

Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle

by
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I. Introduction

The profession of law and its belief in the adversarial system as a means to discern factual truths in child custody litigation is deeply rooted in centuries of political and constitutional theory.¹ Beyond political rhetoric and academic discourse, the definition of who is a parent and who has rights and responsibilities for children may mean that legal definitions, slower to evolve, are narrower than contemporary social definitions and demographic realities. Even as these social, legislative, and judicial adjustments occur over various time horizons, families in conflict must turn to the family court system to resolve the physical and legal custody of children.

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¹ For a critical reflection on this history, see Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 *YALE L.J.* 2106, 2120 (2012) ("This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court, but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes."); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 *S. CAL. L. REV.* 469, 475 (1997) ("Grappling with the subject of court reform in family law presents complex and daunting challenges. The traditional adversarial nature of court systems is inappropriate for the resolution of family legal matters.") (footnote omitted).

428 *Journal of the American Academy of Matrimonial Lawyers*

As political science professor Robert A. Kagan described in broader historical detail, “adversarial legalism is deeply rooted in the political institutions and values of the United States.”² Family law practice in the United States is, through decades of institutional habit and legal training, deeply rooted in the values and structures which drive other adversarial traditions. Scholars and reformers who challenge the efficacy of this method have used phrases like “scorpions in a bottle” and “legally sanctioned fight clubs”³ to metaphorically describe an intentionally designed process with lawyers as advocates or, nowadays, self-represented parties as their own advocates.⁴

Although this article will explore implicit and explicit bias in the context of the adversarial system and the role of Forensic Mental Health Experts (FMHEs),⁵ this exploration requires an

² ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2009).

³ See THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY THE LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* 50 (2004) (“Courthouses are legally sanctioned fight clubs, welcoming immoral, emotionally destructive contests that bring about little relief an tremendous suffering.”); Claire Huntington, *Repairing Family Law*, 57 *DUKE L.J.* 1245, 1293 (2007) (“Finally, despite the reforms, adversarial behavior in at least some contexts is waxing, not waning. This is true even in the field of marital dissolutions, which has seen the most reform and innovation. For example, judges and lawyers report that high-conflict custody cases that are rightly described as ‘combat’ are on the rise, with an increase in the number of allegations of sexual and physical abuse, and claims of custody being made for financial gain.”); Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents*, 7 *PEPP. DISP. RESOL. L.J.* 501, 505 (2007) (“The legal system, with the unique pressures it puts upon litigants, can create new tensions and aggravate those that are preexisting. As one scholar vividly elucidated, ‘[t]he formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.’”) (footnotes and citations omitted).

⁴ The data reflects a substantial surge in self-representation in the United States and Canada. See generally JULIE MACFARLANE, *THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS*, NATIONAL SELF-REPRESENTED LITIGANTS PROJECT (2013); Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative System*, 29 *J. NAT'L ASS'N ADMIN. L. JUDGES* 3 (2009).

⁵ For purposes of this article, forensic mental health experts [FMHE] is short-hand for any licensed professional qualified under state law to diagnosis

important caveat. For more than forty years, the complex world of fragile families has ensured a growing volume of cases that funnel many parents and children, and the rest of their village, through the adversarial portal.⁶ Lawyers, judges, clerks, security personnel, FMHEs, mediators, therapists, case managers, and many other professionals perform extraordinary feats every day managing many thousands of family transactions. Nevertheless, human thoughts and behaviors (professional and lay) gradually conform to such an adversarial environment and the rules, rewards, and sanctions imposed by those with authority.⁷ Biases, like heuristics or mental shortcuts, are intellectual and emotional mechanisms through which all of us manage complex variation

and provide expert opinions in court on risk, competency, or other psychological issues. Thus, the same arguments apply to forensic psychologists, social workers, psychiatrists, or other professionals who rely upon psychological testing, clinical evaluations, third-party data, and the interpretation of that data.

⁶ Research and data may not adequately account for the experiences of foster care, adoption, IVF, international relationships and dissolutions across culture, poverty, race, SES, marriage, religion, family systems, cohabitation, or variables such as homelessness, refugees, immigration, or other barriers, or same sex couples, guardianships, grandparents, kinship, and de facto parenting arrangements. Although Hillary Clinton was vilified for her stance at the time, she was merely revealing an uncomfortable truth that crosses political lines and daily realities. For the text of Secretary Clinton's speech, see <https://www.americanrhetoric.com/speeches/hillaryclintontakesavillage.htm>. What is fascinating is that Clinton's early writings, seemingly radical in the 1970s, are an obvious policy approach today. See Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973); Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 YALE L.J. 1522 (1979).

⁷ There are many brilliant books starting centuries ago that explored the relationship between power and bias and the role of individuals, groups, and the state. If given the option of only two choices for law and mental health students today on bias and bigotry, I (the lawyer) would (and have) assigned in graduate school: ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* (1951) and BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014). There is another book I would add to that list because it has much of value concerning the connections between families and trauma over generations and the impact of social welfare policy. See STACEY PATTON, *SPARE THE KIDS: WHY WHUPPING CHILDREN WON'T SAVE BLACK AMERICA* (2017). For anyone who wishes to argue that social policy is accidental rather than intentional, read the background and history which required decades before enactment of S. 3178 (115th): Justice for Victims of Lynching Act of 2018, at <https://www.govtrack.us/congress/bills/115/s3178/text>.

and unpredictability.⁸ The influence of bias on judges, lawyers, and forensic specialists is deeply, and sometimes unfairly, influenced by an adversarial system which generates pressure to efficiently, if not effectively or equitably, resolve child custody disputes.⁹

Many commentators have recognized that families need a system that is collaborative and more focused on long-term interdisciplinary and transdisciplinary planning and services for children.¹⁰ The adversarial system, by its very nature, *intentionally* pits lawyers, clients, experts, and government against each other. Collaboration does occur frequently in chambers and back-channel communications between professionals, but it also depends deeply on lawyers and forensic specialists trusting each other and consciously avoiding the pressure to conform to “winning” more than accurate use of science or analysis of family dynamics. Too few people understand the compulsion of lawyers to avoid bar complaints and lawsuits which in turn generates fear-based and self-protective behaviors. This is not an excuse, but it is little wonder that, over time, personal values and the exercise of power may become part of how lawyers, judges, and FMHEs manage clients and cases.¹¹

⁸ The literature is vast and has led to a fair number of Nobel Prizes, but for relevant sources see DANIEL KAHNEMAN, PAUL SLOVIC, & AMOS TVERSKY, *JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1985); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Tess Neal & Stanley L. Brodsky, *Forensic Psychologists' Perceptions of Bias and Potential Correction Strategies in Forensic Mental Health Evaluations*, 22 PSYCHOL., PUB. POL'Y, & L. 58 (2016).

⁹ For an excellent discussion of these connections, see Benjamin D. Garber, *Sherlock Holmes and the Case of Resist/Refuse Dynamics: Confirmatory Bias and Abductive Inference in Family Law*, FAM. CT. REV. (forthcoming 2020) (“By definition, mental health professionals (MHPs) engaged in family law matters are asked to engage in a sort of retrospective detective work.”).

¹⁰ See Danielle D'Amour, et al., *The Conceptual Basis for Interprofessional Collaboration: Core Concepts and Theoretical Frameworks*, 19 J. INTERPROFESSIONAL CARE 116, 117 (2005) (“Another element to be factored into this complex situation is that these professionals interact in environments that present not only opportunities but a range of organizational constraints. These constraints add another level of complexity to relationships between professionals.”).

¹¹ This topic reflects philosophical and governmental theories about surveillance and reflexivity going back decades. See Jeanette Elizabeth Schmid &

These institutional pressures have yielded a legalistic fiction that all lawyers are equally skilled as client-counselors and trial lawyers. As such, the environment formed by adversarial legalism will seamlessly spur truth through an adversarial distillation of evidence. From that set of events in a courtroom over an hour or days, a judge will enter a factual judgment based upon law.¹² From that fiction, however, derives an underlying companion myth when FMHEs are called upon to provide expert opinion: FMHEs apply a uniform understanding of a uniformly-accepted science of child custody to the facts specific to an individual set of family dynamics.

Some research suggests that the presence of an expert may powerfully influence decision making by judges; though most research concerns jury trials.¹³ We need not resolve that discussion here, but if the myth were false or over-exaggerated, lawyers would discourage the presence of FMHEs.¹⁴ Quite the opposite.

Shoshana Pollack, *Developing Shared Knowledge: Family Group Conferencing as a Means of Negotiating Power in the Child Welfare System*, 21 *PRAC.: SOC. WORK IN ACTION* 175, 176 (2009) (“The knowledges of subjugated groups are frequently overlooked and negated. This occurs also in the child welfare context where information developing and sharing processes reflect the biases of both individual workers and the institution itself.”) (citations omitted).

¹² See *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that in death penalty cases, for example, the Supreme Court purports to apply “meaningful adversarial testing.”); *In re Adoption of T.D.*, 87 A.3d 726, 728 (Me. 2014) (“Indeed, often the most effective challenge to the quality, completeness, or competence of a guardian ad litem’s work will be accomplished through cross-examination of the GAL at trial.”).

