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Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts

ANDREW SCHEPARD* & JAMES W. BOZZOMO**

I. Introduction

In cooperation with the American Bar Association's Coordinating Council on Unified Family Courts, faculty and students of Hofstra University's Center for Children, Families and the Courts conducted a survey of various courts in states we believed had made a commitment to implement a unified family court (UFC) model. Based on a questionnaire developed by the Center and the Coordinating Council, Hofstra Law School students interviewed court administrators, family court judges, or knowledgeable members of the family court bar in eighteen states. A detailed description of the survey, its methodology, and its findings is being published in the *Family Court Review*.¹ The key findings of the survey are summarized later in this article.²

We asked survey participants to tell us why they created UFCs, what cases were included in their UFCs, what services they provided to litigants,

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We thank Moreen Murphy, Director of the American Bar Association Steering Committee on the Unmet Legal Needs of Children for her invaluable help in organizing the survey of unified family courts discussed in this article.

1. James W. Bozzomo & Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 FAM. CT. REV. 12 (2004).

2. The views expressed in this article are those of the authors only and do not necessarily reflect the official views or policies of the American Bar Association or any of its entities.

and how they provided those services. We do not claim that the survey was either a comprehensive survey or a random sample of UFCs. The responses to this survey were simply the subjective impressions of the contacts surveyed. Furthermore, the responses from the participating jurisdictions did not reflect the overall functioning of the court structure in those states; instead, the contacts were requested to provide information based upon knowledge of those jurisdictions (counties or specific courts) considered to have a UFC.

Our aim in this project is to provide an informal snapshot and benchmark of the evolution of UFCs at the beginning of the twenty-first century. Hopefully, the snapshot will encourage states that have not committed to the concept to implement UFCs expeditiously, and to encourage states further along to keep going. Our aim also is to identify questions about UFCs that need more research.

Another goal of the survey was to set the stage for a later project to determine how best to evaluate a UFC's performance and level of effectiveness. The survey thus asked participants to share what measures they would use to determine if a UFC is performing effectively and whether an evaluation has been conducted of the UFC's operations.

II. Summary of Results

In all, eighteen separate jurisdictions were surveyed. Each was identified and contacted by the ABA, to determine whether the jurisdiction would be willing to participate. Surveys were provided by e-mail, and then Hofstra Law School followed up with a brief telephone call.

The actual data represents a compilation of the responses given by the particular contact person. In most cases, contacts were reluctant to express a firm opinion on amount of usage regarding particular services; rather, they provided an overview of the available services within their court systems, some of which were discretionary while others were mandatory. The actual usage of particular services seems to depend on the needs of the community. Budgetary constraints often result in targeted services, which specifically address the needs of those communities (*e.g.*, a community may have a particularly strong need for a domestic violence program or a supervised visitation program). Therefore, whether or not a jurisdiction provides a service does not reflect necessarily the court's rejection of that service; rather it means that the court simply does not provide it. As discussed, a more realistic conclusion is that the UFC model is flexible and responsive to budgetary considerations and community needs. A major challenge UFCs must face is determining what services to provide and how to provide them in a time of limited budgets and increasing need.

Survey results show that UFCs share essential characteristics, the critical elements of a properly functioning UFC. The following represent some key results of the survey:

- Every jurisdiction indicated its UFC has subject matter jurisdiction over custody, paternity, support, juvenile delinquency, visitation, child abuse and neglect, adoption, and divorce.
- Every jurisdiction claiming to be a UFC had access to some form of mediation. The issues that are mediated within a particular UFC differ among jurisdictions.
- Every jurisdiction claimed to have access to support services of various kinds.
- Every jurisdiction, except Washington, that considered itself to be a UFC has jurisdiction over every type of status offense.³ Washington has limited jurisdiction over status cases.⁴
- Each jurisdiction, except Washington, has jurisdiction over foster care (17 of 18).
- 94% of jurisdictions provided for parent educational services, but only 50% of jurisdictions offered children's education support groups.
- 94% of jurisdictions had jurisdiction over domestic violence cases.
- 78% of jurisdictions had a form of Differential Case Management ("DCM") in place, which encouraged judges to distinguish between cases that needed intensive judicial or therapeutic intervention and cases that did not.⁵

III. Overview

The purpose of this article is to supplement survey results with broader reflections on their meaning and interpretation. The survey indicated that growth of UFCs is a positive development for families and children, as it creates a judicial system that is both more efficient and more likely

3. The surveyed status offenses were designated as: truancy, supervision, unruliness, and curfew violations; see Bruce J. Winick et al., "Wayward and Noncompliant" People with Mental Disabilities: What Advocates of Involuntary Outpatient Commitment Can Learn from the Juvenile Court Experience with Status Offense Jurisdiction, 9 PSYCHOL. PUB. POL'Y & L. 233, 244 (2003) ("Status offenses are acts, which are unlawful only for children").

4. Pennsylvania, a jurisdiction that does not consider itself to be UFC, has no jurisdiction over status offenses.

5. See ANDREW SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 113-24 (forthcoming 2004) for a definition and discussion of differential case management.

to serve therapeutic justice values⁷ by mandating mental-health or social-service interventions that have a positive impact on their lives. Nonetheless, a UFC is a court, not a social services agency, and must remain committed to due process values and to accountability of non-judicial personnel. These issues are highlighted in our comments.

Our survey reveals that UFCs vary in the services available to help troubled families and children. Despite these differences, all have made a serious commitment to mediation to help resolve family disputes in a wide variety of subject-matter cases. UFCs overwhelmingly mandate or refer parents to mediation in child-custody and child-protection disputes, juvenile offender, and status offenses. The challenge for UFCs in the future is not a choice between mediation and litigation, but a plan to integrate the two.

Finally, we discuss the options for evaluation of a UFC. Evaluation of a UFC should be thought of as a tool of a never-ending process of choosing appropriate methods to achieve desired goals, not a single, one-time event. The evaluation becomes a critical tool to help the UFC meet the evolving needs of families and children in a community.

Our headline is that a one-size evaluation does not fit all. There are many different ways that a UFC can be evaluated, ranging from control group studies, to litigant- and stakeholder-satisfaction surveys, to public hearings, to a comprehensive self-study and outside review by an expert visiting team. The choice of evaluation technique should reflect, we believe, the purposes of the evaluation and available resources.

IV. Goals, Definitions, and Values

A. UFCs are Generally Perceived of as a Step Forward in the Administration of Efficient, Therapeutic Justice for Children and Families

Survey respondents report that their unified family courts are organized with broad-based subject matter jurisdiction over virtually all family-related disputes. Many report use of the one-judge, one-family assignment system. The reasons they advance in support of a UFC fall into two broad groupings—efficiency and therapeutic justice.⁷

For example, Honorable Susan B. Carbon, Supervisory Judge of the Grafton County Family Division in New Hampshire, expressed her belief

6. Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 798-801 (1997). Professor Babb was the first scholar to apply therapeutic jurisprudence to family law decision-making.

7. Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 473 (1998) (stating that the result of a unified family court is a one-family one-judge system that is more efficient and more compassionate for families in crisis).

that "one judge per family" affords consistency, accountability, and ensures adequate and fair time for all concerned parties. Jan Hood of the Administrative Office of the Court in North Carolina stated that the UFC model resulted in "better case management," which ultimately led to speedy case resolution. Karen Alley, Senior Deputy Court Administrator for Family Court in the 20th District, Florida, stated that one of the greatest indicators of success of a UFC was empowerment of families by therapeutic justice, which enables families to be better off at the end of the process than they were when they entered the system.

1. EFFICIENCY

Efficiency has always been a prime rationale for a UFC, as well as the larger movement for trial-court unification, of which the UFC is a highly significant part. Roscoe Pound, the great scholar and former dean of Harvard Law School, is the guiding spirit behind both the UFC and the movement for trial court unification. His Progressive era arguments for both are rooted in the economic efficiency that results from consolidating the task of delivering justice at the trial-court level to a single organizational unit.

Pound's famous 1906 address to the American Bar Association, *The Causes of Popular Dissatisfaction With the Administration of Justice*, sparked the movement to unify disparate trial courts.⁸ In it, Pound stated, "[m]ultiplicity of courts is characteristic of archaic law."⁹ His arguments in favor of trial court unification were those of efficiency and conservation of resources.¹⁰ For example, Pound argued, "hard and fast lines between courts operate to delay business in one court while judges in another court have ample leisure."¹¹ As might be expected, Pound's address caused a furor within the legal establishment of the time but was proved right by history.¹²

Later in his career, Pound simply extended the same efficiency arguments in support of the trial-court-unification movement to the UFC. According to Pound, the aim of a UFC is:

to put an end to the waste of time, energy, money, and the interests of the litigants in a system, or rather lack of system, in which as many as eight separate

8. Pound's address is reprinted at 35 F.R.D. 231 (1964).

9. *Id.* at 284.

10. Pound was not just a bean counter. For example, he also condemned "exaggerated, contentious procedure" as giving "the whole community a false notion of the purpose and end of law" as a "mere game." *Id.* at 282.

11. *Id.* at 287.

12. See Andrew Schepard, *Another Look: Trial Court Unification in California in the Post Proposition 13 Era*, 11 Sw. U. L. REV. 1295, 1303 (1979) (discussing Pound's address and reactions thereto).

and unrelated proceedings may be trying unsystematically and frequently at cross-purposes to adjust the relations and order the conduct of a family which has ceased to function.¹³

Note Pound's emphasis on saving "time, energy and money" as the principle objective of creating a UFC. His principle goal in creating a UFC is simply to conserve the public and private resources required for family dispute resolution. Adjudication is more efficient for all concerned if all related claims and parties are before the court, and the court can resolve all their disputes in a single judgment. Indeed, one can view the movement for consolidated trial courts and for UFCs as part of a broader movement in civil procedure to consolidate all claims arising out of a "common nucleus of operative fact" in a single court to the maximum extent constitutionally possible on efficiency grounds.¹⁴

Simple efficiency is a particularly important goal in this time of ever-increasing caseloads in our family courts and decreasing resources to handle them. While the criminal and civil dockets of our state courts are either stable or decreasing, the dockets of our family courts are increasing dramatically, with no end to the increase in sight.¹⁵ The average caseload of a New York Family Court judge (who does not even hear divorce cases) is 2,500. In Brooklyn, New York, in 1997 family court cases "received slightly over four minutes before a judge on the first appearance and a little more than eleven minutes on subsequent appearances."¹⁶ Legislators and executive-branch officials who heavily influence court budgets are particularly fond of efficiency arguments. Without enough resources to serve the needs of troubled families and children, a prime public-policy goal is to deploy those resources the courts do have as efficiently as possible. States are justified in creating UFCs based on this ground alone.

2.THERAPEUTIC JUSTICE

Survey respondents believe that UFCs are a step forward in judicial administration, not simply because they save "time, energy and money," but also because they deliver "therapeutic justice" for families and children.¹⁷

13. Roscoe Pound, *The Place of the Family Court in the Judicial System*, 5 CRIM. & DELINQUENCY 161, 164 (1959). See generally, Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31 (1998) (discussing current status of unified family courts in the United States).

14. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (Brennan, J.) (defining the scope of supplemental jurisdiction in the federal courts over state claims over which the court would not otherwise have subject-matter jurisdiction related to a federal claim over which it does).

15. See SCHEPARD, *supra* note 6 at 38-40.

16. John Sullivan, *Chief Judge Announces Plan to Streamline Family Court*, N.Y. TIMES, Feb. 25, 1998, § B, at 7. col. 3.

17. See Babb, *supra* note 7, at 798-801 (adopting a therapeutic perspective). See also Babb, *supra* note 8 (envisioning a Model Unified Family Court).

During our survey, Karen Alley, of Florida, indicated that therapeutic justice was essential to "empowering" families. This concept also has been recommended by Florida Supreme Court's Family Court Steering Committee in June 2000, wherein the Steering Committee noted that the therapeutic justice process "should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums where the family can resolve problems without additional emotional trauma."¹⁸

Therapeutic justice evaluates the legal system by applying mental health criteria. When persistent social problems, such as child abuse, domestic violence, drug addiction and parental conflict following divorce, appear on court dockets, therapeutic justice asks whether legal interventions are likely to produce net benefits or burdens for the mental health of litigants.¹⁹

Positing the delivery of therapeutic justice as a goal of UFCs distinguishes them from a consolidated trial court that can decide all aspects of other types of civil claims. We consolidate civil cases arising out the same nucleus of fact, before a single judge in a single court on efficiency grounds, not to achieve substantive goals of making the litigants' lives better. Traditionally, courts define their role in civil cases as an umpire rather than a proactive force to improve the lives of the parties to the dispute. An umpire (the judge) resolves disputes between the players according to the rules in the book. Sometimes, umpires have to interpret rules or resolve disputed facts. They are not supposed to care who wins or who loses, so long as the game is played according to the rules. Substantive outcomes are generally for legislatures to determine. Ordinary civil courts certainly do not care whether the mental health of litigants is better or worse as a result of judicial intervention.

