

Child Protection and Custody Conflict: Should Forensic Social Workers or the Courts be the "Gatekeepers" of the Reliable and Ethical Use of Social Science?

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Some Assumptions for Today (Not Judgments but Assumptions)

- CPS cases are generally poverty cases involving custody of children
- Unlike private cases, CPS parents are litigating against the state
- Policy pendulum swings the past 40 years have shifted between termination and adoption to reunification (and back and forth and back and forth)
- Parents and children have court-appointed lawyers with large case loads and often clients with no familial or economic resources
- Judges must process a volume of serious jeopardy risks without much reliable or valid science about "what works" in the US (the courts as "black boxes")
- Parents are often required to undergo evaluation by licensed professionals hired by the state and observation by case managers without forensic training
- Forensic social work experts may testify but what are these professionals testifying to as a science of risk assessment and evidence-based interventions?

I. A Primer: Fragile Families and CPS

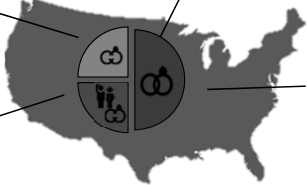


Short summary: Marriage and divorce

In the U.S., approximately 1.2 million couples divorce each year. 20% divorce within ten years.

In the U.S., approximately 2.3 million couples marry each year.

50% of these divorces occur in families with minor children.



Growing earnings inequality and increased educational attainment of women, relative to men, have led to declining marriage rates for less-educated women since the 1970s

This means more than **one million children** experiencing **parental dislocation** annually.

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Cohabitation (Nope-still not marriage)

- Since the 1970s, research suggests that parents in cohabiting unions are more likely to dissolve at shorter intervals than marriages.
- This means a substantial proportion of children under age 12 experience separation of the birth parents.
- "Serial cohabitation may be an emerging norm as cohabiting unions form and break up, often more than once before a cohabiting relationship leads to marriage" (Lichter, Qian, & Mellott, 2006, p. 236).
- Poverty and single parent families increase the likelihood of CPS investigations and judicial proceedings.

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Systemic Consequences?

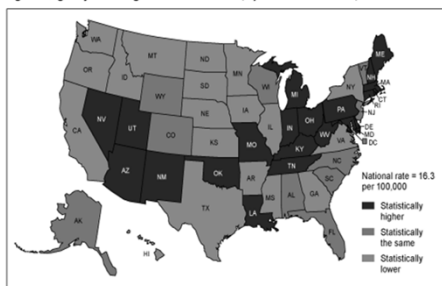
"Accumulated developmental deficits in early childhood place children on a lower lifetime trajectory with negative implications for adult cognitive and psychological functioning, educational attainment, and subsequent income, thus contributing to continued inequalities in the next generation" (Walker, et al., 2011, p. 10).

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The Next Generation and Substance Use: Adolescents

- 276,000 adolescents were current nonmedical users of pain relievers.
- 22,000 had an addiction to prescription pain relievers
- 21,000 adolescents had used heroin in the past year, and an estimated 5,000 were current heroin users.
- Most adolescents who misuse prescription pain relievers are given them for free by a friend or relative.
- The prescribing rates for prescription opioids among adolescents and young adults nearly doubled from 1994 to 2007 (ASAM, 2016).

Figure 4. Age-adjusted drug overdose death rates, by state: United States, 2015



CPS Data

- An estimated 3.4 million children received either an investigation or alternative response at a rate of 45.1 children per 1,000 in the population.
- The number of children who received a CPS response increased by 9.0 percent from 2011 to 2015.
- For FY 2015, approximately 4.1 million children (duplicate count) were the subjects of reports (screened-in referrals).
- Eighteen percent of these children were classified as victims with dispositions of substantiated (17.3%) and indicated (0.7%). The remaining children were nonvictims (USDHHS, 2015).

Foster Care Data

- During FY2014, there were an estimated 415,129 children in foster care, 264,746 children entered foster care and 238,230 children exited foster care.
- The numbers of children in foster care in 2014 (415,129) remained lower than those in care on the same day in 2005 (513,000).
- However, FY 2014 saw an increase in these numbers as compared to FY 2013 (400,989) (Child Welfare Gateway, 2016).

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Diverging Destinies and CPS?