¹³ See Margaret Bull Kovera, Melissa B. Russano, & Bradley D. McAuliff, *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers’ Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 *PSYCHOL., PUB. POL’Y, & L.* 180, 185 (2002) (“Based on the results of basic social psychological research on scientific reasoning ability, it is logical to expect that judges may not be able to identify flaws in expert evidence proffered in their courtrooms. It is possible, though, that judges’ extensive experience in evaluating the admissibility of expert evidence will have provided them with knowledge about scientific methodology that laypeople do not possess. *However, judges report relying on experts’ credentials and experience rather than the content of their testimony when judging the credibility of expert testimony.*”) (emphasis added).

¹⁴ The advent of parental alienation the past decade is rooted in selection and allegiance bias. See e.g. *J.F. v. D.F.*, 2018-51829 N.Y. 1, 40 (Supreme Court, Monroe County, Dec. 6, 2018) (unpublished decision) (“Because without hav-

432 *Journal of the American Academy of Matrimonial Lawyers*

The government frequently uses FMHEs in child protection cases to justify parental termination or to advocate for permanency guardianships or adoptions; and private FMHEs are retained by a party or ordered by the court to conduct a mixture of psychological evaluations, risk assessments, or parental capacity evaluations. In these contexts, an FMHE can appropriately use phrases like *peer-reviewed* and *empirical research*, but another category of FMHEs, with help from lawyers, know that these phrases may trump any meaningful understanding by courts of generalizability, methodology, or even what peer-reviewed science means to scientists.¹⁵

In that sense, this use or misuse of phrases to describe research and apply it to *a* family is a form of inverse bias, because

ing access to both parties and without having the ability to perform multiple methods of analysis on data, it becomes very, very difficult to fact check what one person says about the other. The testimony becomes very, very open to something called confirmation bias. The testimony is speculative at that point and would be nonscientific.”); *McClain v. McClain*, 539 S.W.3d 170, 175 (Tenn. Ct. App. 2017) (“Upon receipt of the psychologist’s report, the trial court conducted a second two-day bench trial in June 2016, ultimately finding that this was a case of severe parental alienation in which the father had actively supported the children’s alienation from the mother without reasonable cause.”); *Knutsen v. Cegalis*, 137 A.3d 734, 735-36 (Vt. 2016) (“Dr. Craig Knapp had conducted a forensic evaluation of parents and the child. The court found that father and stepmother saw the forensic evaluation as a vehicle to once again attempt to establish that the child had been assaulted by mother.”).

¹⁵ The phrase “peer-reviewed” is a short-hand which lawyers and judges rarely deconstruct. See Richard Smith, *Peer Review: A Flawed Process at the Heart of Science and Journals*, 99 J. ROYAL SOC’Y MED. 178, 178 (2006) (“My point is that peer review is impossible to define in operational terms (an operational definition is one whereby if 50 of us looked at the same process we could all agree most of the time whether or not it was peer review). Peer review is thus like poetry, love, or justice.”). For example, simple trial questions are whether the research was funded by the NIH or subject to an Institutional Review Board [IRB]? See Lura Abbott & Christine Grady, *A Systematic Review of the Empirical Literature Evaluating IRBs: What We Know and What We Still Need to Learn*, 6 J. EMPIRICAL RES. HUMAN RES. ETHICS 3, 3 (2011) (“Institutional review boards (IRBs), a fixture in the U.S. research firmament, review most research involving human participants before it is initiated and at least annually until it is complete. IRBs review research proposals to assure they adhere to federal regulations (Department of Health and Human Services; Federal Drug Administration), include adequate protections of study participants’ rights and welfare, and are ethically sound. But, little is known about how well IRBs accomplish these goals.”).

judges, trying to protect children, are often desperate for scientifically-based explanations for why parent(s) harm children by chronic conflict or abuse.¹⁶ Even with all the emerging literature concerning the biological, epigenetic, and cultural influences of bias, this topic has been rarely discussed in terms of the relationship between lawyers and FMHEs and, concomitantly, the influence of those relationships on child custody outcomes imposed by judges.¹⁷ In our experience across forensic and trial roles, the influence and impact of bias requires more study from graduate school to practice than an occasional educational event.¹⁸

Thus, this article narrowly chooses this one “wicked”¹⁹ policy to explore. Part II of this article describes implicit and explicit bias (defined below) and what the research suggests may influ-

¹⁶ It is too easy to forget the human price of a system designed for conflict management by adversarial umpiring. See generally Peter G. Jaffe, et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 45 *JUDGES J.* 12 (2006).

¹⁷ See Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 *ETHICS & BEHAV.* 3, 5 (2003) (“In all court work by health professionals, the pull to affiliate with retaining attorneys can be both powerful and subtle. Of course, a preselection bias sometimes exists, with attorneys requesting assessments from experts who are perceived as having a likely tilt toward the attorneys’ desired outcome.”). As the authors aptly note in the context of death penalty cases, “The pull to affiliate has the potential for being intensified in instances in which the stakes are higher.” *Id.*

¹⁸ An article by Paul Chill written years ago is still an important read. You do not have to agree to appreciate that the discussion is thought-provoking. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 *FAM. CT. REV.* 457, 459 (2003) (“In contrast to the government, the overwhelming majority of parents in child protection cases are poor, and the quality of the representation they receive from their court-appointed lawyers (if they have counsel at all) marginal or inferior. This leads to further exaggeration of the risks of non-intervention. Second, although judges are supposed to operate as a check on CPS actions, they exhibit the same defensive outlook as many CPS caseworkers.”).

¹⁹ The literature on organizations and public administrations is a vast source of knowledge and case studies which would benefit family courts. See Brian W. Head & John Alford, *Wicked Problems: Implications for Public Policy and Management*, 47 *ADMIN. & SOC’Y* 711, 716 (2015) (“Wicked problems are generally seen as associated with social pluralism (multiple interests and values of stakeholders), institutional complexity (the context of interorganizational cooperation and multilevel governance), and scientific uncertainty (fragmentation and gaps in reliable knowledge).”).

434 *Journal of the American Academy of Matrimonial Lawyers*

ence lawyers who hire as FMHEs and the opinions of those experts?²⁰ And, in a collateral but significant question which is understudied in family law, what does research concerning the gender of a forensic expert suggest about the selection and impact of FMHEs? Should bias be an explicit part of any discussion of all aspects of family court reform (well, yes, but that one is easy)?²¹ And how do we, as professionals, discuss bias without confusing that discussion with fads-by-credential that are simply a means to persuade and justify a set of beliefs without regard for ethical duty or harm to others.²²

²⁰ See Brodsky & Galloway, *supra* note 17 at 5 (“In all court work by health professionals, the pull to affiliate with retaining attorneys can be both powerful and subtle. Of course, a preselection bias sometimes exists, with attorneys requesting assessments from experts who are perceived as having a likely tilt toward the attorneys’ desired outcome.”). As the authors aptly note in the context of death penalty cases, “The pull to affiliate has the potential for being intensified in instances in which the stakes are higher.” *Id.*

²¹ A substantial majority of cases settle using alternative dispute resolution [ADR]. Mediators and other co-parenting counselors operate a private and non-public forum for family decision making. There are certainly good intentions, but ADR practitioners and experts are more likely to influence settlements given the relatively small percentage of cases that go to trial. This is particularly likely when a self-represented litigant cannot adequately respond to expert opinion. This article suggests that bias is a topic which should be understood by anyone working with families. See Nancy A. Burrell, William A. Donohue, & Mike Allen, *Gender-Based Perceptual Biases in Mediation*, 15 COMMUNICATION RES. 447, 448 (1988) (“Not only might disputants perceive mediators to act differently toward them, mediators might, in fact, behave differently toward disputants, depending upon their gender.”); Keith William Diener & Shazia Rehman Khan, *Thwarting the Structural and Individualized Issues of Mediation: The Formalized Reflective Approach*, 26 SOUTHERN L.J. 137, 142 (2016) (“The private process of mediation allows mediators to ignore legal rules, precedent, and even ethical norms when attempting to resolve disputes. Mediators may serve as tools to further prevalent biases due to absence of scrutiny and legal rules that could protect the process from the vices of ignorance, injustice, and prejudice.”).

²² See Henry H. Bauer, *Anomalistics, Pseudo-Science, Junk Science, Denialism: Corollaries of the Role of Science in Society*, 28 J. SCI. EXPLORATION 95, 105 (2014) (“The conventional wisdom maintains a view of science based on something like the earliest days of modern science, namely, that science is an objective, disinterested pursuit of authentic knowledge by people of outstanding intellect whose only aim is to uncover the best possible understanding of the natural world. But pervasive conflicts of interest, external control of research directions and funding and publication, and politicization of the interpretation of scientific data make today’s science nothing like the science of even a century

II. Being Biased and “Wicked” Policy Problems

When court authority is invoked concerning the “best interests” of a child or allegations of abuse or neglect, this very act of conflict often triggers the involvement of FMHEs acting as experts for judges, lawyers, government, private agencies, and parties in the judicial system in diverse fields ranging from adult guardianships to criminal sentencing to parental termination to child custody to access to mental health care.²³ In child protection and child custody FMHEs provide expert opinions concerning parenting capacity, personality and psychological diagnoses, and prediction of future risk or reunification, developmental stages of children, primary residence and access arrangements, supervised visitations, or relocation.²⁴ Any of these forensic opinions are shaped by the adversarial system and the biases (and values) of individuals and systems as more specifically explored below.

ago.”); John T. Cacioppo, Stephanie Cacioppo, & Richard E. Petty, *The Neuroscience of Persuasion: A Review with an Emphasis on Issues and Opportunities*, 13 J. SOC. NEUROSCIENCE 129, 129 (2018) (“Our focus here is on a prevalent form of social influence that may be unique to humans—persuasion—which refers to the active attempt by an individual, group, or social entity (e.g., government, political party, business) to change a person’s beliefs, attitudes, or behaviors by conveying information, feelings, or reasoning.”).

