced onto the child, as in triangulation. By focusing primary attention on the child, the legal system exacerbates this displacement and thereby harms rather than helps the child and the family.[79]

When courts and advocates consider the interests of all family members, the child gains relief by becoming less of the focus, and the parent assumes greater responsibility as well as greater control in the family. Nevertheless, applying this guideline does not mean ignoring the difference between the child's role and the parent's role, or their relative power. It simply means that in order to assess what is "best" for the child, one must fully understand and appreciate the dynamics of the entire family system.

Third, *maintain the continuity of family ties wherever possible.* In situations involving an immediate risk of harm to a family member, a court may be forced to suspend contact between family members for a period of time. Generally, though, courts should promote continuity of the family system. This guideline supports arrangements such as open adoption, so-called weak adoption,[80] and "shared family care."[81] It also supports shared custody arrangements, wherever feasible, as well as liberal visitation.

A logical extension of this guideline is that courts and advocates should promote alternative dispute resolution mechanisms like mediation rather than adversarial processes for deciding matters affecting children. Support for non-adversarial approaches promotes continuity. For example, research has shown that mediated divorces result in a higher proportion of shared parenting arrangements, more stable child-non-custodial-

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79 For instance, in the scenario described above, the identification of Sarah as the focus of the legal proceedings meant that Sarah continued to exhibit all of the "symptoms" of the family's problems, resulting in even greater trauma to her than her initial victimization. Sarah experienced at least five foster placements, including almost a month in a locked unit of an adolescent psychiatric hospital, a month in an emergency shelter, and two failed foster homes. While in the in-patient psychiatric unit, Sarah began showing signs of depression, including a hunger strike lasting several days. While at the emergency shelter, she continued to appear depressed and, despite her protests, was given anti-depressant medication. In school, Sarah went from being a reasonably good student with no behavior problems to having numerous in-school and out-of-school suspensions. Once the family was reunited, these "problems" soon dissipated, but Sarah undoubtedly was harmed as a result of the prolonged separation from her family.

80 Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497, 498-99 (describing a weak adoption as one in which some, but not all, parental rights would be terminated, such that a biological parent would still be able to visit with her child, but the adoptive parent would have custody rights).

81 Richard P. Barth, *Shared Family Care: Child Protection and Family Preservation*, 39 SOCIAL WORK 515, 515 (1994) (describing shared family care as planned provision of out-of-home care to biological parents and children so that the parent and host caregiver together care for the child and work toward independent in-home care for the child by the parents).

parent relationships, and a higher rate of fulfillment of child support obligations.[82]

Some states are now experimenting with alternative dispute mechanisms that embrace family systems thinking in a more direct manner, such as family group decision making.[83] One example of this approach is the family group conference, an alternative dispute mechanism that originated in New Zealand.[84] The family group consists of extended family members and close family friends, who meet privately to decide whether a child has been abused or neglected and to develop a plan for protecting the child. Thus, consistent with a family systems approach, the family, broadly defined, assumes responsibility for the identification of the problem and the development of solutions.[85]

Courts and advocates may challenge the continuity of family relationships, which may incorrectly be perceived as inconsistent with the goal of "permanency." Permanency is the concept of placing every child in a permanent home, be it with the child's biological family or with an adoptive family. The goal of permanency has been an important platform for many policy makers.[86] Supporters of permanency may oppose legal solutions that maintain family ties with a biological family if the child is living elsewhere, such as with a relative or foster family. When properly understood, however, this guideline is consistent with and serves to promote permanency for children.

The goal of achieving permanency for an increased number of children is often mistakenly linked with the goal of increasing the number of proceedings terminating parental rights. There are two problems with the termination of parental rights in many instances: (1) it fails to recognize the importance to children's healthy development of maintaining the continuity of family ties wherever possible and (2) it does not fit with the reality of the lives of most children whose families are involved in the legal system.[87]

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82 Susan Zaidel, *Ethical Issues in Family Law*, 12 MEDICINE AND LAW 263, 267 (1993).

83 Joan Pennell and Gail Burford, *Widening the Circle: Family Group Decision Making*, 9 J. CHILD & YOUTH CARE 1 (1994).

84 *See* MARK HARDIN, FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND (1996).

85 *Id.* at 3-5.

86 Brooks, *supra* note 73, at 1146 (citing Adoption Assistance and Child Welfare Act of 1979, S. Rep. No. 336, 96th Cong., 1st Sess. 11 (1980)).

