

## The AAML and a New Paradigm for “Thinking About” Child Custody Litigation: The Next Half Century

by

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Since 1962, the American Academy of Matrimonial Lawyers (AAML) has encouraged critical debate and scholarship concerning marriage, divorce, parenting plans, collaborative interventions, and the ethical responsibilities of professionals to parents and children embedded in child custody litigation.<sup>1</sup> As a national organization whose mission is the improvement and delivery of humane services to families, the AAML has a unique opportunity to encourage the transdisciplinary study of child custody conflict.<sup>2</sup> Without too much dramatic license, the legal sys-

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<sup>1</sup> For a list of the American Academy of Matrimonial Lawyers’ (“AAML’s”) publications and model acts, see American Academy of Matrimonial Lawyers, <http://www.aaml.org/library/publications>. For excellent examples, see Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009); George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521 (2008); Mary Kay Kisthardt, *The AAML Model for a Parenting Plan*, 19 J. AM. ACAD. MATRIM. LAW. 223 (2005). The AAML does not generally focus on child protection proceedings, or non-private forms of litigation. Although this paper will have the same focus, the study of violence, trauma, and conflict for children should not neglect a population that suffers, in many cases, even more. See Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful*, 42 FAM. L.Q. 481, 509 (2008) (“Recognizing then, as now, the vast negative impact on society of child maltreatment, I suggested we need new policy solutions to help address the problem, and then not only to fully fund them but to *mandate* them.”). It is important to remember that child protection proceedings are poor families’ custody cases. Parents with resources rarely find themselves in that venue, even when the behaviors are comparable.

<sup>2</sup> This suggestion does not ignore the importance of organizations like the Association of Family and Conciliation Courts and its decades’ long collaboration between professions. The AAML started, and remains, an organization

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tems' traditional approach to fact finding and judicial decision making is a narrow and pedantic view of parental conflict and dispute resolution, too often inadequately informed by a range of empirical evidence of what works and what does not.<sup>3</sup> Indeed, the American Law Institute's (ALI) proposed "approximation rule" (as described more particularly in Part III) provides an excellent example of a public policy initiative disconnected from the realities of human emotion and cognition under conditions of uncertainty and conflict.<sup>4</sup>

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of trial lawyers. The specific outlook may be quite different in the context of conflict resolution. The need to change the structural and philosophical foundation of the legal profession and the judiciary. To "break down disciplinary silos and accelerate the transfer between research and practices, [*transdisciplinary* means] that research teams of the future will be interdisciplinary [and] practice teams of the future will be interprofessional," which calls for "more unified practice models, a common language, and unifying goals." Jason M. Satterfield et al., *Toward a Transdisciplinary Model of Evidence-Based Practice*, 87 MILBANK Q. 368, 369 (2009).

<sup>3</sup> Margaret F. Brinig, *Empirical and Experimental Methods of Law: Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1084 ("Most family law reform, however, has been singularly uninformed by empirical studies, and many of the studies that do exist present some intractable problem for social scientists."). This statement does not account for the recurring problem in family law research of investigator bias. See *id.* at 1092-95. This is not quite the same as the debate concerning evidence-based practice in therapy, for example. See Alan E. Kazdin, *Arbitrary Metrics: Implications for Identifying Evidence-based Treatments*, 61 AM. PSYCHOL. 42 (2006); Stanley L. Witkin & W. David Harrison, *Whose Evidence and for What Purpose*, 46 SOC. WORK 293 (2001).

<sup>4</sup> See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (2002) (hereinafter "ALI PRINCIPLES"). For a more comprehensive exploration than I intend to undertake in this paper, see RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006); Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years after Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 577 (2008) ("[T]he ALI's shrinking relevance, as measured by the Principles' impact, is hardly unique to the ALI. As academic work has become more theoretical and less practical in recent decades, judges have increasingly dismissed its importance."). Public policy itself is an interesting area of study which is deeply influenced by economic theory. See BERYL A. RADIN, BEYOND MACHIAVELLI: POLICY ANALYSIS COMES OF AGE 113 (2000) ("In reality, however, economists (particularly microeconomists) appeared to dominate the social science landscape."); STEVEN E. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY 219 (1999) ("The ana-

In contrast to the approach of the ALI and the legal professional generally, the Santa Fe Institute was founded in the 1980s as a “think tank” for scientists and scholars who sought to understand seemingly complex and chaotic biological and physical systems.<sup>5</sup> Many of the participants believed that mathematical and technological tools drawn from decades of intellectual ferment in such fields as neuronetworks, economics, ecology, artificial intelligence, biology, and physics could illuminate how systems adapt, change, and obtain states of equilibrium. The study of the interlocking matrices of *family systems*,<sup>6</sup> and conflict resolution within the *judicial system* as a constitutional branch of government has, however, managed to remain fairly barren.

More specifically for purposes of this article, legislatures and courts have defined and re-defined the contours of factfinding and the scope of judicial authority in child custody litigation by adjusting the century-old *mantra* “best interests of the child.”<sup>7</sup> This phrase itself implicates an extraordinary range of public policy and personal values. Best for whom? Who is designated the authority? What stereotypes and biases does that authority em-

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lytical framework economists use to look at the world will not always point the way toward good public policy. Moreover, it will sometimes obscure important questions. But there is no superior methodology lurking in the mainstream of some other social science, and this book has not attempted to create one. Still, my criticisms are meant to be constructive. Public policy should improve if we are alert to economists’ propensities and the types of errors they can lead to.”).

<sup>5</sup> For a history of the Sante Fe Institute and its achievements, see generally ROGER LEWIN, *COMPLEXITY: LIFE AT THE EDGE OF CHAOS* (2d ed. 1999); M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (1992).

<sup>6</sup> See Jane M. Spinak, *Adding Value to Family: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 344 (“‘Family system’ theory, which recognizes the family as a complex system whose malfunctioning may have multiple causes requiring creative legal dispositions, reinforces and helps to explain the value-added role of the Family Court. This psychological theory rejects the medical pathology model of court intervention (i.e., finding the ‘fault’ or ‘cause’ of the family’s problem and ‘fixing it’ by court order) as ineffective to accomplish both the social goals of the family and the dual legal goals of the child welfare system to maintain families and keep children safe. The family system approach provides a powerful psychological analogy to constitutionally-based family integrity.”).

<sup>7</sup> See generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008).

ploy?<sup>8</sup> What, if anything, is the tripwire for acceptable parenting or “how low can it go”? What interventions work and why? How does gender, race, culture, or socio-economic status influence outcomes in court?<sup>9</sup> Finally, and of overarching importance in the child custody arena, whether “people pay much attention to laws in the first place, and, particularly, whether or not law affects their behavior?”<sup>10</sup>

The quest for answers requires the study of *forms* of child custody conflict that adapt and shift within the inherently combative environment of the judicial system. The objective should be to develop a more empirical understanding of the specific forms of parental conflict in litigation. For legal professionals this may mean accepting military historian John Keegan’s characterization of attempts to understand the actual battle between Napoleon’s French Reserve Cavalry and the Russians in 1807: “It sounds unbelievably complicated; indeed it reads like something from the Karma Sutra, exciting, intriguing, but likely to have proved a good deal more difficult in practice than it reads on the

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<sup>8</sup> Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 298 (2009) (“The best interests of the child standard has been criticized almost since adoption because its indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases as well as the scripts and models left behind by metaphors and stories. If there is no evidentiary basis for deciding that one custodial arrangement is better than another, and if the parents are unable to agree on what is best for their family, judges will look to their own images of ideal families to assess the families who come before them.”).

<sup>9</sup> See Mary E. Gilfus et al., *Gender and Intimate Partner Violence: Evaluating the Evidence*, 46 J. SOC. WORK EDUC. 245, 246 (2010) (“We argue that gender is an important dimension of IPV because it renders a conceptual frame for understanding complex social positions that influence people’s sources of personal and social power and, hence, their risk or vulnerability for intimate personal violence.”); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 111 (2008) (“Empirical research on gender and negotiation offers insight into the differences between men and women at the bargaining table and the situational variables that exacerbate or eliminate the differences.”).

<sup>10</sup> Brinig, *supra* note 3, at 1096; see also Charles K. Rowley, *On the Nature of a Civil Society*, 2 INDEP. REV. 401, 418 (1998) (“In a civil association, the law must not be the instrument of special interests nor the tool of government. It must constitute a body of moral and precedential rules binding on everyone.”).

printed page.”<sup>11</sup> For similar reasons, accurately describing and measuring family systems that are never static and ever-adapting requires much more precise application of an array of professional disciplines, beyond just the law as the exercise of power, privilege, and sanction.

Unlike the Karma Sutra,<sup>12</sup> this paper has only four moving parts. For purposes of exploring this topic, Part I employs a metaphor to help describe the lenses of professionals from varying disciplines. For several hundred years, lawyers have found metaphors a useful means for shaping the law and rendering judgments about the facts. In the context of child custody conflict, an applicable metaphor, famously adapted by the political philosopher Isaiah Berlin, is from the ancient fable of the fox and the hedgehog: “The fox knows many things but the hedgehog knows one big thing.”<sup>13</sup> The study and development of a judicial science of this form of conflict, and its implementation as public policy, requires a transdisciplinary blending of foxes and hedgehogs. Following employment of this metaphor, Part II provides a brief critique of judicial decision making and the best interests standard as a foundation for a discussion of the approximation rule in Part III. A smattering of social science sources are cited in the ALI text and footnotes but, as with many developments in domestic relations law, the approximation rule is a well-meaning but conventional tweaking of *legal mechanics*.<sup>14</sup> If this policy suggestion was grounded in empirical science and applied to its

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<sup>11</sup> JOHN KEEGAN, *THE FACE OF BATTLE: A STUDY OF AGINCOURT, WATERLOO, AND THE SOMME* 43 (1976).

<sup>12</sup> In the interest of full disclosure, I have never read the book but relied on the description in Wikipedia.

<sup>13</sup> ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* (Elephant Paperback 1993) (1953) (quoting Archilochus). This metaphor has been important to the development of historical theory, which has much to offer for a science of understanding human behavior in combat. See Harris Sacks, *Hedgehog and Fox Revisited*, 16 J. INTERDISC. HIST. 267 (1985).

<sup>14</sup> For non-lawyer views, see Mary E. O'Connell, *When Noble Aspirations Fail: Why We Need the Approximation Rule*, 1 CHILD DEV. PERSP. 129 (2007); Eleanor Willemsen et al., *The Ethics of the Child Custody Process: Are the American Law Institute's Guidelines the Answer?*, 22 CHILD & ADOLESCENT SOC. WORK J. 183 (2005). For an early defense, see Robert E. Emery, *Changing the Rule for Determining Child Custody in Divorce Cases*, 6 CLINICAL PSYCHOL. SCI. & PRAC. 323 (1999).