A UFC has an additional and vital goal beyond simple, efficient umpiring: to make the emotional life of families and children better. In this sense, the UFC is the modern-day successor to the juvenile courts, created to promote a positive change in the juvenile offender. Juvenile courts are a special forum for young offenders, mobilizing community resources and working with parents to help rehabilitate them.²⁰

Protecting and promoting the interests of children is a vital public policy for all states. Instead of focusing just on the juvenile, the UFC focuses on the family as a social system. The UFC is based on the premise that family

18. RECOMMENDATIONS OF THE FLORIDA SUPREME COURT'S FAMILY COURT STEERING COMMITTEE, A MODEL FAMILY COURT FOR FLORIDA (June 2000).

19. See *supra* note 18. See also Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & LAW 184, 185 (March 1997).

20. See generally, Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (describing the early philosophies of juvenile courts).

members are interconnected emotionally, economically, and spiritually. Any court order about one family member is likely to affect all. Whatever behavioral, mental-health problems, or conflict that brought one family member to court is likely caused or influenced by other family members. The legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court's attention in the first place.

In essence, to put the UFC in the language of modern civil procedure, when a dispute about one family member is in court, other family members are what we today call a person whose joinder is "needed for just adjudication."²¹ When two cases involving the same family are in court, the cases and claims should be consolidated before a single judge because the family relationship by its very nature creates a "common question of law or fact."²² Joinder of family members and consolidation of family cases are procedural conditions for the delivery of therapeutic justice because family members are interconnected.

UFCs promote therapeutic justice for families because they create a single forum to develop a plan for family rehabilitation without the specter of conflicting orders and proceedings. The Colorado court system recently has reported that as a result of a court structure that fragments family disputes between different courts:

[f]amilies who face multiple court filings frequently find themselves appearing before several judges on several different dates. Consequently, judges who preside over each case are unaware that there are other matters pending before other judges The absence of critical information too often results in judges entering orders that conflict with those of one or more judges in other cases involving the family.... When family cases are resolved in court, families are generally required to undergo multiple assessments and complete treatment plans These requirements frequently overlap, are duplicative of requirements in other cases, or conflict with the requirements in other cases.²³

In a nonunified court system, a battered woman can request a protective order in one court; her husband can file for divorce and temporary relief in another; and their child, who is acting out and committing minor criminal acts in response to the pressures of the family situation, can be brought before yet a third court. This dispersal of the family into different courtrooms is inefficient and would probably horrify Roscoe Pound. Today,

21. FED R. CIV. P. 19.

22. FED R. CIV. P. 42(a).

23. COLORADO JUDICIAL BRANCH, COURT IMPROVEMENT COMMITTEE, COLORADO COURTS' RECOMMENDATIONS FOR FAMILY CASES: AN ANALYSIS OF AND RECOMMENDATIONS FOR CASES INVOLVING FAMILIES 9-10 (May 2001).

those who support UFCs also focus on the fact that the underlying problem, the dysfunction and conflict in the relationship between the parents and the child's reaction thereto, is the same regardless of the label that a court system puts on the case. The court system must address the underlying problem through diagnosis and a mandated service plan, regardless of the subject-matter-jurisdiction label through which the family enters the legal system.

B. Due Process and Accountability of Nonjudicial Personnel

A UFC dispensing therapeutic justice nonetheless remains a court, with awesome powers to mandate that parents and children take part in education, mediation, and therapy; to create or destroy parent-child relationships, and to confine a juvenile to the equivalent of jail. These powers must be exercised in a manner consistent with due process so as not to let the UFC relapse into a modern-day version of the pre-*Gault* juvenile court, providing neither due process nor therapeutic justice to those who came before it.²⁴ The need for UFCs to respect due process is reflected in one survey respondent's concern that a judge in a UFC would have access to information about the family that would not otherwise be admissible in a particular proceeding.²⁵

These are legitimate fears. A single judge permanently assigned to the same family could wield enormous discretionary power arbitrarily, might have access to information that would not be admissible in a particular type of proceeding, and could fail to make distinctions between civil and criminal family matters in applying burdens of proof and for other procedural purposes. None of the survey respondents, however, has indicated that these due-process concerns overwhelm the efficiency and therapeutic justice advantages of UFCs. The risks that an overreaching and incompetent judge in a UFC poses for a given family pales by comparison to the chaos created for families already in crisis by a court system that organizes judicial and support services by legal issue rather than by addressing the needs of families as a whole and the interrelationships among family members.²⁶

24. *In re Gault*, 387 U.S. 1 (1967), is the leading case that brought due-process protections to the juvenile court. The Supreme Court majority described the shortcomings of the juvenile court in that case in great detail.

25. The Washington, D.C., respondent hopes to learn from an evaluation of the UFC, whether judges will become prejudiced as a result of handling cases such as "abuse and neglect," while also dealing with "shoplifting" charges involving the same family member. For a more in-depth discussion of this dilemma, see Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 438-39 (2002).

26. Jay Folberg, *Family Courts: Assessing the Trade-Offs*, 37 FAM. & CONCILIATION CTS. REV. 448, 451 (1999).

No state that has a UFC has found the risks created by the one-judge, one-family system so pervasive that it has reinstated a more fragmented system of judicial assignments. Appeals are available to remedy injustice and procedural irregularities in individual cases. Judicial selection and retention procedures can improve the quality of judges in a unified family court, and judicial education can help them make distinctions between procedures in different types of cases.

A more subtle and also legitimate fear is that UFCs also must address the problems of delegation of decision-making to mediators, mental-health professionals, and other nonjudicial personnel on whom the court relies heavily to diagnose family problems, resolve family disputes, and make recommendations for service plans. The relationship between parents and children is not only emotionally precious; it also is a constitutionally recognized value. The Constitution does not explicitly mention the words "parent," "child" or "family." The Supreme Court, nonetheless, has held that parental rights are entitled to procedural protection as part of the "liberty" protected by the due-process clause and cannot be terminated without a hearing.²⁷

In the context of a grandparent visitation dispute, the Supreme Court recently has held in *Troxel v. Granville*²⁸ that a parent has a constitutional right to control the upbringing of his or her child as part of due process of law. The deference to parents' decisions that *Troxel* seems to require signifies that parental rights have a substantive meaning as well.²⁹ Other courts have described a constitutional right to family integrity that cannot be violated by government action absent a "compelling" state interest in, for example, the protection of children.³⁰

The constitutional value we place on parental and family rights requires that elected or appointed judges, accountable public officials, ultimately make decisions about them if a UFC cannot facilitate agreement on a plan for family reorganization. The UFC relies heavily on nonjudicial personnel, such as mediators, mental-health evaluators, and guardians for the child. These professionals can be extremely helpful to the court, parents, and children. They are not elected or appointed public officials. The training and

27. *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that unwed father entitled to a hearing before custody rights are affected in a child dependency proceeding).

28. *Troxel v. Granville*, 530 U.S. 57 (2000) (restating long-standing Supreme Court precedent holding that there is a rebuttable presumption that parents make decisions in the best interests of their children).

