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Love Means always Having to Say You're Sorry: Applying the Realities of therapeutic Jurisprudence to Family Law

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ARTICLES

LOVE MEANS ALWAYS HAVING TO SAY YOU'RE SORRY: APPLYING THE REALITIES OF THERAPEUTIC JURISPRUDENCE TO FAMILY LAW

Marsha B. Freeman*

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I. INTRODUCTION

A man married over a decade to his current wife is deciding whether to attend the high school graduation of his beloved granddaughter from his first marriage. Before committing to go,

* Associate Professor of Law, Barry University School of Law. I would like to thank law reference librarian Ann Pascoe for her wonderful and always willing research help, and Nancy Shofield, my research assistant, for her hard work and effort in making this article possible. I would also like to give special appreciation and thanks to Bruce Winick for his kind support and encouragement on taking the precepts of therapeutic jurisprudence and applying them to family law issues, including dissolution.

1. *Love Story* (Paramount Pictures 1970); FRANCIS LAI, *THEME FROM LOVE STORY* (Paramount Records 1970).

he needs to find out if his ex-wife will be attending. She feels the same way; he goes, she stays home.

Anyone involved in the family law arena would not be surprised to hear of a loving relative's willingness to miss such a momentous family occasion. Alternatively, the relative may wish to attend, but is clearly unwanted and possibly even uninvited. Years after the original divorce, bitterness and anger may continue to influence and guide people in their relationships not just with each other, but with family members who had neither knowledge of nor complicity in causing the real and/or perceived injustices of the earlier time. Often, these perceptions are either fueled or at least accentuated by the traditional litigation methods used in obtaining the divorce.²

A simple question: "Where will you be sitting at the wedding (or graduation, or birth of a grandchild)?", transforms a remote concept in time into a valid question to be posed to clients when discussing dissolution. Most parties naturally think only in the here-and-now, focusing on the necessities of custody, support, and property distribution. But the conscientious lawyer needs to redirect the client to the future. The two-year-old who doesn't want to leave mommy for a sleepover at daddy's may well want to live with dad when he's a teenager. Often, even the idea of such a possibility will invoke feelings of loss (and losing) in mom, and victory in dad. The job of the lawyer is to refocus the parties' perceptions from that of a continuing contested battle into a continuous redefining of the family.³ Hard as this transition may be for the parties, it is no easy task for the lawyers either. Our traditional litigation systems are designed around individual representation, rights, and relief.⁴ Shifting that paradigm to family-centered thought processes has been a slow, albeit continual, progression in the legal field.⁵

2. See generally Judith S. Wallerstein and Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION COURTS REV. 368 (1998).

3. See generally Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of the Children and the Adversarial System*, 52 U. MIAMI L. REV. 79 (1997); Marsha B. Freeman, *Reconnecting the Family: The Need for Sensible Visitation Schedules for Children of Divorce*, 22 WHITTIER L. REV. 779 (2001) (discussing the need to accept that the divided family is still a family, albeit with new terms and roles).

4. Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 3 (1996).

5. *Id.*

Slow as it may have been in coming, criticism of the traditional litigation methods in family law, especially as applied to dissolution, has grown dramatically over the last few decades.⁶ Commentators have reported on the effects of prolonged litigation on all involved, including the parties, the lawyers, the court, and the children of divorce.⁷ It is now routinely recognized that the more fractious the proceeding, the more difficult the aftermath for everyone involved.⁸ Studies have documented the societal impact of divorce in general, and litigious divorce in particular, highlighting increases in juvenile delinquency, as well as substantially higher teen drop-out, pregnancy, and marriage rates.⁹ Although divorce itself has moved from an anomaly to a relatively accepted part of life,¹⁰ societal acceptance does not lessen its impact on individuals or families.¹¹ Marital dissolution has long been recognized as second in trauma only to the death of a spouse, and to likewise include stages of recovery similar to that of the grief process.¹²

One of the most difficult concepts for parties to accept is that the court *cannot*, through its *legal* decision-making, address or alleviate the emotional harm caused by the divorce.¹³ This is especially true for children of the divorce, whose suffering may be exacerbated as their parents jockey for position in the traditional litigation methods and lose sight even of the need to focus their attention on their offspring.¹⁴

In a concerted effort to counteract these negative impacts of litigious divorce, alternative methods of dissolution have evolved. Mediation, arbitration, and, more recently, collaborative and cooperative techniques, have made inroads in attempting to alleviate the harmful aspects of family law litigation.¹⁵

6. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 180 (2004); see, e.g., Pauline H. Tessler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L. J. 317, 322-24 (2004) (criticizing the costly and conflict-engendering process of traditional family law).

7. See generally sources cited *supra* notes 2-3; see also *infra* note 118.

8. Weinstein, *supra* note 3, at 87.

9. See *id.*

10. Tessler, *supra* note 6, at 321.

11. *Id.*

12. *Id.*

13. *Id.* at 322.

14. *Id.*

15. See generally Tessler, *supra* note 6.

Mediation involves a neutral facilitator assisting the parties in determining the issues and arriving at a fair compromise.¹⁶ While this can be a beneficial cost- and time-efficient alternative to litigation, it has its own set of problems. Commentators have noted the pitfalls of lawyer and non-lawyer mediators alike attempting to cross the lines of legal advice and facilitation in legitimate ways.¹⁷ Additionally, not all cases lend themselves to mediation, including those involving domestic violence or simply an emotionally unbalanced playing field.¹⁸ While having legal representation in the proceedings alleviates much of these concerns,¹⁹ the reality today is that increasing numbers of litigants are entering dissolution proceedings of all types sans attorneys, citing either the prohibitive costs involved or the perception of prolonged litigation.²⁰

Arbitration similarly lowers the costs and time of litigation, but relies on a third-party decision-maker who issues a binding decision.²¹ Again, many litigants, seeking to deviate from traditional litigation settings, likely would not want to find themselves in the position of relying on a third party to determine their case.²² While arbitration is theoretically less formal and stressful than the courtroom setting, it does not eliminate this part of the procedure, and is, in addition, frequently non-appealable. Arbitration agreements, partly because of their rigid terms, have been

16. See Marsha B. Freeman, *Divorce Mediation: Sweeping Problems Under the Rug, Time to Clean House*, 78 U. Det. Mercy L.R. 67, 69-70 (2000).

17. See, e.g., *id.* at 68-69; see generally Marsha B. Freeman, *Reconnecting the Family: A Need for Sensible Visitation Schedules for Children of Divorce*, 22 WINTER L. REV. 779 (2001).

18. See *id.* at 72.

19. *Id.* at 73.

20. See Associated Press, *More Couples Seeking Kinder, Gentler Divorces: Lawyers, Clients Collaborate to Craft a Fair Outcome for Everyone Involved*, MSNBC, Dec. 18, 2007, <http://www.msnbc.msn.com/id/22315262> (noting that recent surveys show that far more than half of all divorce cases in numerous jurisdictions have at least one pro se party); see also Pauline H. Tessler, *supra* note 6, at 318-19 (arguing that lawyer-mediators, unlike collaborative lawyers, are actually stepping out of the practice of law to practice mediation instead). While collaborative lawyers continue to represent their clients in an advocacy role, mediators on the other hand generally need to recognize that they are entering a different field altogether, one in which they are not representing anyone. See generally Freeman, *supra* note 16 (discussing the problems inherent in lawyer-mediators who continue to also practice law).