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narrow sample of the conventional ideal of the nuclear family, the rule might enhance an understanding of what people, including lawyers, judges, and other investors do in child custody cases.<sup>15</sup>

What the approximation rule is not is the product of research concerning the cognitive limits of human beings, the emotional yin and yang of parental conflict, or the exercise of rational and irrational choice(s) within the specific environment of the judicial system. In Part IV, therefore, I suggest that the development of a judicial science of child custody conflict better fits a *functional/contextual* construct that creates, assesses, and evaluates knowledge claims, theories, and interventions within a matrix of observable events and measurable outcomes.<sup>16</sup> For such an approach to avoid a hedgehog understanding of child custody

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<sup>15</sup> See Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009). In another study, the authors suggested a “more sympathetic view of lawyers as well.” Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1681 (2007). Unfortunately, these authors went far afoot when they stated that ALI’s approximation rule “has received significant support” and that “some studies have suggested that even when parties entered joint physical custody arrangements, the parties drifted into the custody patterns that had pre-existed the separation, often mother custody.” *Id.* at 1677-78. The footnote cites one article written in 1992 and another article from 1995. Empirical science requires literature more current than a decade old to propagate the conclusion that “[i]n this light, the approximation rule simply reflects the likely long-term outcomes.” *Id.* at 1678. There was literature, contemporary with their citations, that explored such assertions. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996); Greer Litton Fox & Robert F. Kelly, *Determinants of Child Custody Arrangements at Divorce*, 57 J. MARRIAGE & FAM. 693 (1995).

<sup>16</sup> This approach is not new. See Margaret Cotroneo et al., *Uses and Implications of the Contextual Approach to Child Custody Decisions*, J. CHILD & ADOLESCENT PSYCHIATRIC NURSING, July 1992, at 13 (rejecting the traditional mechanistic approach to psychology and suggesting that theories and research be evaluated in terms of their contribution to the prediction and influence of behaviors); see also Anthony Biglan & Steven C. Hayes, *Should the Behavioral Sciences Become More Pragmatic? The Case for Functional Contextualism in Research in Human Behavior*, 5 APP. & PREVENTATIVE PSYCHOL: CURRENT SCI. PERSP. 47 (1996); Eric J. Fox, *Clarifying Functional Contextualism: A Reply to Commentaries*, 54 EDUC. TECH. RES. & DEV. 61 (2006); Suzanne Slater & Julie Mencher, *The Lesbian Family Life Cycle: A Contextual Approach*, 61 AMER. J. ORTHOPSYCHIATRY 372 (1991).

conflict requires what the AAML may offer to this dialogue: a place for transdisciplinary research and debate.

## I. Hedgehogs and Foxes

As one scholar wrote, lawyers do love “a range of figurative expressions” from “long favored visual[s]” to the “aural.”<sup>17</sup> Many legal concepts have striking “visual images”: property rights are a “bundle of sticks,” constitutional principles are a “fixed star,” “chain of title,” “bright line” tests, “zone[s] of twilight,” or “black letter” law.<sup>18</sup> More critically, legal philosophies that are “distinctively feminist, African American, Hispanic, or Jewish” often approach jurisprudence “as a matter of ‘voice’”: speaking and singing in ways in which fairness demands a “hearing” and “careful listening” to all these voices.<sup>19</sup> These metaphors, among many others, expose the scaffolding of policy debates that reflect fundamental relationships between individuals and institutions: property, privacy, legal rights, and lawful responsibilities, among others. Indeed, the evolution of a rule of law in a civil society, and the evolution of the human capacity for cognitive and emotional regulation, are concurrent events that step forward, sideways, and painfully backward through the prism of personal and institutional conflict.<sup>20</sup>

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<sup>17</sup> See Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aural-ity, and the Reconfiguration of American Legal Discourse*, 16 *CARDOZO L. REV.* 229, 230-31 (1994). There are many other examples, including “horizontal privacy,” which has a variety of meanings depending upon context. See NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* 127 (2010).

<sup>18</sup> Hibbitts, *supra* note 17, at 230-31.

<sup>19</sup> *Id.* at 231.

<sup>20</sup> See FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 276 (2003) (“When the ‘rule of law’ is contrasted with the ‘rule of men’ the core idea is that individual power, creativity, initiative and discretion have their dark side. The rule of men would be fine if all men were good, but when many men are not so, and when a degree of risk aversion is justified, we may often prefer to lose the most positive efforts of the best men in order to guard against the most negative efforts of the worse of them.”). In his critique of the eighteenth century Prussian General Clausewitz’s premise that “War is the continuation of policy by other means,” John Keegan writes: “Our culture looks for compromises and the compromise at which it has arrived over the issue of public violence is to deprecate its manifestation but to legitimize its use. Pacifism has been elevated as an ideal; the lawful bearing of arms – under a strict code of

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While writing for a different purpose, Berlin argued in 1953 for value pluralism – not moral relativism at all, but the very human notion that there are many roles that attach to any objective outcome. To describe this view of human nature, Berlin examined human dilemmas of freedom, choice, and responsibility for others and employed the metaphor that for the hedgehog, “there exists a great chasm between those who link everything to a single central vision” while foxes “seize upon a vast variety of experience” without any “unitary inner vision.”<sup>21</sup> In modern America, policies that implement laws or rules that are distinctly limited to one vision are often “tethered to culturally embedded stories and symbols.”<sup>22</sup>

This metaphor may seem an odd start to a paper about child custody litigation and various scientific endeavors within the judicial system. But I have reflected upon these lessons a great deal over the years. Any lawyer (and by lawyers I mean judges who are lawyers as well) knows that the daily art of resolving the dimensions and paradoxes of human thought and behavior when causing others to suffer requires a very careful and conscientious balancing of hedgehog and fox.<sup>23</sup> Indeed, Berlin’s notion was

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military justice and within a corpus of humanitarian law – has been accepted as a practical necessity.” JOHN KEEGAN, *A HISTORY OF WARFARE* 5 (1993). My son Ryan, a history major in college at the time of this writing, introduced me to Keegan’s writings. As Keegan notes, “Our institutions and our laws, we tell ourselves, have set the human potentiality for violence about with such restraints that violence in everyday life will be punished as criminal by our laws, while its use by our institutions of state will take the particular form of ‘civilised warfare’.” *Id.* at 4. The fact that child custody litigation is a strident form of violence seems to be given shorter shrift; perhaps this is because the judicial system is seen now as an accepted form of typical or “civilized warfare.” *Id.*; see also Steven W. Kairys et al., *The Psychological Maltreatment of Children*, *PEDIATRICS*, Apr. 2002, at 68, 68 (“Psychological maltreatment is a repeated pattern of damaging interactions between parent(s) and children that becomes typical of the relationship.”).

<sup>21</sup> Janet Ewald, *Foxes in the Field: An Essay on an Historical Methodology*, *AFR. STUD. REV.*, June 1987, at 9, (quoting BERLIN, *supra* note 13).

<sup>22</sup> Berger, *supra* note 8, at 259.

<sup>23</sup> For use of this metaphor in the legal literature, see Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist: One Case at a Time: Judicial Minimalism on the Supreme Court by Cass R. Sunstein*, 89 *GEO. L. J.* 2297, 2350 (2001) (“Plato thought that the Platonic Guardians should rule because they knew the truth. Sunstein thinks judges should rule even though there may be no such thing as truth. Like real world hedgehogs, Sunstein’s Justices take self-



that the critical examination of human suffering is a fundamental goal of a “flourishing” civil society.<sup>24</sup> This concept is much more than an ideal when we discuss the consequences of child custody litigation, parental conflict, social science research, and its intersection with the judicial system.

The practice of domestic relations law no longer governs “relationships between individuals, rather than between individuals and the state” but “pits one family member against another in a zero-sum struggle for resources.”<sup>25</sup> Child custody conflict is a complex social and political problem that defies linear solutions. Thus, the implementation of interventions that have an empirical grounding requires a shift from a unitary vision of legal form and structure to the transdisciplinary exploration of fields like cognitive psychology, economics, neurobiology, and evolutionary biology.<sup>26</sup> Both science and law do attempt to account

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preservation as their all encompassing purpose; they are perhaps the first Platonic Guardians in history to fear their own shadows.”); See also Timothy P. O’Neill, *Scalia’s Poker: Puzzles and Mysteries in Constitutional Interpretation*, 24 CONST. COMM. 663, 676 (2007) (“Scalia the puzzle-solving hedgehog and Breyer the mystery-loving fox—could different modes of judicial thinking actually affect the way justices interact with their colleagues?”).

<sup>24</sup> See Rowley, *supra* note 10, at 412.

<sup>25</sup> Anne L. Alstott, *Progressive Visions of the American Family: Private Tragedies? Family Law as Social Insurance*, HARV. L. & POL’Y REV., Winter 2010, at 3, 3.

<sup>26</sup> See Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) (“The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law.”); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 391 (2006) (“One of the most significant lessons from cognitive psychology in the past quarter century is the idea that when people make judgments under conditions of uncertainty, they use shorthand methods of decision making called ‘heuristics.’ While these mental shortcuts usually result in accurate judgments, they can include systematic psychological biases and errors of probabilistic reasoning.”); Janet Weinstein & Ricardo Weinstein, *“I Know Better Than That”: The Role of Emotions and the Brain*, 7 J.L. & FAM. STUD. 351, 353 (2005)

If the legal system is to play a therapeutic, rather than a damaging role, in these relationship changes, it must take into account how people behave, why they engage in these behaviors, and what kinds of processes might be helpful to them. The new field of Neuro-Jurisprudence provides an opportunity to consider how the brain interacts

for the cognitive and emotional limitations of humans.<sup>27</sup> The law, however, is an instrument or means to the entry of a judgment about a specific set of facts proffered within rules of evidence and statutory enactments. Conversely, science seeks explanations that may be replicated with a higher degree of trustworthiness than mere educational guesswork, however well-intended.

The legal systems' approach to child custody litigation has bumped, grinded, and glared at transdisciplinary study yet still remains disconnected from any systematic application and implementation.<sup>28</sup> In an important article arguing for the law as a recognizable form of science, Thomas Ulen suggests the need for a shared "focus on a particular subject matter, a theoretical core from which hypotheses about that subject matter may be derived by those learned in the theory, and an agreed upon technique for

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with the law. Hopefully, as we continue to learn about the brain, we can educate legislators, judges, lawyers, law enforcement personnel, therapists, and others who deal with people suffering through the restructuring of their families, to intervene more effectively.

<sup>27</sup> This sentence implicates a vast literature concerning the philosophy of science, the acquisition of knowledge, the distinction between experimental and exploratory science, and the often uncomfortable relationship between science and law. See Hayne W. Reese, *Review of Capaldi and Proctor's Contextualism in Psychological Research? A Critical Review*, 34 J. APPLIED BEHAV. ANALYSIS 379 (2001). This is not as esoteric a topic for lawyers to study as it seems. See Joseph Sanders, *Science, Law, and the Expert Witness*, LAW & CONTEMP. PROBS., Winter 2009, at 63, 63 ("Expert witnessing is a particularly useful place to observe the clash of legal and scientific conventions because it is here that one group of people (scientific experts) who are integrated into one set of conventions are challenged by the expectations of a different set of conventions.").

