

Forensic Experts and Family Courts: Science or Privilege-by-License?

by
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I. Introduction

More than a century ago, the renowned federal judge, Learned Hand (perhaps the most famous appellate judge never appointed to the U.S. Supreme Court) wrote that “[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best.”¹ In this sense, the constitutionally-empowered duty and responsibility of American courts, to provide litigants with a judgment at a point in time in a case, has awkwardly coexisted for generations with the organic nature of expert knowledge derived from all forms of science.² The debate about “how to do it best” requires courts, as the Law’s ventilator, to balance disciplines and sub-disciplines of experts-in-science with *forensic* evidentiary policies expressed as judicial rules of inclusion and exclusion.

For the reasons explored in this article, use of the precise term *forensic* matters here. The ordinary tension between acceptable science and expert opinion occurs when a quantitative and

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¹ Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

² By “science” I mean an organized and methodological approach to the acquisition and testing of knowledge, with sufficient transparency and objective data that the analysis and conclusions (falsified or validated) may be replicated and applied to other forms of knowledge. See SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (2009); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477 (1986) (“Three-quarters of a century have passed since an American court first invoked social science research to support its choice of a rule of law.”).

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data-driven analysis of a theory or hypothesis or themes derived from a qualitative research question are proffered by an expert for the purpose of persuading a judge or jury that one outcome is preferable to another.³ Of course, expert opinions may come from many scientific disciplines (e.g., physics and chemistry) which do not ordinarily require licensure to offer expert knowledge.⁴ Experts qualified, with or without licensure, may then provide an opinion based upon facts not admitted in evidence, data sources provided by others, and interpret and explicate research drawn from a variety of sources like mathematics or physics (think the “ideal gas law” and deflated footballs).⁵ Nothing surprising there.

What may surprise is that the professional discipline of forensic experts, as against mere mortal expert opinion, has a more precise core role identification and correlative duty: *to convey with competence and integrity a relevant, concrete, and generalizable system of specialized knowledge which ethically, logically,*

³ See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 220 (2006) (footnotes omitted) (“Expert testimony, whether presented by plaintiffs or defendants, can strongly influence juries. An expert witness has extraordinary powers and privileges in court Experts are unique in that their testimony may be based on evidence that otherwise would not be admissible. For example, experts can base their testimony on hearsay to justify their opinions, even if such underlying evidence is inadmissible. Expert witnesses can testify on the ultimate issue in a case, even though a lay witness would be prohibited from doing so.”).

⁴ In contrast, “if a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those which are rationally based on the perception of the witness and which are helpful to a clear understanding of his testimony or the determination of a fact in issue. Thus, although an opinion by a lay witness may be permissible if based on his own perception, such perception must be ‘adequately grounded on personal knowledge or observation just as would be the case with simple statements of fact.’” *Chrysler Credit Corp. v. Bert Cote’s L/A Auto Sales, Inc.*, 707 A.2d 1311, 1317 (Me. 1998) (quoting RICHARD FIELD & PETER MURRAY, MAINE EVIDENCE § 701.1 (4TH ED. 1997)).

⁵ For a discussion of the more important policy and social utility of science, see Chad Orzel, *Tom Brady and the Ideal Gas Law: Physics of Deflategate*, SCIENCE BLOGS, Jan. 23, 2015, <http://scienceblogs.com/principles/2015/01/23/tom-brady-and-the-ideal-gas-law-physics-of-deflategate/>.

and rationally informs judicial decision making.⁶ What may supplement that surprise is the trap sprung daily in thousands of transactions in family courts.⁷ It is not the definition itself but the transmutation of conceptual frameworks, theories, or hypotheses as a predictive funnel, predicated on the existence of relevant scientific research, from which judges may minimize “unguided guesswork, or intuitive decision-making.”⁸ Coupled with this

⁶ The definition of forensic, as defined by specialty organizations, is the one which has been adapted for this article. See Tina Maschi & Mary Lou Kilian, *The Evolution of Forensic Social Work in the United States: Implications for 21st Century Practice*, 1 J. FORENSIC SOC. WORK 8, 13 (2011) (“Effective forensic social work requires an integrated yet two-pronged approach that addresses well-being (psychosocial) and justice (law and policy) to help individuals, families, and communities.”). But when licensed professionals like licensed clinical social workers or clinical psychologists testify, even involuntarily, and offer labeling and diagnoses that may influence the outcome of a child custody case, that is forensic testimony. This article, however, is concerned with those who intentionally inhabit that role. See AMERICAN PSYCHOLOGICAL ASSOCIATION, SPECIALTY GUIDELINES FOR FORENSIC EXPERTS (2011), <http://www.apa.org/practice/guidelines/forensic-psychology.aspx>; COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE CMTY., NAT’L RES. COUNCIL OF THE NAT’L ACADS., *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at http://www.nap.edu/catalog.php?record_id=12589 (“Courts do not typically review testimony after finding the underlying methodology reliable and permitting the forensic analyst to take the stand. As the NAS Report explained, ‘the legal system is ill-equipped to correct the problems of the forensic science community.’”); Harry T. Edwards, *The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar*, 51 JURIMETRICS 1 (2010); NATIONAL ORGANIZATION OF FORENSIC SOCIAL WORKERS (2011), <http://nofsw.org/>.

⁷ The phrase “family court” means divorce, parental rights, paternity, child protection, or litigation in which rights and responsibilities of a child are subject to judicial decision making. There are nuanced differences in each legal paradigm, but that does not alter the arguments in this article. Although beyond the scope of this article as well, use of the term “divorce” implicates a narrowing bandwidth for differentiating family systems since demographic data suggests a growing population of non-married parents. Precision in research requires hypotheses in which chronic conflict may be of a different nature and require different interventions. For a current review of the data, see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

⁸ Judith Cashmore & Patrick Parkinson, *The Use and Abuse of Social Science Research Evidence in Children’s Cases*, 20 PSYCHOL., PUB. POL’Y & L. 239, 239 (2014); see also Yosef Rafeq Jabareen, *Building a Conceptual Framework: Philosophy, Definitions, and Procedure*, 8 INT’L. J. QUALITATIVE METH-

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transmutation comes the convenient and less expensive (as compared to battles between experts in tort cases) influence of science-by-licensure in child custody litigation.

Without even attempting (or being asked) to justify forensic opinion as scientific research, clinical social workers, lawyers,⁹ and psychologists testifying from the stand under oath influence and justify the ultimate outcome in many child custody cases. As an explicit function of conveying the perception of scientifically obtained research and data, judges permit lawyers to introduce social science research without any serious test of reliability, validity, or “relevance to the facts.”¹⁰ In this context, relevance means that social science research, derived from “analogue studies,”¹¹ has application to the actual facts of the case as compared with extending anecdotal or laboratory data to child custody litigation.¹²

ODS 49, 51 (2009) (“In this paper I define conceptual framework as a network, or ‘a plane,’ of interlinked concepts that together provide a comprehensive understanding of a phenomenon or phenomena. The concepts that constitute a conceptual framework support one another, articulate their respective phenomena, and establish a framework-specific philosophy. Conceptual frameworks possess ontological, epistemological, and methodological assumptions, and each concept within a conceptual framework plays an ontological or epistemological role.”); Karl E. Weick, *What Theory Is Not, Theorizing Is*, 40 ADMIN. SCI. Q. 385, 389 (1995) (“The process of theorizing consists of activities like abstracting, generalizing, relating, selecting, explaining, synthesizing, and idealizing. These ongoing activities intermittently spin out reference lists, data, lists of variables, diagrams, and lists of hypotheses. Those emergent products summarize progress, give direction, and serve as placemarkers.”).

⁹ A separate discussion implicates other “expert” roles in which lawyers offer opinions, such as a guardian ad litem. See *Jones v. Jones*, 43 So. 3d 465, 480 (Miss. Ct. App. 2009) (“The record fails to reflect that the guardian ad litem was qualified to render such a conclusion. Moreover, the record reflects that her conclusion in this case lacked any factual basis since no inquiry was done to determine if the children had been sexually abused or not. See *S.G. v. D.C.*, 13 So. 3d 269, 274 n.5 (Miss. 2009) (Guardian ad litem qualifications should be based on the principles set forth in *Daubert.*”) (citation omitted).

¹⁰ Cashmore & Parkinson, *supra* note 8, at 240.

¹¹ *Id.* at 242.

