

COLLABORATION BETWEEN JUDGES AND SOCIAL SCIENCE RESEARCHERS IN FAMILY LAW

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Recent discussions between social science researchers, advocates, judges, lawyers, and family court personnel highlight the strong commitment of professionals across disciplines to work together to assess critically important issues in family law. The difficulty has been bridging the gap between the professions to create true understanding and collaboration and to develop empirical research that can advance the field of family law. To help further collaboration, this article first summarizes a series of discussions between researchers and judges concerning the similarities and differences between the law and social sciences in (1) the methods through which the disciplines pursue truth, (2) the standards used to evaluate evidence, and (3) the methods to pursue justice. With a clearer understanding of the philosophical similarities and differences between the disciplines, the manuscript then reviews the concerns and roadblocks that currently limit social science research in family courts, while identifying possible solutions.

Keywords: *family law; empirical research; collaboration; researchers; judges; evidence-based practice; empirically supported treatments*

Recent discussions between social science researchers, advocates, judges, lawyers, and family court personnel highlight the strong commitment of professionals across disciplines to work together to address critically important issues in family law. The conference, "For the Sake of the Children: Advances in Family Dispute Resolution," held in Bloomington, Indiana (Indiana University, November 2007), reaffirmed the importance of several disciplines coming together to frame important unanswered questions and define empirical research methodology necessary to examine the questions. Following the conference, we (family court judges and social science researchers studying divorce, or relationship dissolution more broadly) held ongoing discussions to address important family law questions. The difficulty has been bridging the gap between the professions to create true understanding and collaboration and to develop empirical research that can advance the field of family law.

There is a commitment and desire to work together, yet over the years, the process of doing so has been challenging (e.g., Kelly & Ramsey, 2007). Common to both disciplines, law and social science, is the desire to test assumptions, hypotheses and beliefs in the search for the truth (Shuman & Sales, 1998). Somewhat challenging is that the disciplines use very different philosophical approaches and have different constraints on the application of the truths. To help further collaboration, this paper first summarizes a series of discussions concerning the similarities and differences between the Law and Social Sciences in (1) the methods through which the disciplines pursue truth, (2) the standards used to evaluate evidence, and (3) the methods used to pursue justice. With a clearer understanding of the philosophical similarities and differences between the disciplines, the paper

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then reviews the concerns and roadblocks that currently limit social science research in family courts, while identifying possible solutions.

COMMON GOAL: PURSUIT OF TRUTH

PURSUIT OF TRUTH IN LAW

In the law, the traditional adversarial process governs the pursuit of truth. Legal advocates use the best evidence available (including social science research) to present strong arguments supporting positions of clients. From these arguments, it is assumed that the truth will emerge. The legal process is governed by rigid rules governing all aspects of the process, from the order and time periods in which documents need to be filed with the court to the content of what can and cannot be said in open court before the judge. The focus of this process is on the pursuit of truth in a particular case. This type of truth has been traditionally referred to as adjudicative facts—because it is used by judges to decide (or “adjudicate”) a resolution for a specific case. Some legal truths address broader purposes, such as understanding the context in which to interpret particular case-specific facts (social framework) or the general truths for arguing that a law should be changed (legislative facts or social authority) (Davis, 1942; Monahan & Walker, 1991). An example of social framework would be a lawyer calling an expert to review social science research regarding the fallibility of eyewitness testimony (e.g., the speed of memory decay, effects of stress on eyewitness accuracy, relationship of confidence of a witness to accuracy) to assist the judge (or jury) in determining the credibility of particular eyewitnesses in a specific case (Monahan & Walker, 1991). Social science research is not used to argue for a change in the rules of evidence regarding eyewitness testimony but rather to assist in determining facts of a particular case. If social science research was used to argue that the laws should be changed, it would then be used as social authority. Legislative facts or social authority are much more similar to social science’s approach to the pursuit of truth.

PURSUIT OF TRUTH IN SOCIAL SCIENCE

Social scientists use an equally rule-bound process, the scientific method, to pursue scientific truths and build a base of scientific knowledge. In this context *science* refers to a system of acquiring knowledge that relies on using rational methods to empirically test hypotheses and theories to propose explanations. The goal is to search for general laws and principles based upon likenesses and differences in the phenomena being observed (Skaggs, 1945) and to make reliable predictions about future unknown events (Braithwaite, 1953). *Scientific knowledge* then is a particular kind of knowledge that is produced via specific rules known as the *scientific method* (Bordens & Abbott, 2007; Kelly & Ramsey, 2007). This method combines a series of five cyclical recurring steps: (1) observing a phenomenon, (2) forming tentative explanations or hypotheses concerning cause and effect relationships regarding the phenomenon, (3) conducting studies to rule out alternative explanations, (4) revising and refining the hypotheses, and (5) repeating the process (Bordens & Abbott, 2007; Popper, 1959; 1962).