- Substantial portions of American society criminalized and imprisoned at younger ages with no chance of rehabilitation or relief from stigma (The New Jim Crow).
- Among young people who lack resources, families are difficult to form or sustain.
- Aging population less able to physically and economically help children and grandchildren.
- Endemic underemployment and unemployment, with increasing educational, technological, wage disparities, and intergenerational poverty.
- Embedded cognitive, behavioral, and mental health and trauma histories and more complex substance abuse or addictions (legal or illegal).
- Complex and shifting forms of interpersonal violence.
- Family systems struggling beyond available social services.
- Almost one fifth of young adults live in poverty, more than double the percentage in 1973 (Ruggles, 2015).

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II. Primer: Ethics v. Values



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Values (Hint: Superman or Wonder Woman?)

- The various beliefs and attitudes that determine how a person or group actually behaves.
- Values identify what should be judged as good or ideal in a given culture.
- A well-defined value system makes a fine moral code...
- But is it *not* a professional ethical code.

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Ethics (hint: Batman or Wonder Woman?)

- Ethics is an action concept, not best wishes or good intent.
- Ethical principles provide a framework for how to turn values into professional action or inaction.
- Ethical principles are a matrix of rules of professional conduct, not just a convenience.
- Ethical decision making is a rational and cognitive, not an emotional, process.

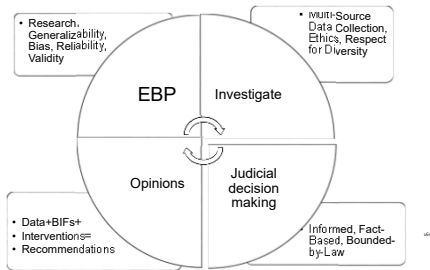
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Ethics as a Code of Professional Conduct

- Ethical Codes are legally imposed principles of conduct that govern professional action or inaction.
- Ethical Codes are rules and standards for which a violation may result in sanction through complaint.
- Ethical Codes may provide the source for liability as a standard of care.
- Ethical Codes are not stagnant: what may be a "safe harbor" in one era (e.g. no legal role of fathers) may implicate risk in another.

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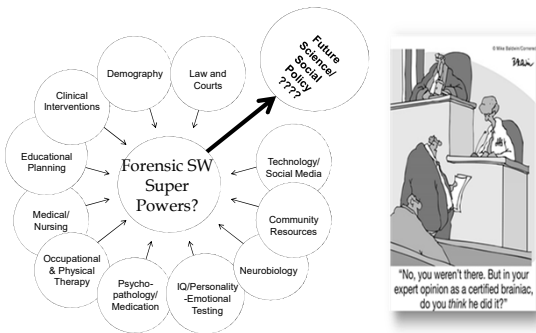
Conceptualizing Ethical "Gatekeeper" Forensic Practice?



III. "Being" a FMHE Expert in CPS Cases



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Who is a Forensic Mental Health Expert [FMHE]?

Any qualified, trained, and licensed psychologist or social worker who offers to provide:

- scientific, technical, and specialized knowledge derived from that professional discipline within the requirements of the applicable law and ethical codes;
- through the use of interdisciplinary research, theory, practice, testing, interviews, and specialized literature;
- for the express purpose of providing assistance and services to the legal system so as to influence judicial fact finding and decision-making.

(See APA Specialty Guidelines for Forensic Psychology, 2011; NOFSW Code of Ethics, 2011)

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Forensics and Woozles (or Bacon's Idols....)*

Woozles first mentioned in *Winnie-the-Pooh* (1926) by A. A. Milne.

- Deceitful, weasel-like animals that live in the Hundred Acre Woods.
- Avid honey stealers, often associated with heffalumps.
- Most feared creatures by Pooh and his friends, especially Piglet.
- Pooh and Piglet follow what they assume to be woozle footprints in order to catch a woozle.
- When the footprints become more numerous, Pooh explains this by revealing that woozles often travel with wizzles.
- They later realize they had been walking in circles, and footsteps were their own.

* Disclaimer: Dr. Tennesse declines to accept responsibility for the *Bacon* slides below at the end after the ducks.

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Woozles and Family Courts

- Courts and families benefit from research when it is methodologically sound and applied forensically with ethical and precise disclosure of reliability, validity, and generalizability in a factual and legal context.
- Gelles developed concept that when research is misrepresented or misused then false beliefs are perpetuated in systems as alternative research or hypotheses may be ignored.
- Research can be used to "woozle" courts (and particularly family courts) into believing things that are not true at all or only partially true or have become truth-by-repetition or canon.