21. See Robert E. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 381 (2008).

22. *Id.*

upheld by courts where attempts to overturn them would result in subsequent unfairness to a party.²³

Collaborative divorce generally involves both parties and attorneys agreeing to forego litigation and arriving at a suitable compromise through a variety of negotiation methods,²⁴ while cooperative law may include court intervention, but in a more supportive, rather than decisive, role.²⁵ One judge termed it “hands-on courts” where outcomes, not just procedures, matter.²⁶ While judges, observing family law practice from their unique vantage point, have been generally supportive of such maneuvers,²⁷ this shift away from traditional court processes has not always easily lent itself to acceptance by lawyers.²⁸

Collaborative lawyering has been described as a change in mindset for the lawyer as much as the client, recognizing that good advocacy may well demand a switch from established thought processes to a realization that “winning” in the short term is not always best for the client. Advocating what is best *overall* for the client (which may include considering the other party as well as the children) can be viewed as a new form of

23. See *Kiell v. Kiell*, 633 S.E.2d 827, 828-29 (2006) (remanding to determine whether there was a valid arbitration clause in a collaboration agreement and holding that the wife’s right to a jury trial was not breached by such a valid clause (citing *Creekside Constr. Co. v. Dowler*, 172 N.C. App. 558, 562 (2005))); see also *United States v. Cox*, No. 3:05CR92, 2006 WL 1431694, at *1 (W.D.N.C. May 23, 2006) (refusing to allow the government to confiscate all of the marital proceeds from a bank account jointly owned by the parties, as the said account had been previously divided in binding arbitration, and instead ruling that the wife was entitled to the share awarded her by the arbitrator pursuant to a collaborative agreement).

24. Tessler, *supra* note 6, at 317. See generally James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. DISP. RESOL. 431 (2002).

25. See Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 5 (2006). In a cooperative scenario, the parties may seek the aid of the court in resolving or helping with specific issues, but all agree that the final outcome should ideally be an amicable agreement between the parties. The judge in these cases sees his or her role as more of a facilitator, with the weight of the court behind him or her, rather than a traditional decision-maker.

26. See Honorable William Schma, *Therapeutic Jurisprudence: Knowledge & Information Services*, THE NAT’L CTR. FOR STATE COURTS (2000), http://www.ncsconline.org/wc/publications/kis_prosol_trends99-00_pub.pdf (citing Judith S. Kaye, Chief Judge of the State of New York).

27. See generally *id.*

28. See Freeman & Hauser, *supra* note 26, at 7 (noting the need to train law students in non-litigation family law). Changing the mindset is easier at the beginning than halfway through the process, or further.

strength.²⁹ This does not mean the lawyer should abandon immediate goals of the divorce, but rather that all involved should be aware that the passage of time may affect those needs and goals.³⁰ While mediation can help clients recognize and plan for the future, collaboration likewise promotes this scenario while simultaneously allowing for continued legal advocacy on the client's behalf.³¹ It is, in many instances, simply "eliminating the middleman" (*i.e.*, the judge).³² Because family law, especially dissolution, is necessarily focused on the children of the relationship, collaborative law provides an effective forum in which the parties can feel protected by a personal legal advocate, while still creating a progressive relationship for the future.³³ Clients who feel left adrift or even threatened by the mediation formula may well feel safer and be more likely to commit to collaborative procedures.³⁴

These alternative forms of resolution have helped to focus everyone involved, as well as society in general, on the positive aspects of avoiding costly, prolonged, and frequently bitter litigation in the hope of achieving faster, better, and more amicable results. The goal is a divorce that is both less financially costly and more emotionally satisfying for the parties and their children.³⁵

Section I of this paper will focus on a brief history of therapeutic jurisprudence and restorative justice, and will provide an overview of their current place in the law. Section II will discuss the concepts, goals, and methodology of therapeutic jurisprudence and restorative justice in relation to family law issues, and

29. See Lawrence, *supra* note 24, at 431.

30. See generally Robert H. Aronson, *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIMONIAL L. 41 (1992) (noting how the American Academy of Matrimonial Lawyers has proffered a new set of aspirational rules for family law attorneys, and recognizing that "zealous representation" in the concept of family law may well aggravate the problem rather than help solve it); Lawrence, *supra* note 24, at 432-33 ("Collaborative lawyering is especially well suited to domestic relation contexts . . . where the two parties wish to create and maintain a working relationship after the dispute is settled."). There are many, including this author, who advocate for states to adopt the rules as corollaries to, or even replacements for, the traditional ethical rules of conduct when dealing with family law cases.

31. Lawrence, *supra* note 24, at 432.

32. *Id.*

33. See *id.* at 433.

34. Tessler, *supra* note 6, at 318.

35. See *id.* at 317 (citing the benefits of lower costs, more autonomy for the parties, and self-generated agreement by the parties, who are still able to access private legal advice throughout the process).

in particular the dissolution of marriage. Section III and the conclusion will look at the effects of formalizing therapeutic jurisprudence and restorative justice in family law, including concerns about ethics rules and the personal impact on clients, lawyers, and the judiciary.

II. YOU'VE LOST THAT LOVING FEELING: FEELINGS CHANGE, BUT BASIC KINDNESS DOESN'T HAVE TO³⁶

Many areas of law have already recognized this simple phenomenon: the mere act of contrition on the part of the offender can contribute to a feeling of validation on the part of the victim.³⁷ Two alternative theories of justice have grown in popularity given their goals of providing forms of healing to parties. Therapeutic jurisprudence and restorative justice derive their nomenclature from the idea of literally restoring not just one's property, but one's faith—more simplistically, healing emotionally, not in spite of the judicial process, but because of it.³⁸ Aptly put, judicial actions can have therapeutic or anti-therapeutic effects.³⁹ Where one has a choice of actions, and where that choice is a reasonable alternative,⁴⁰ it is logical to incorporate the therapeutic into the legal landscape.

Therapeutic jurisprudence is best viewed as an addendum to a number of other alternative forms of legal practice, including collaborative law and problem solving courts.⁴¹ While some view the beginning of the therapeutic jurisprudence movement as recent,⁴² others attribute its emergence to the simultaneous begin-

36. THE RIGHTEOUS BROTHERS, YOU'VE LOST THAT LOVING FEELING (Philles Records 1964).

37. See Schma, *supra* note 26.

38. See generally Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006).

39. David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, A.B.A. J. 54, 54-56 (May 2003).

40. I am not claiming that all actions lend themselves to therapeutic intervention. The survivors of the senseless and violent murder of a loved one would likely not want nor benefit from such actions, although even that is subject to debate. Numbers of survivors have "forgiven" the crime's perpetrators in an attempt to move on with their own lives or simply as part of their own deeply-held convictions.