¹² *Id.* at 241 (“While randomized, controlled trials have been called the ‘gold standard’ in research, this is very difficult in research concerning children and families, and it is not feasible or ethical.”). The authors point out the public split that occurred regarding relocation research between prominent researchers writing amicus briefs in state appellate courts. See *id.* (“The claims made in such briefs about the interpretation of social science evidence are, however,

This disconnect becomes more troubling when diversity, socio-economic status, quality of lawyers, quality and affordability of therapists or parent education, disability, family supports, housing, transportation, emotional or cognitive strengths, or other variables are not part of the expert calculus or the use of forensic testimony. The proffered argument, therefore, is that evidentiary rules of inclusion or exclusion work well-enough for the privileged but pose special and unique challenges for forensic experts who provide opinions that label or diagnose families and individuals caught in custody litigation.¹³ Thus, this article will begin with a discussion of the relationship between experts and courts as a means of exploring whether parental alienation is a syndrome derived from science or a conceptual framework. The article concludes by suggesting that forensic experts and courts have a reciprocal duty to protect families from “science” which is not *science* but still leaves room for family courts to utilize conceptual frameworks for informed and organized decision making.

For purposes of this article, therefore, the definition of forensic may be deconstructed, as follows: (a) forensic opinions in family court implicate the archeology of human thoughts and behaviors, individually and in groups; (b) there exists a unique power and force to forensic opinions as judges in bench trials act under the constraints of docket compression and limited independent resources;¹⁴ and (c) licensure-status *alone* in family court (e.g. medicine, psychology, law, therapy, and social work)

open to challenge, and in some cases, vigorously contested by other social scientists.”).

¹³ See, e.g., *State v. Favoccia*, 51 A.3d 1002, 1009 (Conn. 2012) (“Adopting the Appellate Court’s syllogistic reasoning, the defendant posits that permitting an expert witness to make that connection, but not opine directly on a complainant’s credibility or diagnosis, is the logical equivalent of permitting an expert to testify that the bird acts, walks and quacks like a duck, but then precluding that expert from opining that a particular bird is, in fact, a duck.”).

¹⁴ See Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL., PUB. POL’Y & L. 267 (2001); Stephen Porter & Leanne Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 119 (2009).

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may qualify, *ipse dixit*,¹⁵ the expert's ultimate opinion about a person or family.¹⁶ These propositions are not made lightly nor without an appreciation that colleagues, among all professional disciplines, may disagree rather sternly. Yet it is a collaborative discussion that Fellows of the American Academy of Matrimonial Lawyers and licensed forensic professionals should openly engage in as a function of ethical and scientific duty to families.

As a template for this argument, Parental Alienation Syndrome (PAS or now PA since the S was lost in a recent divorce)¹⁷ provides a means for exploring these issues.¹⁸ Indeed, the rapid

¹⁵ See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence . . . connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.")

¹⁶ See *Woodard v. Custer*, 719 N.W.2d 842, 850 (Mich. 2006) ("Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty."); *In re Commitment of A.S.*, 982 P.2d 1156, 1167-68 (Wash. 1999) ("We further hold a social worker is not disqualified as a matter of law from rendering an opinion as to the presence of a mental disorder in a person subject to a 14-day confinement, provided the social worker otherwise qualifies as an expert and the opinion meets the requirements of ER 702 and 703.").

¹⁷ The history of PAS is repeated in almost every article on the topic so I will not repeat it here. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 *FAM. L.Q.* 527, 550 (2001) ("PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research. PA, although more refined in its understanding of child-parent difficulties, entails intrusive, coercive, unsubstantiated remedies of its own.").

¹⁸ For an analysis of research on PAS, and its theoretical and methodological limitations, see Michael Saini, et al., *Empirical Studies of Alienation*, in *PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT* 434 (Kathryn Keuhnle & Leslie Drozd, eds. 2012) (Reviewing a total of 729 papers and 10 doctoral dissertations which met criteria, and concluding that "PA/PAS is not a diagnostic syndrome at this time but rather a cluster of commonly recognized symptoms; there is little empirically validated evidence about

deployment of PAS from conceptual framework or theory to “shock and awe” child custody science, presents an intriguing opportunity to explore this adaptive dynamic of licensure privilege.¹⁹ We shall begin, however, with a discussion of the role of forensic experts in family court before addressing PAS as an example of the transformation of conceptual frameworks or theoretical paradigms to a predictive and powerful “science” in family court.²⁰

cause, prognosis, and treatment”). One of the risks in this area of litigation is that there are rather uncomfortable roots that become masked or ignored with the passage of time. Historically situating science and theory is an important lesson because language or biases used in one era about a social problem may seem absurd or even dangerous to another generation. See Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100 (1998) (The creator of PAS rooted his thought experiment in the “identification of seven psychodynamic factors that result in children’s negative feelings and false allegations” as well as his view that children are “polymorphous perverse” and may exhibit a “striking degree of sadism” or “innate cruelty.” *Id.* at 102-104.)

¹⁹ There are other examples in child custody litigation of the variance between helpful theoretical models, taxonomies, or conceptual frameworks, and the transmutation of such concepts to research findings generalizable by experts to a family-system-in-litigation. See, e.g., William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. CT. REV. 192 (2000). From another discipline, this may be called the “Woozle Effect” drawn from Winnie-the-Pooh. See Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 PSYCHOL., PUB. POL’Y & L. 164, 166 (2014) (“A sociologist whose area of expertise was the research on domestic violence, Gelles (1980) was concerned about how this research was frequently misrepresented and misused by advocacy groups for their own political purposes. In particular, he was troubled because only those studies that supported a particular advocacy position—many of which were seriously flawed—were being presented as ‘the’ research evidence, while those studies refuting the position were being ignored. As a consequence, many false beliefs about domestic violence were perpetuated—beliefs Gelles (1980) referred to as woozles.”).

²⁰ The difference between theories and evidence reflects what the physical sciences have debated for decades: a “particular paradigm is neither right nor wrong, but merely reflects perspective, an aspect of reality that may prove more or less fruitful depending on circumstance—just a myth, though not really true, may contain allegorical insights that prove more or less fruitful depending upon circumstances.” PAUL DAVIES & JOHN GRIBBIN. THE MATTER MYTH: DRAMATIC DISCOVERIES THAT CHALLENGE OUR UNDERSTANDING OF PHYSICAL REALITY 9 (2007).

II. Fraternal Twins: Experts and Courts

At its core, an adversarial system with centuries of built-in assumptions about the means to truth through the probing examination and cross-examination of forensic witnesses has had serious implications for vulnerable populations in family court.²¹ Over the past four decades, the vast demographic changes in family systems through divorce, cohabitation, de facto parenting, child protection, foster care, interpersonal violence and abuse, juvenile and adult mass incarceration, substance abuse, mental health disorders, and poverty have embedded the judicial system in the lives of millions of Americans. The consequence to any society wanting to exercise autonomy and liberty, and now dependent upon judges and mental health experts to regularly label and divide children and family systems, is remarkably understudied.

In either case, whether rules of inclusion or exclusion are that of statistical validity and reliability, peer-reviewed general acceptance, qualitative rigor, or other threshold criteria for courtroom science is of little relevance to this argument. What does matter is that in the corporate/insurance tort universe that gave us *Daubert v. Merrell Dow Pharmaceutical, Inc.*²² and its progeny, state and federal courts can hold “fair fights” between experts whatever the threshold legal test and without much regard for cost.²³ Indeed, anyone seeking to collect an Alexandrian-size law and forensic library on one topic will find a rather daunting volume of such parsing in the legal and social science literature. But—and this “but” is a meaningful caveat—what if

²¹ In most family court matters, and many civil and criminal matters, there is no jury but just one judge who both decides the facts and applies the law, including the admissibility of expert testimony based upon factors which, though unique to each state, always implicate qualifications, credibility, weight, methodology, probativeness, and reliability. See Stanley L. Brodsky, Michael P. Griffin & Robert J. Cramer, *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*, 28 BEHAV. SCI. & L. 892 (2010).

²² 509 U.S. 579 (1993).