²³ See AMERICAN PSYCHOLOGICAL ASSOCIATION SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (2012), <http://www.apa.org/practice/guidelines/forensic-psychology.aspx>; Tina Maschi & Mary Lou Killian, *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.”).

²⁴ See Benjamin D. Garber, *The Chameleon Child: Children as Actors in the High Conflict Divorce Drama*, 11 J. CHILD CUSTODY 25, 34 (Mar. 2014) (“Custody evaluation and associated judicial decisions require a comprehensive analysis of all levels of the family system.”); William T. O’Donohue, Kendra Beitz, & Lauren Tolle, *Controversies in Child Custody Evaluations*, in PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY 290 (Jennifer L. Skeem, Kevin S. Douglas, & Scott O. Lilienfeld, eds., 2009) (“Custody evaluations often include multiple constructs (e.g., attachment, abuse potential, parenting skills) that are discussed across different time periods (past, present, future); an assessment instrument might be adequate for one of these tasks or time periods but poor at another.”).

At the threshold, it is probably helpful to acknowledge the simplistic, but convenient, criticism of the judicial system, and lawyers, judges, and experts, as imperfect actors.²⁵ Decades of organizational and political science literature have addressed these criticisms in more depth when systems, like courts, must inhabit and implement, in real time, policy and practice:

a “wicked problem” is one that cannot be definitively described or understood (since it is differently seen by differing stake-holders, has numerous causes, and is often a symptom of other problems). “Wicked problems” cannot readily be resolved (since they are characterized by a “no stopping rule” resulting from cascading consequences that are difficult to discern at the outset), and can only be addressed in “better or worse” ways, rather than by proving solutions are “true” or “false.” *“Wicked problems” occur when the factors affecting possible resolution are difficult to recognize, contradictory, and changing; the problem is embedded in a complex system with many unclear interdependencies, and possible solutions cannot readily be selected from competing alternatives.*²⁶

Any set of wicked problems operating within political and organizational systems are influenced by forms of *explicit and implicit bias*. In child custody litigation, FMHEs, lawyers, and judicial systems are even more deeply bound by the cascading values, needs, and wants of individuals and groups. The key point is that limiting the impact of bias within policy and practice for child custody litigation requires striving for “better” as the most feasible alternative to weary acceptance of the status quo. Even though explicit forms of bias were less prominent, or at least public, throughout the past century (until recently) these still manifest in subtle ways such as the language of poverty.

Of more concern for this article are implicit biases which may affect people’s insight, understanding, decision making, reactions, and behavior, often without them realizing it. As a gen-

²⁵ In some recent studies, there is concern that the “CSI-Effect” is generating distorted beliefs about forensic science as the public comes to believe that in an hour a case can be discovered and resolved with tangible, physical, and irrefutable proof of guilt. See Nicholas J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 *JURIMETRICS* 357 (2007). Lawyers and judges are not immune.

²⁶ Judith Welch Wegner, *Reframing Legal Education’s Wicked Problems*, 61 *RUTGERS L. REV.* 867, 870-71 (2008) (footnotes omitted and emphasis added).

eral set of behaviors, implicit bias is driven by *attitudes* and *stereotypes* that people have about social categories, such as gender, race, or sexual orientation. Research suggests that an attitude is an association between some concept (for example, gender) and an evaluative valence, either positive or negative. A stereotype, however, is an association between a concept (for example, gender) and a trait. Current research suggests that biases regarding gender are likely a combination of both explicit and implicit biases.²⁷

The fact that the topic itself is sensitive does not make it less a reality for anyone who has spent time in the literature and the field.²⁸ For judges, trial lawyers, mediators, forensic mental health professionals, therapists, guardians ad litem, and academics, the suggestion of bias coupled with the metaphor of a “fight club” or scorpions in a bottle” may cut quite deeply.²⁹ Self-reflec-

²⁷ For a discussion of these terms in the legal literature, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 948 (2006) (“Implicit-memory research conducted in the 1980s led researchers to develop measures of other implicit mental phenomena. Two of these—implicit attitudes and implicit stereotypes—are especially relevant to bias and discrimination.”); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2011) (“Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls?”).

²⁸ The literature is beyond vast as a word search in Google Scholar of “gender bias child custody” will reveal and that is even without adding facts related to domestic violence or claims of alienation or various syndromes. See Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 173 (1984) (“When an elaborate custody battle is anticipated, the experts will create painful situations in their efforts to substantiate the testimony they have been paid to give. In much the same way that an artillery battery can ‘liberate the hell out of’ a peaceful hamlet, experts can create emotional imbalances in the very children they are trying to ‘protect.’”); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard*, 77 LAW & CONTEMP. PROBS. 69, 70 (2014) (“Mothers’ and fathers’ supporters have also battled over the formulation of the best-interests standard itself, with each group arguing for presumptions that can trump other factors when the standard is applied.”).

²⁹ See *supra* note 3.

tion and reform combined with good intentions may not shield the consequences of such adversarial methods for children—particularly for the poor, who are more frequently subject to benevolent “guidance” about what is best for them.³⁰

This article and its discussion of bias is not about the constitutional and social freedom to choose the other parent or the right to avoid litigation by compromise and collaboration. It is difficult to have these conversations without seeming to engage in blaming or shaming language about parents who claim later that they are dissatisfied, *ex ante*, with that choice or the very real consequences of abuse and violence. Moreover, it is critical to note that a lack of internal and external resources, or the presence of adverse childhood experiences, could contribute to iterations of child custody litigation and the reduction in resilience or coping skills.³¹ Interpersonal violence, substance use and abuse, spite, hurt, rigidity, selfishness, mental health disorders, and emotional liability can all contribute to the duration and intensity of litigation.³²

³⁰ The tendency to think of family law as separate from child protection forgets that, for the economically disadvantaged, a proceeding with the state is their child custody litigation. See Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 913 (2009) (“Many commentators and practitioners have described bias in the legal system against the poor, particularly in their roles as parents. This may trigger greater scrutiny and intrusion of the kind embraced by this regime-required attendance at parenting education, mental health evaluations, continuing oversight by parenting coordinators, custody evaluators, and other newly created players in the family justice system.”).

³¹ See generally Tracie O. Afifi, et al., *The Relationship Between Child Abuse, Parental Divorce, and Lifetime Mental Disorders and Suicidality in a Nationally Representative Adult Sample*, 33 CHILD ABUSE & NEGLECT 139 (Apr. 2009); Karen Hughes, et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 LANCET PUB. HEALTH E356 (2017).

³² See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 24 (1987) (“A custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy. Use of expert and character witnesses can be especially harmful. ‘The parents will call each other officially crazy, and the children will begin to wonder about themselves as well as their parents. Also, the ‘efforts of attorneys, working in an adversary spirit, can escalate conflict between parents and draw children into divorce arguments.’”).

Yet it is also not so simple as to viscerally blame family courts, as a democratically-designed process, for their imperfections when adults choose to be less empathic, kind, chivalrous, respectful, and dignified, or more violent and controlling. When there is waiver of family autonomy or self-determination by parents or child abuse and neglect occurs, the (procedural) constitutional right to an adversarial trial and the (substantive) constitutional right to be a parent triggers the duty of family courts to mete out orders to establish rules for daily family functioning. Nevertheless, the “need for speed” given these wicked problems too often overruns implementation of thicker scientific and ethical questions for family courts.³³

There is also an assumption that the adversarial means of truth-finding will reveal flaws or misapplication of methodology, statistical analysis, heuristic biases, or anecdotal opinion confused with peer-reviewed science. There is little point in re-hashing the many dilemmas created when family court systems cast an impenetrable web over adversarial conduct and its consequences.³⁴ Beneath the web, lawyers are required to advocate for clients, and that advocacy does *not* extend to finding experts who may be averse to client interests.³⁵ Quite the contrary. Lawyers

³³ See David Robertson, *Thick Constitutional Readings: When Classic Distinctions Are Irrelevant*, 35 GA. J. INT'L & COMP. L. 277, 279 (2006) (“A thick reading of a constitutional right attempts to respond to a rights’ claim in a way fitting the overall ethical aspiration instantiated in the constitution, while a thin reading seeks to apply a minimalist textual interpretation.”).

³⁴ For a more thorough reading of this metaphorical point, see WILLIAM IRWIN, 23 SPIDER-MAN AND PHILOSOPHY: THE WEB OF INQUIRY (2012).