41. Diacoff, *supra* note 38, at 2.

42. See Kelly Richards, Exploring the History of the Restorative Justice Movement 1 (2004) (unpublished manuscript, available at http://fp.enter.net/restorative_practices/bc/04_richards.pdf) (citing Russ Immarigeon, *Prison-Based Victim-Offender Reconciliation Programs*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 463, 463-76 (Burt Galaway & Joe Hudson eds., 1996)).

ning of human communities.⁴³ It is, however, undisputed that the modern emergence of therapeutic jurisprudence as a formidable addition to legal jurisprudence systems occurred in the early 1990's, and is widely credited to its acknowledged cofounders, David Wexler and Bruce Winick.⁴⁴

Since its modern reemergence, therapeutic jurisprudence has become a lynchpin of the new methods of progressive jurisprudence. Its adherents share a belief that resolutions should go beyond the mere legal relations among the parties and should also maximize the emotional and psychological welfare of the individuals involved.⁴⁵ Daicoff describes the sum of these new legal processes, including mediation, collaborative law, and therapeutic jurisprudence, as working together to form a "comprehensive law movement" dedicated to promoting emotional healing that the traditional legal approaches generally ignore.⁴⁶

While they all share certain goals, these movements differ in methodology. In mediation, a third-party facilitator promotes agreement between the parties.⁴⁷ While a worthwhile process in general, mediation as noted has its critics, due to inherent pitfalls involving lawyer and non-lawyer mediators alike, as well as some cases being unsuited for mediation, especially those involving domestic violence or a serious emotional imbalance between the parties.⁴⁸ Collaborative law requires the parties and their attorneys to forego litigation in an attempt to reach a more amicable, or at least more workable, settlement.⁴⁹ Where traditional litigation methods themselves promote anger between the parties and may harm family relationships, collaborative law provides for a more economical and hopefully less hostile way to reach a resolution.⁵⁰ Cooperative law allows for court intervention where

43. *Id.* (citing E. Weitekamp, *The History of Restorative Justice*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 75, 75-102 (Gordon Bazemore & Lode Walgrave eds., 1999)).

44. Daicoff, *supra* note 38, at 11.

45. *See* Daicoff, *supra* note 38, at 5. *See generally* Wexler & Winick, *supra* note 39.

46. *Id.* It should be noted that the legal community has attempted to recognize and address some of these concerns over the years, such as allowing "victim impact statements" before criminal sentencing. These movements, however, go far beyond simply allowing a victim to express his or her feelings, but try to change the outlook of the victim.

47. *See* Freeman, *supra* note 16, at 69-70.

48. *Id.*

49. *See* Lawrence, *supra* note 24.

50. Daicoff, *supra* note 38, at 25 (citing Tessler).

needed, but asks the court to act in a more advisory, or supportive, rather than decisive role.⁵¹ While this can be a helpful resource, many judges and attorneys alike balk at the idea of a judge involving himself or herself in a case as anything other than a neutral fact-finder.⁵²

Exemplifying the idea of “problem-solving courts” is the movement for family court unification. This movement focuses on tying together the elements of family cases, and also attempts to address the underlying issues, psychological or otherwise, that contributed to the ongoing problems associated with the cases.⁵³

Many attorneys already informally incorporate the methods and goals of collaborative and/or cooperative law in an effort to effectuate more workable and less costly resolutions for their clients.⁵⁴ The collaborative law movement, however, formalizes those approaches by providing for contractual commitments by the parties and attorneys to forego litigation; it frequently requires the attorneys to withdraw from the case if the client decides to litigate.⁵⁵ The purpose of such formalities is not only to promote the ideals of a collaborative approach, but also to create the methodology to adhere to it.

Collaborative law has made great strides in the area of family law, particularly for divorce, including an ABA endorsement of its goals and procedures.⁵⁶ While all of the alternative dispute resolution and collaborative/cooperative methods of dissolution have made significant advances over traditional litigation in more amicably resolving legal issues, none directly attempt to address the psychological and emotional needs of the parties which so often fuel continued anger and hostility long after the formal case concludes.

Therapeutic jurisprudence and restorative justice take this more personal, and frequently more intense, approach. Restorative justice has made great inroads in the areas of criminal law and juvenile justice.⁵⁷ In some nations, collaborative and family

51. See Freeman & Hauser, *supra* note 25, at 5.

52. See *id.* at 24-25 (noting the need to move away from the paradigm of “neutral” arbitrators in divorce proceedings).

53. See Daicoff, *supra* note 38, at 33; see also Freeman & Hauser, *supra* note 25, at 2 (discussing the advent of unified family court systems in Florida and other states).

54. See Tessler, *supra* note 6, at 326.

55. Daicoff, *supra* note 38, at 27.

56. *Id.*

57. See Wexler & Winick, *supra* note 39, at 54.

group conferences replace traditional trial and sentencing procedures.⁵⁸ In the United States, therapeutic jurisprudence and restorative justice are used as supplements to the traditional criminal justice system, with care taken to preserve the defendant's rights and procedural due process.⁵⁹ They are recognized as very helpful in promoting accountability for the offender and a sense of fulfillment for those offended (both the individual and the community).⁶⁰ They are valuable tools in rehabilitating the offender and allowing him or her to reacclimate to a willing community environment, one which has shown a predisposition to recognizing the ability of the offender to make sincere changes in behavior.⁶¹ The rehabilitation, rather than mere punishment, of the offender is an important, though frequently neglected, goal in juvenile justice.⁶² Promoting ways in which the offender can accept responsibility, make restitution, and be afforded a form of forgiveness prevents further similar behavior and allows the individual and community victims to heal in a deeper and more personal way.⁶³

In many ways, this is analogous to the collaborative movement in dissolution of marriage, where the emphasis is on preserving rights, remedying wrongs, and simultaneously promoting continuing relationships.

Both therapeutic jurisprudence and restorative justice focus not on traditional individual rights or theories of justice, but on the "care ethic," which highlights the preservation of interpersonal harmony, individual's feelings rather than just legal rights, and relationship maintenance.⁶⁴ They promote these goals in striving not only for just legal rewards, but also for emotional healing.⁶⁵ Wexler refers to therapeutic jurisprudence as looking at the problem not just through the traditional legal result lens,

58. *Id.* at 30.

59. *Id.* at 31.

60. *Id.*

61. *Id.*

62. See generally Marsha B. Freeman, *Bringing Up Baby (Criminals): The Failure of Zero Tolerance and the Need for a MultiDisciplinary Approach to State Actions Involving Children*, 21 QUINNIPIAC L. REV. 533 (2002).

63. Daicoff, *supra* note 38, at 33.

64. *Id.* at 6 (citing CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982)).