²³ Caring about cost or balancing risk/benefit for shareholders is a rather different analysis than deciding between legal fees or paying a mortgage or giving up hope for access to children. There are, of course, very wealthy individuals involved in family court litigation but policy regarding access to qualified experts or legal services should not be grounded in those who live a few standard deviations from the mean.

the subtle distinctions and non-subtle consequences of these rules correlate to harm when the spread in resources degrades the capacity of family court litigants, segregated within family law courthouses, to challenge privileged science-by-licensure?²⁴

This is not a complaint about “fairness” or “social justice,” but merely an observation.²⁵ In the outside realm, the distinction between levels of gate-keeping functions for trial judges is intellectually interesting and, in cases with millions of dollars at stake, may actually predict an outcome at trial. This is especially true in non-family court matters where there is often no actual trial as summary judgment, motions in limine, or interlocutory appeals follow a deluge of depositions and discovery. The need to pause over this observation occurs because the adversarial system has embedded this mythical dynamic of adversarial truth-revelation as its chimera,²⁶ equally applicable to all forms of civil and criminal litigation.²⁷

²⁴ For a very thought provoking article concerning power imbalances in child protection cases, see Paul Chill, *Burden of Proof Begone*, 42 FAM. CT. REV. 540 (2004).

²⁵ When teaching graduate students in social work, I emphasize two shorthand intellectual thought-experiments at the beginning of social welfare policy. The first is a Pareto Improvement. See *Pareto Improvement*, INVESTOR WORDS, http://www.investorwords.com/12231/Pareto_improvement.html (last visited Oct. 19, 2015) (“Action that benefits even a single person without harming anyone else. This is possible to implement by utilizing idle resources in the economy or by getting rid of deadweight losses that result in market failures.”). The second is the “veil of ignorance” drawn from JOHN RAWLS, *THEORY OF JUSTICE* (1971). Both conceptual frameworks have value for shaping social welfare policy theory and discussions.

²⁶ See *Chimera*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/chimera (last visited Oct. 19, 2015) (In Greek mythology, a fire-breathing female monster with a lion’s head, a goat’s body, and a serpent’s tail or a thing that is hoped or wished for but in fact is illusory or impossible to achieve).

²⁷ In perjury cases, the U.S. Supreme Court has championed the adversarial system as the best means to assure truth-detecting because it is the “responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.” *Bronston v. United States*, 409 U.S. 352, 358-59 (1973). In the context of expert witnesses, federal courts have made clear that the same “cautions” apply with particular force to expert witnesses such as a physician:

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In family law (and the daily arena of criminal law practice as well), organizational demand to process volume trumps the capacity of lawyers or judges to even begin to challenge expert evidence with any degree of rigor. This is not a criticism of all the honorable and ethical professionals who each day try with head and heart to help parents and children. The measure, however, is not whether all of us are trying hard enough, but whether we accept the reality that adversarial litigation and judicial decisions after trials are not an effective or efficient tool for families, professionals, or judges.²⁸

In this modern era of massive child custody conflict across demographic categories and developmental stages for children, experts and family courts share a common incubator: courts are “legally sanctioned fight clubs.”²⁹ Unlike other host environments in which mental health experts and lawyers participate, like prisons, hospitals, and schools, none have an embedded constitutional role for a judge in which he or she is designated to act as a referee when calling a punch or counter-punch as “fair” or “foul.” While controlling the fight with rules and voice, the judge may decide the outcome with the force and authority to punish or reward. In family courts, these fight clubs thereby generate a

“Unless the strict requirements governing perjury convictions developed by the common law and applied by California are carefully applied, the willingness of experts to assist factfinders with the specialized knowledge needed to decide many cases, see *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 . . . (1993), may atrophy.” *Chein v. Shumsky*, 373 F.3d 978, 980-81 (9th Cir. 2004). Given the trip-wire standard for competent counsel in death penalty cases, for example, this assertion expresses either an amused cynicism, a lack of reality, or different standards for the impoverished facing the death penalty as against the privileged who may face perjury charges.

²⁸ See Barbara Glesner Fines, *Fifty Years of Family Law Practice—The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIM. LAW. 391, 409 (2011) (“While the demographics and regulation of the legal profession have changed the practice of law for all attorneys, the changes family law attorneys have experienced in their practice have been some of the most dramatic of any sector of the legal profession.”); John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 431 (2011) (“The primary role of family courts has shifted from adjudication of disputes to proactive management of the family law-related problems of individuals subject to their jurisdiction.”).

²⁹ THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY THE LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* 50 (2004).

shifting and ever-undulating tension between efficiency (“get a large volume of cases done swiftly”) and justification (“this is a judicial opinion buttressed by data/science”).

The suggestion that expert evidence, pressed by these competing demands, is adequately tested by traditional notions of adversarial fair play in this peculiar environment is just that: a child-like myth separated from reality.³⁰ Underlying these external organizational tensions is an internal strain which should generate fierce debate: should the legal test for admissibility of forensic testimony from the psychological, psychiatric, and social work professions be the same as the physical sciences when resources are not equitably distributed and the reality, not myth, of the adversarial system is compromised by this imbalance?³¹ This question then reveals an uncomfortable corollary: if the current adversarial system cannot adequately and equitably (not equally) serve families without wealth or resources, should forensic experts voluntarily reveal the limits of research in each case to each side rather than rely upon the adversarial system to unravel such truths to a judge?³²

In the examples that follow (and this is a very incomplete list), theory or working hypotheses or conceptual frameworks may be disguised as science and then generalized to a parent or child on the ultimate issue in the case. For example, courts within the adversarial system struggle with a “science” of [pick one]:

³⁰ The “myth of the robe” or the “child-like myth” has many sources but the one I refer to is derived from the seminal book, JEROME FRANK, *LAW AND THE MODERN MIND* (1970).

³¹ See generally *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* (Robert M. Galatzer-Levy et al., eds. 2009); David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 *SCIENCE* 31 (July 1, 1988); Sol Gothard, *Power in the Court: The Social Worker as an Expert Witness*, 34 *SOC. WORK* 65 (1989).

³² See Bruch, *supra* note 17, at 540 (“In practice, PAS has provided litigational advantages to noncustodial parents with sufficient resources to hire attorneys and experts. It is possible that many attorneys and mental health professionals have simply seized on a new revenue source—a way to “do something for the father when he hires me,” as one practitioner puts it.”). Another author suggests that experts be required to provide an “objective summary of the scientific information relevant to the matter before the court.” Robert F. Kelly & Sarah H. Ramsey, *Standards for Social Science Amicus Briefs in Family and Child Law Cases*, 13 *J. GENDER, RACE & JUST.* 81, 84 (2009). But this suggestion, quite insightfully, runs contrary to the core of an adversarial system.

parent-child attachment, overnights for infants and pre-school children, current child abuse and neglect as predictive of future risk, domestic violence and supervised or unsupervised visitation, parent child reunification, substance abuse/mental health and functional parenting, the distortions of memory and programming, genetic or environmental factors, and the vast “human experiment” of the last forty years: shared, sole, or allocated parenting plans.

While it is true that debates about the so-called “hard sciences” and evidentiary rules of admissibility have their own controversies,³³ a trenchant difference exists between empirically-driven science with statistically reliable and valid methodology and other forms of social science that may be more about evolving moral or value-laden opinions of what “ought to be.”³⁴ The distinction may be expressed as follows: if modern technology was available to a physicist testifying in court 200,000 years ago to the movement of an atom, the movement of that atom would be the same for a scientist today whether or not the scientist was an atheist, closet phrenologist, Newtonian convert, or Freudian ideologue.

The distinction drawn by this brief thought-experiment, however, implicates an ever-adaptive matrix of theory, intuition, observation, feelings, anecdotal evidence, and scientific methodology, recognizable to philosophers and scientists for centuries, but which daily challenges and bedevils modern family courts. The trap is more than intellectual or hypothetical. To recognize an ideology-of-science, marshalled and transformed by lawyers under the artifice of direct and cross-examination to gain persuasive advantage in a trial, is itself no minor feat. What is disconcerting, from a legal and scientific standpoint, is when a conceptual framework or theory morphs into a science of explanation and predication, like the movement of a molecule.

³³ See Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CINN. L. REV. 867 (2004). For a contrasting example from the psychological testing field, see Richard Rogers et al., *Validation of the Millon Clinical Multiaxial Inventory for Axis II Disorders: Does It Meet the Daubert Standard*, 23 LAW & HUM. BEHAV. 425 (1999).

³⁴ See Elizabeth F. Loftus & John Monahan *Trial by Data: Psychological Research as Legal Evidence*, 35 AM. PSYCHOL. 270 (1980). D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002).

Even in the absence of a scientific methodology as described by Francis Bacon or Isaac Newton or Charles Darwin centuries ago,³⁵ it is conceded that there is a benefit to most conceptual frameworks in terms of better-organized judicial decision making in matters like parent relocation or efforts to alienate a parent.³⁶ More bluntly stated, this distinction between sciences often turns rather crudely on whether the social sciences inform judicial decision making by providing reliable and generalizable science to the specific case or whether ideological preferences are disguised as science-by-license.³⁷ After all, state family courts face profound challenges beyond just the volume of families who use courts for substituted parenting allocations or lack of funding. The struggle to assure rigor and reliability by forensic experts must occur in real-time without sacrificing the need for speedy resolutions because families in conflict may require the imposition of any structure as better than none.