<sup>28</sup> See Jay Lebow & Kathleen Newcomb Rekart, *Integrative Family Therapy for High-Conflict Divorce with Disputes Over Child Custody and Visitation*, FAM. PROC., Mar. 2006, at 79, 80 ("The mental health treatment and judicial systems have both been slow in developing and implementing specific intervention strategies that fit the special needs of families facing intractable conflict."); see also Paul H. Harnett, *A Procedure for Assessing Parents' Capacity for Change in Child Protection Cases*, 29 CHILD & YOUTH SERV. REV. 1179 (2007); Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286 (2009); Lois B. Oberlander, *Ethical Responsibilities in Child Custody Evaluations: Implications for Evaluation Methodology*, 5 ETHICS & BEHAV. 311 (1995); Janet Seden, *Creative Connections: Parenting Capacity, Reading with Children and Practitioner Assessment and Intervention*, 13 CHILD & FAM. SOC. WORK 33 (2008).

determining whether the hypotheses are acceptable to those in that field.”<sup>29</sup> Professor Ulen is quite right. It is time to develop a judicial science of child custody that embodies a most fundamental principle of science: theory drives practice and thereby, in turn, forms the basis for problem definitions, concepts, variables, and hypotheses.<sup>30</sup> Wishful thinking, preferences, privileges, biases, shrinking social norms, self-absorption, the entitlement mentality, and lack of work ethic do little to enhance the ability of the legal system to protect children.<sup>31</sup> Indeed, court orders today often mean no more to the public than an invitation to start again.

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<sup>29</sup> Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 880. This is not a theory new to science or philosophy, as noted by Thomas Hobbes in 1651:

*Science* is the knowledge of consequences, and dependence of one fact upon another, by which . . . we know how to do something else when we will, or the like another time; because when we see how anything comes about, upon what causes, and by what manner; when the like causes come into our power, we see how to make it produce the like effects.

JOHN K. RHOADS, *CRITICAL ISSUES IN SOCIAL THEORY* 7 (1991) (quoting THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., 1962) (1651)).

<sup>30</sup> See LESLIE GROSS PORTNEY & MARY P. WATKINS, *FOUNDATIONS OF CLINICAL RESEARCH: APPLICATIONS TO PRACTICE* 16 (3d ed. 2009) (“The scientific approach has been defined as a systematic, empirical, controlled and critical examination of hypothetical questions about the associations among natural phenomena.”); Biglan & Hayes, *supra* note 16, at 47 (“Theories and research are evaluated in terms of their contribution to prediction and influence of behaviors.”). For a discussion of possible criteria for applying the scientific method to judicial decisions, see Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263 (1989).

<sup>31</sup> See Richard A. Epstein, *Behavioral Economics: Human Error and Market Corrections*, 73 *U. CHI. L. REV.* 111, 112 (2006) (“Any social system has to contend with antisocial behavior that inflicts harm on others, and, at the other extreme, must give breathing room for the acts of generosity and selflessness that falsify the claims of universal human egotism.”). Child custody litigation is, however, a different and much more confined market. If approximately 95 percent of custody cases settle, and only a small percentage proceed to trial, and a Westlaw or LexisNexis search of appeals reveals that only 1 percent of cases are actually appealed, and an even smaller percentage receives a written, published decision, how much litigation over children occurs over periods of years? Quite a lot.

This is not the simplistic blame game of bashing parents for sport or some silly sense of moral superiority or preference for one family structure over another.<sup>32</sup> The interlocking research and policy problems of conflict and trauma, of family dislocation and interventions, of the role of the judiciary when providing direct social services, or the claim for broad-based social insurance against any risk to the *polis*, are deeply embedded in the perception that the judicial systems should be predictable, determinate, and knowledge-based. Lest this seem too much to expect, the social sciences do not have a claim to purity when confronting the same problems. Both professions have hedgehogs and foxes.<sup>33</sup> Indeed, contemporary specialization makes it more difficult to study complex problems between turf battles (“silos”) that impede the opportunity to explore and alter the canons of other specialties. In that sense, the Santa Fe Institute is a useful model for encouraging hedgehogs and foxes to share and critique scientific, social, and legal theories in the custody conflict market. After all, as the economist F.A. Hayek has written, “[w]ithout a theory the facts are silent.”<sup>34</sup> But any unified or blended theory must recognize a range of voices and visions that ignore conventions or traditions.

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<sup>32</sup> See Tali Schaefer, *Saving Children or Blaming Parents? Lessons From Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 524 (2010) (“[B]oth class design and legislative histories reveal a moral condemnation of parents’ decision to dissolve the nuclear family.”). Parents in “intact” households engage in violence, conflict, abuse, and neglect as well. What is true, and requires constant reminder, is that all professionals who have frequent contact with conflicting parents must be careful not to inflate the problem of parental conflict as a function of family dislocation merely because those parents find themselves mired in the muck of litigation. See *id.* at 514 (“Thus it is possible that when judges estimate the likelihood of divorce being so acrimonious that parents require intervention, their judgment is influenced by the availability of vivid recollections of worst-behaving litigating spouses.”).

<sup>33</sup> See Stephen Parker, *The Best Interests of the Child: Principles and Problems*, 8 INT’L J.L. POL’Y & FAM. 26 (1994); Ralph L. Rosnow, *Hedgehogs, Foxes, and the Evolving Social Contract in Psychological Science: Ethical Challenges and Methodological Opportunities*, 2 PSYCHOL. METHODS 345 (1997). I thought of trying a new metaphor like a “fodgehog” for the rest of the paper, but it just did not work—even when I write late at night or early morning.

<sup>34</sup> KEEGAN, *supra* note 20, at 6.

## II. The Child Custody Market

According to Berlin, “[e]very situation calls for its own specific policy, since out of the crooked timber of humanity, as Kant once remarked, no straight thing was ever made.”<sup>35</sup> The rules or standards by which judges impose the allocation of children’s custody have too often followed that same crooked timber public policy path.<sup>36</sup> For several centuries, for example, children born-out-of-wedlock were labeled with derogatory phrases and suffered, by their mere status as children born outside the legal status of marriage, various forms of social, economic, and legal discrimination.<sup>37</sup> Since the 1970s, the rhetoric of best interests and child custody is commonly voiced, rather unpleasantly, at the extremes of the “rights” of women and men (and only derivatively children) with proponents tossing in “responsibility”<sup>38</sup> like

<sup>35</sup> Christopher J. Robinette, *Tort Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 332-33 (2007) (quoting Isaiah Berlin, *Political Ideas in the Twentieth Century*, in FOUR ESSAYS ON LIBERTY 39-40 (1969)). The criminal law has undertaken similar debates. See generally Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008).

<sup>36</sup> There is, of course, the argument that a “toss of the coin” is a more intellectually honest method of judicial decision-making in child custody cases than “rational process.” See JON ELSTER, SOLOMONIC JUDGMENT: STUDIES IN THE LIMITATION OF RATIONALITY 158 (1989). The prolonged legal process between warring parents may do greater damage than a coin toss which may shorten the process, but, as most lawyers learn, the human spirit is amazingly resilient and creative when it seeks to harm another. Even a coin toss may not stop the next iteration of conflict. Moreover, and never to be underestimated in American society, for “justice not only to be done but to be seen to be done, the parties must be allowed to select and present the information they deem relevant.” *Id.*

<sup>37</sup> See A. Madorah Donahue, *Children Born Out of Wedlock*, 151 ANNALS AM. ACAD. POL. & SOC. SCI. 162, 162 (1930) (“Truly, society has accorded to children born out of wedlock treatment less kind than that accorded other children.”); *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008) (tracing history of parenting and custody allocations the “designer” approach of these concepts ask the question, “‘What is best for this *family*?’ This diversity, however, makes it difficult to apply standardized provisions of the law, especially when the existing statutes do not fully address all the permutations that can occur.”) (emphasis added).

<sup>38</sup> Professor Scott asserts that social norms that underlie parenting, *i.e.* responsibilities that arise from community forces of cost and benefit, are undermined by a legal regime that discourages responsibility. Elizabeth S. Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Mar-*

a visceral request for “burgers—and fries with that.” Nevertheless, the “past fifteen years have seen a spirited reexamination of child custody law and have resulted in trends and countertrends as state legislatures attempt to come to terms with the realities of child-custody disputes.”<sup>39</sup> As family systems devolve and reconstruct amidst cultural upheaval, political turmoil, civil rights conflicts, moral tensions, and unconstrained social networking, children live through more complex forms of conflict between parents.<sup>40</sup> When parents utilize the courts for this peculiar kind of litigation, the modern American lament is often found in notions of “fairness”<sup>41</sup>—which often means, “give me what *I want* because *I feel* that’s fair.”

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*riage*, 86 VA. L. REV. 1901 (2000); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990). For those who believe that the contemporary dialogue is any less contentious, or more scientific, see *B.B.V. v. B.S.V.*, 859 N.E.2d 448 (Mass. App. Ct. 2006) (mother awarded sole physical custody even though she was involved in an incestuous relationship because best interests of child standard applies and is not a “punishment” for a parent’s shortcomings); *Greer v. Greer*, 624 S.E.2d 423 (N.C. Ct. App. 2006) (appellate court reverses trial judge who took “personal notice of the natural bond that develops between infants and a mother, especially when the mother breast feeds the infant” when not supported by the evidence and in contravention of the legislature’s repeal of the “tender year” presumption); *In re Marriage of Hansen*, 733 N.W.2d 683, 693 (Iowa 2007) (reviewing history of joint physical custody and in light of “current social realities” the court held that “the social science research related to child custody issues is now richer and more varied than it was in the past”). The stereotypes and myths of gender and parenthood are no less heated today.

<sup>39</sup> Francis J. Catania, *Learning from the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857, 862.

<sup>40</sup> See William V. Fabricius & Linda J. Luecken, *Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce*, 21 J. FAM. PSYCHOL. 195 (2007); Juliana M. Sobolewski & Paul R. Amato, *Parents’ Discord and Divorce, Parent-Child Relationship and Subjective Well-Being in Early Adulthood: Is Feeling Close to Two Parents Always Better Than Feeling Close to One*, 85 SOC. FORCES 1105 (2007).

<sup>41</sup> This question may also be posed in the broader context of a “fair society.” See also Anne L. Alstott, *What Does a Fair Society Owe Children—and Their Parents?*, 72 FORDHAM L. REV. 1941, 1941 (2004)

What role do—and should—parents play in a fair society, taking the term fair society in a Rawlsian sense? Over time, our society’s demands on parents have steeply increased, while the economic rewards of child-rearing have diminished. At one time, children were an emotional and economic bonus, providing workers for the farm or factory

Many unpleasant policy battles have been fought over parental rights and duties under the guise of patriarchalism, traditionalism, feminism, careerism, daycareism, latchkeyism, deadbeatism, entitlementism, and meism.<sup>42</sup> From *ism* to *ism*, the fractals of the best interests standard have reflected shifting societal values towards the roles of mothers, fathers, and third parties, as well as generational cancers like domestic violence and child abuse. All the political and social roots that generate this standard, however, percolate amidst evolving scientific notions about “proper” parenting; which ultimately is a test of values in “binary opposition” to the other.<sup>43</sup> Unfortunately, each quest for

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as well as security in old-age. For today’s parents, in contrast, child-rearing is a one-way obligation: parents spend time and money preparing their offspring for modern life, without expecting much other than love in return. Today, society expects parents to do the intensive work of preparing children for modern life. We expect parents to invest far more time and money in their children than ever before; we rely on parents to give priority to their children’s needs for nearly two decades; and we expect them to do so without much economic reward. Slowly but surely, a combination of technological, social, and legal change has transformed modern parenthood into an extraordinarily demanding social role—and one that carries a built-in tension between meeting our children’s needs and pursuing lives of our own.