³⁵ John F. Edens, et al. “Hired Guns,” “Charlatans,” and Their “Voodoo Psychobabble”: Case Law References to Various Forms of Perceived Bias Among Mental Health Expert Witnesses, 9 PSYCHOL. SERV. 259, 260 (2012) (“Although professional ethical guidelines (e.g., American Psychological Association, 2002) clearly mandate that mental health professionals are to be competent and objective in their work, it would be naïve to think that all professionals are. It would also be naïve to assume that all mental health experts in all circumstances will be completely immune to the demands of an intrinsically adversarial system that pressures them to deviate from the goals of nonpartisanship and dispassionate opinion.”); Tess Neal & Thomas Grisso, *The Cognitive Underpinnings of Bias in Forensic Mental Health Evaluations*, 20 PSYCHOL., PUB. POL’Y, & L. 200, 206 (2014) (“Scientific and clinical expertise in the courtroom is dependent on the expectancy that the expert seeks accuracy and avoids anything that may lead to bias in the collection or interpretation of data. Challenging that expectancy is a growing body of research suggesting that

440 *Journal of the American Academy of Matrimonial Lawyers*

may hire experts to protect lawyers from irritated clients, and clients rather plainly want experts to confirm their beliefs about themselves and the other parent.³⁶

Lawyers and FMHEs are trained in graduate school and continuing education to search for and criticize bias by others, but they may have less of an understanding of its emotional and intellectual influences on their own services to clients and community. Competence and integrity under various professional ethical codes are co-extensive with teaching a deeper appreciation of the consequences of bias; yet lawyers and FMHEs rarely discuss the influences of these biases on each profession and outcomes in the court system. While there is always variation, judicial outcomes rely on the capacity of lawyers and judges to organize and present testimony about a family in a short span of time and under the compression of emotion and limited family resources.³⁷

The fact that something like bias is normal as part of the human condition does not make that an excuse for professionals acting in such a manner. The pressure on FMHEs to conform their opinion to the lawyer and client's view of the case is a reciprocal and adaptive reality of the legal system's very nature: a system in which there is little opportunity to install large-scale policy design, much less rigorous assessment or accountability mechanisms beyond cross-examination. The social contract between individuals with freedom to choose thereby gives rise to

forensic examiners differ in the data they collect and the opinions they reach, depending on the social contexts in which they are involved in forensic cases.”).

³⁶ See Bradley D. McAuliff & Jeana L. Arter, *Adversarial Allegiance: The Devil Is in the Evidence Details, not Just on the Witness Stand*, 40 L. & HUMAN BEHAV. 524, 525 (2016) (“Of course experts, like any other witness, can intentionally and consciously bias their testimony in favor of one party. However, such behavior would be unethical and violate established professional practice guidelines (e.g., Ethical Principles of Psychologists and Code of Conduct, 2010; Specialty Guidelines for Forensic Psychology, 2013).”).

³⁷ See Chad Michael McPherson & Michael Sauder, *Logics in Action: Managing Institutional Complexity in a Drug Court*, 58 ADMIN. SCI. Q. 165, 188 (2013) (“Our findings remind us that court decisions are not made in legal vacuums and that focusing on standardized procedures and roles can only take us so far in explaining how legal decisions are constructed. Informal aspects of deliberations, especially the professional and institutional considerations in which the court is embedded, influence decision making and the severity of outcomes.”).

the wicked set of political and institutional barriers that state family court systems must hurdle to resolve millions of family transactions with limited resources and with good speed.

III. Bias Is the Translation of *Iipse Dixit*

If we assume that the selection of FMHEs is a function of lawyer choice (or judicial appointment) then we can explore the potential impact of that choice on judicial outcomes.³⁸ Often unspoken but equally disconcerting is that lawyers (and judges) rarely possess the knowledge or time required to effectively cross-examine the FMHE. In the United States, the quality of expert evidence in civil and criminal cases is tested by cross-examination and pretrial motions *in limine*. In family court, the administrative need to process volume occurs without the resources available to corporations or insurers. Each side may hire its own expert, provide the expert data, work with the expert on the report to be offered in court, and then prepare the expert to advocate for the client (within ethical limits).³⁹ In child protection, the state may have its group of FMHEs to draw upon for investiga-

³⁸ See McAuliff & Arter, *supra* note 36, at 533 (“Tentatively we can suggest to judges and attorneys that adversarial allegiance exists, that it can (but not always) influence how experts process evidence, and that it may be more likely in cases involving evidence that is not blatantly flawed. What is striking about this conclusion is that from a statistical standpoint, experts are more likely to encounter evidence that rests at the middle of the quality distribution than either extreme end.”);

³⁹ William G. Austin, et al., *Forensic Expert Roles and Services in Child Custody Litigation: Work Product Review and Case Consultation*, 8 J. CHILD CUSTODY 47, 51 (2011) (“This arena has its own debate among FMHEs. The current terms of art for mental health experts in child custody litigation (e.g., evaluator, reviewer, instructor or educator, and consultant) have traditionally been referred to as different “roles” for which the child custody professional community is attempting to define standards.”); Steven M. Essig, et al., *Practices in Forensic Neuropsychology: Perspectives of Neuropsychologists and Trial Attorneys*, 16 ARCHIVES CLINICAL NEUROPSYCHOL. 271, 284 (2001) (“As discussed above, attorneys view preparing their clients for forensic examinations as part of their responsibility. By advising their clients about the nature of the tests they will take and how to respond in a manner that will most benefit their cases, attorneys can confound the data and raise questions about the validity of the results.”).

442 *Journal of the American Academy of Matrimonial Lawyers*

tion and opinion and funds may be available to a parent for an expert but the court must still carefully discern admissibility.⁴⁰

In most instances, and in some form or variation, expert opinion of all sorts is grounded in *Daubert v. Merrell Dow Pharmaceuticals*⁴¹ and its progeny. The power and authority to give an expert opinion using social science, rather than physics or chemistry, to opine on parenting capacity is judicially and legislatively authorized in all states. What is misunderstood (or ignored) is that the adversarial system does not permit a judge to do more than hear evidence in a courtroom under rules enacted generations ago. Consequently, a stranger vested with constitutional authority and donning a robe must divine a result from evidence proffered in a matter of hours amidst the rituals of a courtroom. The risk in such a compressed environment is that expert opinion becomes a “truth detector.”⁴² What then matters in child protection or child custody cases is that hiring competing experts to interpret data and explain outcomes may support a client’s position. What is troubling is the assumption that such

⁴⁰ See, e.g., *In re Q.R.P.*, 902 N.W.2d 809, 810 (Wis. Ct. App. 2017) (“Based on all of this, the trial court found that Dr. Iyamah had provided sufficient data using acceptable tools for her expert opinion to be more than *ipse dixit* (essentially, “because I said so”) testimony. Then, after initially indicating that all of Dr. Iyamah’s testimony might come in, the trial court reconsidered after trial counsel’s argument and excluded Dr. Iyamah’s “poor prognosis” testimony. This careful parsing of the testimony reveals the trial court’s thoughtful and fair exercise of discretion.”).

⁴¹ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). Not all states are *Daubert* states but there is generally some form of gate-keeping or threshold reliability test. *In re Sarah C.*, 864 A.2d 162, 164 (Me. 2004) (“To meet the two-part standard for the admission of expert testimony, the testimony must also meet a threshold level of reliability.”). For purposes of this article, reference is not generally made to federal or state variations on FED. R. EVID 701-705.

⁴² See *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986) (“We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert’s stamp of truthfulness on a witness’ story goes too far in present circumstances.”); *State v. Black*, 537 A.2d 1154, 1157 n.1 (Me. 1988) (“We note that a significant number of jurisdictions have recognized that although an expert may testify in order to explain inconsistent conduct or testimony of the victim, the expert cannot offer an opinion as to the truth of the victim’s story.”); *State v. Maday*, 892 N.W.2d 611, 619 (Wis. 2017) (“Expert testimony does not assist the fact-finder if it conveys to the jury the expert’s own beliefs as to the veracity of another witness.”) (citation omitted).

forms of opinion will be proven true or false within adversarial combat between parties with lawyers.⁴³

As a hypothetical protection against the random skills of lawyers and judges, the U.S. Supreme Court in *Daubert* mandated that scientific evidence be subject to a “reliability test.” Among the factors the Supreme Court suggested in *Daubert* are the following: whether the theory or technique can be or has been tested; whether the theory or technique has been subjected to peer review and publication, since 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. While *Daubert* has value, *General Electric Co. v. Joiner*⁴⁴ has special relevance to forensic opinions in family court:

[C]onclusions 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 that is 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.⁴⁵

Critics argue quite vigorously that such an adversarial method of finding facts only increases the duration and intensity of family conflict, harms children, and benefits the lawyers economically. The statement itself does not answer the social policy problem of what society should do when parents have a child and, for reasons that might be quite sad and unfair, find them-

⁴³ See Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 949 (2008) (“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.”).

⁴⁴ 522 U.S. 136 (1997).

⁴⁵ *Id.* at 146; see Sophia Adrogué & Allen Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts*, 47 S. TEX. L. REV. 881, 899-900 (2006) (“[M]ethodologies 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.”).