The search for truth across social science and legal disciplines has important similarities and differences. The broader types of truths found in law (social authority or

social framework) are much more similar to social science research truths and, in fact, often use social science to frame the arguments. For social science, these truths are found through testing competing hypotheses using approved and rigorous scientific methods to discard those hypotheses that do not survive the scientific process and to retest those that do (Popper, 1959; 1962). Scientific truths are seen as only temporary, as science is continually testing and refining scientific truths. Frustrations arise when researchers provide judges with data necessarily couched in tentative terms upon which judges must make important concrete and long-lasting determinations about a person's (or a family's) future.

STANDARDS OF EVIDENCE FOR TRUTH

STANDARDS OF EVIDENCE FOR TRUTH IN LAW

The Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), established a set of criteria for federal court judges to use in evaluating and deciding whether to allow scientific information into evidence in particular cases. The judge is instructed to perform a gatekeeping function by analyzing the underlying science being offered and determining if it was acceptable based on specific criteria. These criteria include: (1) whether the underlying theory or technique can be (or has been) tested; (2) whether the error rate and the standards used to control it are known and acceptable; (3) whether it has been subjected to the peer review and publication process; and (4) whether (or to what degree) it has been accepted in the relevant scientific community.

Several scholars have reviewed the *Daubert* criteria and linked them to the scientific method used by social scientists noted above (e.g., Kelly & Ramsey, 2007). The first criteria under *Daubert* (testability) relates to the first and second criteria under the scientific method (developing hypotheses concerning cause and effect relationships). A key element of any hypothesis is that it is stated in a manner which can be tested and potentially falsified. A hypothesis relevant to family law might be the following: *Children of parents attending parent education programs during a divorce will report lower levels of parental conflict during exchanges than children whose parents did not attend such a program.*

The second *Daubert* standard (error rate) relates to the third criteria under the scientific method (conducting studies to rule out competing hypotheses) (Kelly & Ramsey, 2007). A reasonable research design to test this hypothesis would be: *Couples seeking divorce are asked if they are willing to participate in a study. If they agree, they are randomly assigned to either attend a parent education program or a comparison program (e.g., given readings about divorce). As part of agreeing to be in the study they are called monthly for a year and asked to fill out questionnaires about the level of parental conflict.* This allows the researchers to test the hypothesis that participation in the parenting education program will result in lower conflict.

The third *Daubert* criterion (peer review) is an important check on the quality of the research. Peer review entails scholars from within the same area of expertise reviewing a potential article and providing comments and critiques as to the quality of the research. This process is essential for researchers in the last step of the scientific method (repeatedly revising and refining the hypotheses). In contrast, caution is warranted when reviewing research published in journals that do not require peers to review and judge the quality of

the research prior to its publication. In addition, research published by companies owned by the authors of the research must be considered with caution. For example, Richard A. Gardner, M.D. explained his arguments for a set of symptoms he popularized (“parent alienation syndrome”) in four books published by the company Creative Therapeutics, Inc., which was owned by Richard A. Gardner (National Council of Juvenile and Family Court Judges, 2006).

The fourth *Daubert* criterion (general acceptance in scientific community) is important because it is assumed to reflect the quality of the scientific method used and approval of the work by scientific peers (peer review process). For example, one hopes that widely used interventions were well-designed and scientifically tested. However, this is not always the case. As will be noted in more detail below, there are numerous interventions that, while popular (e.g., Critical Incident Stress Debriefing, “Scared Straight Programs,” DARE programs), have been found to do harm when subjected to empirical testing (Lambert & Miller, 2001; Lilienfeld, 2007; Rhule, 2005).