A discussion of fairness from the perspective of institutions is beyond the scope of this paper. See EDWARD E. ZAJAC, *POLITICAL ECONOMY OF FAIRNESS* (2001).

<sup>42</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 346-47 (1990):

On the one hand, in the notion, which is basic to the greatest-happiness principle, that everyone’s wants are as good as everyone else’s (pushpin is as good as poetry, in Bentham’s expression), utilitarianism is individualistic; it allows each person to choose his own conception of the good. On the other hand, in treating society as in effect a single person whose happiness we want to maximize – because one person’s misery can in principle offset another’s happiness, which indicates that it is the aggregate that counts rather than its distribution across persons– utilitarianism is radically collectivist. In this it resembles a number of other questionable ‘isms’–nationalism, racialism statism, communism – all of which also treat the individual as a cell of a larger organism.

<sup>43</sup> CHRISTOPHER R. WILLIAMS & BRUCE A. ARRIGO, *LAW, PSYCHOLOGY, AND JUSTICE: CHAOS THEORY AND THE NEW (DIS)ORDER* 88 (2002); see Geoffrey D. Carr et al., *Evaluating Parenting Capacity: Validity Problems with the MMPI-2, PAI, CAPI, and Ratings of Child Adjustment*, 36 *PROF. PSYCHOL.*

a better theory of judicial decisionmaking was often buttressed by the latest scientific fad, as proffered in the media and professional literature. Yet for nearly a century now, the role of the judge in a child custody case remains bounded by the “sobering responsibility of deciding the care and custody of a minor child act[ing] not at all as a mere arbiter between the two adult adversaries, simply reacting to the evidence they may see fit to adduce in support of their respective positions.”<sup>44</sup> Instead, the judge’s function is that described in the oft-quoted words of then Judge Cardozo in *Finlay v. Finlay*:<sup>45</sup>

He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a “wise, affectionate and careful parent” and make provision for the child accordingly . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights “as between a parent and a child” or as between one parent and another. He “interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the [state] as *parens patriae*.” The “paramount consideration for the court at the time of divorce, or at the time of a requested alteration of a decree regarding custody, is the present and future welfare and well-being of the child.”<sup>46</sup>

To accomplish this set of tasks, judges are required to examine whatever evidence is admissible in a formal courtroom structure, with a critical mind’s eye looking backward to past conduct while the other mind’s eye squints to predict a child’s

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RES. & PRAC. 188, 188 (2005) (noting that in forensic evaluation, “there is likely no area in which emotions run higher than the custody of children . . . . Parents who are being assessed to aid the courts in determining child custody are, understandably, strongly motivated to present themselves in a positive light, but this can obscure the data on which conclusions must rest.”); Amy Eldridge & Erika Schmidt, *The Capacity to Parent: A Self-Psychological Approach to Parent-Child Psychotherapy*, 18 CLINICAL SOC. WORK J. 339, 339 (2004) (“The act of parenting defies description; it is an act rather than a science. . . . Parenting is more than the sum of behaviors.”). For a comprehensive discussion of scientific and legal relationships in child custody cases, see JOANNA BUNKER ROHRBAUGH, *A COMPREHENSIVE GUIDE TO CHILD CUSTODY EVALUATIONS: MENTAL HEALTH AND LEGAL PERSPECTIVES* (2008); Fred Schmidt et al., *Assessing the Parent-Child Relationship in Parenting Capacity Evaluations: Clinical Applications of Attachment Research*, 45 FAM. CT. REV. 247 (2007).

<sup>44</sup> *Ziehm v. Ziehm*, 433 A.2d 725, 728 (Me. 1981).

<sup>45</sup> 148 N.E. 624 (N.Y. 1925).

<sup>46</sup> *Ziehm v. Ziehm*, 433 A.2d at 728 (quoting *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925)).



future from the protests, promises, and presentations of the parents.<sup>47</sup> The act of judging, however, is not a solo or silo effort. For all its flaws, strengths, and myths, the contemporary domestic relations' system is a market triangulated by lawyers (agents), clients (principal), and authority (judge), with inputs and outputs from guardians ad litem, therapists, and all other manner of appointed or employed professionals.<sup>48</sup> The complex dimensions of this structure for dispute resolution has very real consequences

<sup>47</sup> See *Grover v. Grover*, 54 A.2d 637, 638-39 (Me. 1947):

One of the most important, if not the most difficult, problems to be decided by any court is the question of proper custody of minor children at the time of, or after a divorce. The family 'war' is fought by the father and mother, but too often the lifetime scars are carried by their children. Too frequently also, the principals in the divorce are more concerned in defeating the wishes of a former wife, husband, or 'relative-in-law,' than they are interested in the welfare of the child. The law looks, however, only to the child's welfare; and the father, mother and other blood relatives, as such, have no rights in or to the child. A child is not 'owned' by anyone. The state has, and for its own future well-being should have, the right and duty to award custody and control of children as it shall judge best for their welfare.

<sup>48</sup> See KEN LEWIS, *CHILD CUSTODY EVALUATION BY SOCIAL WORKERS: UNDERSTANDING THE FIVE STAGES OF CUSTODY 1* (2009) ("Family court judges across the country have long welcomed partnerships with mental health professionals to help resolve custody disputes"); Margaret F. Brining & F. H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 *IND. L.J.* 393, 408 (1998):

Even if joint custody does not affect physical custody, it might still serve as a useful monitoring device to reduce agency costs between the parties. Agency costs describe the costs of anticipated misbehavior by agents to their principals. As used by economists, the definition of principal and agent is broader than that used by lawyers. For economists, agency refers to any consensual relationship among two or more parties in which one, the principal, implicitly confers authority on the second, the agent, whose decisions may confer benefits or impose costs on the principal.

Another approach may be found in the aptly entitled article by Brian H. Bix, *How to Plot Love on an Indifference Curve*, 99 *MICH. L. REV.* 1439 (2001) (book review). For a sampling of the connection between markets and the law with the implication that the judicial system is, indeed, a closed market, but still a market, see Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 *CORNELL L. REV.* 717 (2000); Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 *VAND. L. REV.* 1653 (1998); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. CAL. L. REV.* 113 (1996); Richard D. Ray-

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when considering fundamental changes to the adjudication of child custody conflict under fluid and ever-adapting conditions of uncertainty and limited resources.

For example, traditional forms of lawyer advocacy make it an ethical violation for the lawyer, as the agent for the principal-client, to disclose confidential information without the consent of the client.<sup>49</sup> This means that outcomes often depend upon a series of secrets and strategies between lawyers and clients intended to gain individual benefits rather than cooperation and a situation in which a random factfinder, the judge, is deprived of critical information. The result is an adjudicatory system bound by conventional notions of confidentiality and privilege piled on by parental self-interest and distrust for each other, the lawyers, the other professionals, and the process of factfinding and judgment. Transparency in litigation is, thereby, a *choice* because each parent has the power to *choose* to fully and objectively to share information. The consequence (or “cost”) may be less litigation expense, better feelings of moral certainty, and probably a better outcome than that imposed by a judge, who must operate with information asymmetry when making crucial decisions about future behavior.<sup>50</sup>

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mond, *The Neglect of Human Capital Gains and Losses Upon the Dissolution of Long-Term Marriages: A Suggested Remedy*, 12 J. FORENSIC ECON. 135 (1999).

<sup>49</sup> For a summary of this state of affairs, see Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998); see also Sanford L. Braver et al., *Experiences of Family Law Attorneys With Current Issues in Divorce Practice*, 51 FAM. REL. 325, 325 (2002):

In this article, we examine a data source that has been surprisingly overlooked in efforts to understand the influences of family law – the perspectives of family law attorneys. There are several benefits to exploring their experiences. First, divorce attorneys are privy to many or most of the negotiation processes and can make informed judgments about how family members were influenced and how they behaved and felt. They can comment with authority on the process and know details of the cases that may never reach the formal filings or arguments. Second, much of the informal process is influenced strongly by the attorney. What the lawyer tells his or her client about the chances to prevail, regardless of whether or not the forecasts are accurate, can constrain the bargaining of the client.

<sup>50</sup> See ELSTER, *supra* note 36, at 102-03 (“Judges, unlike coins or dice, can be moved by argument, even if the arguments affect only the second decimal of

This is not just an epistemological discussion of truth but acceptance of the notion that a distinction exists between perception and objectively viewed data proffered to explain thoughts or behaviors over time horizons that are short, medium, or long. Differences in perception, for example, may occur when two people witness a car accident. The human physiology of cognition, memory, vision, hearing, attention span, and a litany of other biological and environmental factors influence the reported observation. Conversely, objective, rational, or historical truths are known to parents who conceive a child. The perception of these facts in a child custody case may be interpretative (as against perjury) but the disincentives for parents to share the truth too often governs outcomes.<sup>51</sup>

### III. The “Approximation Rule”

Chapter Two of the ALI’s *Principles of the Law of Family Dissolution* adopted two core values that are relevant to this article: a preference for negotiated parenting agreements but, if unsuccessful, a default rule in which the “custodial responsibility allocated each parent should approximate the proportion of care taking functions each parent experiences as part of the separation or, if they never lived together, prior to the filing of the action.”<sup>52</sup> The former is not new conceptually. Nevertheless, its

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a number whose first decimal is chosen at random.”); *see also* Saul Levmore, *Joint Custody and Strategic Behavior*, 73 *IND. L.J.* 429 (1998).

<sup>51</sup> The economist Robert Aumann provides an intriguing means of analyzing this problem from the perspective of the Talmud. *See* Robert J. Aumann, *Risk Aversion in the Talmud*, 21 *ECON. THEORY* 233 (2003). Under Jewish law, a “perjurer is treated exactly like the person against whom he testified would have been treated, had the perjury not been discovered. This rule is universal; applies to the most trivial civil claim as well as to capital cases. Thus, if Adams falsely testifies that Brown committed a capital crime, then Adams is executed; and if Adams falsely testifies that Brown owes Cox \$100.00, then Adams must pay Cox \$100.00.” *Id.* at 233. In the context of modern child custody, there is much less certainty that perjury will be immediately discovered (or that anyone with moral or legal authority will ever act on that information) because institutional constraints (resources versus volumes of cases) means that the passage of time will dampen or even abrogate the potential imposition of punishment.