444 *Journal of the American Academy of Matrimonial Lawyers*

selves caught in an adversarial system.⁴⁶ This point requires an adjustment in the role of the judge based on a conciliation of research and the ethics of judicial decision making:

Legal, psychological, and sociological scholars have all examined and opined about judicial decision making to determine how judges decide cases. The methods of analysis and theories posed are varied, rich, and complex, suggesting that decision making is a product of reason and intuition. Some find that political agendas or background and experience inform decision making, while others argue that judges are influenced by precedent. One theme, however, that resonates throughout much of the literature is that “judges are human.” They are swayed by heuristic decision making, friendships, beauty, the strength of a case, public opinion, fear of reversal, and the normal set of cognitive biases to which we all are subject: expectation bias, hindsight bias, confirmation bias, tunnel vision, and so forth.⁴⁷

There are many forensic experts who remain neutral even when pressured, but those reports may never see the courtroom if confidentiality or privilege is properly exercised by the lawyer.⁴⁸ This is the norm as it pertains to roles in an adversarial system in which lawyers and judges test evidence within legal rules, not the methodologies of science. As scholars have noted quite thoroughly, even if the expert is qualified, the reliability

⁴⁶ See Neal & Grisso, *supra* note 35, at 209-10 (“Finally, we imagined a legal context that might change the role of forensic examiners in a way that accepts adversarial participation through expert evidence—a legal context full of practical, scientific, and ethical questions. These questions may or may not be worth trying to answer as we strive to improve the validity and reliability of forensic mental health evaluations and to foster trust in our work process and products.”).

⁴⁷ Jane Campbell Moriarty, *Will History Be Servitude: The NAS Report of Forensic Science and the Role of the Judiciary*, 2010 UTAH L. REV. 299, 317-18.

⁴⁸ Jonathon Gould, et al., *Testifying Experts and Non-Testifying Trial Consultants: Appreciating the Differences*, 8 J. CHILD CUSTODY 32, 36 (2011) (“When those findings and opinions are not what the retaining attorneys had hoped to hear, the attorneys and experts usually part company and the involvement of the experts is, more often than not, undisclosed. When the findings and opinions orally imparted by the experts to the attorneys are viewed by the attorneys as supportive of their legal positions, the FMHPs employing this model then offer either to provide litigation support services or to offer testimony.”). This debate is not new, but the traps should be clear by now. See Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265 (2011).

and relevance of any opinion should still adhere to ethical duties of candor and scientific rigor:

Using a *Daubert* analysis should likewise result in the exclusion of the expert's testimony on "best interests." A decision on the ultimate issue requires legal analysis and consideration of many factors, some of which may not be known to the expert. Because the best interest standard is admittedly indeterminate, it is not possible to critically assess the expert's predictions on which outcome would serve the child's best interests. In other words, the expert's opinion would not have scientific validity and should not be allowed under *Daubert*.⁴⁹

If bias is both internal to each professional and externally reinforced by allegiance to one side by the forces of an adversarial system, then the environment of litigation itself may inherently lack the capacity to challenge "winning" strategies that encourage and sustain bias in its myriad forms. If we then conceptualize bias in child custody litigation as more deeply rooted in a formulation given by the U.S. Supreme Court in *Joiner*, inadmissible expert opinion by *ipse dixit* reasoning, it may be possible to reform the reliability of FMHE opinions and lawyer behavior regarding expert opinion.⁵⁰ The question for modern family courts, therefore, is whether current differences in a lawyer and FMHE's duty to the court and family system should be reformed to better help shift intergenerational and embedded conflict to collaboration and safety. And understanding bias and bigotry are useful for targeting such a goal.

⁴⁹ Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 22-23 (2004).

⁵⁰ Bruce Budowle, et al, *A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement*, 54 J. FORENSIC SCI. 798, 799 (2009) ("There have always been challenges to the use of science in legal proceedings. In the adversarial system the evidence is criticized in a negative, nonconstructive manner."); Kirk Heilbrun & Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 PSYCHOL., PUB. POL'Y, & L. 219, 242 (2010) ("However, there is good reason to think that poor practice of forensic psychology has the potential to harm the accuracy of legal decision making and the interests of both defense and prosecution across a range of legal decisions.").

IV. Bias Is not Bigotry and Explicit Is not Implicit

Bias, it should be noted, is not the same as *bigotry*. Bigotry or prejudice, or “preconceived opinion not based on reason or actual experience; . . . partiality” is similar to bias in that preconceptions guide or trump reason and decision making absent the capacity to stop, reflect, and respond with intellectual and cognitive insights.⁵¹ Unfortunately, these terms have become synonymous in politics and policy. Bias is, however, quite different. The term *bias* has conjured a socially constructed negative meaning without differentiating implicit and explicit bias, the purposes they serve in social change, or the purposes they can serve in academia. Bias is something we each possess, and it is explicit knowledge of our biases that we should teach. The fact that bias exists within socially constructed scientific and policy realities does not diminish the duty to carefully and critically understand the impact and mechanisms for reducing its influence on vulnerable families in an adversarial system.⁵²

As a threshold matter, we suggest that the intellectual and emotional skill set required to transform and transfer scientific knowledge requires insight into the causes and consequences of bias—implicit and explicit. Researchers in social psychology have recognized that negative attitudes toward certain social groups or personal characteristics may “often exist at the margins of awareness and are not easily accessible to individuals.”⁵³ Decades of research have defined explicit bias as thoughts and feelings that people deliberately think about and may consciously describe and report. Implicit biases often exist outside of conscious awareness and may be automatically activated and thereby influence behavior without conscious volition. Implicit bias is categorized

⁵¹ See Carlos Hoyt Jr, *The Pedagogy of the Meaning of Racism: Reconciling a Discordant Discourse*, 57 *SOC. WORK* 225 (July 2012).

⁵² See Philip Dybic, *Anything Goes? Science and Social Constructions in Competing Discourses*, 38 *J. SOCIOLOGY & SOC. WELFARE* 101, 117 (Sept. 2011) (“Social constructions speak towards the operation of bias. Since the elimination of bias is a major goal in understanding reality, social constructions are eminently useful in identifying this bias.”).

⁵³ William J. Hall, et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 *AM. J. PUB. HEALTH* e60, e61 (Dec. 2015).

by one's unconscious or automatic tendencies, associations, or actions that occur without thought.⁵⁴

Implicit bias is, by no means, an excuse for explicit bias. Implicit bias's appeal to blaming the unconscious should not elicit an excuse for derogatory statements or actions against a particular individual or group. Blending, or indiscriminately using the terms "bigotry" and "bias" together, has consequences on the insight required of FMHEs and the legal system to examine and transform research and observations to judicial outcomes. People have heuristic, or mental short-cut, reactions to data acquired by the senses that allow them to move through their days; though neurologically and culturally built into those short-cuts are powerful biases.⁵⁵ Brains thereby process information and filter noise using these cognitive shortcuts. Behavioral economists and social psychologists have studied the influence and consequences of these heuristics on our cognitive and emotional decision making for decades now. Knowledge of these organic events may help avoid the impact of bias or, at least its explicit revelation as part of an investigation, report, and expert opinion to a court.⁵⁶

In practice, these forms of bias (or its permutations and combinations) may generate alliances with a client based on no data except the statements of one person.⁵⁷ Bias could reject the

⁵⁴ For an insightful discussion, see Jules Holroyd, Robin Scaife, & Tom Stafford, *Responsibility for Implicit Bias*, 12 *PHILOSOPHY COMPASS* e12410 (2017); Katheryn Russell-Brown, *The Academic Swoon over Implicit Racial Bias: Costs, Benefits, and Other Considerations*, 15 *DU BOIS REV.: SOC. SCI. RES. ON RACE* 185 (2018).

⁵⁵ See generally *BEYOND PREJUDICE: EXTENDING THE SOCIAL PSYCHOLOGY OF CONFLICT, INEQUALITY AND SOCIAL CHANGE* (John Dixon & Mark Levine eds., 2012); JONATHAN KAHN, *RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE* (2017).

⁵⁶ See Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 *OR. L. REV.* 61, 99 (2000) ("Courts identify cognitive illusions that might affect juries, but fail to identify cognitive illusions that affect judges and fall prey to them.").

⁵⁷ This point matters given the confusion that occurs in family court between clinicians treating a client and forensic professionals. In one study, jurors viewed clinical therapist and forensic testimony as equally scientific but more heavily weighed the therapist testimony in their decision-making. See Daniel Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 *PSYCHOL., PUBL. POL'Y, & L.* 267 (2001).

intelligent and mindful use of multiple hypotheses to explain a family system or a child's distress. Unhinged bias might create cognitive dissonance or distortions and thereby enhance the risk that such bias leaves the lawyer and expert in an ethical trap rather than as active and constructive members of an interdisciplinary team helping a family. What matters is exploring the forms of bias that may more frequently influence the opinions of FMHEs as hired and the behavior of lawyers and judges in a system that tolerates bias as adversarial strategy.