This adversarial process renders the forensic role even more complex because modern American courts regularly, if unconsciously, engage two non-intertwined strands of expert testimony

³⁵ See Francisco J. Ayala, *Darwin and the Scientific Method*, 106 (Supp. 1) PROC. NAT'L ACAD. SCI. 10033 (2009).

³⁶ For examples of this debate with various nuances, see William G. Austin, *Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility on Children of Divorce*, 46 FAM. CT. REV. 137 (2008); William Bernet, et al., *Parental Alienation, DSM-V, and ICD-11*, 38 AM. J. FAM. THERAPY 76 (2010); Benjamin D. Garber, *Parental Alienation and the Dynamics of the Enmeshed Parent-Child Dyad: Adulthoodification, Parentification, and Infantilization*, 49 FAM. CT. REV. 322 (2011); M. Brianna Pepiton, et al., *Is Parental Alienation Disorder a Valid Concept? Not According to Scientific Evidence. A Review of Parental Alienation, DSM-5 and ICD-11 by William Bernet*, 21 J. CHILD SEXUAL ABUSE 244 (2012).

³⁷ Professor David Faigman has written numerous books and articles exploring this topic for many years. See DAVID FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* (2000); David Faigman, *Admissibility Regimes: The Opinion Rule and Other Oddities and Exceptions to Scientific Evidence, the Scientific Revolution, and Common Sense*, 36 SW. U.L. REV. 699 (2007); David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989). Leaving his arguments concerning specific theories or research aside, the translation of a theory into a science from which an expert could testify was a response to incredibly complex and emotional factual events in the 1970s and 1980s which then merged with societal and political attention to domestic violence, child abuse, and the enactment of new laws in the civil and criminal arenas.

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as applied to evidentiary rules of inclusion and exclusion. As one author reasoned in an excellent historical article:

Despite what so many participants in the legal sphere may have hoped, science is not in the business of producing incontestable certainty. Some matters may be taken as provisionally true, even probably true, but much of what is fought about in court will be outside the parameters of consensus. Moreover, when the consensus runs too deep, it may no longer be science at all, but dogma.³⁸

For the corporate, the powerful, the insured, and the wealthy, federal and state courts take quite seriously the role of gatekeeper and the sanctity of judicial prerogatives to act as arbiters when ranking the value of any sub-specialty of science. In child custody or child abuse and neglect matters, however, the poor and non-privileged, the mentally or physically disabled or disempowered, or those families who lack the resources to hire lawyers with specialized qualifications or rebuttal experts, the judiciaries' jealously-guarded realm of gatekeeper is, reluctantly for many state court judges, abdicated in favor of high-volume resolution or toss-it-up "weight" of the evidence.

Compared with state family courts, much of the civil docket for federal judges includes complex class action, civil rights, securities, product, or environmental litigation. In federal court, both parties are likely represented by law firms paid with insurance or other corporate resources (or contingent fee incentives for plaintiffs). Federal courts have time and resources for case management, pretrial motions concerning exclusionary and inclusionary evidentiary objections, and lengthier trials.³⁹ Within federal court litigation, adversarial traditions may thereby be vigorously exploited and the qualification and admissibility of ex-

³⁸ Jennifer Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 *VILL. L. REV.* 763, 799 (2007).

³⁹ See Adam R. Prescott, *On Removal Jurisdiction's Unanimous Consent Requirement*, 53 *WM. & MARY L. REV.* 235, 260 (2011) ("Justice Sandra Day O'Connor, who served as both a state and federal judge, has expressed what she believes are the reasons defendants prefer having their cases heard before federal judges: federal judges are often better compensated, and their positions are more prestigious; the life tenure of federal judges insulates them from the majoritarian pressure that democratically elected officials encounter; and federal judges are more amenable to the defendant's position in constitutional rights lawsuits.") (footnotes omitted).

pert testimony tested by sophisticated statistical and methodological tools and, subsequently, re-tested on appeal.⁴⁰

In family courts, emotionally and factually complex litigation often invokes, as a matter of practice, summary narratives and perspectives of parents and other lay witnesses even before the addition of expert witnesses. Although parents may otherwise employ expert witnesses if the family or court provides sufficient economic resources, the reality is that family court litigation rarely invokes chemistry or physics through forensics testimony so judges hear from experts whose qualifications and admission are routine or whose opinions are vaguely scientific.⁴¹ In those circumstances, experts hired in child custody or abuse litigation may extrapolate, under oath, that testing or observation of an individual, often normed with homogenous samples, graduate school students, or measured within clinical or institutional environments, are determinative of thoughts or behaviors of an individual or family system writhing within the forces of an adversarial host environment.⁴²

⁴⁰ See, e.g., *Estate of Barabin v. Asten Johnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (“The district court first excluded Mr. Cohen’s testimony based on his ‘dubious credentials and lack of expertise.’ The district court’s only explanation for reversing its decision, without a Daubert hearing or findings, was, ‘I think the plaintiffs did a much better job of presenting to me the full factual basis behind Mr. Cohen testifying and his testimony in other cases.’ Absent from the explanation is any indication that the district court assessed, or made findings regarding, the scientific validity or methodology of Mr. Cohen’s proposed testimony. Therefore, the district court failed to assume its role as gatekeeper with respect to Mr. Cohen’s testimony.”); *In re Chocolate Confectionary Antitrust Litigation*, 289 F.R.D. 200, 208 (M.D. Pa. 2012) (“Despite the paucity of relevant precedent in the Third Circuit and the discordant views percolating in the circuits, the court finds that a thorough Daubert analysis is appropriate at the class certification stage of this MDL in light of the court’s responsibility to apply a ‘rigorous analysis’ to determine if the putative class has satisfied the requirements of Rule 23.”).

⁴¹ Even in the forensic science of fingerprints, tool marks, and shoeprints there is debate about the language of categorical conclusions (match or no-match) as against the language of probabilities and statistics. See William C. Thompson & Eryn J. Newman, *Lay Understanding of Forensic Statistics: Evaluation of Random Match Probabilities, Likelihood Ratios, and Verbal Equivalents*, 39 *LAW & HUM. BEHAV.* 332 (2015).

⁴² For a cogent analysis of psychological testing or evaluations in child custody, see Jelena Zumbach & Ute Koglin, *Psychological Evaluations in Family Law Proceedings: A Systematic Review of the Contemporary Literature*, 46

In family courts, therefore, the features or taxonomy of PAS may be quite proper for use as a conceptual framework for a guardian ad litem, forensic expert, or lawyers and judges as a means to guide decisions by categorizing and weighing admissible evidence within the context of those features.⁴³ What becomes problematic is when *features*, which are descriptive of symptoms and behaviors, become a syndrome or diagnosis which *predicts* a particular *outcome* in a child custody or abuse and neglect case.⁴⁴

III. PAS Is a Legit Conceptual Framework?

As Victor Schwartz and Cary Silverman suggested, the Supreme Court “deputized trial court judges”⁴⁵ to determine reliability, based upon a nonexclusive list of key factors, before admitting expert testimony, including: (1) whether the theory or

PROF. PSYCHOL.: RES. & PRAC. 221, 221 (2015) (“The growing number of professional custody evaluators in this field, along with an increasing number of ethics complaints and malpractice suits, has led to an increasing examination of practice standards and evaluation reports.”); *see also* Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005).

⁴³ *See* Richard A. Warshak, *Ten Parental Alienation Fallacies that Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 235 (2015) (“This article identifies 10 prevalent and strongly held assumptions and myths about parental alienation found in reports by therapists, custody evaluators, and child representatives (such as guardians ad litem), in case law, and in professional articles. Ideas were determined to be fallacies if they are contradicted by the weight of empirical research, by specific case outcomes, or by the author’s more than three decades of experience evaluating, treating, and consulting on cases with parental alienation claims.”).

⁴⁴ *See* Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757 (2005); Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. AM. ACAD. PSYCHIATRY & L. ONLINE 158 (2003). In *Parental Alignments*, Dr. Johnston sampled 215 children drawn from an archival database of divorced families within three San Francisco counties. The findings suggested a range of positive and negative responses to parental conflict with rejection of a parent suggesting multiple determinants. A quick search on Google Scholar found that the article has been cited 109 times. The limitations and aging of this research reinforces the need for more research which may account for the variables or determinants cited by the author.