<sup>52</sup> ALI *PRINCIPLES*, *supra* note 4, at § 2.08, cmt. a. While most states treat children of married and nonmarried the same, the type of litigation necessary to establish parentage often makes these cases different procedurally from divorce. *See* Elizabeth M. Schneider, *Domestic Violence Law Reform in the*

value is important enough to state unambiguously.<sup>53</sup> The latter, however, is very nuanced and derives from what Margaret Brinig applauds as feminist principles that “permeate the chapter.”<sup>54</sup> In contrast to such rules as the innocent parent rule, the maternal preference rule, or the primary caretaker presumption, the approximation rule means that no “parent becomes the sole custodian; no one is relegated to visitation.”<sup>55</sup> The idea that neither parent emerges as a victor following a custody determination is “a major change” because “approximating the caretaking each did before presents less of a change (and therefore a feeling that

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*Twenty-First Century: Looking Back and Looking Forward*, 42 *FAM. L.Q.* 353 (2008). In particular, anyone who has worked with non-married parents knows that many fathers (and sometimes mothers depending upon child protective services) are foreclosed from access to a child. Based upon a lack of resources to fight the government in a child protection proceeding where many cases involve non-married, young couples, it may take months after the birth of a child for that parent to forge a relationship, much less maintain it. The penalty imposed on parents with few personal or financial resources should not be shuttled aside merely because the policy assumes a certain elitist construct that fails to account for poverty, education, socio-economic status, or cultural, racial, and ethnic diversity. For an interesting discussion of oppression, see Sara Lichtenwalter & Parris Baker, Teaching Note, *Teaching About Oppression Through Jenga: A Game-Based Learning Example for Social Work Educators*, 46 *J. SOC. WORK. EDUC.* 305 (2010). Given the lack of any cookie cutter consensus in the social science literature concerning child custody allocations, it is rather surreal to suggest that the political process could adopt a uniform approach to parenting standards (from culture to culture, state to state, economic barrier to economic barrier) unless one eliminates human diversity, or manages cases at the genome level.

<sup>53</sup> See *ALI PRINCIPLES*, *supra* note 4, §§ 2.02(1)(a), 2.09.

<sup>54</sup> Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 *DUKE J. GENDER L. & POL'Y* 301, 302 (2001). For a different position, see F. Carolyn Graglia, *A Nonfeminist's Perspectives of Mothers and Homemakers Under Chapter 2 of the ALI Principles of the Law of Family Dissolution*, 2001 *BYU L. REV.* 993, 999 (“To feminists, evidence of the economic hardships that divorce has inflicted on women and children simply reinforces their argument that women should never choose to be homemakers.”); Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science and the Baseball Bat Kids*, 45 *FAM. CT. REV.* 600 (2007). For an examination of these issues under Florida's new law, see Alexa Welzien, Comment, *Life, Liberty, and the Pursuit of Parental Equality: Florida's New Parenting Plan Overshadowed by Lingering Gender Bias*, 33 *NOVA L. REV.* 509 (2009).

<sup>55</sup> Brinig, *supra* note 54, at 304.

one has lost and the other won) than does the equal division mandated by many 'joint custody' awards."<sup>56</sup> This is true because, as the commentators assert, "a precise accounting of the responsibilities assumed for caretaking functions is often not required, when measurements are necessary they should be based on the parents' actual performance of caretaking functions" which thereby limits qualitative disputes unless the demonstrative disparity in parenting abilities is so substantial "that consideration is necessary to prevent harm to a child."<sup>57</sup>

Therein lies a fundamental flaw in the approximation rule, which assumes an incentive for truth within an adversary system built upon an entirely different set of traditions and rules. In child custody litigation, parents who prefer litigation rather than collaboration may incur no marginal costs for that choice and thereby impose those costs upon society by creating a higher probability of chronic conflict litigation, excessive use of scarce judicial resources, more children-at-risk, and economic deprivation for the family system. Indeed, such human qualities interject the concept of a "sporting theory of justice" in which each trial is "a drama of surprises with the happy ending for the side with the more agile courtroom performer and the more extensive facilities for investigation."<sup>58</sup> Current practices thereby encourage entry into the judicial system as a lottery, which is the least efficient means of obtaining optimal outcomes.<sup>59</sup> The adoption of the ap-

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<sup>56</sup> *Id.* at 304-05.

<sup>57</sup> ALI PRINCIPLES, *supra* note 4, at § 2.08, cmt. c. In the context of caretaking functions, the ALI Principles do account for parent by estoppel and de facto parents under specific circumstances. *See id.* at §§ 2.03(1)(c), 2.18.

<sup>58</sup> RICHARD H. FIELD ET AL., MAINE CIVIL PRACTICE 415 (2d ed. 1970); *see* *Cyr v. Cyr*, 432 A.2d 793, 796 (Me. 1981) ("To choose the greater of two goods is admittedly no easier than to identify the lesser of two evils. Nevertheless, the judge is obligated to make this choice.").

<sup>59</sup> *See* Edward Stringham, *Kaldor-Hicks Efficiency and the Problem of Central Planning*, Q. J. AUSTRIAN ECON., Summer 2001, at 41, 44 ("Judges are human agents, not ideal observers; they do not possess superior knowledge of the future, or of the operation of physical or economic laws."). Elster, however, makes a different point concerning lotteries as a means to resolve intractable custody cases:

The notary of lotteries would be subject to the agreement of the parties to decide custody by the toss of a coin. A more radical proposal would be to make randomization obligatory when the parties could not reach agreement. There are two main arguments for this proposal.

proximation rule, as law from the top to the bottom, ignores reams of research concerning human choices in conflict and the appetite for that conflict. More importantly, changes in a law of this sort cannot add to the knowledge of what and how parental conflict occurs, what interventions may blunt its occurrence, and what remedies the judicial system can impose that are more efficacious and efficient.

Given this set of propositions, the approximate distribution of time invites methods of cultural anthropology as it requires the observation, accurate recording, and meticulous reporting of those observations in real time and under circumstances when parents have emotional and economic incentives to avoid *a* truth – much less *the* truth.<sup>60</sup> The ethical dilemma is well known to family law lawyers and mental health professionals who often negotiate with parents to reduce conflict by trading a parenting plan that may be miserable for their children for the costs of acrimonious litigation. Some parents, of course, will reorganize their lives and reduce conflict while others will view schools, therapists, relations, children, and the judicial system as avenues for cruelty.

The point is that if the commentators believe a cultural anthropological approach should be accepted, such a “scientific approach” must develop “broad theories about the processes that lead to observed patterns of variation in human biology, lan-

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First, the procedure has the virtue of being simple and automatic, thus sparing the child the pain of custody litigation. The point of litigating would largely disappear, and as a result the number of cases brought would be drastically reduced. When a case was brought, it would be decided as soon as the judge found that neither parent was unfit. Using simple, robust criteria for unfitness (physical neglect, physical abuse, sexual abuse, psychic disorders, courts would be able to make swift rulings. Less damage would be imposed on fewer children. Second, awarding custody by the flip of a coin would be fair to the parents, since the procedure would safeguard the important values of equal treatment and equal opportunities.

ELSTER, *supra* note 36, at 170-71.

<sup>60</sup> See Robert L. Welsch & Kirk M. Endicott, *Studying Cultural Anthropology*, in *TAKING SIDES: CLASHING VIEWS IN CULTURAL ANTHROPOLOGY* xv (Robert L. Welsch & Kirk M. Endicott eds., 2d ed. 2005) (“Cultural anthropology . . . is the comparative study of human ways of life.”). The ethical and scientific debates about the means of observing and the interpretation of those observations is profoundly complex and important. *See id.* at xxiv-xxv.

guage, and culture.”<sup>61</sup> These processes must connect present observation to “patterns of past parenting . . . calculated to preserve the greatest degree of stability in the child’s life.”<sup>62</sup> This then suggests a formula:  $[P(A)/100(t) - P(A)/100(t) = 100]$  with  $t$  the percentage of time spent with the parent and child by P(A) and the percentage of time with P(B) which must equal 1 (100 percent). As a function, this outcome must, of course, then be divided by years (months/days) of parenting (a smaller marker at times) because the formula must account for change and that change may shift the approximation percentage as the child ages or the family has a traumatic event like a primary caregiver who has cancer or stayed home due to loss of a job.

Moreover, if the commentators really mean for the approximation rule to conform to historical truth(s) then judges should, as a matter of accuracy, allocate non-parenting time to third parties.<sup>63</sup> For example, if P(A) was parenting 63 percent of the time than 37 percent of non-parenting time is allocated to P(B). Of course, the dilemma is that P(B) actually parents 37 percent of the time while P(A) allocates 40 percent of her 63 percent to grandparents (GPs) or daycare, then 25.2 percent of actual parenting time should be allocated to P(A) and 37.8 percent to GPs. As it happens, Illustration 2 from the ALI Principles is an excellent example of the commentators’ original intent:

Shira and Duncan have three children, ages six, eight, and ten. Throughout their marriage, Duncan worked 10- to 12-hour days in full-time employment and spent an average of three to four hours a week supervising and playing with his children. Shira was a stay-at-home parent, providing virtually all of the children’s day-to-day needs. In their divorce proceedings, Shira seeks primary custodial responsibility and Duncan wants equal care taking responsibility.

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<sup>61</sup> *Id.* at xxi.

<sup>62</sup> ALI PRINCIPLES, *supra* note 4, at § 2.08, cmt. b. I often ask parents to consider what it would be like to work, change homes, and live their children’s schedule. I do not receive much more than a shrug as a response—basically, bummer for them. *See id.* (“The way the parents chose to divide responsibility when the family lived together anchors the negotiations in their own lived experience rather than in unrealistic or emotion-based aspirations about the future.”).

<sup>63</sup> *See generally* Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1 (2009); Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parenting Status?*, 74 MO. L. REV. 25 (2009).

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The court should allocate custodial responsibility in a way that approximates the caretaking functions Shira and Duncan each performed for care of the children during the marriage. Under 2.03(5) and (6), wage-earning is a parenting function, but it is not a caretaking function and thus is not relevant to determining the proportion of caretaking functions each parent performed. Unless one of the exceptions set forth in Paragraph (1) applies, the court should allocate primary custodial responsibility to Shira. Duncan is presumptively entitled to the amount of custodial time allowed under the uniform rule of statewide application required under Paragraph (1)(a) of this section, which is likely to be greater than the four hours per week he spent performing caretaking functions during the marriage.<sup>64</sup>

In the language of social science researchers, all of these are inexact hypotheses. What each of these hypotheses is *not* is empirical science – at least not yet. For example, the commentators concede that parental separation may make it necessary for parents to change work schedules or re-arrange other personal and financial obligations.<sup>65</sup> Unfortunately, such past concessions seem to only bind the father. One would think that forty years of social policy that severed fathers from families, particularly in minority or impoverished communities, would have taught professionals something about the connection (even if crass) between economic stability and parental investment in children.<sup>66</sup>

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<sup>64</sup> ALI PRINCIPLES, *supra* note 4, Illustration 2, at § 2.08, cmt. c.

<sup>65</sup> See ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 170 (1994) (“Financial arrangements with respect to the children are a particular concern, because they may play a strategic role in a custody dispute”); Katharine Baird Silbaugh, *Money as Emotion in the Distribution of Wealth at Divorce*, in *RECONCEIVING THE FAMILY*, *supra* note 4, at 234 (suggesting that the ALI’s “attempt to separate financial and nonfinancial matters is futile”).