29. See James W. Bozzomo, Note, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 *HOFSTRA L. REV.* 547, 566 (2002) (discussing the fundamental nature of parental rights).

30. *Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999). See generally, Bozzomo, *supra* note 30.

practices of these important professionals have not yet been standardized. The UFC faces a challenge to ensure that these nonjudicial professionals are qualified and accountable, do not coerce families into uninformed, involuntary agreements, or supplant the role of the judge in making ultimate determinations that affect the parent-child relationship.³¹

The UFC judge is responsible for the quality of services that it mandates or recommends to parents and children in crisis. The judge cannot delegate his or her quality assurance and ultimate decision-making functions to anyone else. In essence, UFC judges need to become critical consumers of the expertise of other professions in order to keep them within appropriate professional boundaries. A UFC judge does not need to be a psychologist but does, in general terms, need to be able to distinguish between high- and low-quality psychological evaluation reports to determine what weight to give them in a custody or juvenile-placement determination. The UFC judge also needs to be able to recognize the difference between mediation that produces coerced settlements and mediation that uses methods that maximize parents' opportunity for self-determination.

C. High-Quality Judges

The complex and sometimes conflicting efficiency, therapeutic justice, and due-process goals of a UFC require it to be staffed by sophisticated, committed judges who are experts in not only family law, but also in mental health, dispute resolution, social services, and case management. The single most important factor that determines the quality of a UFC is the quality of its judges. They are the court's face to the public, the managers of its multidisciplinary operations, and the decision-makers of last resort for parents and children.³²

Creation of a UFC is an opportunity to decisively reject the idea that a family court is at the bottom of the hierarchy of judicial prestige. Many newly appointed judges are sent to the family court, and some of them cannot wait to be replaced so they can move up to commercial litigation. Some of these judges have very little experience with family law, even more have no training in psychology, social services, or mediation. Some discover that they do not want to deal with emotionally distraught parents all day, while managing the overwhelming caseloads, and many prefer the relative serenity of contract and tort cases. While the family court is a

31. See SCHEPARD, *supra* note 6, chs. v, x, xi & xii for a discussion of standards and practices for mediators, lawyers for children, and neutral mental-health evaluators in the context of child custody disputes.

32. Babb, *supra* note 8, serves as a reference for a more in-depth analysis of unified family courts and therapeutic jurisprudence in association with family law.

rewarding experience for some judges, others view it as dealing with mostly “non-legal” and emotional matters. The difficulty of attracting and retaining passionate and knowledgeable judges for the UFC is just another manifestation of the problem that our society has in attracting and retaining professionals who work with children and families—teachers, pediatricians, nurses, day-care providers, etc.³³

There is no greater challenge for judicial administrators than attracting and retaining well-qualified judges of appropriate background and temperament for the UFC.³⁴ Judges assigned there should want to make a career working with families and children and should have the disposition to do so. The creation of the UFC should begin to assure such judges that they will have the resources and support to make a positive difference in the lives of the families and children that come before them. Administrators need to create incentives for new judges to join the UFC and once there afford them the professional respect and recognition they deserve. Perhaps judges in the UFC should be paid more than those who deal with less challenging matters. In many states today, they are actually paid less than other judges. Experienced judges who leave the family court should be viewed as a serious loss to the community, and administrators should explore what could have been done to keep them on the bench.

D. The Core Subject-Matter Jurisdiction of a Unified Family Court Is Generally Agreed on

Survey respondents recognize the importance of assigning subject-matter jurisdiction over most family disputes to a UFC. Every jurisdiction surveyed indicated a UFC should have the power to adjudicate disputes over custody, paternity, support, visitation, child abuse and neglect, adoption, and divorce. Virtually every state surveyed includes jurisdiction over juvenile delinquency, every status offense of children, foster care, and domestic-violence civil cases in their UFCs.³⁵

States differ on whether to include criminal cases involving family members in a unified family court, and there is certainly room for a difference of opinion on this controversial subject.³⁶ The high standards of proof for criminal conviction and the evidentiary safeguards generally provided to criminal defendants caution against including criminal cases in a UFC. Criminal-law determinations by courts generally include an emphasis on moral blame and punishment, while the emphasis on most

33. *Id.*

34. *Id.*

35. *See supra* II. Summary of Results.

36. Delaware's UFC, for example, adjudicates misdemeanors but not felonies.

family determinations is rehabilitation and the best interests of children.³⁷ On the other hand, the same therapeutic justice rationale that suggests that all family-related disputes should be included in a UFC, regardless of legal label, supports including at least some kinds of crimes arising out of the family in a UFC.

This is the kind of question that empirical research can help illuminate. We know little, for example, about how many families have cases on both the criminal and civil sides of a trial court, or what their common characteristics are. Thus, we can say little about whether therapeutic justice goals would be served better if the criminal and civil dockets involving the same family are consolidated. Certainly, a useful study can compare a UFC with jurisdiction over criminal matters to one that does not on measures of efficiency, therapeutic justice, and due process of law.

V. Mediation is a Vital Function of a UFC

Chief Justice Arthur Vanderbilt, a pioneer in the improvement of judicial administration, has remarked that “[j]udicial reform is no sport for the short-winded or for [those] who are afraid of temporary defeat....”³⁸ Judge Vanderbilt thus recognizes that bringing about fundamental change in complex bureaucratic institutions such as courts takes persistence and patience and a time horizon that extends over years, not days or months. The time for reform probably has been shortened since Judge Vanderbilt’s time by the improved speed and ease of information sharing through the Internet and inexpensive travel between jurisdictions. These developments make it easier to learn of successful innovations elsewhere. Nonetheless, Judge Vanderbilt probably would be amazed by the rapid rise and growth of mediation in the UFC.

Seventeen out of eighteen jurisdictions reported that mediation was available in their UFCs in different areas, ranging from divorce and child custody to child-protection cases. This result reflects the enormous growth of mediation in the family court since the Pound Conference (named in honor of Roscoe Pound, the grandfather of modern judicial administration, identified earlier) in 1976, less than thirty years ago, a relatively short time period for change in complex bureaucratic institutions such as courts.

In every movement, a defining event shapes and frames what is to come. For the alternative-dispute-resolution movement, that event was the Pound Conference (convened by the American Bar Association), in April

37. Bozzomo, *supra* note 30, at 550.

38. Arthur T. Vanderbilt, *Introduction to MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* XIX (Arthur T. Vanderbilt ed. 1949).

1976, in which more than 200 judges, scholars, and leaders of the bar gathered to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. At this conference, then Chief Justice Warren Burger called for exploration of informal dispute-resolution processes.³⁹

Professor Frank Sander, Reporter for the Pound Conference's follow-up task force, projected a powerful vision of the court as not simply "a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case."⁴⁰ The Pound Conference emphasized alternative-dispute-resolution processes—particularly mediation—as better for litigants such as family members who had to have continuing relationships after the trial was over, because it emphasized their common interests rather than those that divided them.