Confirmation Bias Within the Adversarial System

Confirmation bias “refers to our tendency to search for and interpret information that confirms our prior beliefs (e.g., those who believe that arthritis pain is influenced by the weather will notice their pain more during extreme weather events, but may pay less attention when the weather is fine).”⁵⁸ In various contexts, when people know the outcome of an event, but try to hide that knowledge, research suggests that people may be even more influenced by knowledge of the outcome. This “tendency is known as hindsight bias or the knew-it-all-along effect.”⁵⁹ From a research-based understanding of confirmation bias there is the underlying “anchoring effect,” which describes the tendency to rely on the first piece of information offered (i.e., the anchor) when making decisions. From that anchor, subsequent judgments may be “influenced by initial information or beliefs (including when that information is unreliable or even arbitrary—e.g., a number on a roulette wheel or drawn from a hat).”⁶⁰

Some scholars have more precisely distinguished between *motivated* and *unmotivated* forms of confirmation bias.⁶¹ For example, experts may treat data in a biased way when motivated by the desire to defend beliefs they wish to maintain; though this is not to suggest intentional mistreatment of evidence, even if the expert has a stake in supporting a “valued belief” in certain out-

⁵⁸ Gary Edmond, et al., *Contextual Bias and Cross-Contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals*, 14 *LAW, PROBABILITY & RISK* 1, 6 (Mar. 2015).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCHOL.* 175, 176 (1998).

comes.⁶² Confirmation bias has long been recognized by philosophers and the earliest scientists to be an important determinant of human thought and behavior. As Francis Bacon wrote in 1620:

The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate. . . . And such is the way of all superstitions, whether in astrology, dreams, omens, divine judgments, or the like; wherein men, having a delight in such vanities, mark the events where they are fulfilled, but where they fail, although this happened much oftener, neglect and pass them by.⁶³

The risk with confirmation bias is that cross-examination is more likely a futile endeavor without efforts to educate and ensure protections against such biases *before* trials occur.⁶⁴ Even assuming that lawyers and judges could recognize such pre-trial and trial biases within themselves, the adversarial system may well bleach out its effects, because the professionals might find common (group) ground in the courtroom for a particular outcome; especially given time and resource limitations. Often there is too much information to process, creating a risk that if “one has expectations about an event, or hypotheses about its cause, one tends to draw selectively from the available evidence and

⁶² *Id.* There are many examples of the misuse of individual beliefs as science in family courts. See Jennifer Houlton, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD. LEGAL RTS. J. 1, 11 (2006) (“PAS’s twenty-year run in American courts is an embarrassing chapter in the history of evidentiary law. It reflects the wholesale failure of legal professionals entrusted with evidentiary gatekeeping intended to guard legal processes from the taint of pseudo-science.”).

⁶³ *Id.* quoting FRANCIS BACON NOVUM ORGANUM (1620), in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 39 (E.A. Burt ed., 1939). Bacon framed this analysis of potential biases, as we now use that language, in the context of four idols. Itiel E. Dror, *How Can Francis Bacon Help Forensic Science-The Four Idols of Human Biases*, 50 JURIMETRICS 93 (2009).

⁶⁴ See generally Budowle, et al., *supra* note 50; Gary Edmond, et al., *Thinking Forensics: Cognitive Science for Forensic Practitioners*, 57 SCI. & JUST. 144 (Mar. 2017); Aaron Robb, *Strategies to Address Clinical Bias in the Child Custody Evaluation Process*, 3(2) J. CHILD CUSTODY 45 (2006).

focus on those items that confirm the working hypothesis.”⁶⁵ Outcome expectations in groups may thereby play into confirmation bias and lay the groundwork for selective attention to data (which may then become evidence). As Seymour Kety suggested decades ago, “it is difficult to avoid the subconscious tendency to reject for good reason data which weaken a hypothesis while uncritically accepting those data which strengthen it.”⁶⁶ What if these tendencies have an additional effect on the selection of the FMHE in the form of gender and its related research?

Bias and Gender of the FMHE: A Special Category?

By observation, common sense, and limited research, it is fair to argue that FMHEs play a powerful role in judicial outcomes. The argument that these experts influence a relatively small portion of child custody cases may ignore the influence in settlement and poverty cases in which the state may utilize experts to prove abuse or neglect.⁶⁷ This is so even if empirical data as to whether expert opinion improves judicial decision making or reduces re-litigation rates among parents is still in the preliminary stages.⁶⁸ In this adversarial context, scholars and practition-

⁶⁵ Michael D. Risinger, et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 15 (2002).

⁶⁶ *Id.* quoting Seymour S. Kety, *Biochemical Theories of Schizophrenia (Part I)*, 129 SCIENCE 1528, 1529 (1959).

⁶⁷ Specific data would be difficult to ascertain. See Austin, et al., *supra* note 39, at 50 (“We are concerned only with custody cases that reach the litigation phase and involve a child custody evaluation. This is a very small percentage of divorces. The vast majority of divorcing parents informally settle their parenting issues.”); Mary Johanna McCurley, et al., *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 J. AM. ACAD. MATRIM. LAW. 277, 277 (2004) (“Mental health professionals are frequently appointed by courts to become involved in custody cases in the role of child custody evaluator.”).

⁶⁸ See Margaret Bull Kovera, Melissa B. Russano, & Bradley D. McAuliff, *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers’ Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 PSYCHOL., PUB. POL’Y, & L. 180, 185 (2002) (“Based on the results of basic social psychological research on scientific reasoning ability, it is logical to expect that judges may not be able to identify flaws in expert evidence proffered in their courtrooms. It is possible, though, that judges’ extensive experience in evaluating the admissibility of expert evidence will have provided them with knowledge about scientific methodology that laypeople do not pos-

ers for generations have recognized that the adversarial nature of legal proceedings in the United States likely creates “partisan bias in experts through unconscious affiliation with the side that hires them (i.e., adversarial allegiance) and by attorneys who select and pressure experts to make extreme claims.”⁶⁹ An ever-growing body of research from psychology, social psychology, and behavioral economics suggests that experts are susceptible to a host of implicit biases that may distort or influence scientific judgments or opinions.⁷⁰

Existing conventions of cross-examination and competing experts may not only fail to remediate the risk of confusion and distortion during the transfer of expert opinion, but might actually create more harm as judges select or reject from these opinions in whole or part.⁷¹ In child protection and child custody matters, the adversarial system requires lawyers to locate and employ experts for their side who offer admissible evidence on whether, for example, parental termination should occur, or which parent should have primary physical custody. When forensic mental health experts are employed, their role is to offer testimony concerning the probability of future risk, clinical diagnosis,

sess. *However, judges report relying on experts’ credentials and experience rather than the content of their testimony when judging the credibility of expert testimony.*”) (emphasis added).

⁶⁹ John Kellerman, et al., *Expert Opinion: Hot Tubbing as an Alternative to Adversarial Expert Testimony*, (2018), http://ap-ls.wildapricot.org/resources/EmailTemplates/2018_04%20April%20AP-LS%20Newsletter/ExpertOpinionApril.pdf.

⁷⁰ See Daniel C. Murrie & Marcus T. Boccaccini, *Adversarial Allegiance Among Expert Witnesses*, 11 ANN. REV. L. & SOC. SCI. 55, 58 (2015) (“Questions about adversarial allegiance are long-standing and widespread. Expert witnesses—particularly those from medicine and the behavioral sciences—have long been tolerated with skepticism and sometimes characterized as hired guns who can reach any conclusion to support the party that retained them.”); Neal & Grisso, *supra* note 35, at 206 (“We think there are good reasons to be concerned. Scientific and clinical expertise in the courtroom is dependent on the expectancy that the expert seeks accuracy and avoids anything that may lead to bias in the collection or interpretation of data. Challenging that expectancy is a growing body of research suggesting that forensic examiners differ in the data they collect and the opinions they reach, depending on the social contexts in which they are involved in forensic cases.”).

⁷¹ See, e.g., *Clement v. State*, 458 A.2d 69, 72 (Me. 1983) (“In general, a fact finder is not bound to accept the opinion of an expert, especially in the field of psychology which may not be the most exact of sciences.”).

and testing data for purposes of creating a profile of family systems' conflict and functional parenting capacity, for example.⁷²

Compounding confirmation bias is what is often termed *selection effects* which occur when attorneys choose evaluators who have preexisting attitudes that favor their side or only use experts with the more favorable findings to testify. Both of these biases can be augmented by *allegiance effects* which may occur when retained evaluators, paid by one side, form opinions that favor that side. In one study, Tess Neal demonstrated that some experts have preexisting biases that could affect their willingness to work for one party or another in the adversarial system—which likely amplifies the effects of system-induced biases.⁷³ It is rather likely that both the adversarial system and the characteristics of FMHE duty may enhance the risk that the adversarial environment encourages and condones these biases as a zealous service to the client.⁷⁴

Thus, the special category of bias in family court deserves discussion because most of child custody litigation bears witness to the impact of gender at all levels, from the societal to social norms to the courtroom.⁷⁵ The employment of forensic experts is

⁷² For an example of a conceptual framework for evaluators, see Benjamin D. Garber, *The Chameleon Child: Children as Actors in the High Conflict Divorce Drama*, 11 J. CHILD CUSTODY 25, 34 (2014) (“First, the artificial nature of the process and the evaluator’s presence invite questions about the Hawthorne effect and raises paradoxical questions.”) (citation omitted).

⁷³ See Daniel C. Murrie, et al, *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCHOL. SCI. 1889 (2013); Tess Neal, *Are Forensic Experts Already Biased Before Adversarial Legal Parties Hire Them?*, 11 PLOS ONE E0154434 (2016). In fairness, FMHEs may make a wise and informed decision not to work with certain lawyers who behave aggressively or unethically using zealous advocacy as an excuse.