<sup>66</sup> See Alstott, *supra* note 25, at 3 (“Family law forms part of a larger system of public law – a social insurance system that allocates the risk of life events like disability, family breakup, mental illness, substance abuse, and parental poverty.”); Paul R. Amato et al., *Changes in Nonresident Father-Child Contact from 1976 to 2002*, *FAM. REL.* Feb. 2009, at 41, 51 (“We also have shown that the increase in nonresident father contact is strongly bound up with increases in men’s payment of child support.”). Even in intact marriages, money is conflict. See Lauren M. Papp et al., *For Richer, for Poorer: Money as a Topic of Marital Conflict in the Home*, *FAM. REL.* Feb. 2009, at 91. For a unique discussion of this conversation and the value of the “fit” parent who works, see Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 *ALASKA L. REV.* 173 (2007). The darker truth is that most custody cases are



Some argue as well that this hedgehog approach is appropriate because “many women identify with their children’s interest (perhaps more than men do)” so as to be less likely to act from selfish self-interest.”<sup>67</sup> This assertion is consistent with relational theory which suggests that “persons are socially embedded and that their identities form within the context of social relationships” such that the “ethical differences between men and women, the ethics of care relationships, and the extent to which caring work is overwhelmingly performed by women.”<sup>68</sup>

Although the approximation rule does not reveal a theory supported by science, relational theorists do perceive “interdependent relationships as generating, over time, obligations in excess of those devised by voluntary contractual relationships.”<sup>69</sup> Unfortunately for proponents of the rule, human behavior is not so linear, nor is it possible to replay the past as if the parties kept score on some Platonic cave with the shadow of human conduct uncontaminated by the tourquing of truth or malice aforesaid. Human relationships, and the systems that humans socially construct, are about depth and movement, transitions and adaptations, and are as complex as the difference between Cartesian geometry with an  $x$  and  $y$  axis and calculus with its fluid measures of change, vectors, angles, and dimensions.

A thought experiment may be derived from a very basic – and perhaps unfairly distorted – use of the Rawlsian “veil of ignorance.”<sup>70</sup> Rawls posited that if human beings had to create a political system in which each of them would not know ahead of time whether he or she would be pauper or prince, humans

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about minimally accepted standards of parenting, not the child’s right to excel. See Paul H. Harnett, *A Procedure for Assessing Parents’ Capacity for Change in Child Protection Cases*, 29 CHILD. & YOUTH SERV. REV. 1179, 1179 (2007). (“The aim of the capacity-to-change through intervention is to determine whether a family has the potential to eventually achieve a minimal level of parenting.”).

<sup>67</sup> Brinig, *supra* note 54, at 305-06.

<sup>68</sup> ROBERT LECKEY, CONTEXTUAL SUBJECTS: FAMILY, STATE AND RELATIONAL THEORY 7 (2008).

<sup>69</sup> *Id.* at 8.

<sup>70</sup> See JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls theory is “concerned only with the justice of the basic structure of society, not with justice in particular contexts such as the allocation of scarce medical resources or the selection of soldiers for military service.” ELSTER, *supra* note 36, at 2.

would adopt political systems that equally distributed what Rawls considered primary values (which is well beyond the scope of this paper). Nevertheless, let us apply the notion of a “veil of ignorance” to a parenting plan under the approximation rule. At the time of procreation, parents must select a plan which each must accept as the truth for the future of their custody arrangement.<sup>71</sup> Like the commentators, both parents agree to be bound by the mathematical truths of past parenting arrangements, honor the choices made within the marital partnership, and refuse to let the reasons for family dislocation or the current economic or emotional circumstances deflect, in the slightest, from the strictest construction of past choice under ignorance of the future.<sup>72</sup>

Would a parent still choose to be worse off given an opportunity to take the chance to litigate the future of their children? Which parent is risk averse? Would the “winning” parent deviate from historical truth because current circumstances require cooperation and compassion? Will “good” parents appreciate each other’s proposed outcome at that future point in time irrespective of choice under the veil of ignorance? Will a “bad” parent – one or both – opt for a flip of the coin because he or she “could not possibly lose”? What if the judge can only select “A” or “B,” (like baseball arbitration, no “C”)? Never forget: Americans spend millions of dollars on lottery tickets or slot machines with plausible odds of less than a google but not much less in concrete terms.

What we do know about the approximation rule, literally, is that its implementation is hampered by the human capacity for

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<sup>71</sup> I have heard judges and lawyers often apply the biblical reference to Soloman and the allegory of physically dividing the baby in half knowing the biological mother would prefer to lose her child to the other woman than have her own child killed. The logical flaw is that one mother was the biological parent and the other not. In custody cases, both parents are biological parents with the emotional or psychological incentive to inflict pain on the other, even if that may mean harming their child. *See id.* at 67-68.

<sup>72</sup> *See* ALI PRINCIPLES, *supra* note 4, § 2.08 cmt. m (whether interim arrangements were informal or court-ordered, the division “of caretaking functions during interim arrangements [is] not considered in determining past performance of caretaking functions under Paragraph (1)”). The commentators prefer “expedited decisionmaking” but that is not a likely reality. Policy recommendations should be grounded in feasibility.

resentment, lust, greed, hurt, shame, sadness, envy, or vengeance. In this very sense, the approximation rule ignores human nature in its quest for legal solutions grounded in mathematical certainty measured by the judicial system as an institutional calculator. Whatever one's philosophical or political bent, such an outcome is more Matrix or Stepford Wives than real. The "Law's" manifestation in the form of a judge is really an absent supervisor virtually all the time. Punishment for perjury or litigiousness is intermittent and unreliable. In the absence of a reliable source of enforcement, the cost to defectors is only *post facto* at best – and even then there are plenty of strategies that delay or obscure any semblance of truth. If the matrix for organizing the observation of human traits is flawed then such a policy is not enhanced by a linear legal paradigm which is an unrealistic reflection of parents-in-conflict.<sup>73</sup> The conundrum, therefore, is whether the approximation rule offers anything new or whether it simply packages old biases of gender and older myths of judges as a Philosopher-king or Father-superman, in a less offensive wrapper.<sup>74</sup>

I do not idly pursue this sojourn. The problem is that this nation is far beyond having any respect for social norms as a regulating power or authority.<sup>75</sup> The goal of limiting change for chil-

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<sup>73</sup> See Rich Vodde, *Fighting Words and Challenging Stories in Couples Work: Using Constructionist Conflict Theory to Understand Marital Conflict*, 6 J. FAM. SOC. WORK 69, 70 (2001) ("The absence of a clear understanding of marital conflict grounded in a theoretical structure leads to operational definitions, clinical formulations, interventions and evaluative techniques that are not only different but inconsistent and incongruent.").

<sup>74</sup> See Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 U. KAN. L. REV. 629, 668 (2007) ("Any theory of human behavior would be unfalsifiable if it always avoided empirical evidence by changing its interpretation of these unobservable initial conditions."). Many years ago Judge Jerome Frank wrote a powerful response to this notion: "Modern civilization demands a mind free of father-governance." JEROME FRANK, *LAW AND THE MODERN MIND* 252 (1930).

<sup>75</sup> See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 8 (2002):

The second theme is that many legal rules are best understood as efforts to harness the independent regulatory power of social norms. These efforts sometimes succeed and sometimes fail; what is important to understand is that social norms are unlikely to change as part of simple, discrete, low cost interventions by the government, although proposals along these lines are sometimes found in the literature, and

dren after disruption and dislocation is rather unrealistic because change occurs by virtue of family disruption and dislocation. This syllogism is not accidental. In real life, any form of change requires emotional and economic adjustment. How people, including children, manage chaos, emotionally, cognitively, financially, is the challenge.<sup>76</sup> Unless a majority of the *polis* fight to amend the constitution or convince the government to enact mandates that assure and insure a home, health insurance coverage, a vehicle, education, and aggregate financial support (among other needs and wants) at the same or better level as existed before dislocation and separation, change will occur – often traumatically and irretrievably.<sup>77</sup> To implement the approximation rule requires a *public* insurance option for all of life’s moral and material hazards.<sup>78</sup> The commentators have made clear that this ideal (another term that does not mean “empirical”) is to render feelings, emotions, history, and economics non-factors:

From the child’s point of view, what matters is how he or she was cared for and by whom, not why. Also, attempts to arbitrate the equities of roles assumed during a marriage would make relevant the kind of emotional and subjective factors that the section is intended to eliminate.<sup>79</sup>

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that attempts to intervene are risky, because social norms are complex, poorly understood, and sensitive to factors that are difficult to control.

<sup>76</sup> See Kathryn Abrams & Hila Karen, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Solangel Maldonado, *Taking Account of Children’s Emotions: Anger and Forgiveness in “Renegotiated Families”*, 16 VA. J. SOC. POL’Y & L. 443 (2009).

<sup>77</sup> See Alstott, *supra* note 25, at 5 (“To be sure, present family law and social insurance address different, if sometimes co-occurring life risks.”). Of course, this would require redistribution of income and wealth. Parents who remain in an intact household could argue for a similar floor so that fairness is met in the Rawlsian sense. An important caveat, however, as I mentioned earlier, is that “child protective interventions disproportionately continue to involve poor families, and especially families of color.” Davidson, *supra* note 1, at 484.

<sup>78</sup> For the record, however, I do not endorse the abrogation of capitalism and I agree with many of the historical tenets of feminism in the context of power and privilege and its consequences.

<sup>79</sup> ALI PRINCIPLES, *supra* note 4, at § 2.08, cmt. d. These are, of course, exceptions. For example, in Illustration 4, mother and father have two children, ages 7 and 10. Mother was the primary breadwinner and father did not work outside the home. Mother worked from 5:30 a.m. to 2:00 p.m. Father cared for

The themes that guide the approximation rule can be distilled from this discussion: First, the past governs the future allocation of child custody time unless it puts a child in jeopardy. Second, the gender of the parents creates different burdens of proof. Third, the current developmental phase of the children, their gender identities, shifting attachments, and other factors prevalent in the social science literature are irrelevant unless there is jeopardy. Fourth, parental feelings of fairness are overcome by a standard set of parenting plans which form a “now-prevailing norm” or reflect the best science-of-the-moment.<sup>80</sup>

The entire history of human conflict is littered with such attempts by historians, philosophers, economists, legal scholars, and other professional thinkers to find a robotic calculus for human choice under conditions of uncertainty.<sup>81</sup> As I mentioned at the outset, I respect the enormous efforts required to generate the ALI Principles. But lawyers are very creative souls, and clients (*pro se* or not) more so. The problem with parents-in-conflict, however, is often not about the parenting schedule but rage, character disorders, anxiety, immaturity, emotional dysregulation, depression, hurt, impulsiveness, immaturity, violence, control,

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the children as infants and toddlers, got them ready for bed, and performed virtually all the other custody functions. What matters is the “functions these parents performed” and therefore, the “court may *not* assume that because father was a stay-at-home parent, he performed most of the custody functions.” *Id.* Illustration 4, at § 2.08, cmt. c (emphasis added). Unfortunately, this example means that *working mothers* are presumed to perform most of the custody functions because (unlike other illustrations involving mom) the father who stays at home still has the burden of proving the *quality* and *quantity* of *his* parenting. The literature concerning division of labor, and the burden on mothers, is heated enough. Graglia, *supra* note 54, at 999 (“To feminists, evidence of the economic hardship that divorce has inflicted on women and children simply reinforces their argument that women should never chose to be homemakers.”).

<sup>80</sup> There is no citation for this point in the ALI Principles. Since we live with fifty states in a federalist democracy, a federal law could be proposed establishing a uniform federal “norm” rather than let each state develop its own. This falls into the “be careful what you wish for” category. Entire bodies of social science and law have discriminated against women and minorities for decades at great harm to individuals and society.

<sup>81</sup> For a discussion of the shift in economics (that “dreary science”) from perfect rationality to emotion and irrationality, see *generally* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francesco Parisi & Vernon E. Smith eds. 2005).

power, and abuse. History – or back to the future - does not cure these ingrained aspects of the human condition in litigation.