STANDARDS FOR EVIDENCE FOR TRUTH IN SOCIAL SCIENCE: EVIDENCE-BASED PRACTICE STANDARDS

There are additional standards for conducting social science research that are part of the scientific method, as applied to the specific issue of evaluating interventions with individuals and families. Evidence-Based Practice (EBP) Standards have been gaining popularity in various disciplines including research on psychotherapy intervention, and EBP is an important reference point for discussing interventions for families in a court setting. Indeed, psychotherapy research has already informed important areas of family law, for example by providing evidence of the effectiveness of certain post-divorce parenting programs for both mothers and fathers (e.g., Cookston, Braver, Griffin, DeLuse, & Miles, 2007; Forgatch, DeGarmo, & Beldavs, 2005; Wolchik et al., 2005). The importance of evidence based standards of practice is related to the fact that it is essential to understand the quality of different research studies and what can (and cannot) be concluded from them. Psychotherapy researchers have debated the relative merits of different research designs to answer important questions for decades (see Chambless & Ollendick, 2001, for a review) and have developed a well-defined set of research design rules to help identify the quality of the intervention studies (e.g., Beck & Sales, 2001).

In psychotherapy research, evidence-based practice refers to integration of the three elements, put forth initially in medical research (APA Presidential Task Force on Evidence-Based Practice, 2006) (“Task Force Report”), to be used by a practitioner when deciding what treatment to offer a client or patient. The three elements or “legs,” to be integrated when making treatment decisions, are: (1) patient characteristics, culture and preferences, (2) clinical expertise, and (3) best available research evidence. The weight assigned to each leg in decision-making has spawned widespread, and at times vociferous, debates (e.g., Norcross, Beutler, & Levant, 2006). These three elements or “legs” factor into considerations judges must also make in deciding the quality of scientific evidence offered in legal cases.

Leg 1: Patient Characteristics and Culture

Evidence-based practice proposes that researchers (and practitioners) consider an assortment of factors related to the individual patients. Characteristics such as gender,

gender identity, ethnicity, race, age, family context, financial resources, sexual orientation, and developmental or life stage are important in deciding which treatments are appropriate. In addition, a clinician must consider a patient's culture (e.g., values, history, knowledge, rituals, and customs) and preferences regarding treatment (Task Force Report, p. 278). Social scientists must decide which subjects to include and exclude in research studies in order to arrive at findings that can generalize to broader populations. Judges also must consider an individual litigant's characteristics in making decisions such as ordering parties to participate in counseling or in making custody decisions and often must do so without the advantage of clear social science evidence concerning how to do it. Unfortunately, little research exists about how culturally, racially or ethnically diverse populations treat their children or each other and what specific variables might be important to consider in making decisions about their families.

Leg 2: Clinical Judgment/Expertise

Clinical expertise is defined as competence gained through specialized education, training and experience that results in effective practice (Task Force Report, p. 275). Unfortunately expertise has serious shortcomings, including biases and errors that plague all humans' information processing, even that of experts (Task Force Report, 2006). Common errors arise from the use of strategies and heuristics to speed decision-making or form emotional reactions that lead to biased reasoning (Ditto, Munro, Apanovitch, Scepansky, & Lockhart, 2003; Task Force Report, 2006). In generalizing or making inferences from observations, there are risks of errors in judgment, including idiosyncratic interpretations, overgeneralizations, and confirmatory biases (the well-established phenomenon that people look for or interpret new information to confirm preconceptions and avoid information and interpretations that would contradict prior beliefs) (Dawes, Faust, & Meehl, 1989; Task Force Report, 2006). In law, these cognitive errors are particularly striking in the area of criminal profiling (Hicks & Sales, 2006) and are controversial in the area of judicial determinations based on custody evaluations addressing the "best interests of the child" standard in child custody cases (Emery, Otto, & O'Donohue, 2005). Because the "best interests" standard is vague, the statutory guidelines for judges and evaluators to use in assessing parents and children in relation to "best interests" are also vague, and the scientific evidence supporting major concepts (e.g., whether children's wishes should be elicited, whether infant overnights are harmful, relevance of psychological testing) is scant; thus, custody evaluations can be biased and address the evaluators' favorite concepts (e.g., Parent Alienation Syndrome, Psychological Parent) as opposed to some objective truth (Emery et al., 2005).

In related work, social scientists have been investigating the quality of judgments made using clinical judgment (aka clinical methods) as a means of integrating complex sources of data versus the quality of judgments made by integrating data based on statistical methods. Clinical judgment relies on intuitive and informal processes (hopefully based on expertise) to integrate complex sources of client data. Statistical methods integrate complex data based on the output of statistical formulas such as actuarial tables and computer programs yielding reproducible predictions (Grove & Meehl, 1996). Over 50 years of research finds that, when statistical formulas are available for integrating data, systematic/mechanical integration consistently outperforms informal, subjective, clinical integration (Grove, Zald, Lebow, Snitz, & Nelson, 2000). As one example, this

difference is particularly clear in the prediction of future violence (see, e.g., Egisdottir et al., 2006, for a review). Statistical methods consistently outperform clinical integration of data in predicting future dangerousness.