65. *Id.* at 8, 9 (citing Tessler's reference to this conglomeration of legal and emotional well-being as "rights plus").

but rather through a variety of lenses aimed at procuring total results for the individual.⁶⁶

Wexler and Winick assert that traditional legal processes and remedies have inherently anti-therapeutic consequences, and proffer that therapeutic jurisprudence can reduce those results, and enhance therapeutic results, without defeating or even lessening traditional legal processes and values.⁶⁷ Therapeutic jurisprudence is a method that maximizes the positive effects of traditional legal processes and results while maintaining its own goals and importance. Thus, it is not a replacement for traditional legal methods and processes.⁶⁸

Emerging from its interdisciplinary legal and psychological roots, therapeutic jurisprudence has expanded from mental health law to many areas of law.⁶⁹ Therapeutic jurisprudence, in effect, takes into consideration an individual's likely feelings of anger, anxiety, hurt feelings, and depression in finding a legal solution to the problem.⁷⁰ One example might be an injured client needing an apology from the defendant to be able to move on from the incident.⁷¹ Many medical malpractice plaintiffs have lamented that they would not have sued "but for" the perceived arrogant refusal to apologize on the part of the defendants.⁷²

Restorative justice is likewise rooted in the idea of both protecting and strengthening the community.⁷³ While traditional legal avenues highlight the objective commission of a crime, restorative justice seeks to determine the subjective issues in-

66. See David B. Wexler & Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence 3*, Carolina Academic Press Studies in Law and Psychology (1996); see also Daicoff, *supra* note 38, at 10.

67. Wexler & Winick, *supra* note 39, at 763; see also Daicoff, *supra* note 38, at 11.

68. Daicoff, *supra* note 38, at 11.

69. *Id.* (describing its use in such varied legal venues as drug abuse, worker's compensation, disability law, torts, and contract law). While therapeutic jurisprudence has also veered into domestic violence, child abuse reporting, and some issues in family law, this article will promote its greater acceptance and use in family law dissolution in particular. *Id.*

70. *Id.* at 14 (citing Winick).

71. *Id.* at 15 (noting that in some cases litigation itself may be part of the therapeutic remedy, citing sexual harassment as an example where an offender may need to admit wrongful acts to understand his or her actions and a victim may need to assert himself or herself to promote healing).

72. *Id.* at 14.

73. Tom Cavanaugh, *A Restorative Justice Rooted In The Common Good: Notes and Reflections on a Collection of Works*, <http://www.hopehealing.org/PDF%20files/Cavanaugh,%20A%20Restorative%20Justice.pdf>.

volved, from the point of view of the offender, the individual victim, and the community.⁷⁴ To accomplish this, restorative justice looks at a criminal act not just as an offense against the state, but as an event between individuals.⁷⁵ In this scenario one looks not only to penal sanctions, but also to restitution to the individual harmed as well as society in the form of the community. Not only are the victims experiencing reparation, but the offender is led, hopefully, to discover his or her inner good and embark on a more positive road.⁷⁶

Much of the foregoing has a sanctimonious ring to it, no doubt. Why should a victim "forgive" his or her offender, particularly in physical or violent crimes? Does "love thy neighbor"⁷⁷ really make sense when your neighbor has been harassing you for years? The answer lies in what one is trying to accomplish. If pure punishment is the goal, then neither therapeutic jurisprudence nor restorative justice is needed. In this paradigm, society has little interest in a remorseful offender; restitution is for the benefit of the victim alone.

The problem with this mode of traditional punishment, be it civil or criminal, is that it accomplishes *only* the punishment of the offender. A victim may be "made whole"⁷⁸ by civil suit, but that is generally only in a monetary sense. The state may punish an offender with prison time, but again that does nothing to satisfy the victim's need for anything other than momentary vindication.⁷⁹

Therapeutic jurisprudence and restorative justice each attempt to change the dynamics of the criminal and civil court sys-

74. *Id.*

75. *Id.*

76. *Id.* Cavanaugh refers to these paths in more moral or even religious tones; for the purpose of this article these issues are left untouched.

77. *Leviticus* 19:18 (King James).

78. Traditional civil actions and criminal fines seek to compensate the victim for what he or she lost by the offender's actions. In many cases, criminal fines are within the purview of the state, not the victim, with the offender "repaying" the state for the inconvenience and cost of trial.

79. To be sure, a victim may well feel vindicated by an offender's incarceration and/or fines, but this article seeks to address the larger view of the feelings and emotional needs of both parties. One should note that this article does not seek to explore or expand the concepts of therapeutic jurisprudence or restorative justice in terms of the most heinous or violent crimes, for which they may indeed not be applicable.

tems. While neither seeks (at least in the United States)⁸⁰ to thwart the traditional legal scheme, both are motivated to include other theories of behavior on the supposition that these changes will help the victim achieve more than monetary compensation or vengeance. They also benefit the offender by offering him or her the opportunity to make more than jurisprudential amends, but personal ones as well.⁸¹ Society likewise benefits when the offender becomes a productive citizen and the victim is better able to resolve lingering hurt.⁸²

Such concepts are not entirely new. The idea of victim statements in court before sentencing, victim agreements to plea bargains, and similar scenarios have paid heed for a number of years to the need for emotional, as well as judicial, closure for the victim. Likewise, allowing a defendant to make a presentencing statement similarly sends the message that some good might still come of this person, although with a decidedly more jaundiced view. While presentencing statements are fairly commonplace, few courts likely give great credence to the timely protestations of remorse and requests for mercy in the actual sentencing.

In recent times, such concepts have taken a more structured view, with the advent of such measures as community mediation and teen courts.⁸³ Bickering neighbors will theoretically understand each other (and the consequences of their actions) better by sitting down with a trained mediator to iron out a resolution, rather than spending money suing each other and building bigger fences. Additionally, drug courts have been developed as a meaningful and preferable alternative to traditional sentencing guidelines.⁸⁴ Rather than a judge overseeing treatment and recovery, all the players—judge, prosecutor, defense attorney,

80. See Daicoff, *supra* note 38 (noting that other countries have far expanded therapeutic jurisprudence and restorative justice programs which in many cases circumvent the traditional penal system).

81. See generally Daicoff, *supra* note 38; Richards, *supra* note 42.

82. *Id.* at 15.

83. See Paula A. Nessel, *Youth Court: A National Movement*, American Bar Association: Division for Public Education, 17 TECHNICAL ASSISTANCE BULL. 1, 8 (2000) available at <http://www.abanet.org/publiced/tab17.pdf>. Nessel provides general information on teen courts as well as statistics from individual states on use and recidivism. One of the findings was that youth court was seen as a learning experience with behavior modification components, and that teens charged in youth courts more clearly recognized that there were consequences attached to their actions. See *id.*

84. Deborah J. Chase & Peggy Fulton Hora, *Drug Court Judges Get to Color Outside the Lines*, 37 CT. REV. 12, 12 (Spring 2000).

treatment provider, probation officer, and any others involved—use a team approach, which focuses not on the merits of the pending case but on the participant's recovery and behavior.⁸⁵ The teen court approach is similar: delinquent adolescents have the opportunity to address their victims, explain their actions and feelings, and hopefully obtain a much-needed perspective on others' views of their conduct. Ideally the delinquent teens learn and grow from the experience, and it provides them, the victims, and society far more lasting benefits.⁸⁶ Indeed, the benefits of such programs have been recognized as a valued component as well in the development of safe schools, and are seen as meeting the requirements of the No Child Left Behind Act⁸⁷ in qualifying for federal funding.⁸⁸

These programs are successful examples of alternative approaches to traditional punishment, and highlight the benefits of options which facilitate gains for everyone involved, victim and offender alike. Similarly, therapeutic jurisprudence offers the hope of providing for more than the mere legal resolution in a dissolution, helping all to move forward in a more positive manner.