See Nielsen, L. (2014). Woozles: Their role in custody law reform, parenting plans, and family court. *Psychology, Public Policy, and Law*, 20(2), 164-180; Nielsen, L. (2015). Shared Physical Custody: Does it Benefit Most Children. *Journal American Academy of Matrimonial Law*, 28, 79-137; Nielsen, L. (2015). Pop goes the woozle: Being misled by research on child custody and parenting plans. *Journal of Divorce & Remarriage*, 56(8), 595-633.

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Hence the “Woozle” Trap for Forensics

- How are FMHE “used” in child-centered cases?
- What mechanisms may ensure that forensic experts:
 - remain independent of pressure from the host environment (family courts and state agencies);
 - avoid transformation of scientific and research knowledge to meet family court expectations and demands;
 - explain the limitations of testing and research based upon race, SES, culture, disability, or diversity;
 - determine if research/opinion is reliable, valid, or generalizable for the purpose for which it may be employed by a court; and
 - Remain a neutral and objective source of data and the efficacy of interventions for the court?

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Anti-Warping” the FMHE Role?

- FMHEs should give balanced consideration to *all* data.
- Relevant research/measures should be explained within report and testimony.
- Theoretical/conceptual frameworks proffered as child custody science by insiders should be exposed.
- Diagnosis using the DSM-5 should be carefully applied and explained to avoid labeling or shame.
- Findings/recommendations should be examined for consistency within and between data sources.
- Alternative hypotheses should be transparently considered and rejected when inconsistent.
- Be aware of biases and disclose race, SES, culture, ESL, or disabilities which may compromise results.
- Be careful, thorough, systematic, and data-driven.
- Do not *ever* assume lawyers and judges in an adversarial system know what is scientific methodology or may care if the explanation may impede the outcome.



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IV. Is *Being* an Expert Different in Family Courts?

“Under these conditions, the adversary case-by-case method, dependent on individual prosecutors, defense attorneys, judges, and juries and their ability to understand and marshal the requisite expertise in case after case, especially given the system’s many imbalances, is not a good way to address forensic sciences. The risk of error in individual cases is high.”

Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 949 (2008).

Do you share this Belief?

Forensic testimony in child protection is a powerful predictor of trial outcomes because the fact finder may give more weight to credentials than actual reliability or validity of the scientific methodology???????????????

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Daubert in Family Court [or not really]

Daubert (1993) mandated that scientific evidence be subject to a “reliability test” rather than the “general acceptance test” set forth in *Frye* (1923). The Court also imposed upon judges this “gatekeeping” responsibility:

Is the reasoning or methodology underlying the testimony scientifically valid and can be applied to the facts at issue:

- whether the theory or technique can be or has been tested;
- whether the theory or technique has been subjected to peer review and publication, as such review “increases the likelihood that substantive flaws in the methodology will be detected”;
- the known or potential rate of error; and
- whether the theory or technique enjoys general acceptance within the relevant scientific community.

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Family Court and *Daubert*?

- The proponent of scientifically based expert testimony must establish that the expert's opinion is based on principles and methods that are reliable.
- Reliability may be established either by demonstrating that the principles and methods generally are accepted in the relevant scientific community or by applying the factors set forth *Daubert*.
- The judge is the gatekeeper and is responsible for making the threshold determination that the expert opinion is reliable.
- Particularly in the case of psychological or behavioral sciences, lack of prevalence data alone may not be sufficient to justify a ruling that the theory is unreliable within the meaning of *Lanigan*.

Commonwealth v. Hoose, 5 N.E.3d 843, 467 Mass. 395 (2014).

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The Duck or Egg Problem in Forensics?

General Electric Co. v. Joiner, 1997, p. 146:

- Conclusions and methodology for expert opinion are not entirely distinct from one another.
- Trained experts commonly extrapolate from existing data.
- Nothing in either *Daubert* or the Federal Rules of Evidence requires a 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.
- Have you seen families “ipse dixit” by licensure/status of expert opinion witnesses?

*Latin: He himself said it. An unsupported statement that rests solely on the authority of the individual who says it. <http://legal-dictionary.thefreedictionary.com/ipse+Dixit>

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Who has heard this testimony and opinion by an FMHE (at various points in time)?