87 A third problem which is tangential to the issues raised here is that involuntary termination of parental rights by itself does not ensure permanency for children. Martin Guggenheim, Professor of Law and Director of Clinical and Advocacy Programs at New York University School of Law, recently completed an empirical analysis of the effects of increased prosecutions of termination of parental rights proceedings. Professor Guggenheim found, based upon data from Michigan and New York, that children were being left in a worse position as a result of the increased number of termination proceedings, in that "states are destroying the legal relationship between parents and children for no good purpose and that, as a

Research and theory support the need to sustain children's attachments to their biological families, even when the children no longer are able to live with their biological families. According to Matthew B. Johnson, Ph.D., a clinical psychologist speaking at a 1992 Conference on the Termination of Parental Rights held at Rutgers University School of Law:

> [w]ithin the whole issue of advocacy in children's rights there needs to be an appreciation for the importance of the child's right to maintain contact with their [sic] biological family. Even if the biological family cannot . . . assume custodial care, visitation should be encouraged, even if there is a long term foster placement or adoption. There is a lot of evidence to support this. When I say evidence I mean empirical evidence, psychologists and other mental health professionals have conducted research that indicates that it strengthens the child and contributes to the child's adjustment in foster care or adoptive placement when they maintain some type of contact with the biological parent.[88]

As stated earlier, the theoretical support for this position derives not only from family systems literature but also from psychological literature on attachment.

Further, the termination of parental rights does not fit with the reality of the lives of most children who are involved in the legal system. Whether or not legal ties are severed, many children continue to have some form of contact with their biological parents.[89] Severing such ties is also traumatic for children, who remain attached to biological parents and other adult figures who share, or seek to share, intimate relationships with them.[90] We have come to accept these principles to a great extent

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result, a record number of children have become legal orphans." Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 121-22 (1995).

88 *Transcript: Conference on Termination of Parental Rights Held on November 19, 1992*, 15 WOMEN'S RTS. L. REP. 53, 68 (1993). *See also* Amadio & Deutsch, *supra* note 14, at 63 (citing ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS AND ADOPTIVE PARENTS 214 (1979), as "a significant social research study provid[ing] support for the idea of open adoption.")

89 Davis, *supra* note 67, at 370 (quoting Rita S. Eagle, *Airplanes Crash, Spaceships Stay in Orbit: The Separation Experience of a Child "In Care"*, 2 J. PSYCHOTHERAPY PRAC. & RES. 318, 331 (1993)) ("'past ties are tenacious, [ ] they may have persisting effects in children's lives, and [ ] respect for these ties by new caretakers may help, rather than hinder, the development of new relationships'").

90 *Id.* ("adults must transcend differences of class, race, history, and parenting capacity to provide for each foster child as cooperative a network of care as the child's decidedly disadvantageous circumstances will allow . . . Termination of parental rights will sometimes be constructive, but will more often be irrelevant or detrimental.").

in the context of divorce custody decision making[91] but are reluctant to transfer that knowledge to our thinking about children in the foster care system.[92] Nevertheless, the legal system needs to accept that maintaining the continuity of family ties is equally important for children who are separated from their biological families as a result of legal proceedings related to foster care and adoption as for children whose parents divorce each other.[93]

Fourth, *emphasize the current functioning of family members rather than their past experiences.* This guideline means that professionals should mainly focus on developing a complete and thorough assessment of the family's present status, rather than dwelling on past motives or incidents. Past experiences may need to be considered, however, to the extent that they are part of the family's current functioning.

To take a difficult example, even in a family with a history of domestic violence, one should seek a professional's thorough assessment of the family's current functioning. This assessment would look beyond superficial conduct to determine whether the issues related to the family's history of domestic violence have been resolved. It would focus on current status, such as whether all family members have received and benefited from treatment aimed at addressing the domestic violence and any related issues, such as substance abuse. At the same time, this guideline would prevent a court from allowing a factor such as a parent's history of mental illness to interfere with its decision making.

Finally, *focus on the family members' strengths* rather than their deficiencies. The implementation of this guideline, by itself, would contribute a great deal toward the effectiveness of interventions initiated through the legal system. From the instant a petition alleging abuse or neglect is filed in juvenile court, the legal system passes judgment on the competence of the family and, specifically, the competence of parents. Parents are then supposed to prove that they are competent, while being treated as if they were not. Instead, courts and advocates need to empower parents—to assist them in drawing upon the mutual and collective strengths within their family systems. Qualified, licensed, professional family therapists can assist families in this process. Family therapists

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91 *See* Zaidel, *supra* note 82, at 267 (noting that the two most important variables serving the child's interest after a divorce are: (1) a stable, ongoing relationship between the child and both parents and (2) the absence of conflict between the parents during and after the divorce).

92 Factors contributing to this reluctance include the court's interest in "judicial economy" and adoptive parents' interest in being able to create a "fictional family."

93 Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 380 (1996) ("[t]here is much to suggest that, from the perspective of the child, these two situations present more similarities than differences.")

can also provide guidance to courts and advocates who are attempting to achieve simultaneously the goals of preserving the family, ensuring the child's safety, and working toward permanency.

These guidelines create a process for making legal decisions affecting child custody, rather than dictating a particular outcome. The process incorporates an inclusive and expansive definition of a family system.[94] It values the interests of every member of the entire family system and, accordingly, seeks to maintain all of a child's family relationships. These guidelines apply to *all* legal decisions affecting child custody, whether they occur in the context of a divorce or a neglect proceeding. They indicate areas where laws and policies need to be altered to accommodate arrangements that will better serve all members of our society.