III. BREAKING UP IS HARD TO DO: RECOGNIZING THE DIFFERENT AVENUES AVAILABLE CAN BE INVALUABLE⁸⁹

While “never having to say you're sorry” may have been a moving emotion in an iconic movie,⁹⁰ it unfortunately is the antithesis of real-life situations involving the breakdown of the romantic relationship. Love often wanes, and when it does the ability to recognize the other party's need for some form of remorse can go a long way in promoting not just healing for the

85. *Id.*

86. See JAMESTOWN AREA LABOR-MGMT. COMM., PEER MEDIATION IN CHAUTAUQUA COUNTY, N.Y. SCHOOLS (2003), <http://www.mediate.com/articles/jalmc.cfm> (extolling the virtues of teaching conflict resolution techniques to teenagers as both a benefit individually and to the overall school environment, including fewer suspensions, detentions, and expulsions).

87. See generally No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2005).

88. Tricia S. Jones, *Conflict Resolution Education: The Field, the Findings, and the Future*, 22 CONFLICT RESOL. Q. 233, 233 (2004), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/109801331/PDFSTART>.

89. NEIL SEDAKA, *BREAKING UP IS HARD TO DO* (RCA Records 1962).

90. LOVE STORY, *supra* note 1.

individual, but harmonious future relations among all family members.

This article promotes applying the concepts and methodology of therapeutic jurisprudence and restorative justice to the arena of family law, and in particular to the dissolution of marriage. While alternative dispute and collaborative methods have given us a framework to resolve family issues with less rancor, they rely on form rather than substance; they seek to control the parties' conduct, but do not necessarily attempt to promote a better understanding of their own or their partner's behavior. Rather than simply accepting that alternative dispute resolution (ADR) methods such as mediation, arbitration, and collaborative law have made advances in parties' recognition of feelings of loss, betrayal, and depression, among others, this article argues for the use of the actual tactics employed in therapeutic jurisprudence and restorative justice to bring about results consistent with their uses in other areas of law. Instead of a criminal or tort offender recognizing his or her damaging actions and learning to live productively in society, here the parties accept their own responsibility in bringing about the dissolution and learn to forgive (if not forget) the other's role in it, simultaneously accepting the value of learning to live effectively as a post-dissolution family unit.⁹¹

The idea that traditional litigation methods cannot keep up with modern goals has emerged in a number of venues. The comprehensive law movement seeks to merge the ideas and ideals of a number of the alternative dispute theories, including mediation, collaborative law, holistic justice, problem-solving courts, and therapeutic and restorative justice, into one core idea of healing justice.⁹² In addition to concerns about the parties to an action, similar worries about protecting and preserving the practicing attorney's emotional stability has led to a movement to humanize the legal education process, in an effort to train lawyers to be aware of and manage their own emotional needs as well as recognize and deal with those of their clients.⁹³

Casebooks are replete with the stories of failed unions and the legal consequences they engender. What is not as apparent

91. See generally Freeman, *supra* note 3 (promoting the idea that dissolved families are still families, merely with different names and functions, and that the dissolution of legal ties does not and should not dissolve binding biological ties).

92. See Daicoff, *supra* note 38, at 1, 48.

93. *Id.* at 50, 51.

are the damaged lives spawned not just by the breakdown itself, but by its path through the legal system. Even years after the divorce, with children approaching young adulthood, parents still fight over custody or visitation, each seeing his or her own view as paramount to their children's well-being.⁹⁴ Common sense would dictate that the intended beneficiaries of such actions, the children, would see this constant turmoil as having an overwhelming negative effect on their lives, one which prevents them from feeling settled or content. Indeed, Wallerstein's studies clearly indicate that constant hostility between parents burdens the children well into adulthood.⁹⁵ Yet under the present system, parents (and lawyers) are conditioned to fight for changes, afraid that any display of understanding or even just fatigue over the course of such anger will be equated with weakness, and, perhaps, even a sense of actually letting their children down.

Therapeutic jurisprudence first began as an academic exercise in better lawyering, branching out into a more appropriate approach to mental health law than traditional punishment models had allowed.⁹⁶ Its multidisciplinary approach, focusing on the emotional and psychological well-being of the client in addition to the legal results, has formally expanded to other disciplines today, including juvenile and family law.⁹⁷ For the most part, however, its inclusion in family law has been limited to its relation to the goals of collaborative law, where the lawyers and parties agree that avoiding court intervention serves everyone's best interests.⁹⁸

While the use of therapeutic jurisprudence and restorative justice has been far more extensive in the fields of criminal law and juvenile justice, it continues to be limited in family law are-

94. See *Rosen v. Rosen*, 386 So.2d 1268 (Fla. Dist. Ct. App. 1980), 528 So.2d 42 (Fla. Dist. Ct. App. 1988), 576 So.2d 308 (Fla. Dist. Ct. App. 1990), 696 So.2d 697 (Fla. Dist. Ct. App. 1997), *Young v. Hector*, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1998), 833 So. 2d 791 (Fla. Dist. Ct. App. 2002), & *Sibley v. Sibley*, 833 So. 2d 847 (Fla. Dist. Ct. App. 2002) for examples of the "never-ending case," where litigants have fought over everything, especially their children, for years on end, sometimes until the children literally reach the age of majority.

95. See generally Wallerstein & Lewis, *supra* note 2.

96. See Wexler & Winick, *supra* note 39, at 54.

97. *Id.* While the ideals of therapeutic jurisprudence are present in non-litigation theories, there has been no formalization of the practice in the area of family law, particularly regarding dissolution of marriage. This article promotes the adoption of both the ideals and framework of therapeutic jurisprudence in resolving marital issues.