- Attachment disorder
- "Natural" bonding "not observed"
- Parental alienation syndrome
- Sexual abuse accommodation syndrome
- Personality disorders are intractable forms of mental illness
- Battered women's syndrome
- Munchausen-by-proxy
- Affluenza defense [remember?]
- DSM diagnoses "almost" always impairs functional parenting capacity
- Which labels are generalizable and methodologically reliable science for parents in CPS cases?
- Which are "fads" or conceptual frameworks yet to be studied?
- Which research is normed for a population in CPS court?
- Which theory or research allows FMHEs to opine as "truth detector"?
- Should FMHEs affirmatively provide limitations of theory from research or just wait for cross-examination?
- Which would Pooh recognize as a woozie?

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V. And Now a Few Threats to FMHE opinions



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The "CSI effect" (And yes, judges may be not Immune

- Distorted beliefs about forensic science caused by CSI-type (a/k/a forensic science) shows influences perceptions of expert testimony.
- The law can do nothing to control what the writers of CSI/NCIS say on television.
- The law does control what forensic scientists may offer as expert opinion under oath.



Schweitzer, N. J., & Saks, M. J. (2007). The CSI effect: Popular fiction about forensic science affects the public's expectations about real forensic science. *Jurimetrics*, 47, 357-364.

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"Clinical" (Expert?) Opinions...

- In one study, jurors viewed clinical therapist and forensic testimony as equally scientific but more heavily weighed the therapist testimony in their decision-making.
- This outcome has been replicated in research, as well as the presenters' anecdotal experiences-even with judges.
- If clinical-opinion-by-licensure is more heavily weighted than forensic testimony, family courts and *Daubert* may inadvertently make it easier for clinical opinion to be admitted despite multiple forms of bias and unreliability.

Krauss, D. A., & Sales, B. D. (2001). The effects of clinical and scientific expert testimony on juror decision making in capital sentencing. *Psychology, Public Policy, and Law*, 7(2), 267-304.

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Selection/Allegiance Effects

- Is "apparent allegiance" due simply to attorneys choosing evaluators who have preexisting attitudes that favor their side, or calling only experts with the most favorable findings to testify in court (selection effects)?
- Or do evaluators, once retained and promised payment by one side, tend to form opinions that favor that side (allegiance effects)?



Murrie, D. C., Boccacini, M. T., Guarnera, L. A., & Rufino, K. A. (2013). Are forensic experts biased by the side that retained them? *Psychological Science*, 0956797613481812.

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Confirmation Bias

Confirmation bias is the tendency of people to favor information that confirms their beliefs or hypotheses. People display this bias when they gather or remember information selectively, or when they interpret it in a biased way. The effect is stronger for emotionally charged issues and for deeply entrenched beliefs. People also tend to interpret ambiguous evidence as supporting their existing position.



COGNITIVE
BIAS

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And always account for diversity and vulnerability!



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***Before we Finish: *Bacon v. Bacon*
or Pooh's Woozles? Your favorite?



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***Bacon and the "doctrine of idols": 500 years before Woozles

Francis Bacon developed the doctrine of "idols," in which he laid out his understanding of the various obstacles that get in the way of truth and science – false idols that prevent us from making accurate observations and achieving understanding.

These idols distort the truth, and thus stand in the way of science. He categorized these into four groups:

idola tribus
(idols of the tribe)

idola specus
(idols of the den or
cave)

idola fori (idols
of the market)

idola theatri
(idols of the
theatre)

Acknowledging such idols and establishing safeguards against them are critical milestones of a science.

Dror, I. E. (2009). How can Francis Bacon help forensic science? *The four idols of human biases. Jurimetrics*, 50, 93-110.

VI. Forensic Work...



Laughter
is an
instant
vacation.
- Milton Berle

Humor



What are humor skills?

- Ability to see the absurdity in difficult situations
- Ability to take yourself lightly while taking work seriously
- A sense of joy in being alive

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"Do me a favor, honey, and go get me a latte?"

Humor Applied...Think about Ducks!!!!

50-Wholesale.com



What is "Duck-like"?

- "Water off a duck's back"
- How do you NOT absorb what you experience (hear, feel, and see) everyday?
- Do not think or be a Sponge!!!!

Ducks ARE Calming: Meet Polly



<https://www.thedodo.com/rescue-goat-duck-costume-2107301918.html>

Humor and Coping