#### **IV. A Functional/Contextual Approach**

Presumptions of an equal division of community property, child support guidelines, and spousal support guidelines have not noticeably reduced the American capacity for litigation in family matters. (Just run a database search). While Vulcan self-control has merit in the abstract, it is not yet feasible. History matters. Character matters. Capacity for emotional regulation and cognitive adjustment matters. The evolution of a child's developmental phases matters. The child's present and future intellectual and socio-economic circumstances matter. The strengths, weakness, and vulnerabilities of the family system in its totality and across multiple time horizons matters.

Even assuming each state could develop a lodestar parenting plan based upon whatever social science lobbyist may strike the other particular branches of government as prudent it seems troublesome to anyone who has experienced the development and enactment of public policy. For example, any such policy may impose values that fail to account for cultural, racial, religious, or other differences as a function of modern demographics that include gay and lesbian couples, grandparents, foster care, aunts, uncles, stepparents, all arranged in combinations and permutations unique to each family system. For parents on welfare, unemployment, or working with annual earnings of less than \$100,000, the implementation of such public policies suggests the concurrent need for social justice insurance for all Americans to assure Rawlsian equality within the veil of ignorance. If the approximation rule means what it intends, such an economic *floor* is appropriate irrespective of the parents' lot in life if proponents are serious.

Since such an outcome is rather unrealistic, the research problems or thought experiment should be framed by theories and policies that are grounded and feasible. By its very structure and function, the legal system inverts the fundamental tenet of empirical science if science is to undergird public policy: theory

drives practice.<sup>82</sup> In science, the research problem drives the hypothesis. The hypothesis drives the methodology. Methodology drives measurement and the selection of tools for that purpose. The quest for a unified theory of domestic relations law *and* an empirical science of human conflict is no more or less legitimate goal than Saint Thomas More's quest for Utopia,<sup>83</sup> though much more likely to look like Gulliver's Travels in reality. Assuming Utopia is out of reach for now, the approximation rule may be contrasted with a theory of function and context that seeks to develop an organized system of "empirically-based verbal concepts and rules that allow behavioral phenomena to be predicted and influenced with precision, scope, and depth."<sup>84</sup> As applied to child custody litigation, the functional/contextual approach, as a means to evaluate knowledge and policy implications in practice, integrates the aggregate of parental choices within an evol-

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<sup>82</sup> See Biglan & Hayes, *supra* note 16, at 47 ("Theories and research are evaluated in terms of their contribution to the prediction and influence of behaviors.").

<sup>83</sup> See R.W. CHAMBERS, THOMAS MORE 134 (1973) ("We must never forget then that in Utopia the despotic supremacy of the State is balanced by inviolability of a priesthood entirely exempt from State control."). Whether one agrees with him or not, the late Professor Zinn understood the struggle between fact, interpretation, and institutional authorities who create the rules and interpret the outcome. See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 684 (2003):

But there is no such thing as a pure fact, innocent of interpretation. Behind every fact presented to the world – by a teacher, a writer, anyone – is a judgment. The judgment that has been made is that this fact is important and that other facts, omitted, are not important. There were themes of profound importance to me which I found missing in the orthodox histories that dominated American culture. The consequence of those omissions has been not simply to give a distorted view of the past but, more important, to mislead us all about the present.

<sup>84</sup> Biglan & Hayes, *supra* note 16, at 50-51; see Yaacov Trope & Ruth Gaunt, *Attribution and Person Perception*, in SAGE HANDBOOK OF SOCIAL PSYCHOLOGY: CONCISE STUDENT EDITION 181 (Michael A. Hogg & Joel Cooper, eds.) (2d ed. 2009) ("A number of studies have investigated the influence of context on the identification of behavioral information. This research has shown that when the behavioral input is ambiguous, its identification depends on the context in which it is processed."); Harold Kincaid, *Contextualism, Explanation, and the Social Sciences*, 7 PHIL. EXPLORATIONS 201 (2004).

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ing family system and adaptive time horizons.<sup>85</sup> This avoids a time hangover in which *ex ante* bargains (when no one was literally bargaining) for more than snuggle-time become formal contracts subject to specific enforcement in the future. Without a means to connect parenting function and a child's specific developmental pathway, child custody outcomes only exist in a hypothetical world.<sup>86</sup>

In a different but applicable form, Corina Benjet and her colleagues argue for a shift in focus from a predisposing bias of parental unfitness for women with mental illness to a functional-contextual analysis of parental behavior and intervention.<sup>87</sup> As the authors noted, “;There are few other areas of law where the

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<sup>85</sup> See Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 *FAM. CT. REV.* 363, 364 (2009) (“A second element of the paradigm shift in family dispute resolution is the belief that most family disputes are not discrete legal events, but ongoing social and emotional processes.”).

<sup>86</sup> See Nancy Darling & Laurence Steinberg, *Parenting Style as Context: An Integrative Model*, 113 *PSYCHOL. BULL.* 487, 488 (1993) (“The model we offer defines parenting style as a constellation of attitudes toward the child that are communicated to the child and that, taken together, create an emotional climate in which the parent's behaviors are expressed.”); see also Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 *RUTGERS L. REC.* 1, 16 (2006):

There are several particular aspects of the adversarial system that limit its ability to effectively handle complex family problems. The first is that the resolution of these issues often requires that the decision maker make predictions about future behavior (not unlike child custody in divorce cases). The adversarial system is not particularly well adapted to that task. Most legal decisions are made based on a finding of what has occurred in the past and assigning the appropriate consequence to it. Predicting future human behavior is far more difficult than making an assessment of what happened in the past. In addition, a judge is required to take a far more active role in order to ensure the child's continued protection. The process is also not contextually oriented. The mere existence of legal proceedings will change the very nature of the relationships being evaluated. Individuals who find themselves subject to legal scrutiny will behave in ways that may not be predictive of their future behavior. For most families, their involvement in a court proceeding is a frightening and difficult experience.

<sup>87</sup> See Corina Benjet et al., *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 *J. FAM. PSYCHOL.* 238 (2003).



courts rely as heavily on social science data as they do for decisions about children's welfare' . . . , and as social scientists we have the ethical responsibility to inform the courts with information that is empirically based."<sup>88</sup> This is important because "[u]niversal criteria for parenting competency, let alone well-validated assessment techniques for these criteria, are not yet available."<sup>89</sup> The "absence of clear statutory guidance and professionally validated and agreed upon criteria" means, however, that human cognitive processes "must be considered in understanding how parenting competency is determined."<sup>90</sup> Moreover, psychological testimony "may be biased by stereotypes of the mentally ill, which are founded more on societal expectancies than on empirical evidence"<sup>91</sup> which can lead to a bias toward advocating for optimal family environments for children.

Thus, the development of "larger, more general models of parenting is needed. We are unable to know how well we are evaluating parental competencies if we have not adequately defined them."<sup>92</sup> For that purpose, the authors make cogent suggestions for a functional/contextual approach to child custody that may facilitate transdisciplinary study:

- The model needs to define parenting competencies and skill areas and the thresholds that define minimally acceptable parenting. For example, skill areas may include problem-solving abilities, a repertoire of child management skills, medical care and physical care skills, capacities for warmth and nurturance, social-cognitive, stress management and social skills.
- The model must allow for cultural diversity that are sufficiency flexible so that diverse parenting can be accounted for within "universally minimal standards."
- The model should account for ecological factors. For example, parents who have a strong social network may allow compensatory factors to enhance areas of that person's weaknesses. The analysis slides in a given direction after consideration of a child's developmental or special needs, which may reduce or enhance resiliencies or competencies within social network and family systems.

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<sup>88</sup> *Id.* (citation omitted).

<sup>89</sup> *Id.* at 239.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 246.

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- The list of skills or strengths needs to be broadened beyond psychological factors to include physical care such as hygiene, home stability, and other environmental and socioeconomic factors.
- In the specific context of child custody, parental cooperativeness, or lack thereof, of new relationships, sibling and step-sibling relationships, and the pressure or absence of interpersonal violence or chronic disruption, must be accounted for “as is.”<sup>93</sup>

The approximation rule itself is not without reference to context: “Circumstances that would not constitute abuse and neglect under a state’s child-protection statutes might still constitute harm under this section if the alternative the court is being asked to consider as significantly superior for the child.”<sup>94</sup> This is an important point. A conflict in parenting styles (mom is “hypercritical, tense, and rigid” and dad is “more loving, relaxed and accepting”) does not amount to a gross disparity in parenting abilities (for the adults anyway) so the math rule still applies. If, however, the same facts exist but there is: (1) “uncontroverted evidence” that (2) mom has a bi-polar disorder, (3) the children have advocated (presumably through a guardian ad litem) that they “feel safer and more secure being with their father,” (4) she “may not be to blame for her condition” (unlike the father who works full-time), and (5) this “untreated condition renders her parenting abilities grossly inferior to those of [dad]” then (only then) is the court justified “in departing from the allocation of custodial responsibility that would otherwise be justified under the past caretaking standard, in order to protect the children’s welfare.”<sup>95</sup> Other illustrations likewise contrast the minimal

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<sup>93</sup> See Corina, *supra* note 87 at 246. Any reference to “universally minimal standards” seems to parallel notions of natural law and natural rights that may derive from socially developed norms within existing social contracts. There is, however, a place somewhere between optimal and minimal that should functionally attach to the safety and stability of children.

<sup>94</sup> ALI PRINCIPLES, *supra* note 4, at § 2.08, cmt. h.

<sup>95</sup> This example is derived from Illustration 17 and 18. See *id.* at § 2.08, cmt. h. Illustrations 19, 20, 21, and 22 reveal other policy and political values. The theme is that the *choice* to be disorganized and unstable in relationships with multiple parties is not a “gross disparity.” Illustration 19, *id.* For example, in Illustration 5, mother and father were married for twenty years, with four children and three still at home, ages 6, 11, and 14. Father worked outside the home for the first seventeen years as a school teacher and mother stayed home. Once the youngest began school full time, mother returned to school and then to full time employment. Father “assume[d] the majority of after-school care-

quality of parenting for moms to lose custody and the parenting qualities necessary for a father to gain custody.

Without the need for such contortions, a functional-contextual approach applies standards that legislatures or courts may adopt and revise (function) to the factual past, present, and future of the family system (context).<sup>96</sup> Assuming each set of functions is tested against a minimal or optional level of care, the aggregate of these factors should yield a range of strengths and deficiencies. Function always recognizes context as its complement. Thus, if the best interests test is a list of functions (and it is) then context is the evaluation of *functional parenting capacity* [FPC] within such a matrix of judicial decision making.

A functional and contextual approach avoids the paradoxes inherent in the approximation rule. As children grow older, fathers and mothers often organize different relationships with their children. Mothers may turn to a career after children return to school to fulfill a cultural narrative of value or their own legitimate self-interest.<sup>97</sup> Fathers may be buried in building a career that requires absence as a trade-off for family stability. Either narrative (or stereotype) does not necessarily reflect the value of the children to each parent or correlate to quality of parenting at the time of family dislocation. The reality for children, however, is that their perception of the past, and the function and capacity of adults upon whom these children depend, is subject to the child's emotional and cognitive state at that moment of time division. Ultimately, however, even the ALI commentators had to concede that exceptions apply when there is reason to believe that the allocation standards could serve not only the child's best interest, but "will also usually comport with general notions of fairness to the parents."<sup>98</sup> When general no-

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taking responsibilities for their children." *Id.* at cmt. c. Unless there is jeopardy [my term], the court should "allocate custodial responsibility to [mom], with significant responsibility to dad and recognition of his more *recent* and *more extensive* custody role." *Id.* (emphasis added). The commentator's conclusion: "[mother's] seventeen year period as primary caretaker predominates over [father's] more recent role." *Id.*

<sup>96</sup> See LECKEY, *supra* note 68, at 18.