98. See *id.* at 57.

nas. The alternative methods that are utilized tend to focus on the outward behavior of the parties, not on resolving the underlying causes of it. Other than the increased promotion of alternative dispute resolution practices, many courts continue to treat family disputes from a strictly legal (and adversarial) perspective.⁹⁹ This failure to recognize and/or address the complexity of non-legal issues, many emotionally charged, makes the courts major contributors to the cycle of continuous litigation that affects many families.¹⁰⁰

Family law judges may feel they are not equipped to deal with these non-legal, and generally far more difficult to handle, issues. They are not, after all, mental health professionals, and should not pretend to be. However, this reluctance to deal with such issues does not render them less prevalent in the courtroom. As already recognized in mental health, drug, and juvenile justice cases, the use of restorative justice ideals effectively aids parties in settling their overall problems, and not merely the immediate legal issues they face.¹⁰¹

Court administrators and judges as a whole recognize the benefits of moving from an adversarial model to a problem-solving approach in resolving family law cases.¹⁰² Our historically adversarial legal system, designed to determine individual rights and positions, has failed to address the myriad of issues incapable of courtroom resolution.¹⁰³ Maintaining the traditional position of impartiality restricts the courts from providing outside services necessary for the overall well-being of the family members, rather than just the legal rights of the individuals.¹⁰⁴ But as with mental health and drug dependency issues, courts deciding family law issues will likewise have to acclimate not just to the idea of a healing system, but also to the reality of it. Therapeutic jurisprudence does not advocate abandoning legal judgments in a case, but it does provide for the non-legal, emotional needs of the parties.¹⁰⁵ While our adversarial system is based on determining and finalizing the legal rights and responsibilities of the litigants, the

99. See generally CONF. OF STATE COURT ADM'RS, POSITION PAPER ON EFFECTIVE MANAGEMENT OF FAMILY LAW CASES (2002), <http://cosca.ncsc.dni.us/WhitePapers/EffectiveMgmtFamilyLaw.pdf>.

100. *Id.* at 1.

101. *Id.*

102. *Id.* at 1-2.

103. *Id.* at 2.

104. *Id.*

105. See Wexler & Winick, *supra* note 39.

very fact that family law issues are seldom capable of being determined with finality, especially where children are involved, makes them ripe for a truly alternative system of resolution.¹⁰⁶ Rather than leaving families in turmoil until the money runs out or the children grow up, the parties and their children would be better served by a legal system that also recognizes and deals with the emotions, anger, anxiety, and conflict engendered by these issues.¹⁰⁷ While it is difficult for courts to deal with emotionally unsteady litigants represented by counsel advancing their positions, courts are faced daily with the ever-increasing numbers of pro se litigants pleading their own cases, without the appropriate means to aid them.¹⁰⁸

To appreciate the inability of traditional litigation to solve the parties' issues, much less alleviate the concomitant pain and suffering, one has only to look at a sampling of the never-ending divorce cases that permeate the field. In one case, a court, faced with continuous motions for changes in custody based on which school district offered more choices for the children, admonished the parents that if they refused to take responsibility for agreeing on their own children's upbringing, they should not complain when the court handed them decisions they did not like.¹⁰⁹ Another case had parents warring over whether their teenage children should be forced to move to England with their mother.¹¹⁰ The case lasted until the children were near high school graduation.¹¹¹ A rather notorious case pitted two professionals against each other in continual battles, including custody and child support issues.¹¹² Human nature being what it is, it is unlikely that any of these parties recognized even years later the continuing detrimental effect of their actions on their children.¹¹³ Not only

106. See generally CONF. OF STATE COURT ADM'RS, *supra* note 99.

107. *Id.* at 3.

108. *Id.* It should be noted that the increase in pro se litigants has been attributed to a number of causes, but high among them are costs of attorney representation (especially in a prolonged battle) and the perception that such representation itself may well lead to the prolonged nature of the case.

109. *Birnbaum v. Birnbaum*, 211 Cal. 3d 1508, 216 (Ct. App. 1989).

110. See generally *Muniz v. Muniz*, 789 So. 2d 370 (Fla. 3d DCA 2001).

111. *Id.*

112. See *Young v. Hector*, 740 So.2d 1153 (Fla. Dist. Ct. App. 1998), 833 So.2d 791 (Fla. Dist. Ct. App. 2002).

113. One of the most horrific examples of this involved a case where the parents had fought for years over custody and visitation of their two daughters. One of the children eventually committed suicide. In the midst of the horror experienced by all, including the court personnel who had observed them over the years, the parents

does the litigation method and mentality fail to resolve even the legal issues, but it also clearly stunts the emotional growth and stability the parties likely envisioned for their children at birth.

While studies have long focused on the detrimental effects of divorce in general on children, and particularly high conflict divorce,¹¹⁴ more recent research indicates that unhappy marriages ending in amicable divorce may have positive or at least neutral effects on the children.¹¹⁵ While the parties may certainly retain the normal anger and frustration levels inherent in a dissolution, they learn to deal with them in ways that do not negatively impact the children.¹¹⁶

IV. DON'T STOP THINKING ABOUT TOMORROW: CONSTRUCTIVE CHANGES CAN BRING POSITIVE RESULTS¹¹⁷

Many areas of law take into account the idea of legal realism: the recognition that courts should consider the social consequences of their decisions.¹¹⁸ This can be accomplished by allowing social science experts to testify to the overall effects of their actions.¹¹⁹ Family law cases make up an ever-growing portion of state civil dockets.¹²⁰ While these cases arguably are among the best candidates for decisions involving "legal realism," they have been, traditionally, among the least likely to be decided this way.¹²¹ Rather than acknowledge the realities of families' needs, including anticipating changes in structure and function over the years, judges have generally attempted to impose their own views of a satisfactory *legal* solution and ignored such relevant items as evidence regarding child development.¹²²

continued to blame each other for the tragedy, rather than uniting in spirit, at least for their surviving child.

114. See generally Wallerstein & Lewis, *supra* note 2.

115. Victoria Clayton, *Divorce Doesn't Have to Destroy the Kids*, MSNBC, Dec. 11, 2007, <http://msnbc.msn.com/id/21474430> (citing research done by nonprofit organizations).

116. See *e.g.*, *id.*

117. FLEETWOOD MAC, *Don't Stop Thinking About Tomorrow*, on RUMOURS (Reprise Records 1977).

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

119. *Id.*

120. *Id.* at 776.

121. *Id.* at 775.

122. *Id.*

Instead of giving families solutions with which they can actually work, courts all too frequently leave the families with their views on how a family should look and act like.¹²³

Applying a problem-solving approach to family law, by its definition, includes helping the parties resolve their legal and emotional conflicts while treating all of the actors with dignity and respect.¹²⁴ Instead of *reacting* to a format of formally adversarial positions, parties and lawyers alike are motivated to treat everyone as responsible players committed to finding compatible grounds for a solution. Rather than courts superimposing their view of a functioning family, social scientists focus on the realities of the interaction between child and parent in defining the needs of the changing family structure.¹²⁵ While family courts theoretically should seek to satisfy the best interest of the child, best interest standards themselves vary widely from state to state and seldom include a requirement to hear from expert witnesses not just on the present state of the child's mind, but on the likely development of the child's feelings.¹²⁶ The largest and most important parts of a child's development will occur within his or her own "microsystem,"¹²⁷ consisting of the family unit (present and future) and interactions within it. Unfortunately, the present legal system for resolving family law issues leaves little room for including findings relating to future development, and is therefore highly unlikely to devise solutions related to it. Instead, those seeking to provide for a child's future must recognize the situational changes imposed on children and families, and account for them in the resolution.¹²⁸ Doing so will enable the decision-maker to better understand the complexities facing children of divorce and to use the law more effectively in shaping outcomes, especially in the area of child custody.¹²⁹ Other areas of the dissolution are likewise seen by social scientists as an ongoing event rather than a single occurrence, and the inclusion of a multidisciplinary approach is a positive step towards the courts' recognition of the continuing changes that will occur.¹³⁰

123. *Id.* at 775-76.