IV. APPLICATION OF THE GUIDELINES

Had the judge applied a family systems approach in the case described in the beginning of this Article, the case would have proceeded in a dramatically different manner. The judge initially would have determined who comprised the family system. Immediately, the judge would have discovered that the family system essentially consisted of the mother Ms. P., the twelve-year-old daughter Sarah, and the seven-year-old daughter Rachel, who were living together, along with two older sisters who were living in separate households. The judge would have assessed whether the boyfriend was part of the family system. In this instance, he was not; indeed, the mother was willing to, and eventually did, sever all ties with him in order to keep the family together. It should be noted that had the boyfriend been part of the family system, the court would have had to recognize his role in the system in assessing appropriate dispositional and treatment alternatives.

Next, the judge would have considered the interests of all members. Accordingly, the judge would have viewed the rape as symptomatic of problems affecting the whole family. This would have translated into intervening with the entire family system instead of solely with Sarah, the rape victim, who, consistent with a medical model, became the individual "patient" in this scenario. Family systems interventions would not have ignored the rape but would have addressed it in the context of the broader issues affecting the family. This view would have understood that only addressing the rape and not the systemic issues would not repair the family and therefore would not facilitate the reunification of mother and daughters.

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[94] *See supra* text accompanying notes 13-14.

A key intervention from the outset would have been to involve the entire family in family therapy. The goals of family therapy would have included: addressing the dysfunctional patterns in the family that led to Sarah's victimization; restoring Ms. P. in the proper parental role; helping Ms. P. attend to Rachel's educational and other needs; addressing other individual issues that might surface in the course of treatment; and coordinating the provision of any concrete services needed by the family, such as employment and housing.

This family system was highly enmeshed, with diffuse boundaries. The generational boundaries were particularly weak, such that Ms. P. was unable to set appropriate limits and to act as the parent. Ms. P. also exhibited low self-esteem and possible alcohol abuse. The predominant emotion expressed in the family was anger. Indeed, it seemed that every emotion was expressed as anger, and anger was constantly being displaced onto others, such as the agency caseworker, both in and outside of the family system. In addition to these issues, which could have been addressed through family therapy, Ms. P. and two younger daughters were basically homeless, and she was unable to sustain a job. Further, Rachel was not attending school regularly because of the family's homelessness; as a result, her learning disability went undiagnosed.

These issues could have been addressed by merely looking at the family as a whole rather than focusing solely on the rape incident and Sarah. This intervention would have removed some of the focus from Sarah and the rape incident, but it would have served her needs and interests more effectively than any interventions aimed at her as an individual, inasmuch as Sarah's greatest need was arguably for Ms. P. to be an effective parental figure in her life.

Third, the judge would have attempted to maintain family ties and continuity wherever possible. Accordingly, he might not have removed Sarah and Rachel from their mother's care, but instead he might have attempted to identify a safe place where they could stay together. Even if the judge had determined that it was necessary to remove Sarah and Rachel from Ms. P.'s care until their safety could be assured, under this approach the judge would have ordered frequent visitation between mother and children, along with the family therapy. This last point illustrates that family systems thinking does not dictate a particular outcome, but instead defines a process with a set of guidelines that courts and advocates should apply flexibly according to the particular concerns identified in each situation.

Fourth, the judge would have emphasized the current status of the family system rather than past motives. This does not mean that Ms. P.'s inability to protect Sarah would have been ignored. This issue would

have had to be addressed in family therapy, since it was a long-term treatment issue for the family.

Fifth, the judge would not have blamed Ms. P. for her deficiencies but instead would have focused more on her strengths. The judicial system would have used its energies to identify how to shore up the family system so that reunification could occur. As indicated earlier, this support for the current needs of the family members and the system as a whole would have included assistance with concrete needs, such as employment and housing.

CONCLUSION

Our legal system purports to care about children. Indeed, genuine concern for children motivates courts and advocates. Yet, in our efforts to help children, we often condemn their parents. Perhaps we derive a sense of security by treating these "bad" individuals differently from ourselves. Perhaps we want retribution, which we achieve by depriving these parents of the thing they cherish most—their children.

What we fail to recognize is that by these same actions, we deprive children of something they also cherish and need—their families. If we truly care about children, we must begin by respecting their family systems. We must accept that not all parents are capable of functioning at the same level or capable of caring for their children in a consistent manner. We must understand that the most effective way to help children is to empower their parents and to assist them in functioning in their parental role to the best of their abilities. We must invest our legal and social energy in strengthening families rather than judging them based upon their weaknesses.

In the words of Barbara Bennett Woodhouse, "for the sake of our children, our first priority must be to support and work with children's functional families, whatever forms they may take. We must affirm family values of mutual care and help families meet the needs of their dependent members."[95] Family systems thinking provides a comprehensive model for working with children and their families toward these constructive purposes. If courts and advocates pursue the least destructive arrangement to the continuity of family relationships, our legal system may truly become a source of compassion and caring for children and families in our society.

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[95] Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 505 (1993).