⁴⁵ Schwartz & Silverman, *supra* note 3, at 218.

technique can be and has been tested, (2) whether it has been subjected to peer review and publication, (3) whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation,” and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community.”⁴⁶

In child custody litigation, the range of theories or evidence-based practices drawn from clinical environments and then extrapolated to adversarial environments includes parent-child attachment, the propriety of overnights for young children, and the implications of domestic violence on parenting plans.⁴⁷ Whether any of these criteria actually applies as predictive science in family courts is an intriguing question. As a threshold matter, this discussion would matter little, if at all, but for the fact that privileged forensic knowledge proffered as science, expressed and admitted in court, undoubtedly influences the trial outcome.⁴⁸

This distinction does matter, however, because the consequences of science-by-credential has generated a plausible dilution of family autonomy, created dependency for judicial opinions, and increased the risk that children are exposed to more chronic and implacable litigation. After all, vulnerable individuals and disadvantaged groups (let alone children) more often than not lack the will or knowledge, in the daily grind of survival, to continue to fight back much less challenge expert opinions about them. It is precisely this disparity in power that places a

⁴⁶ *Id.* at 222.

⁴⁷ See James G. Byrne, et al., *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 115 (2005); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2004).

⁴⁸ The use and misuse of attachment theory, for example, has led to a kerfuffle among a group of researchers in various journals. The important point is that politics and child custody research are not left at the door of the laboratory. In family law practice, the hazards of misusing social science for adversarial advantage requires even more scrutiny. For a cogent analysis of this dilemma, see Cashmore & Parkinson, *supra* note 8 at 248 (“The onus then is a joint one-on social science researchers to communicate their methodologies and findings in a clear and transparent way, on expert witnesses to be mindful of the application and limitations of the findings for the case at hand, and on judges to understand what questions to ask and how to assess the reliability and relevance of social science research.”).

special ethical and legal burden upon the courts and interdisciplinary professionals.

Now this does not mean that research has not attempted to fit PAS, with emphasis on the S, into a procrustean box from the perspective of the harm that such behavior causes—and it does.⁴⁹ In qualitative research, in particular, the conceptual framework guides the research lens of the researcher so accepting PAS as a conceptual framework is certainly a permissible approach, much like the use of phenomenology or grounded theory.⁵⁰ The threshold difficulty begins with the term “syndrome,” which has been used in Western medicine since 1541.⁵¹ Medical dictionaries define a syndrome as “[a] set of symptoms which occur together” or “several manifestations, no one of which is specific” that tend to occur together.⁵² Indeed, the term is derived from the Greek word as a literal translation into the word “concurrency,” or a running together but the term itself is “defined somewhat loosely in medicine and psychology.”⁵³

From its inception in the 1980s, this juxtaposition of alienation (itself a word that implicates malice aforethought) with the term “syndrome” was generally defined as “a conscious or unconscious attempt by one parent to behave in a manner that undermines the child or children’s relationship with the other parent (e.g., target parent)” with an outcome that resulted from “two main factors: programming or brainwashing of the child by

⁴⁹ See Amy J.L. Baker, *The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study*, 33 *AM. J. FAM. THERAPY* 289 (2005); Amy J.L. Baker & Douglas C. Damall, *A Construct Study of the Eight Symptoms of Severe Parental Alienation Syndrome: A Survey of Parental Experiences*, 47 *J. DIVORCE & REMARRIAGE* 55 (2007); Naomi Ben-Ami & Amy J.L. Baker, *The Long-Term Correlates of Childhood Exposure to Parental Alienation on Adult Self-Sufficiency and Well-Being*, 40 *AM. J. FAM. THERAPY* 169 (2012). A careful view of this limited “research” reveals a rather odd propensity to appear in the same journal by some clever authors.

⁵⁰ JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 44 (2012) (“Qualitative research begins with assumptions and the use of interpretive/theoretical frameworks that inform the study of research problems addressing the meaning individuals or groups ascribe to a social or human problem.”).

⁵¹ John E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 *PAC. L. J.* 1449 (1992).

⁵² *Id.* at 1450.

⁵³ *Id.* at 1451.

one parent against the other parent and the child's vilification of the target parent."⁵⁴ Intrinsic to the PAS framework in the 1980s was a means to try to shift allegations of domestic violence from accuser to accused,⁵⁵ amidst strains of the old-Munchhausen-by-proxy as each evolved on a semi-parallel plane.⁵⁶

Nevertheless, original employment of the term "syndrome" had the important advantage of encouraging public and judicial belief in a utilitarian or functional short-hand science-for-the-court. It really mattered that the word "syndrome" viscerally and powerfully meant to courts and lawyers, as well as many in the social work and psychological and psychiatric professions, something more than just *mere* opinion but *opinion with the veneer of science*. And this happened extremely fast by scientific standards. Few people caught in the day-to-day world of child custody litigation know the etymology or the rigor required for scientific methodology before generalizing data to a vulnerable population existing in judicial environments.

⁵⁴ James N. Bow et al., *Examining Parental Alienation in Child Custody Cases: A Survey of Mental Health and Legal Professionals*, 37 AM. J. FAM. THERAPY 127, 128-29 (2009); see also Lenore E. Walker et al., *A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court*, 1 J. CHILD CUSTODY 47 (2004).

⁵⁵ See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657 (2002); Marie Mele et al., *Men Who Seek Protection Orders Against Female Intimate Partners*, 2 PARTNER ABUSE 61 (2011); David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J. L. & PUB. POL'Y 83 (2008).

⁵⁶ See Lisa Hains Barker & Robert J. Howell, *Munchausen Syndrome by Proxy in False Allegations of Child Sexual Abuse: Legal Implications*, 22 J. AM. ACAD. PSYCHIATRY & L. ONLINE 499, 499 (1994) ("Gardner has written extensively about sex abuse issues and claimed that allegations of sexual abuse are one of women's most powerful weapons in custody disputes."); Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome (Part I)*, 15 AM. J. FORENSIC PSYCHOL. 23 (1997) ("In Gardner's experience, born out by the clinical and research literature reviewed below, mothers are more frequently found to engage in PAS, which is likened by Clawar and Rivlin to psychological kidnapping."). What should not be lost is that Gardner and PAS is "derived from a theory that considers pedophilia and incest as benign, non-abusive conduct, and that misses the advocacy positions of pro-pedophilia activists." Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILDREN'S LEGAL RIGHTS J. 1, 2 (2006).

There is ample literature concerning the argument that the theory of PAS has morphed into *predicative* child custody science in court; to the point of marketing saturation if not science. With the passage of time, however, dropping the s-word from the vernacular was prudent when peer-reviewed research appeared too amorphous to sustain the original. There are proponents who still argue that sufficient research supports more than a conceptual framework or hypotheses but suggests an actual science generalizable to any parent caught in child custody litigation.⁵⁷ The “existence of the phenomenon” and its harm to children and a parent is a fair extrapolation of decades of research and skilled observation which may even support the “general acceptance” of interdisciplinary professionals by survey or as implied in the DSM-5.⁵⁸ The intellectual pause occurs when sound feeling becomes scientifically objective data to which a court can apply *to the legal test* established by state legislatures for custody determinations.

To be clear. If there is a scientific methodology that supports a “syndrome” as defined for five hundred years then the *absence* of such factors could operate to establish that the syndrome is *not* present? Like a test for cancer, the microscope should reveal factors consistent or inconsistent with clinical diagnosis and

⁵⁷ See Bernet, et al., *supra* note 36, at 81 (“We believe there is almost uniform belief in the international mental health community that parental alienation is a real phenomenon that affects the life-long mental health of thousands of children and likewise the mental health of their families. Parental alienation affects the quality of life of those who are exposed to it. We believe there is enough research regarding validity, reliability, and prevalence to support the adoption of parental alienation as a psychiatric diagnosis.”); *but see* Normand Carrey, *Coasting to DSM-5-Parental Alienation Syndrome and Child Psychiatric Syndromes: We Are What and Who We Define*, 20 J. CAN. ACAD. CHILD & ADOLESCENT PSYCHIATRY 163,163 (2011) (“Parental Alienation Syndrome (PAS) is a good example of a syndrome trying to sneak in while everyone’s attention is diverted elsewhere. Obviously you sense my bias—but there is serious lobbying going on to include it in DSM-5.”).