124. See CONF. OF STATE COURT ADM'RS, *supra* note 99.

125. Babb, *supra* note 118, at 788 (citing to studies by Professor Urie Bronfenbrenner on the ecology of human development).

126. See FLA. STAT. ANN. § 61.13(3) (West 2002).

127. Babb, *supra* note 118, at 789.

128. *Id.* at 790-91.

129. *Id.* at 791-94.

130. *Id.*

While such a multidisciplinary approach would positively change in-court determined legal resolutions, it would not negate the problems that the court proceedings themselves impose on the parties and children. Courts by necessity seek to define how people should behave in the future.¹³¹ Seeking the assistance of social science professionals in court decisions is admirable, but does little by itself to alleviate the emotional and financial toll experienced by the participants. And these very emotional and financial tolls may change the desired future behavior. While advocates of therapeutic jurisprudence have suggested it is a useful and appropriate addition to traditional litigation methods for a number of years,¹³² reality has proven that its uses in family law are varied and inconsistent, and that maintaining the traditional litigation method, even with the sometime addition of therapeutic ideals, has fallen short of solving the legal, let alone the non-legal, issues facing families in a dissolution. Despite the recognition that adjudication may not be the appropriate forum for litigants with a need to continue relationships, it nevertheless remains the accepted "last resort" to compel parties to compromise and resolve their differences.¹³³

It is this continued reliance on a flawed and sometimes destructive litigation system, alone seemingly *incapable* of resolving the real issues in family law cases, that continues to promote turmoil in families. Alternatives to litigation have been offered over the years, among them the idea of preventive law, analogous to preventive medicine in that it is designed to determine with more certainty legal rights and obligations, thereby minimizing the risk of legal liability and corresponding litigation.¹³⁴

Other forms of alternative dispute resolution, discussed herein, have sought to circumvent the need for litigation with varying degrees of success. Most of these alternatives to litigation include at least some of the ideals of therapeutic jurisprudence as a rationale or component. Commentators have proffered that lawyers should adopt strict adherence policies, including ac-

131. *Id.* at 798.

132. An attempt in the 1960's to incorporate conciliation courts to help divorcing families adapt to their new situations was hindered by the concerns of integrating the system with the litigation model, as well as the costs involved.

133. Babb, *supra* note 118, at 801.

134. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997). Examples of such preventive law can be found in pre- and post-nuptial agreements that seek to set boundaries and limit problems before they arise.

cepting only those clients open to the idea of a therapeutic result, in order to effectuate changes in the practice of family law.¹³⁵

Therapeutic jurisprudence builds on the premise that law has consequences for the mental health and psychological well-being of those affected by it.¹³⁶ Proponents of therapeutic jurisprudence propose that the law be reformed to minimize the negative effects of decisions and maximize the positive, or therapeutic, ones.¹³⁷ In practice, preventive law and therapeutic jurisprudence have merged into a new model of lawyering, centering on the use of care and interpersonal skills to prevent legal liability through the use of interdisciplinary counseling, problem-solving techniques, and alternative dispute resolution methods.¹³⁸

Much of the discussion about the benefits of therapeutic ideals and goals used in family law has centered on the parties. In addition, lawyers (and law students) are encouraged to consider the beneficial effects of problem-solving techniques used in client representation.¹³⁹ The argument thus far has focused on the courts' difficulty in resolving long-term legal issues, and the near impossibility of addressing, let alone fixing, the emotional needs of the family members. While detrimental to the litigants, litigation is frequently far more harmful to the children of the parties, whose emotional needs and desires are frequently misinterpreted or even ignored by the courts. The research clearly shows the harmful effect of high conflict divorces on children, leading many states to offer, or mandate, parenting courses for divorcing couples.¹⁴⁰

There are yet more victims of the traditional litigation methods when used in family law, including attorneys and judges. Convincing a court of the rightness of a party's claim to property

135. *Id.* at 30.

136. *Id.* at 17-18.

137. *Id.*

138. See Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 606 (2006).

139. See Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 429 (2005).

140. See Clayton, *supra* note 115. Some states have tried to be even more proactive, with some courts offering on-site counseling for parents and children, especially in high-conflict cases. Although the response to these sessions was generally favorable, even from those initially resistant to the idea, the Ninth Judicial Circuit had to eliminate the program due to lack of funding.

is stressful; arguing the future of your client's children, especially in relation to the client, can be excruciating in its intensity. Many criminal defense lawyers have rejected family law cases, arguing that defending a client who knows he or she has done wrong and is simply looking for the best result is far less traumatic than trying the fate of the client's children.¹⁴¹ Judges, similarly, often dread a family law rotation (though, in fairness, many grow to love it). Family law attorneys are noted for high rates of dissatisfaction with the specialty, in part from the stress of dealing with other people's lives and property, and in part from the highly contentious methods used in doing so.¹⁴²

Babb has proffered the idea of the therapeutically enhanced, ecological human development model as a means of promoting problem-solving, hopefully resulting in a more positive outcome for the family members.¹⁴³ Such a system would recognize the ecosystems, or environments, in which families live and hopefully thrive, and take them into account when arriving at resolutions.¹⁴⁴ By definition, interdisciplinary models would be a necessary component of any resolution technique.¹⁴⁵ Only by including those professionals with the knowledge and foresight of child development and family dynamics can we hope to arrive at a comprehensive solution to family matters.

Further, non-litigation techniques will provide benefits beyond the family. An interdisciplinary family law model gives the attorneys and judges the ability to focus not just on legal procedures, but also on holistic assessments of all familial needs, working to fashion effective results.¹⁴⁶ Rather than experiencing raised stress levels fueled by arguments or decisions related to the parties and their children, lawyers and judges can see themselves as part of the solution rather than the problem.¹⁴⁷ And

141. See generally Stolle et al. *supra* note 134.

142. See Andrew P. Levin, M.D., *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, 214 *PLI/Crim* 103 (Aug. 4, 2008). See generally Weinstein, *supra* note 3, Freeman, *supra* note 3.

143. See Babb, *supra* note 118, at 802.

144. *Id.* at 788.

145. *Id.*

146. *Id.* at 807.

147. See Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 *CT. REV.* 12, 12 (Spring 2001). The authors refer to a comment overheard at a national drug court conference, that "drug court judges get to color outside the lines." Clearly, judges are as frustrated as

lawyers embrace this opportunity when offered.¹⁴⁸ It is estimated that at least twenty thousand attorneys nationwide have sought training in collaborative law.¹⁴⁹

One question attorneys and judges naturally ask when contemplating a change from the established litigation methods to an interdisciplinary, therapeutic-based dissolution system, is: how would the traditional Rules of Professional Responsibility ("Rules") apply in such a setting?¹⁵⁰ A basic tenet of the Rules is the admonition to attorneys to "zealously represent their client."¹⁵¹ The question appropriately arises as to what 'zealous representation' means in a therapeutic, interdisciplinary mode.