⁷⁴ Although this paper relates to FMHEs, the literature cited in this paper crosses into many fields of forensics. The rates of wrongful convictions alone should be enough to give pause when the human capacity for bias is reinforced by group or institutional behavior. See Glen Whitman & Roger Koppl, *Rational Bias in Forensic Science*, 9 LAW, PROBABILITY & RISK 69, 71 (2010) (“Forensic science evidence is often ambiguous, and the analysis is generally subjective. In spite of such ambiguity and subjective judgement, forensic science testimony is generally categorical, essentially conveying a ‘match’ or ‘no match’ decision. The tension exists within an institutional structure that frequently puts crime labs under the administration of law enforcement agencies.”).

⁷⁵ An important limitation on most of the research is that it is based on mock juries or jury surveys, for example. Research on the gender of experts and

not excluded from that set of social norms. In a realm in which a substantial percentage of trial lawyers, judges, guardians ad litem, therapists, and FMHEs are women, and men and women are observed and judged within this realm, are there implicit or explicit biases which influence the selection of experts? Does that selection influence forensic opinions irrespective of gender or does the gender of lawyers and judges and clients influence outcomes? Research from other fields of trial work suggests that the answer is a tentative *yes*—but with very cautious analysis.⁷⁶

Why this should matter at all is a delicate topic for discussion, but if we are candid about implicit biases, we must start by at least discussing why certain experts are hired with certain characteristics by certain lawyers and whether that, empirically or anecdotally, influences judicial outcomes in child custody cases.⁷⁷ In one research study regarding academia, psychology

the gender of lawyers and judges as variables subject to comparison would be interesting if problematic to undertake so there is little of this type of research in family court. For an early summary of research related to forensic psychiatry, see Marilyn Price, et al., *Gender Differences in the Practice Patterns of Forensic Psychiatry Experts*, 32 J. AM. ACAD. PSYCHIATRY L. ONLINE 250, 257 (2004) (“The impact of stereotypes based on gender maybe positive, neutral, or negative in relation to expert testimony on any given topic. Further study is needed to explore whether the use of stereotypes in fact plays a role in the real world and, if so, what is the extent of the influence.”). The results of an early symposium on this topic of gender and experts may be found in Amy P. Walters, Note, *Gender and the Role of Expert Witnesses in the Federal Courts*, 83 GEO. L.J. 635 (1994).

⁷⁶ See Aimee C. Kaempf, et al., *Gender and the Experience of Mental Health Expert Witness Testimony*, 43 J. AM. ACAD. PSYCHIATRY L. ONLINE 52, 58 (2015) (“In this study, we sought to identify ways in which gender may play a role in how expert witnesses perceive and self-assess testimony experiences and may affect levels of testimony-related anxiety. Overall, we found few gender-based differences. We also did not explore race and culture as variables that could have changed self-perception and suggest further exploration of these aspects in future studies.”); Tess Neal, *Women as Expert Witnesses: A Review of the Literature*, 32 BEHAV. SCI. & L. 164, 177 (2014) (“In sum, the data available to date indicate there are some gender differences in how men and women experts may be perceived, but most of these differences are relatively small and contextually determined. The existing body of data provides some implications for how men and women experts might behave in order to maximize their perceived credibility, which has been reviewed here.”).

⁷⁷ The authors have presented on this topic and the research before interdisciplinary audiences. The reactions are often a surprise but the discussion usually unpacks the reason why the discussion is worth having. For a broader

faculty across the country were asked to evaluate one Curriculum Vitae (CV). The CVs were identical other than the fact that some had a clearly female-sounding name versus a clearly male-sounding candidate name. The researchers hypothesized that CVs with “male” names would be evaluated more favorably than CVs with “female” names. The results confirmed this hypothesis. Psychology faculty members were more likely to state that they would hire the male candidate than the female candidate.⁷⁸ And this took place in academia, not in the more volatile world of the adversarial system, much less the universe of high-stakes child custody litigation.

The research suggests that when deconstructing the elements of credibility there are several characteristics for the expert that are especially relevant. *Trustworthiness*, which means the perception of listeners (judges and/or jurors) regarding the honesty of a witness or belief in that witness testimony offered in good faith to inform rather than mislead. *Knowledge/expertise*, which entails the formal aspects of experience and training that together ascribe levels of competence. Finally, *dynamism/presentation style* relates to style and charisma, including nonverbal elements that inspire likeability, and the characteristics of being friendly, respectful, kind, well-mannered, and pleasant. Research suggest that these features synergistically blend together to determine the expert’s credibility to fact finders.⁷⁹

For both males and females, *competence* (trustworthiness/expertise) is an important prerequisite for credibility as an expert

discussion of this topic in the federal courts, see Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389 (2010) (“The result is now a voluminous body of literature, which focuses on two chief questions: whether and in what ways male and female judges decide cases distinctly—‘individual effects’—and whether and in what ways serving with a female judge causes males to behave differently—‘panel effects.’”); see also Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2004).

⁷⁸ See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1 (2010).

⁷⁹ See Neal, *supra* note 76; see also Tarika Daftary-Kapur, Maureen O’Connor, & Mindy Mechanic, *Gender-Intrusive Questioning: A Survey of Expert Witnesses*, 32 BEHAV. SCI. & L. 180 (2014).

witness. However, Neal concluded that male and female experts are judged differently. Both need to attend to gender role expectations to maintain perceived credibility as experts. For males, maintaining high levels of eye contact (“assertive eye contact”) with whomever is asking questions and with the trier of fact is important for credibility. This requirement did not hold for female experts: women were perceived as credible no matter their level of eye contact. *Likeability* appears to be especially important for female experts but does not appear to be as important for male experts.

In addition, studies have suggested that female experts are viewed as more credible when they use informal speech, minimize technical jargon, explain key terms, and use the name of the defendant or plaintiff rather than referring to him or her as “the defendant” or “the plaintiff.” Female experts attending to their likeability should also use modest rather than excessively certain statements, be willing to smile on occasion and use inclusive statements (e.g., the words *we* or *us* when discussing members of the scientific community). In addition, studies have examined the effect of gender congruency; that is, there is evidence that expert gender is one source characteristic that jurors use to boost credibility of male experts when processing evidence in male-dominated domains (e.g., construction industry) and to prize testimony of female experts in female-dominated domains (e.g., clothing industry).⁸⁰

This research matters because selection, allegiance, and confirmation biases often begin at the threshold of FHME employment.⁸¹ The overarching issue arises from what research suggests

⁸⁰ See Evelyn M. Maeder, *Jurors' Perceptions of Scientific Testimony: The Role of Gender and Testimony Complexity in Trials Involving DNA Evidence*, 3 *COGENT PSYCHOL.* 1264657 (2016) (“We found that jurors voted guilty more often when a woman communicated complicated DNA evidence compared to the same testimony from a man, but no such gender-based differences existed for more simplistic testimony.”). For additional research, see Tarika Daftary-Kapur, Maureen O'Connor, & Mindy Mechanic, *Gender-Intrusive Questioning: A Survey of Expert Witnesses*, 32 *BEHAVIORAL SCI. & L.* 180 (2014); Annette L. Ermshar & Adrienne M. Meier, *Forensic Psychology: Preparing Female Clinicians for Challenging Offenders*, 37 *WOMEN & THERAPY* 72 (2014).

⁸¹ See Thomas G. Gutheil & Robert I. Simon, *Avoiding Bias in Expert Testimony*, 34 *PSYCHIATRIC ANNALS* 260, 261 (2004) (“Attitudes toward women or men, especially stereotypic ones, may bias an expert's opinion.”); Joan

are experts, regardless of gender, who may lack recognition of their biases compared to their perception of bias in others (i.e., bias blind spot).⁸² This statement, however, does not fairly account for the biases of judges and lawyers concerning gender (even as researchers study juries). Each has a personal and organizational role in self-reflection and educating themselves and clients. Similar to the ethical requirements for forensic psychologists under the APA *Specialty Guidelines*,⁸³ there should be a duty to transparently disclose alternative hypotheses, to provide the court and parties with data that supports or does not support the conclusion in a report, and to provide informed consent and assurance that children or vulnerable parties know the scope and consequences of the role. As in *Joiner*, the risk otherwise is that *ipse dixit* analysis is really the guise of confirmation bias hiding selection bias in all its guises.⁸⁴

V. Conclusion

The judicial decision-making problem inherent in child custody begins with a problem inherent in the social and psychological sciences. Psychological or mental health expert opinions which derive from qualitative and quantitative research (rather

S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 *LAW & INEQ.* 311, 314-15 (2017) ("More recent studies have elaborated on a pattern of family court failures to consider evidence of intimate partner violence, disrespectful treatment of battered women, gender biased treatment of mothers, and granting of physical custody to perpetrators of intimate partner violence."). For another point of view, see Donald Dutton, John Hamel, & Jon Aaronson, *The Gender Paradigm in Family Court Processes: Re-Balancing the Scales of Justice from Biased Social Science*, 7 *J. CHILD CUSTODY* 1 (2010).

⁸² Marissa Zappala, et al., *Anything You Can Do, I Can Do Better: Bias Awareness in Forensic Evaluators*. 18 *J. FORENSIC PSYCHOL. RES. & PRAC.* 45, 47 (Dec. 2018).

⁸³ See AMERICAN PSYCHOLOGICAL ASSOCIATION SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY, *supra* note 23.