⁵⁸ Richard Warshak, *Parental Alienation: Overview, Management, Intervention, and Practice Tips*, 28 J. AM. ACAD. MATRIM. LAW. 181, 185 (2015) (“The general acceptance of the concept of unreasonable rejection of a parent as indicated in surveys and in the DSM-5 makes it difficult for professionals to maintain credibility while denying the existence of the phenomenon.”).

thereby conform or negate the diagnostic opinion.⁵⁹ No one is suggesting that clinical insights and skills are less important to the description of behaviors inimical to the best interest of a child or harmful to a parent. Nevertheless, any discussion of this point suggests a paradigm in which the existence of a “syndrome” is factually argued by *ipse dixit* logic and licensure status as forensic truth proffered to a judge.

This output contrasts with the combination, adaptive and tested repeatedly, of clinical skills and scientific methodology which is then (and only then) proffered to a court as relevant and reliable in child custody litigation. In many respects, this is metaphorically like observing the magnetism of two positive poles which can be forced together (to a point) but which will eventually be unable to co-exist in the same space once the external pressure on one or both sides is released. Magnets will respond differently in 100 degrees Celsius than in -100 degrees Celsius and differently again in a vacuum or salt water. The difference is that we can replicate the magnetic tension within different environments (mountain peaks or space or ocean floor) and temperatures, record the results, and then *predict* the next experiment by hypothesizing the influence of these variables.⁶⁰

What matters is that the human sciences invoke even more complex experimental methods because no two past human sto-

⁵⁹ The medical profession critically debates this point as a function of ethical practice and evidence-informed medicine. See Kristi Malterud, *The Art and Science of Clinical Knowledge: Evidence Beyond Measures and Numbers*, 358 LANCET 399, 399 (2001) (“Qualitative and quantitative strategies should be thought of as being complementary rather than conflicting. Medical researchers need a broad range of research skills to choose the path of inquiry that will most adequately provide valid accounts of the actual study field. No methodology can in itself warrant scientific quality—the crucial condition is how the process of knowledge aggregation and organisation is handled and presented.”); John Saunders, *The Practice of Clinical Medicine as an Art and as a Science*, 26 MED. HUMANITIES 18, 18 (2000) (“Ockham’s razor tells us to go for the simplest unifying hypothesis in diagnosing the patient’s disease; Sutton’s law (based on the bank robber who told the judge he robbed banks because that’s where the money is), tells us to go for the commonest explanation. Perhaps we could subsume those two principles into the structures of science. Certainly simplicity or elegance have long been recognised as important features of science.”).

⁶⁰ See Oingsong Liu, et al., *Environmental Magnetism: Principles and Applications*, 50 REV. GEOPHYSICS (2012), <http://onlinelibrary.wiley.com/doi/10.1029/2012RG000393/full>.

ries or narratives are the same, so causation connects facts to outcomes in non-linear fashion. Moreover, the measure of those behaviors at a point in time is subject to change at all other points in time, so a snapshot is the best that social science can hope for. This does not mean that research should avoid conceptual frameworks or hypotheses because intuition and guesswork by fact finders should be reduced in a manner that reduces error rates or improves interventions. But as scholars frequently remind readers: “logic of causality is fundamental to any study of factors that act to substantially increase the probability of an outcome. This kind of thinking is applied in disease-based epidemiologic studies. For example, what causes coronary heart disease?”⁶¹

This may seem like a statement of the obvious (and it is sort of) but you may find little reference in the PAS literature to the influence of confounding,⁶² mediating,⁶³ or moderating⁶⁴ variables in quantitative research design, for example. What *causes* (in both the legal and psychological sense) PAS, differentiates it from other forms of parental conflict, and how to then apply it to fact patterns when an expert is acting forensically ignores these intervening variables at some risk to ethical and scientific du-

⁶¹ Adrian Bauman, et al., *Toward a Better Understanding of the Influences on Physical Activity: The Role of Determinants, Correlates, Causal Variables, Mediators, Moderators, and Confounders*, 23 AM. J. PREVENTIVE MED, 5, 6 (2002).

⁶² See *id.* at 7 (“A confounder is a predictor of the outcome, but is also associated with exposure. For example, age may confound the relationship between a program and its outcome. Age may be related to the outcome—older people may be less likely to be physically active and thus age is associated with exposure—as older people may be less likely to participate in a program. The confounder will influence the observed association between program and outcomes and distort the true magnitude of effects.”).

⁶³ See *id.* (“A mediator, or intervening causal variable, is on the causal pathway between exposure to the intervention . . . and program effects or outcomes.”).

⁶⁴ See *id.* (“Sometimes the strength of the relationship between a program and outcomes varies according to a third variable. This third variable is known as an effect modifier (or moderator). This is analogous to the concept of statistical interaction, with the association A3C varying across levels of the moderator, B.”).

ties.⁶⁵ The fact these thoughts and behaviors are occurring within an adversarial environment during which lawyers and judges are ensconced in their professional roles lessens confidence that dependent and independent variables, much less intervening variables, are accurately accounting for an adaptive and iterative matrix of parental behaviors and thoughts.⁶⁶

⁶⁵ There is some research about PAS and therapists and evaluators but not much in the United States concerning the consequences to children. See Amy J.L. Baker, *Knowledge and Attitudes about the Parental Alienation Syndrome: A Survey of Custody Evaluators*, 35 AM. J. FAM. THERAPY 1, 3 (2007) (“The purpose of the current study was to determine the extent to which this lack of consensus was also reflected in the daily practice of the professionals charged with making decisions directly affected by PAS: child custody evaluators. Too little is known about whether they endorse the concept, what measures, if any, they use to assess it, and correlates of their assessment conclusions.”); Carlos A. Rueda, *An Inter-rater Reliability Study of Parental Alienation Syndrome*, 32 AM. J. FAM. THERAPY 391, 393 (2004) (“The scope of the problem is immense compared with the resources available to accurately quantify the magnitude of this phenomenon.”). But see Junco López, et al., *Parental Alienation Gradient: Strategies for a Syndrome*, 42 AM. J. FAM. THERAPY 217 (2014) (finding differences between custody-holding men and women on the use of alienation).

⁶⁶ See, e.g., *Ex parte S.C.*, 29 So. 3d 903 (Ala. Civ. App. 2009) (“Following the entry of that order, Summerlin referred the child to Dr. Daniel Koch, a forensic psychologist, who Summerlin described as an ‘expert’ in parental alienation syndrome. The child was evaluated by Dr. Koch at some point in late November 2008. However, the mother refused to allow the child to meet with Dr. Frederick based on a concern expressed by Summerlin that it would violate the American Psychological Association Guidelines of Ethical Standards and Principles for the child to receive treatment by Dr. Frederick while she was being counseled by Summerlin.”); *Oates v. Oates*, 377 S.W.3d 394 (Ark. Ct. App. 2010) (“In her final point on appeal, Ms. Oates contends that Dr. Deyoub’s testimony should have been excluded because his opinions were based on the widely discredited psychological theory of Parental Alienation Syndrome (PAS). Although we appreciate the voluminous amount of research and argument explaining why this theory has been discredited and should not be used in Arkansas courts, we hold that the issue is not before us in this case.”); *In re Jaime S.*, 994 A.2d 233 (Conn. App. Ct. 2010) (“The court qualified Frazer as an expert in the field of forensic psychology, custody evaluations and parental alienation. Frazer met with the child once, outside the presence of the mother or father. Frazer defined parental alienation ‘as a circumstance where one parent portrays the other parent in a negative light, and the child takes note of such portrayal. The child has less or no contact with the alienated parent based on the perception put forth by the other parent.’”); *Beyer v. Beyer*, 428 S.W.3d 59 (Tenn. Ct. App. 2013) (“During one visit while [Father]

What also matters is that PAS reveals a much different and deeper point of concern about the admixture of social-science-in-family-courts. What happens, for example, when an allegation of interpersonal violence is mixed with PAS as an affirmative defense in which the factual resolution of the allegation and the factual resolution of the assertion of PAS require one to be found true and the other false? In “such cases, non-offending parents can be placed in an impossible bind. If they do not object to unsupervised contact between a violent parent and the child, they are seen as failing to protect the child. If they do raise objections, they may be accused of alienation.”⁶⁷ PAS thereby represented a complex intersection of: (1) anecdotal expert observation and feelings about how *a* parent may treat the other when fighting over the custody of a child in court and (2) the *hypothesis* that there is *a* set of reliable and valid factors *derived from data* which may be replicated and propagated in child custody litigation.⁶⁸

If such knowledge was shared among professional disciplines, the internal vice grip generated by purposeful use of the word “syndrome” either would not have occurred or would not have otherwise mattered. Nevertheless, choice of language by proponents and their disciples was purposeful and really does matter as a lesson in the desperation of courts to accept and find scientific solutions to combat parenting choices that are frustrating and discouraging.⁶⁹ Yet that is not enough of a point because

was still living in Texas, [Father] dragged the parties’ middle child across the floor and locked her in a closet and later gave her a written article on parental alienation syndrome.”); *In re Termination of Parental Rights to James C.P.*, 719 N.W.2d 800 (Wis. Ct. App. 2006) (“Michael’s arguments that he was prejudiced by counsel’s performance are entirely, and admittedly, speculative. For example, Michael argues that if trial counsel ‘had looked into getting an expert in a timely fashion without relying on her client to advise her, she would have been able to develop a defense based on parental alienation.’”).