Our survey reveals that, less than thirty years after the Pound Conference, Professor Sander's vision of a multi-door courthouse, which matches a litigant's needs with the dispute resolution services available, is closer to realization today in a UFC than perhaps in any other type of court in the nation. The survey results are confirmed by other data that indicate how important court-mandated mediation is in family disputes. "In California, about 20–30% of the total population of separating families file in court to resolve their disputes over the care and custody of their children and are mandated to use mediation . . . [M]ediation attains full resolution in one-half, and partial resolution in two-thirds, of these disputes."⁴¹ Researchers have commented:

This solidly researched 'success rate' of mediation supports the philosophy that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences, with the relatively limited help of a mediator who focuses on specific issues.⁴²

Family group conferencing, a carefully structured form of mediation, is being used ever more extensively in child protection cases with great success in more and more states and family courts.⁴³

39. L. Camille Hebert, *Introduction-The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. DISP. RESOL. 527 (2002).

40. STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 7 (3d ed. 1999) (citing Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976)).

41. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 471, n. 50 (2000).

42. *Id.* at 471-72 (citing numerous studies).

43. Paul Adams & Susan Chandler, *Building Partnerships to Protect Children: A Blended Model of Family Group Conferencing*, 40 FAM. CT. REV. 503 (2001) (describing Family Group

The broad-based consensus on the importance of mediation in the UFC also is confirmed by other sources. In a recent survey of the Florida bar (a state with a long history of requiring mediation of child-custody disputes),⁴⁴ for example, (91% of the members of the Family Law Section have described the impact of mediation on family court as positive, whereas 8% have viewed it as positive and negative, and 1% have seen mediation as negative.⁴⁵

The UFC's incorporation of mediation recognizes that mediation generally serves the best interests of parents and children. The reasons are articulated by the *Model Standards of Practice for Family and Divorce Mediation* recently approved by the ABA. "Experience has established that mediation is a valuable option for many families because it can:

- increase the self-determination of participants and their ability to communicate;
- promote the best interests of children; and
- reduce the economic and emotional costs associated with the resolution of family disputes."⁴⁶

Family members generally prefer mediation rather than litigation as a forum to resolve their disputes because it gives them a voice and the ability to shape their own destiny to a much greater degree than a trial. They also are more likely to adhere to plans they feel they agree on, in comparison to ones imposed on them.⁴⁷ Most importantly, mediation provides an opportunity for collaborative, interdisciplinary planning in a confidential setting for the future of children, an opportunity generally not available in the adversary process.

Limited availability of mediation services may, however, mean that the consensus on the importance of mediation reported by survey respondents is not reflected in the actual experience of many parents and children in a UFC. Our survey respondents have not reported on what percentage of families involved with the UFC actually have mediated their dispute. Previous and somewhat incomplete data from Florida, for example, suggests that only 20% of divorce litigants required to mediate their dispute actually have done so.⁴⁸

Conferencing). For a discussion of how to create a child protection mediation program, see Kelly Browe Olson, *Examining a Child Protection Mediation Program: If At First You Don't Succeed and Then You Don't ...*, 41 FAM. CT. REV. 480 (2003).

44. FLA. STAT. ANN. § 44.102 (West 2003).

45. Sondra Williams & Sharon Buckingham, *Family Court Assessment. Dissolution of Marriage in Florida—Preliminary Assessment Findings*, 39 FAM. CT. REV. 170, 181 (2001).

46. *Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 27, 28 (Overview and Definitions) (2001).

47. The data is reviewed in SCHEPARD, *supra* note 6, at 62-65.

48. Williams & Buckingham, *supra* note 46, at 178.

Why should the use of mediation be so low in a state that mandates it? Some courts still may be reluctant to order unwilling divorcing parents involved in a custody dispute into mediation against the expressed objections of one or the other, even though the court has the power to do so. Another problem may be cost. Mediation services may not be available free of charge, restricting their availability to those who can afford them. If mediation does provide significant benefits to families, it should be available to all, regardless of income. Whether there is a gap between the announced availability of mediation in a UFC and the number of families that actually participate in it would be the subject of a useful future survey.

Furthermore, the judgment of survey respondents that mediation benefits parents and children also should not be taken as a blanket endorsement of mediation or a blanket condemnation of litigation. Courts also need to be critical consumers of mediation services. The great majority of families in court are better off if they resolve their disputes privately through voluntary agreement on a parenting plan facilitated by mediation.

Mediation is not, however, a panacea for all parental conflict or permanently beneficial to all parents. Mediation is not intensive individual or family therapy but a focused dispute-resolution process. It is a brief intervention at a time of crisis that cannot be expected to change deeply rooted personality traits and long-standing patterns of behavior. It encourages planning for responsible parenting. For highly conflicted or dysfunctional parents, the problem is not how they resolve their dispute initially, but that the underlying causes of their conflict are not resolved. They need a more intensive, more therapeutically oriented process that can include mediation rather than the traditional public mediation programs currently allowed.⁴⁹

Litigation also must remain as a viable and vibrant dispute resolution option for some UFC disputes. Some families will not be able to resolve their dispute, no matter how hard a mediator tries. Parents and children cannot be left in limbo, and a court must decide the issues if the family cannot. Mediated agreements are confidential. In rare cases, disputes in the UFC raise important undecided questions of law (*e.g.*, Should a batterer be eligible for joint custody?; Have ambiguous Adoption and Safe Families Act guidelines been complied with?) that courts must resolve in a published opinion to provide guidance to stakeholders, parents, and the public. Disputes involving family violence are not automatically appropriate for mediation, and judicial orders may be required to protect victims against violence. The UFC's question for the foreseeable future is no

49. *The Wingspread Report and Action Plan: High-Conflict Custody Cases: Reforming the System for Children*, 39 FAM CT. REV. 146 (2001); 34 FAM. L.Q. 589 (2001) (giving report and action plan of national multi-disciplinary conference sponsored by the ABA Family Law Section and the Johnson Foundation).

longer mediation versus litigation but mediation and litigation—how can they work together?

*A. UFCs Offer Different Services and Must Make
Difficult Choices on How to Allocate Limited Budgets*

Every jurisdiction surveyed claims to have access to support services. Our survey, however, has revealed that UFCs offer different services to families under different terms and conditions. Many jurisdictions have made the decision to provide parent education programs, substance abuse services, and supervised visitation.⁵⁰ The jurisdictions differ in the means by which they provide such services. One jurisdiction may choose to provide such services through a statewide or county agency, while another jurisdiction may order such services to be paid directly by the parties.