⁸⁴ See Martine B. Powell & Sandra Lancaster, *Guidelines for Interviewing Children During Child Custody Evaluations*, 38 *AUSTRALIAN PSYCHOL.* 46, 49 (2003) ("The issue of confirmation bias is particularly relevant to custody decisions because these decisions are inherently subjective and value laden. For example, personal bias has been shown to predict the type of custody arrangements favored by mental health professionals with some professionals preferring to award custody to parents of one gender over the other.").

than conceptional theories or hypotheses disguised as science) or psychological testing should result in some consistency as to how such information is applied to predictive opinions about a family system. Yet lawyers and judges can read multiple reports from eminently qualified forensic experts and find little uniformity of interpretation.⁸⁵ Sampling methods, cultural and demographic norms for risk, generalizability of cognitive and personality testing, valid and reliable data collection methods, explanations for moderating, mediating, confounding variables, and statistical analysis and error rates, among many other factors, may be buried beneath the dispute.

Thus, one of the most consequential legal problems is that the psychological professions do not agree among themselves about a particular matrix of methodologies (e.g., testing, clinical, collateral sources) and their scientifically reliable application to a particular family.⁸⁶ In contrast to social science methods, the physics of sub-atomic particles, for example, as yet unseen beyond predictive mathematical formulae and shadows can be applied to cell phones, missile guidance systems, and exportation of ocean or space, and scientists can refine physical tools for deeper and more accurate measurement while accepting the model and its efficacy.⁸⁷ The physicist or engineer a company selects as an

⁸⁵ See Birte English, Thomas Mussweiler, & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 198 (2006) ("Even though judges typically do not throw dice before making sentencing decisions, they are still constantly exposed to potential sentences and anchors during sentencing decisions. The mass media, visitors to the court hearings, the private opinion of the judge's partner, family, or neighbors are all possible sources of sentencing demands that should not influence a given sentencing decision.").

⁸⁶ For a recent example, compare Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. AM. ACAD. MATRIM. LAW. 325 (2017), with Sol R. Rappaport, Jonathon Gould, & Milfred D. Dale, 30 *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 J. AM. ACAD. MATRIM. LAW. 405 (2017). One of the authors of this paper (Prescott) is on the Editorial Board of the AAML Journal.

⁸⁷ For an example of this form of analysis, see Sencer Ayas, et al., *Counting Molecules with a Mobile Phone Camera using Plasmonic Enhancement*, 1 ACS PHOTONICS 17, 24 (2013) ("The remarkable sensitivity of the smart phone

expert might affect the quality of invention and the profitability of new products derived from that science, but unchecked bias as a belief in what might be true would have visible consequences for all concerned.⁸⁸

Despite reams of research, social science and legal literature, and efforts at judicial reform, encouraging non-adversarial strategies, child custody decision-making remains startlingly immutable to sustained institutional change.⁸⁹ With that said openly, the challenge for family law lawyers trained to behave in accordance with legal ethics intentionally designed to inculcate adversarial behaviors is that efforts at structural change have not altered the ethical duty to clients who expect aggressive and zealous advocacy.⁹⁰ The question then is not whether biases are a product of

camera combined with high plasmonic enhancement of the optical signal as demonstrated in this article, may pave the way for low cost hand-held systems which can be used in the analytical study of samples at a single molecule level.”).

⁸⁸ For an interesting analysis of the intersection of science and policy, see generally MORRIS B. HOFFMAN, *THE PUNISHER'S BRAIN: THE EVOLUTION OF JUDGE AND JURY* (2014); *see also* Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Reply to Weinshall-Margel and Shapard: Extraneous Factors in Judicial Decisions Persist*, 108 *PROC. NAT'L ACAD. SCI.* E834-E834 (2011) (“We have presented evidence suggesting that when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment”). The statistical analysis has been subject to challenge. *See* Andreas Glöckner, *The Irrational Hungry Judge Effect Revisited: Simulations Reveal that the Magnitude of the Effect Is Overestimated*, 11 *JUDGMENT & DECISION MAKING* 601, 601 (2016) (“According to previous findings on mental depletion, the ‘irrational hungry judge effect’ should at best be small in magnitude (if existing at all; see Carter & McCullough, 2013), which might render the observed extraneous influence less relevant from a practical point of view and the need for state interventions less urgent.”).

⁸⁹ For policy discussions, see Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 *LAW & SOC. INQUIRY* 1 (2006); Douglas M. Teti, et al., *Supporting Parents: How Six Decades of Parenting Research Can Inform Policy and Best Practice*, 30 *SOC. POL'Y REP.* 1 (2017).

⁹⁰ *See* Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 *LAW & SOC. INQUIRY* 441, 479 (2003) (“In closing, we note that from the point of view of the lawyers, expert witnessing may be characterized as a ‘performance.’ Lawyers commission and direct these presentations. The determinants of the perform-

an adversarial system because bias is inherently part of the human condition, but how to manage that reality in a way that protects families and children.

The reliance on adversarial truth seeking makes it no less a powerful myth that trials discern fact from fiction, perception from lying.⁹¹ Much like the perfect rationality and knowledge of buyers and sellers in markets held dearly by economists for generations, this myth has created a false ideal. A couple of lawyers with an assigned judge cannot, in a matter of hours, ferret out an objective truth (whatever that may mean to clients or philosophers) and then render a decision framed by the law of “best interests” or “interpersonal violence” or “abuse or neglect” as defined by statutes applied to millions of family transactions across variables.⁹²

Unlike criminal and tort litigation, the fact that parents must continue to cooperate makes the model of adversarial systems even less rational, whatever its roots.⁹³ This is another more pain-

ance begin with the lawyer’s choice of a performer (casting) and proceed to the content of the testimony (script) and the manner of presentation (staging). If these efforts are successful, the audience’s perceptions of the messenger and the message unite to form their reaction to a performance that is designed to have a specific impact-like the intertwining of character and plot in a play.”); see also Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283 (1999).

⁹¹ See Felicity Nagorcka, Michael Stanton, & Michael Wilson, *Stranded Between Partisanship and the Truth—A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U.L. REV. 448, 452 (2005) (“David Luban states that ‘non-accountable partisanship’ dominates the adversarial system. This is because lawyers advocate their clients’ interests with the ‘maximum zeal’ permitted by law, and are morally responsible neither for the ends pursued by their client nor the means of pursuing those ends, provided both are lawful.”).

⁹² See Elster, *supra* note 32, at 24 (“A custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy. Use of expert and character witnesses can be especially harmful. ‘The parents will call each other officially crazy, and the children will begin to wonder about themselves as well as their parents. Also, the ‘efforts of attorneys, working in an adversary spirit, can escalate conflict between parents and draw children into divorce arguments.’”).

⁹³ See Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2120 (2012) (“This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court,

ful flaw in this process. Once the trial is done and the judge decides, families are then subject to what is termed by the authors as the *cliff effect*. This means that families have the right to return to court in various iterations during the legal minority of a child; and if the family has resources, they continue to hire new experts. To create change means to acknowledge that the complex forms of bias discussed in this article may also distort lawyer behavior and expert opinions, which should collaboratively protect families. Yet professionals and academics persist in believing that introspection is sufficiently effective for reducing bias. In this regard, one study concluded that, “It is essential for evaluators to find methods that can reduce the potential for bias to influence their work. Bias awareness is necessary for improving clinical decision-making in the field of forensic psychology, and further research on debiasing strategies is an important next step.”⁹⁴

Understanding the role of bias, in whatever form, is critical to improving services for families. Moreover, it is essential to recognize that the adversarial system, by its design, may encourage the perpetuation of bias from alternative dispute resolution to trial.⁹⁵ There is a means to such an end in wisdom learned from many moments with a colleague Professor Walter Kisthardt, who

but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes.”); see also Robert Cooter, *Law and Unified Social Theory*, 22 J. L. & Soc’y. 50, 50 (1995) (“Microeconomics concerns the efficiency of markets, but I was more interested in the majesty of law, the struggle of politics, and the deciphering of culture. My explanation of the successes of economics will reveal limits in models of rational behaviour that insulate economics from psychology and sociology.”).

⁹⁴ *Id.*

⁹⁵ There is much less research on race in the context of FMHEs or child custody, but it is very important for future study of family courts given the demographics of families. See James W. Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?*, 32 J. AM. ACAD. PSYCHIATRY L. ONLINE 21 (2004). For a discussion of these concerns, see Leah A. Hill, *Do You See What I See—Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 531 (2006) (“That the Family Court is ill-equipped to address the needs of the hundreds of thousands of cases handled therein is not news. Exploding caseloads, complex problems, and minimal resources are just a few of the ingredients that combine to undermine the Court’s ability to fulfill its promise. What has been given less attention until very recently is the extent to which the Family Court’s failures disproportionately impact low-income families of color.”).

believes so passionately in the strength of human beings to generate and sustain positive change: “The strengths based perspective is an alternative to a preoccupation with negative aspects of people and society and a more apt expression of some of the deepest values of social work.”⁹⁶ He would not suggest that such a course is easy; yet it is all too easy to bathe in the negative and kvetch about the status quo than it is to adjust the values that make protecting children and healing conflict transformative for the courts and the FMHEs and legal professionals who inhabit that environment.

⁹⁶ Ann Weick, Charles Rapp, W. Patrick Sullivan, & Walter Kisthardt, *A Strengths Perspective for Social Work Practice*, 34 *SOC. WORK* 350, 350 (1989).