<sup>97</sup> See *Miller v. Jenkins*, 678 S.E. 2d 268 (Va. Ct. App. 2009) (father planning to stay in home awarded primary physical custody since mother involved with a married man and planned to go to law school).

<sup>98</sup> ALI PRINCIPLES, *supra* note 4, at § 2.08, cmt. d.

tions of fairness govern the process and outcome of child custody litigation, however, the aspirations of the approximation rule are rapidly and rather untidily undone.

## V. Conclusion

Domestic relations professionals implicitly recognize, in policy discussions and cocktail chatter, that the nature of bargaining and repetitive gains yields spitefulness and other forms of non-cooperative behavior. The allocation of parenting time is not the cause of litigation. Many parents move forward with their lives without abdicating parental autonomy to the judiciary. Parental litigation strategies and personal character do reveal that preference. For these parents, and their progeny, new rules of litigation may – and only may – provide a means for lawyers, judges, or other professionals to encourage settlement or judgment. Tradeoffs, economic or otherwise, are more often dictated by threat or fear than any semblance of honor, justice, proportionality, dignity, chivalry, or moderation.<sup>99</sup>

A child's future is not merely an accounting question. The notion that accurate and ethical historical standards exist in child custody cases is a wonderfully optimistic approach. This proposition, however, neglects an entire body of sociological, historical, anthropological, and economic theory concerning centuries of conflict and aggression between human beings. The quest for a truth, and its interpretation, have more often excused the blood-letting and exploited prejudices, biases, and class distinctions.<sup>100</sup> History is, after all, written by the winners, or survivors anyway.

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<sup>99</sup> See KEEGAN, *supra* note 11, at 303:

What battles have in common is human: the behaviour of men struggling to reconcile their instinct for self-preservation, their sense of honour and the achievement of some aim over which other men are ready to kill them. The study of battle is therefore always a study of fear and usually of courage; always of leadership, usually of obedience; always of compulsion, sometimes of insubordination; always of anxiety, sometimes of elation or catharsis; always of uncertainty and doubt, misinformation and misapprehension, usually also of faith and sometimes of vision; always of violence, sometimes also of cruelty, self-sacrifice, compassion; above all, it is always a study of solidarity and usually also of disintegration – for it is towards the disintegration of human groups that battle is directed.

<sup>100</sup> See WILLIAMS & ARRIGO, *supra* note 43, at 91.

Both the hedgehog and the fox would struggle to find out how science and society could benefit from an approximation rule that perpetuates myths concerning the modern family system and social norms that may only be found on the fiction of late night cable repeats from a few decades ago.

In the beginning of this article, I mentioned transdisciplinary fields of study for observing and measuring parental conflict in the judicial environment.<sup>101</sup> Although I hope to explore such a paradigm in a separate paper, the study of parental conflict suggests a move away from personality theories, and the “why” parents do what they do to each other as a function of the blackbox of the human mind to “what” parents do to each other. The what paradigm derives from exploratory and empirical studies in behavioral economics and the notion of “heuristics” which refers to the “cognitive process that generates a decision.”<sup>102</sup> Developments in the field of heuristics may account for emotion and cognition within the compression and uncertainty of the litigation environment.<sup>103</sup> This form of future study implicates an intriguing body of knowledge that demands much deeper thought concerning the modern judicial system as a branch of government so deeply enmeshed in the management of families in conflict.<sup>104</sup>

For all the criticism lofted at Hillary Clinton and her suggestion that raising children “takes a village,”<sup>105</sup> modern family

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<sup>101</sup> See *supra* notes 26-27.

<sup>102</sup> Gerd Gigerenzer, *Is the Mind Irrational or Ecologically Rational?*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 41 (Francesco Parisi & Vernon L. Smith, eds. 2005); Hayden & Ellis, *supra* note 74, at 630 (“In the last decade, legal scholars have taken up the cause and incorporated behavioral economics into their study of law.”).

<sup>103</sup> See Epstein, *supra* note 31, at 112 (“In addition to cognitive shortfalls, all people have strong affective relationships that heavily influence all their interactions, whether in the family, the marketplace, or anywhere else.”).

<sup>104</sup> For a sample of this knowledge-base, see generally KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT: JUST PLAYING* (1998); KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT: PLAYING FAIR* (1995); CYNTHIA EAGLE RUSSETT, *THE CONCEPT OF EQUILIBRIUM IN AMERICAN SOCIAL THOUGHT* (1966).

<sup>105</sup> The same silliness turned the word “empathy” into a near profanity during a recent confirmation hearing for a Supreme Court nominee by President Obama. See, e.g., Daphne Eviatar, *Sotomayor Hearing Pits “Bias” Against “Empathy,”* WASH. INDEP., July 14, 2009, available at <http://washingtonindependent.com/50715/sotomayor-hearing-pits-bias-against-empathy> (“As Ranking

structures maintain a certain equilibrium that undergoes a seismic shift when child custody is the objective of one or both parents. The reality of developmental changes for children occurring in the midst of disorganization, serial relationships, economic upheaval, and child abuse and neglect means the politics and principles of family dissolution are an amalgamation of relations operating through the law, social science, and public policy.<sup>106</sup> Just to be clear, like many colleagues, I have written hundreds of parenting plans with the assurance that few will get me into heaven (assuming that some semblance of offset was otherwise available). Most parenting plans have little to do with the developmental reality of a child or even the factual history. The choice of plans is often intended to minimize, deflect, or defer conflict between adults who may accept an outcome as generally “fair” even if the outcome is an imperfect solution for that child. The truth is that such compromises often implicate the best alternative for the adults and the least detrimental alternative for their child because the preference is to avoid litigation by tempering the cognitive and emotional needs and wants of the adults.

The irony that permeates the approximation rule is that it ignores an important tenet of feminist theory: that “interdependent relationships as generating, over time, obligations in excess of those devised by voluntary contractual undertakings.”<sup>107</sup> Instead, the rule is much more a function of an odd brand of wishful thinking and privilege:

Relational theories suggest two interpretations of these contractual practices. First, the relational theorists may protest that the practice of unalterable marriage contracts fails to take into account the ways in which married subjects become embedded in the relationship. Relational theorists tend to object to strict reliance on contract on the basis

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Republican Jeff Sessions . . . put it in his opening statement, ‘Empathy for one party is always prejudice against another.’”).

<sup>106</sup> See Judith L. Kreeger, *Family Psychology and Family Law—A Family Court Judge’s Perspective: Comment on a Special Issue*, 17 J. FAM. PSYCHOL. 260, 260 (2003) (“Discussing the widening gap between legal precedents and current social science research.”).

<sup>107</sup> LECKEY, *supra* note 68, at 8; see also *id.* at 12 (“In the family setting, relational theories call for sexual equality and diversity in family forums, while taking seriously the responsibilities generated by family relationships, and for recognizing the role of a larger society and sustaining families.”).

that the normative content of relationships is not (transparently predictable *ex ante* . . . . They perceive interdependent relationships as generating, over time, obligations in excess of those devised by voluntary contractual undertakings . . . . The strict enforcement of these contracts and the impediments to altering the matrimonial property regime appear to overlook the cognitive impairments that plague contracting. Such impairments are likely to be especially severe where, as during engagement, parties may tend towards what cheerless economists regard as irrational optimism. Enforcement of these agreements implies confidence that a single moment of contracting can achieve exhaustive and final provision for the future.<sup>108</sup>

Indeed, the ALI commentators adopt an anti-liberal view of relationships. Virtually all business and relationship contracts (married or non-married) are defined and applied *ex post facto*. While people may bargain for the future and prediction is possible, absolute clarity is impossible. The birth of a child is an event with infinite outcomes. The child may have resiliencies, disabilities, or unique capacities of body, mind, or spirit. The parents possess strengths and weaknesses that may bend, break, or evolve during the parenting relationship. What is true is that *function* and *context* at the time of family dislocation are the measure, not *fractions*. A child's life is a fluid, dynamic process of growth and attachment, not a linear equation but a series of complex adaptations to persons and environments.

The best interests standard will always be indeterminate – no matter the length of the list of decisional factors assigned by legislatures or courts. Any attempt to anchor judgments about human behavior in the future is fraught with peril precisely because no list is long enough to account for all variations and permutations when two persons mate. If human beings lived as a linear mathematical function – without illness or some version of celibacy – these rigid demarcations from the past might work. As Keegan teaches in his extraordinary books on military history, however, the human condition is much more able to find ra-

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<sup>108</sup> *Id.* at 35 (citations omitted); see ALI PRINCIPLES, *supra* note 4, at 8 n.15, citing Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615 (1992). In a subsequent article, cited by Brinig, Scott defines liberalism as a framework for shaping family law policy in that a “contractual framework supports binding commitment and fulfillment of responsibility in the family relations.” Brinig, *supra* note 54, at 302 n.7 (quoting Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 688-89).

tional, technological, and creative means for bloodletting than peace.<sup>109</sup>

Ultimately, judicial decisionmaking is about allocating parental values in a state of conflict, with insight, empathy, altruism, cognition, organization, aggressiveness, and emotional lability the focus. There is no unitary legal or scientific solution to child custody cases because of the blend individual and systemic interplay; the availability of resources; economic, social and cultural barriers; and all the advantages and disadvantages unique to each family.<sup>110</sup> Both the hedgehog and the fox need to move beyond silos so as to expand their horizons or the means to “think about” the problem of parents and children. Quantity is not quality. History is not the future.

Which brings us back to the AAML. The judicial system needs to move beyond educated guesses, good faith feelings, undulating social norms, and non-empirical myths to transdisciplinary practices for the implementation of knowledge and judgment. A science of law should be a law of science that is relevant to the task of judicial decision making and the imposition of humane interventions that protect children:

How then should we summarize the conventions of expert (scientific) knowledge? Four components are particularly relevant to this discussion. Scientific conventions involve: (1) searching for the general and theoretical, (2) employing the methods and techniques accepted by one’s field, (3) an attitude of agnosticism that encourages waiting for persuasive evidence before making up one’s mind, and (4) a commitment to sharing data, intellectual honesty, and disinterestedness. How do these stack up against legal conventions concerning expert knowledge?<sup>111</sup>

How indeed? In collaboration with other organizations and individuals, the AAML, like the Sante Fe Institute, can offer a much foxier solution to the dilemma of child custody from which to build a judicial science of decision making.

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<sup>109</sup> KEEGAN, *supra* note 20, at 4 (“History lessons reminds us that the states in which we live, their institutions, even their laws, have come to us through conflict, often of the most bloodthirsty sort.”).

<sup>110</sup> See Robert E. Emery & Kimberly C. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 369 (2008).

<sup>111</sup> Sanders, *supra* note 27, at 66.