The decision to provide direct services, sponsored by the court, is often the result of prioritizing community needs and balancing those needs against budgetary constraints. UFCs simply cannot provide all services to all litigants for free. On the other hand, the decision to forgo services or to order services to be party paid means that some parents and children in need will not have access to services. The delicate balance between cost and need appears to be central to the structure of particular UFCs and is an important reason why there cannot be a single model for a UFC.

To return to Professor Sander's post-Pound Conference vision, the modern UFC is not simply "a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case." The dispute resolution center for parents and children is not a single monolithic entity. Our survey reveals that UFCs create services that meet the needs of particular communities, and the mix of services is quite different from state to state. Parents and children need a diversified dispute resolution system that addresses their needs on an individualized basis.

In essence, survey participants recognize that a UFC must be an institution in constant evolution to meet the changing needs and values of its community. Court budgets are limited, UFC caseloads are exploding, and family problems differ depending upon the community served. Courts inevitably have to make choices about where to concentrate their efforts. A UFC in a rural state may look quite different than a UFC in an urban area. UFCs everywhere must define what services they want to make available to families and children, make a decision about what services it

50. Seventeen of eighteen jurisdictions offer parent education; seventeen of eighteen jurisdictions offer substance abuse services; and sixteen of eighteen jurisdictions offer supervised visitation services.

will fund from its own budget, decide which services and which it will require litigants to pay for. One community may have a very critical truancy or drug-abuse problem and need judicially supervised services to address these problems, whereas another may have a particular need for domestic violence services for new immigrant women. Another community may want to mandate mediation for the custody disputes of divorcing parents, but it may not want to pay for an in-house mediation staff. Its solution may be to contract for mediation services with private service providers approved by the court, who in turn charge privately.

A key question for the future development of UFCs is who should make these critical decisions and how should they be made. For example, should UFC judges and court administrators consult legislators and the public in setting priorities for development of services in a UFC? Should the court have a formal long-term development plan? How should it be created? Should a UFC community advisory council help it set priorities? How much county-to-county variability should state court administrators allow? These are the kinds of questions that UFCs must grapple with as they evolve into centers for providing therapeutic justice. Court administrators and judges will need the help of the mental-health and social-service communities.

B. Thinking About Evaluations

The survey revealed that while some jurisdictions have done periodic evaluations of a portion of the operations of their UFC, most have not evaluated their system in an overall context. Many of the survey respondents have expressed a desire to do more evaluations. Whether and how to evaluate a UFC is a complex question whose outlines can only be touched on in this brief article.

On one level, a UFC is simply a publicly funded human-service institution, with many constituencies and stakeholders. A useful analogy in thinking about the evaluation of a UFC then is the evaluation of a school, a hospital, or any other complex institution in our society that faces multiple pressures in delivering human services to diverse populations. There are multiple ways to evaluate such institutions—caseload statistics, complaints against, consumer surveys, control group studies, observations, etc., each of which captures a part of reality but does not provide a complete picture.

Evaluating any institution that provides human services presents complex challenges ranging from the philosophical to the operational. How do we measure how well a hospital, school, or court is serving the needs of its community? Do we evaluate particular programs of the institution or the institution as a whole? Compared to what baseline?

A court is a particularly difficult human services institution to evaluate

because any evaluation plan must take into account the importance of judicial independence and must not seek to influence decision-making in individual cases. The evaluation process cannot be simply a compilation of the grievances of the interest groups that have cases before the court or the outcomes of particular cases. It must avoid evaluations like that undertaken recently by the Prosecutors Bar Association of Chicago during the Illinois Supreme Court retention elections of 2000 when, as reported in a recent law review article, “[t]he association reportedly posted evaluations of judges based on the judges’ agreement or disagreement with the state’s position in criminal cases.”⁵¹

An evaluation of a court based on the outcomes of cases implies that a judge always should reach a particular outcome, regardless of the law or facts in the case. A UFC should not be evaluated by whether fathers’ rights groups or advocates for foster parents do or do not support its decisions. Courts serve the community as a whole, not just a special-interest group. An evaluation of a UFC must focus on the court in the aggregate, as a bureaucratic institution, not on any particular decisions that a judge makes.

C. Efficiency Measures

It is possible to create measures that test the two critical values in support of a UFC—increased efficiency and better delivery of therapeutic justice. The former is easier to measure than the latter. We can measure how fast a case moves through a court system and whether the time to disposition has improved since the creation of a UFC with reasonable ease. All that is necessary is a computer and a case-tracking system applicable before and after the UFCs creation. Similarly, we can measure how many cases a mediation program settles and whether they settle faster than cases on a litigation track. We can measure the number of court appearances required of parties and whether they increase or decrease as a result of the creation of a UFC or a parent-education program. All of these are measures of “time, energy, and money,” the efficiency reasons for creating a UFC. Efficiency measures, however, run the risk of confusing quantity of cases processed with quality of justice delivered. “Policymakers often think, incorrectly, that an evaluation is like an ‘audit’ or trial in which the results are usually clear-cut and definitive. Either the funds were spent or they weren’t; either the program served its intended beneficiaries at a reasonable cost per client or it didn’t. Such *audit* questions are much easier to answer than the *evaluation* questions of cause and effect . . .”⁵²

51. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 388 (2002).

52. Greg Berman & Anne Gulick, *Just The (Unwieldy, Hard to Gather But Nonetheless*

Take evaluation of mediation programs, for example: Mediators can increase the numerical percentage of cases referred to it that are settled before trial by pressuring parents to reach a settlement. Mediators can do this in a number of ways, principally by becoming more evaluative and directive in their dialogue with participants, using statements like "the judge will not see things your way" or "that's the best offer you can ever expect to get."⁵³ They also can pressure mediation participants to make rapid agreements by imposing tight deadlines for making decisions. These tactics will increase the percentage of cases that the mediator settles.

Many mediators question whether such tactics further the goals of parental self-determination that mediation should promote. A rushed, pressured mediation does not address the parent's underlying interests in resolving the conflict, nor does it do much to improve communication between them. Research has shown that mediation is more likely to result in settlement and positive changes in parental behavior "when the couple spends more time with an experienced mediator who focuses on enhancing communication."⁵⁴ Rushed, pressured mediation may result in more settlements, but it also may result in settlements breaking down after parents leave the mediator's office, causing more litigation later. Statistics indicating an increased settlement rate in a mediation program might, therefore, be touted as a measure of efficiency, but therapeutic justice values suggest that an evaluation should ask why the increased settlements have occurred.