⁶⁷ Patricia Horn & Betsy McAlister Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions*, 57 JUV. & FAM. CT. J. 51, 56 (2006).

⁶⁸ *See id.* (“[PAS] has been attacked as lacking empirical support and peer review, and as being based solely in the author’s anecdotal clinical experience and, as such, not meeting the standard for scientific evidence established by the Courts in *Frye v. U.S.*, *Daubert v. Merrell Dow Pharmaceuticals*, and *Kumho Tire v. Carmichael.*”) (citations omitted).

⁶⁹ This author describes a theme applicable to the courts utilizing social science research. *See* Frank J. Landy, *Stamp Collecting Versus Science: Valida-*

PAS will have another variation soon enough as some other licensed or well-resumed expert publishes a useful tool for the courts. Thus, it is important to begin the process of thinking more carefully about forensic science transformed and translated to judicial shorthand in family courts. Science-by-crisis is not a sound form of public policy. So the question left to consider is what next?

IV. A Somewhat Lengthy Conclusion

For many decades in the United States, the judiciary has embedded social science experiments in judicial decision making as a function of policy and practice.⁷⁰ For reasons often related to the modern expectations of the *polis* and the shifting and adaptive demographics of family systems, modern child custody cases often invoke fierce competition between parental figures and the judicial systems' duty to speedily resolve litigation and protect the best interests of children as *parens patriae*, including sensitiv-

tion as Hypothesis Testing, 41 AM. PSYCHOL. 1183, 1191 (1986) ("If psychologists continue to accept the tripartite division of validation models suggested in the Uniform Guidelines, they will become pitiful giants wandering aimlessly on a landscape being inexorably devastated by those with little interest in or understanding of human behavior and its prediction. By virtue of education, experience and research, psychologists are well prepared to render expert opinion about validity designs and inferences based on test scores. The stamp collectors would mock and limit that right and responsibility.").

⁷⁰ For those who may wonder how much has changed, just chose a label and substitute in these sentences. See William J. Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999, 1013 (1955) ("The answer, it seems to this writer, is that if the courts become convinced that definite personality traits, such as those generally recognized in sex deviates and homosexuals, are developed, isolated, and classified by medical science in regard to other types of crimes, then such evidence should be admitted."); William L. Foster, *Expert Testimony, Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169, 171 (1897) ("It is not unnatural that a man of strong conviction (at the same time honest and unpurchaseable) should become the earnest advocate of his theory, and the zealous assistant of the attorney in preparing, and to some extent conducting his case in court; and the attorney does well to secure his testimony and service (and would be negligent: and wanting in fidelity to his client if he did not) by a suitable recognition of his value to him and his cause; and I agree with Professor Himes that there is no rule of ethics that should cause the witness to refuse the reward of his labor that would not apply equally to the attorney, so long as the testimony on the witness stand is without conscious untruth.").

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ity to gender preferences, culture, race, and socio-economic status. The need for forensic experts is, as noted, a function of trying to avoid random or “gut” outcomes while buttressing fact finding with some modicum of objective scientific processes. Some of the public may want rationales for court decisions making built on something more akin to what is seen on CSI or reality television than the more unpleasant truth that there is less science than informed estimation in a custody case.⁷¹

By itself, child custody cases are complex enough. Yet too many forms of parental conflict are mixed with legitimate or enhanced accusations of interpersonal or domestic violence or malfeasance toward a partner or child.⁷² And it is these accusations that invoke the values of parents (even if that is consciously unknown to each parent), revealed as heuristics, spite, malfeasance, cognitive distortions, or emotional flooding, and that is even before implicating and weaving the values of “custody” science into judicial decision-making.⁷³ Moreover, a growing percentage of child custody cases involve self-represented litigants, with fewer lawyers hired to assist with pretrial and trial practices.⁷⁴

⁷¹ See Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050 (2006). This citation was suggested by Professor Nancy Levit, whose editing of my drafts, as well as the papers of other authors in this Journal for so many years, is an extraordinarily generous gift to the authors and the *AAML Journal*. We are very fortunate to have her insights and legal scholarship; though how Professor Levit churns out her edits with such speed and precision is a mystery. Nancy denies any superpowers, but I remain skeptical but grateful.

⁷² In this Journal issue, readers will find articles by John Hamel and Nada Yorke which provide important review of scholarly discussion for practitioners. One ongoing challenge for the legal universe is trying to create a safe harbor for critical, intelligent policy discussion disconnected from the tendency today to attack character and motive.

⁷³ In an earlier article I argued, and still believe, that there are models drawn from behavioral economics and social psychology that may more realistically and accurately identify and predict chronic conflict than use of personality theories. See Dana E. Prescott, *Judicial Decision Making, Personality Theory, and Child Custody Conflict: Can Heuristics Better Predict a Difference Between Parents Who Do and Those Who Don't*, 11 *WHITTIER J. CHILD. & FAM. ADVOC.* 185 (2011).

⁷⁴ See Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 *J. NAT'L ASS'N ADMIN. L. JUDICIARY* 97 (2007); Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 *J.L. & FAM. STUD.* 57 (2010).

This means that even the filters that lawyers apply to assist clients to creatively resolve disputes, blunt strategies which may backfire in court, or sharpen the relevance of evidence, are absent and, rather dangerously, individual and organizational values may trump the effective use of science.

As Douglas Weed noted, “values” are vital and powerful players in scientific inquiry at both the theoretical and practical levels.”⁷⁵ This means as well that gender, cultural, racial, or socio-economic differences may be marginalized by a “prevailing orthodoxy.”⁷⁶ The conundrum occurs when the orthodoxy of science is confused with values and judicial decision making is premised on the orthodoxy of values disguised as science. No one would really want to drive across a bridge or fly in an airplane based upon the assumption that knowing what *may* happen is within the parameters of a test of significance (a *p*-value) rather than first testing metals under laboratory conditions or replicating the flight of a plane in a wind-tunnel given thrust, wing spans, and environmental conditions.

Jacob Cohen⁷⁷ made this point within the field of psychology: “We appeal to inductive logic to move from the particular results in hand to a theoretically useful generalization. As I have noted, we have a body of statistical techniques that, used intelligently, can facilitate our efforts. But given the problems of statistical induction, we must finally rely, as have the older sciences, on replication.”⁷⁸ Nevertheless, “good theories and intelligent interpretation advance a discipline more than rigid methodological orthodoxy.”⁷⁹ Of course, rigidity (or ideology or hegemony) is different than interpreting the anecdotal, and even rationally observable, as scientific replication.

Distinctions between empirically-based faith disguised as syndromes and science may be an acceptable and necessary

⁷⁵ Douglas L. Weed, *The Nature and Necessity of Scientific Judgment*, 15 J.L. & POL’Y 135, 135 (2007).

⁷⁶ Michael Preston-Shoot, Gwyneth Roberts, & Stuart Vernon, *Values in Social Work Law: Strained Relations or Sustaining Relationships?*, 23 J. SOC. WELFARE & FAM. L. 1, 1 (2001).

⁷⁷ Jacob Cohen, *The Earth Is Round (p<.05)*, 49 AM. PSYCHOL. 997 (1994).

⁷⁸ *Id.* at 1002.

⁷⁹ Leland Wilkinson, *Statistical Methods in Psychology Journals: Guidelines and Explanations*, 54 AM. PSYCHOL. 594, 608 (1999).

trade-off in a modern policy universe that implicates speed and outcomes by volume. Indeed, a fair argument could be made that the potential demise of the social sciences in court may, in fact, occur because disguising moral judgments as science in the courtroom so as to divide “good” and “bad” becomes no longer acceptable. The relevance of the term “syndrome” is particularly acute in this sense if a syndrome is retrofitted as liturgy because the syndrome fits the values and needs of the institution.