Therapeutic family law encompasses a model devoted to the needs of the entire family. It is easy to see the attorney's conflict when she is 'representing' only one of the parties, and not the others.¹⁵² Lawyers could conceivably be concerned lest they run afoul of the Rules while attempting to better serve their clients. Yet collaborative family lawyers are just as determined, or zealous, in seeking amicable solutions as are their litigating counterparts in seeking 'victory' in the courtroom.¹⁵³ In addition, such collaborative family lawyers probably feel better about their objectives, and likely themselves.

Parties have endorsed the ideals and methodology of collaborative divorce, finding it promotes peace and stability from the beginning of the process, rather than instigating anger as in traditional litigation.¹⁵⁴ This, in turn, sets the stage for amicable and meaningful ways to continue raising their children, in separate abodes, but together in mind and spirit.¹⁵⁵

(most) clients and lawyers in the inability of courts to effectuate positive outcomes in cases utilizing traditional litigation techniques.

148. *See supra* note 20.

149. *Id.* Like-minded attorneys in Central Florida founded a chapter of the Inns of Court devoted to collaborative family law.

150. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (1980). Every state has adopted the Rules of Professional Responsibility in some form, requiring lawyers to conduct themselves in some ways and guiding them in others. The Judiciary is similarly advised on permissible and impermissible conduct.

151. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

152. MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1980) (another tenet of the Rules is the admonition to forego conflicts of interest inherent in dual representation).

153. *See supra* note 20.

154. *Id.*

155. *Id.*

As lawyers likewise realize the benefits of such a practice, they face practical dilemmas. The Colorado Bar Association declared confidentiality arrangements inherent in collaborative methods unethical, asserting that they interfere with a lawyer's obligation to provide undivided loyalty to his/her client.¹⁵⁶ The ABA Ethics Committee responded, recognizing the benefits of endorsing the collaborative process as long as the clients were fully informed of its requirements.¹⁵⁷

At least one group of lawyers has addressed the issue of how to deal with the different focus of a collaborative family law model. The American Academy of Matrimonial Lawyers¹⁵⁸ produced an 'aspirational' collection of rules, entitled "The Bounds of Advocacy," which recognizes both the unique place of family lawyers in the client's conflict, and the changing face of desired family law resolutions.¹⁵⁹ The Bounds aspires to allow family lawyers the ability to work in a therapeutic, even multidisciplinary, system without jeopardizing their own careers.¹⁶⁰ It advances a definition of 'zealous' representation in the family law setting to one compatible with the goals of a therapeutic result, while continuing to protect the legal rights and obligations of the clients.¹⁶¹

Some states have already adopted the Bounds as an aspirational tool for family law attorneys.¹⁶² Attorneys may well remain concerned that adhering to an aspirational means may not protect them from noncompliance with the adopted Rules. If we are to fully promote the idea of a problem-solving, therapeutic-based family law model, we must be willing to protect those attempting to fix a broken system. That includes adopting the Bounds, or similar models, as the official rules for family law attorneys and judges. The American Bar Association has recognized this need in endorsing the confidentiality requirements of collaborative practice.¹⁶³ Only when state courts and Bar as-

156. *Id.*

157. *Id.*

158. The American Academy of Matrimonial Lawyers was founded in 1962.

159. See Aronson, *supra* note 30.

160. The Bounds of Advocacy is an aspirational set of rules which recognizes the particular role of the family law attorney. While not yet required in any state, it does seek to guide family lawyers in their representation of clients, especially recognizing the need for collaborative settings.

161. *Id.*

162. Florida has promoted the idea of the Bounds as an appropriate way to deal with issues of representation in family law.

163. See MODEL CODE OF PROF'L RESPONSIBILITY (1980).

sociations similarly recognize that promoting collaborative family methods requires more than words can we truly move on to a more civilized, helpful means of resolution.

V. CONCLUSION

It is telling that lawyers once routinely represented themselves as "*counselors* and attorneys-at-law,"¹⁶⁴ an appellation not as frequently heard today. Yet as lawyers' dissatisfaction with their own work has grown, so has the public's negative attitude toward the legal profession.¹⁶⁵ Much of this negativity emanates from the frequently accurate view of the judicial system as one which stubbornly clings to its role as a decisionmaker rather than a problem-solver. Daicoff cites one law professor's creative use of the famous *Palsgraf*¹⁶⁶ case in tort law to illustrate that what is commonly referred to as a "brilliant piece of legal reasoning" by Justice Cardozo was in reality a decidedly sad outcome for Mrs. Palsgraf, arguing that creative lawyering including a therapeutic approach to the plaintiff's problems might well have resulted in a far more satisfactory result for the client.¹⁶⁷

While courts play not just an intricate but also frequently a continuing role in the lives of dissolved families, it is a sad reality that that role commonly deals with the surface legal issues, seldom addressing the far deeper and potentially more devastating emotional issues.¹⁶⁸ Though other areas of law have adopted therapeutic-based models for resolving problems,¹⁶⁹ family law practice remains embedded, if not in a purely litigation mode, then certainly in no more than a perfunctory collaborative one, designed to address the parties' behavior but not the underlying causes of it. Research has exposed the absolute need for family law practice to approach resolution from a multidisciplinary standpoint.¹⁷⁰ Society and the individuals involved cannot afford to neglect the evidence that children of divorce are damaged by continued and habitual fighting between the parents.

164. See Stolle et al., *supra* note 134, at 50.

165. *Id.*

166. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), *cited in* Daicoff, *supra* note 38, at 21-22.

167. *Id.*

168. See Babb, *supra* note 118, at 775.

169. Other areas of law that have adopted therapeutic practices to varying degrees include mental health law, criminal law, juvenile justice, community mediation, real property, tort law, and contract law.

170. See generally *supra* nn.2-3.

Family law must pay more than lip service to the credo of the *counselor* at law.¹⁷¹ Because family law has many players and many different roles to negotiate, determining what is an appropriate and just resolution is not an easy nor concise order.¹⁷² Aside from the harm done to the children and adults, public respect for the family law system has eroded over the years, in great part due to the court's inability and/or unwillingness to address the actual needs of the family members.¹⁷³ Family members regularly flout judicial orders concerning child support and visitation,¹⁷⁴ due in large part to a resentment at the perceived sense of unfairness in the system.¹⁷⁵ Regular and respectful inclusion of social science experts in determining family law issues would allow for a truly therapeutic, and therefore more positive, outcome to cases. Family law must join the ranks of those legal forums which have already recognized the benefits of providing *real* solutions to all the parties. Practitioners and courts alike must adopt the philosophy of *problem-avoiders*, rather than simply legal decision-makers.¹⁷⁶ Only then can we say we are truly caring for our families, and particularly our children.

171. See Stolle et al., *supra* note 134, at 50.

172. See PENELOPE EILEEN BRYAN, *CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM* 23-24 (2006).

173. See *id.* at 12.

174. *Id.*

175. See *id.* at 24.

176. See Stolle et al., *supra* note 134, at 50.