D. Therapeutic Justice Evaluation Measures

The problem is that the best measures of therapeutic justice are hard to design and expensive to produce.⁵⁵ It usually takes a long-term study over a number of years to measure the impact of interventions on the lives of families and children. Furthermore, "[t]he best research designs use a random-assignment model, splitting a single pool of [subjects] between an experimental track and normal case processing," but in most cases this

Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts, 30 FORDHAM URB. L.J. 1027 (2003).

53. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid For The Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996).

54. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 171 (2002) (citing numerous studies).

55. David H. Demo & Alan C. Acock, *The Impact of Divorce on Children*, 50 J. MARRIAGE & FAM. 619, 642-43 (1988); Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 119-20 (1988); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 349, 358 (1991).

'gold standard' is not feasible" for most studies of UFCs.⁵⁶ Without control group studies, evaluators can observe only that children in joint-custody arrangements do better than children in sole-custody arrangements, or children who live with parents undergoing treatment are better off than children placed in foster care; they cannot attribute causal differences to the nature of the legal relationship or process. Causality can be established with reasonable certainty only by comparing identical groups randomly assigned to different legal arrangements.

Court systems face administrative and ethical problems in allowing researchers to randomly assign parents and children to different tracks for evaluation purposes. For example, they must maintain the confidentiality of litigant identity during the evaluation process. There is also something morally troubling about assigning a family to one tract arbitrarily when another tract might benefit them. This is why, for example, we have no studies (and probably never should have) that compare parents and children randomly assigned to joint custody and sole custody. Nor do we have studies that randomly assign children to live with parents ordered to undertake drug-abuse counseling versus children randomly assigned to live with foster parents. Such controlled experiments are the only way to test whether one legal arrangement causes better outcomes for children than another.

Those carefully controlled, randomly assigned evaluation studies that are completed should be highly valued as extremely important research. For example, a recent study confirmed the value of even brief mediation for many divorcing families over a long period of time. A twelve-year follow-up study of seventy-one divorcing families randomly assigned in the late 1980s to either a mediation group or a litigation control group shows important long-term benefits of only five hours of mediation twelve years later.⁵⁷ Nonresidential parents mediating their dispute were far more likely to see their children every week than nonresidential parents litigating their dispute. The litigating nonresidential parents generally have followed the national trend of dropping out of their children's lives; the mediating nonresidential parents have tended to be much more involved with their children, both through in-person and telephone contact. At statistically significant levels, mediating residential parents have reported that mediating nonresidential parents have more involvement with discipline, school and church activities, and problem solving than nonresidential parents in

56. Berman & Gulick, *supra* note 53, at 1029.

57. Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's "Resolving Child Custody Disputes,"* 10 VA. J. SOC. POL'Y & LAW 164, 172-78 (2002).

the litigation control group. These findings are very encouraging and support an important role for mediation in a UFC.

Another recent carefully controlled six-year follow-up study of a preventive intervention program documented the effectiveness of prevention programs designed to prevent mental health problems in adolescent children of divorce.⁵⁸ Participating children ages nine to twelve years were recruited from families randomly identified by a computerized search of court divorce decrees and other random methods. Some parents and children were placed in one of two approximately eleven-session prevention education programs: one for mothers alone and a second program for mothers and children. Others were assigned to a control group. At a six-year follow up, adolescents in both programs showed reduced rates of diagnosis of mental illness; marijuana, alcohol and drug use; and number of sexual partners. While the sample in the study consisted largely of well-educated and upper-middle-class parents and children, the results were a positive sign that educational programs can have significant prevention benefits and should be a major part of the services available to families involved with a UFC.

Child-protection reform also provides a recent example of a valuable control group study. Researchers recently evaluated whether Dane County, Wisconsin's, accelerated judicial review of selected cases has expedited permanency outcomes for abused and neglected children in out-of-home care.⁵⁹ They compared the results of cases in which more frequent judicial reviews than mandated by law took place against a randomly chosen control group of cases assigned to the less intensive, legally mandated review track. The researchers' findings suggested that more frequent reviews increased the likelihood of adoption of children entering out-of-home care, with no decrease in the likelihood of family reunification. The researchers caution that there are limitations to generalizing from their findings because of the small sample size and procedural differences between states in review of placement. Nonetheless, the controlled nature of the study suggests that increasing the frequency of judicial review of out-of-home placements is a valuable step that UFCs everywhere should consider.

VI. Evaluation Measures Without Control Groups

A. Surveys of Participants and Stakeholders

There are many other valuable measures of how well a UFC is functioning besides multi-year studies involving control groups assigned randomly

58. Sharlene A. Wolchik et al., *Six-Year Follow-up of Preventive Interventions for the Children of Divorce: A Randomized Controlled Trial*, 288 J. AM. MED. ASS'N 1874 (2002).

59. Mark E. Courtney & Joan Blakey, *Examination of the Impact of Increased Court Review on Permanency Outcomes for Abused and Neglected Children*, 41 FAM. CT. REV. 471 (2003).

to one type of legal setting or service or another. Anonymous surveys by mail or phone, for example, can tell court personnel a great deal about what parents and children think of their experience. Similar surveys can be conducted of judges, lawyers, mental-health personnel, and all other stakeholders in the UFC.

Consumer and stakeholder satisfaction surveys are standard operating procedure after, for example, a patient's hospital stay or after automobile service by a dealer. There are many ways to design anonymous surveys, some of which provide a more representative sample of opinion than others. While not without complexity, such surveys are easier and less expensive to organize and conduct than random selection trials.

Satisfaction surveys convey very important data to judges and court administrators. Good "word of mouth" from litigants or lawyers for a court strengthens public support for the judicial system; bad word of mouth does the opposite. We have learned from participant surveys, for example, that parents who are mandated into mediation and parent education highly value their experience, even though initially resistant.⁶⁰ On a more discouraging note, a survey conducted by a national commission found that 50–70% of parents who have experienced the divorce process characterize the legal system as "impersonal, intimidating, and intrusive."⁶¹

B. Public Hearings

Public hearings and the reports that result from them are another method of evaluating UFC performance. Such hearings often are covered by news media throughout the state. The difficulties of public hearings are that those testifying tend to have a very strong opinion one way or another about the treatment by the court. Many witnesses represent special-interest groups. Nonetheless, public hearings tend to generate important momentum for reform if conducted in an appropriate manner.

Public hearings generally have not resulted in favorable pictures of family-court operations. A report of a committee of distinguished New York lawyers and judges, who has heard public testimony from numerous divorce litigants, judges, and lawyers about their experiences has stated, "[I]litigants describe the courts as being unsympathetic, unresponsive, impotent and overwhelmed by delay, and claim that the main concern of lawyers is not to serve their clients' best interests but their own."⁶² An

60. SCHEPARD, *supra* note 6, at 62–64, 75–76.

61. UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, *PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION: A REPORT TO THE PRESIDENT AND CONGRESS* 38–39 (1996).

62. COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, *REPORT 1* (N.Y.S. 1993).

Oregon Task Force on Family Law created by the governor and the legislature conducted extensive public hearings on that state's divorce system and then summed up public dissatisfaction with it:

The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens in Oregon agreed that the family court system was too confrontational to meet the human needs of most families undergoing divorce. The process was adversarial where it needn't have been: All cases were prepared as if going to court, when only a small percentage actually did. The judicial system made the parties adversaries, although they had many common interests.

The Task Force has found that the family court system is collapsing under the weight of too many cases. Too often, children are treated like property, while parents clog the courts with bitter fights over money, assets, and support. The combative atmosphere has made it more difficult for divorcing couples to reach a settlement and to develop a cooperative relationship even after a divorce agreement is worked out on paper.⁶³

C. Self-Study and Outside Evaluation Teams

A comprehensive way for a UFC to evaluate itself is envisioned by analogizing the evaluation to the reaccreditation of a law school or a hospital. A law school, for example, is reaccredited every seven years. A reaccreditation team is appointed by the American Bar Association's Section on Legal Education and includes specially trained law professors, members of the bar, and law-school administrators, among others. They operate pursuant to written guidelines created by the Section in consultation with legal educators. Before the reaccreditation team visits the law school for several days, the law-school faculty prepares a self-study report in which it identifies strengths, areas of concern, and plans for the future. The reaccreditation team meets with faculty and students, and visits classes. It ultimately provides a written and oral report to the law school and the ABA Committee, which is the basis for reaccreditation decisions.⁶⁴

Many, if not most, hospitals seek accreditation from the Joint Commission on Accreditation of Healthcare Organizations (the "JCAHO"). The JCAHO is an organization with a governing board of primarily industry professionals. Accreditation is awarded based upon compliance with a set of predetermined standards and an ongoing commitment to quality assurance.⁶⁵ The Joint Commission conducts period and random evaluations of

63. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 2 (1997).

64. American Bar Association, *The American Bar Association's Role in the Law School Accreditation Process*, available at <http://www.abanet.org/legaled/accreditation/abarole.html>.

65. Joint Commission on Accreditation of Healthcare Organizations, *Facts about the Joint Commission on Accreditation of Healthcare Organizations*, available at <http://www.jcaho.org>.

accredited healthcare organizations to ensure that they remain in compliance. Governmental bodies formally recognize the importance of reaccreditation. Indeed, certain government reimbursement is often contingent upon attaining and maintaining the JCAHO certification.

It is possible to imagine a UFC engaging in a comprehensive evaluation analogous to the process of law school and hospital accreditation. The State Justice Institute has, for example, developed *Family Court Performance Standards and Measures* and methods of implementing them that could be the basis of periodic UFC self-study and visits by accreditation teams.⁶⁶ Trained evaluation teams of judges, academics, researchers, and others could be created by organizations like the National Council of Juvenile and Family Court Judges, the American Bar Association, and the Association of Family and Conciliation Courts. The UFC judges and administrators could engage in a self-study before the evaluation team arrives. The evaluation team could observe court operations, meet with stakeholders, and write a report.

Obviously, such a detailed evaluation procedure would be expensive to conduct and has to maintain confidentiality and judicial independence. Nonetheless, it probably would be worth the cost because of the additional public support and confidence in the UFC's operations that the periodic comprehensive "reaccreditation" would provide. A collaborative effort between relevant national organizations to develop a pilot project for a comprehensive evaluation of a UFC could be time well-spent.

There are a wide range of options available for evaluation of a UFC, each with its benefits and burdens. The critical questions that the judges and administrators responsible for the UFC should ask in choosing among them and in planning its evaluation should include:

- Why are we doing an evaluation, and what do we hope to gain from it?
- What would an ideal outcome be of the planned evaluation?
- What will we do if we learn information during the evaluation that is less than flattering to the court's operations?
- Do we have the expertise to conduct the evaluation in-house, or do we need an outside consultant?
- Whom do we want to involve in the evaluation process?
- How can we ensure that confidentiality of litigant records is maintained?
- Is there any risk that judicial independence in deciding cases will be compromised by the planned evaluation?

jcaho.org/about+us/index.htm.

66. State Justice Institute, *Family Court Performance Standards and Measures* (1999), available at http://courts.state.de.us/family/standards/standard.htm#P22_2951.

- What resources are we prepared to commit to evaluation?

If the purposes and procedures of the evaluation are well-formulated in advance, the outcome is likely to be more satisfactory.

VII. Conclusion

In the *Structure of Scientific Revolutions*, the philosopher of science, Thomas Kuhn, articulated a theory of how new ways of thinking displace the old. Kuhn defines paradigm as the “entire constellation of beliefs, values, techniques and so on shared by the members of a given community.”⁶⁷ A paradigm is basically the accepted wisdom of a society as it pertains to one area of knowledge—it is the prevailing explanation for something. According to Kuhn, normal science proceeds by elaborating a particular paradigm. When problem solving within a paradigm no longer can account for significant “facts,” a scientific revolution can occur, involving the birth of a new paradigm. Kuhn argues that changes in paradigms are not evolutionary, but rather they are a series of peaceful interludes punctuated by intellectually violent revolutions that result in replacing one worldview with another.

Law and judicial administration are not natural sciences, and Kuhn’s concept of paradigm shift may have become something of an overused cliché. However, it may be a valuable shorthand way to describe what is occurring in the development of UFCs. The survey that Hofstra’s Center for Children, Families and the Law conducted in conjunction with the American Bar Association’s Coordinating Council on Unified Family Courts suggests that many states are moving vigorously in the direction of creating a single court for family problems and assigning a single judge to a single family. UFCs are relying on mediation as a primary method of family dispute resolution. They offer a menu of services unheard of years ago, tailored to the needs of their communities. These changes are occurring in what for legal institutions is a remarkably short period of time.

What makes one paradigm more attractive than another is that its answers to the important questions of the particular field are superior to its rivals. A fragmented system of subject-matter jurisdiction assumes that it is more important for courts to address legal categories than the underlying dynamics that bring families to the courtroom. The assumptions behind it do not meet the needs of troubled families and children. Families need not only due process, but they also need efficiency and therapeutic justice to address their problems. They need more opportunities for carefully facilitated self-determination, and they require fewer less-judicial dictates.

The survey shows that UFCs are becoming the paradigm for delivery of

67. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 175 (3d. ed. 1996).

dispute resolution for families and children in the twenty-first century. Our task for the future is to consolidate and strengthen this promising development. Our challenge is not to create a court of law or a social services agency, but to create a UFC, a unique institution that mandates and manages the process of providing needed services, while providing due process to litigants and accountability of judicial and nonjudicial personnel.