Whether these forms of knowledge are privileged, authoritative, or evidence-informed is of no small consequence to those caught in the legal system, many of whom are isolated and vulnerable because of poverty, race, literacy, education, culture, language, psychological impairments, physical disabilities, or other barriers. Although these labels may seem abstract or obvious to those who hold the privilege, to consumers the meaning is tangible and the consequences often irreversible. A natural side effect of any professional discipline that seeks a special status from the state is to define itself as part of a privileged caste with unique insights.

The risk to the public, and particularly the vulnerable, occurs when the shift, often subtle or incremental, moves from a set of shared values and societal objectives to an ideology in which the wants of the discipline blend with the needs of government institutions. This symbiosis between social science, forensic experts, and the judiciary did not occur by historical accident. Indeed, social science has the tendency to “foster competitive theories that purport to explain the behavior of the same phenomena” with the result that each side becomes an “evangelist” for “warring grand concepts” that lack empirical validation.⁸⁰ The problem of rigor, however, arises precisely because *medical* disease models using the language of syndromes, and grounded in the most prevalent example, the *Diagnostic and Statistical Manual [DSM]* (all versions), does not fit well within a judicial environment that teaches nothing about how to critically read research with even a rudimentary knowledge of biology, neuroscience, chemistry, epidemiology, or *p* values.⁸¹

⁸⁰ JOHN W. SUTHERLAND, *A GENERAL SYSTEMS PHILOSOPHY FOR THE SOCIAL AND BEHAVIORAL SCIENCES* 4 (1973).

⁸¹ See Myers S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 *YALE L.J.* 1345, 1349

Fossilized knowledge may live as myth or cherished beliefs because change is rarely easy for closed groups acting within a shared organizational and professional culture. Any researcher seeking legitimate scientific proof must first describe the traits and patterns that are emergent in conversation with those who experience the phenomena because, unlike the predictable activities of atoms or subatomic particles or magnets acting without ill-motivation, social science views the forces of human behavior in real time and not just the forces of nature.

While this point may seem obvious, research pertaining to personality tests, attachment, the causes and prediction of aggression and violence, and the functional capacity to parent, among selective examples, may have little connection to quantitative or qualitative research outcomes when the person under observation and judgment is *subject to the compression of litigation*. The point is that to *forensically* translate knowledge to courts implicates the ethical duty to assure that measures and methodology are generalizable outside the clinic or the laboratory, as well as across cultures, race, socio-economic status, and other forms of diversity or non-dominant populations. After all, forensic opinions are not merely abstract events but have tangible consequences when expressed in forums with the power and authority to engage labeling and sanctions.

Busy judges and busy lawyers and busy experts in state family court rarely have sufficient time, motivation, or money to argue standards for admitting expert evidence. Indeed, the juridical norm for family courts, including child protection and restraining orders, too often becomes a staged play in which efficiency and volume substitutes for substance. Thus, any check on expert authority will have to come from the courts and the professionals

(1947) ("The debate about how much lawyers should be taught about science and policy is not new but, rather surprising, resistance in the academy has prevented any significant curriculum changes in terms of this form of rigor and empirical knowledge-base. The time has come for legal realism to yield predominant emphasis to policy science, in the world community and all its constituent communities. It is time for corrosive analysis and inspired destruction to be supplemented by purposeful, unremitting efforts to apply the best existing scientific knowledge to solving the policy problems of all our communities.""). For a more current argument, see Richard A. Goodman, et al. *Other Branches of Science are Necessary to Form a Lawyer: Teaching Public Health Law in Law School*, 30 J. L., MED. & ETHICS 298 (2002).

before personal privilege or heuristic decision making is substituted for expert opinion. Courts have repeatedly debated this threshold requirement for inclusion or exclusion because there is a consensus: expert testimony, when admitted by the court by finding the witness an expert, is a powerful predictor of trial outcomes because the fact finder may give more weight to the credentials than actual reliability or validity of the scientific methodology.⁸²

Sofia Adroque and Alan Ratliff aptly note that methodologies “that are generally accepted in practice in the real world are not always accepted in court. Further, methodologies interchangeable in the real world are often more strictly separated by case law.”⁸³ At the level of methodology, the question is not so tactfully argued: what is “real” science? What “proof” is required to establish scientific fact in court versus in the laboratory? Is it the certainty of the sun rising in the East and setting in the West or the physical probability that a car moving at 60 mph will require x feet to stop after the driver hits the brakes under certain weather conditions? Is it the statistical probability that recidivism decreases for men after age forty or that children who are raised by parents of substance abusers have a greater risk of substance abuse, marital failure, and lower educational achievement? These types of questions have been entertained by courts with varying degrees of frustration and consistency.

⁸² There is extensive research concerning the influence of experts on jurors but less so concerning bench trials; much less in child custody cases. See Carol Krafka, et al., *Judge and Attorney Experiences, Practices, and Concerns regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL., PUBLIC POL’Y, & L. 309, 302 (2002) (“Relying on measures such as the frequency of key words mentioned or the number of words devoted to discussion of a particular issue, these studies draw inferences about the factors influencing judges’ admissibility decisions, judges’ comprehension of Daubert criteria, and the differential application of Daubert to scientific and technical evidence in various legal contexts.”); Daniel C. Murrie, et al., *Diagnostic Labeling in Juvenile Court: How Do Descriptions of Psychopathy and Conduct Disorder Influence Judges?*, 36 J. CLINICAL CHILD & ADOLES. PSYCHOL. 228 (2007) (Study examined the influence of diagnostic criteria and diagnostic labels for psychopathy or conduct disorder on judicial decisions.).

⁸³ Sofia Adroque & Alan Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts*, 47 S. TEX. L. REV. 881, 900 (2005).

What has made this expert-by-credential issue so challenging is that this series of Supreme Court cases inverts the assumption of experts as honest brokers of science to one “influenced by the social, economic, and political situation of the expert and the expert communities.”⁸⁴ Judges must, of course, render judgments in one case and move to another dozens of times a day. As described above, if great care is not practiced the exchange of information between forensic expert and organizational authority may congratulate those who are privileged and blame those who are not.

Yet none of the scientific methodologies or theories offered in family court are value-free. Despite those who argue for some pure form of science, whether falsifiability or strict positivism (or neo-Luddism as Jacques Chevalier and Daniel Buckles amusingly write) the study of humans within the forces of courts is a process of “expertocracy.”⁸⁵ The challenge is recognizing when expertocracy is a matter of licensure or resume authority rather than actual science. And that challenge then morphs the identity and role of forensic experts into more than mere advocate but as an ethical and scientific source of the most neutral and highest quality evidence for family court judges.⁸⁶

PAS is but one example of this challenge and the conundrum for judges, lawyers, and forensic experts. There many others that arise when social science merges with or submerges the courtroom, including PAS or research related to shared physical custody.⁸⁷ What may shift the discussion is giving primacy to the

⁸⁴ Joseph Sanders et al., *Legal Perceptions of Science and Expert Knowledge*, 8.2 PSYCHOL., PUB. POL'Y & L. 139, 149 (2002).

⁸⁵ JACQUES M. CHEVALIER & DANIEL BUCKLES. PARTICIPATORY ACTION RESEARCH: THEORY AND METHODS FOR ENGAGED INQUIRY 3 (2013).

⁸⁶ In a metaphor and framework which can apply to all professional disciplines when invoking science in the child custody arena, authors referred to this trap as the “dark side” of professional ethics. See Samuel Knapp, et al., *The Dark Side of Professional Ethics*, 44 PROF. PSYCHOL.: RES. AND PRAC. 371 (2013).

⁸⁷ For a comprehensive example of critical analysis of research combined with a deep understanding of the role of lawyers and the legal system when relying upon experts interpreting that research, see Linda Neilsen, *Shared Physical Custody: Does It Benefit Most Children*, 28 J. AM. ACAD. MATRIM. LAW. 79, 138 (2015) (“Rather than being swayed by hearsay about ‘what the research shows,’ we serve the best interests of children by relying on data over dogma

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interests of children in long-term outcomes which are safe and stable without regard for traditional biases about gender or poverty, among many other factors that drive a wedge between myth and science; anecdote and empirical data; and systemic efficiency and the rights and responsibilities of parents to children. Not a simple task but one that can and should be done.

and by being on the alert for woozles that can lead us astray in making decisions about the most beneficial parenting plans for children.”).