Thus, while judges are trained to trust their analytical ability in processing sets of complex information and making decisions (e.g., custody evaluations, psychological evaluations, police records, court documents, and expert testimony), social scientists are actually trained *not* to trust their ability in integrating complex sets of data to arrive at decisions (Grove & Meehl, 1996). Social scientists are instead trained to seriously question their clinical integration of data and search for more mechanical forms of integration (Hilton et al., 2004). The difference in the weight given to expertise in integrating different types of data with specific case facts creates unease between the social science and law disciplines.

While evidence-based practice promises to bridge the gap between using more rigorous methods of combining data with less rigorous, more intuitive clinical expertise, serious questions (for which there are no current empirically-driven answers) remain about how clinical (or judicial) decision-making should be accomplished. For example, what specific client variables are considered? What specific client variables ought to be considered? How are the client variables to be weighed in relation to legal mandates? How does a judge reach a decision about the client variables and legal mandates in terms of their relative importance? Are there feedback loops to provide judges with information regarding the short- and long-term outcomes of their decisions?

Leg 3: Best Available Research Evidence

This leg of evidence-based practice includes a variety of types of empirical research; however, the gold standard research design for answering cause-and-effect relationships in understanding why interventions do or do not work is a randomized controlled trial (RCTs) (Task Force Report, 2006). RCTs are research studies that have at least the following characteristics:

Random Assignment. Subjects in treatment studies volunteer to participate and then are randomly assigned to a group. By randomly assigning clients to a treatment group or a control group (e.g., no treatment or different treatment groups), many client variables will be distributed evenly among the groups (e.g., age, sex, motivation for participating, order of participation in the study) (Kazdin, 1994). This is important so that if differences are found at the end of the study, the differences can be attributed to the treatment rather than because the groups were also different at the beginning of the study (e.g., couples with less severe conflict were assigned to mediation, thus making mediation appear more successful).

Treatment Manuals. Treatment manuals are a huge advance in the field, as they minimize the variability in the delivery of specific treatments across different treatment providers and allow the replication of treatments in other studies. These manuals can provide session-by-session scripts and explicit descriptions of the techniques and strategies used or can be moderately flexible at specific points in treatment. During the treatment phase, therapist delivery of the treatments can be monitored to ensure that the treatments being provided are the ones intended (as specified in the treatment manuals). Without this level of control, a

researcher cannot be certain that the results of the study are due to the specific treatment being provided (Chambless & Ollendick, 2001).

Well-defined outcomes with adequate methods of assessment. Outcome measures must offer a sufficient test of the particular aspect of the presenting problem the therapy was designed to address. It is important that the instruments used to measure the outcomes be reliable and valid (Chambless & Ollendick, 2001). While this factor may be the most important factor for judges, without adherence to the other important aspects of research (i.e., random assignment, treatment manuals, replication of studies), carefully measured outcomes are meaningless. In other words, “garbage in, garbage out.”

Replication of studies. Replication of findings of a study with an additional sample of subjects and by an independent research team is critical to being truly confident about whether a treatment works (Chambless & Ollendick, 2001). Replication of results protects against drawing premature conclusions based on a particular set of researchers or therapists with a particular set of biases or from a subject sample that might be unusual (Chambless & Ollendick, 2001).

Such criteria help to define randomly controlled trials (RCTs) and social science researchers heavily weigh the conclusions drawn by their colleagues who conduct RCTs, as they are considered the Gold Standard in establishing cause-and-effect relationships in studies of intervention effectiveness. Social science task forces have attempted to distill the findings from RCTs and various other research studies by providing lists of treatments that have been tested and the results of those studies. Practitioners can refer to such lists when making decisions about what services to provide to clients, and clients can use these lists in choosing a service provider. Empirically supported treatments (ESTs) refer to a set of psychological treatments that have been reviewed by several separate task forces, made up of teams of researchers, and thus identified as having a strong empirical basis. A wide array of psychological interventions have been thus evaluated, including treatments for adult, child, marital, and family therapy. Judges ordering clients to treatment and practitioners providing that treatment should carefully consider lists of ESTs provided by expert task forces (Chambless & Ollendick, 2001).

“Do No Harm”: Another Important Use of RCTs

A major consideration for both judges and social scientists within family law is that participation in treatment should cause no harm to the participant (the same concerns arise about participation in research and will be addressed in more detail below). Regarding therapy interventions, research regarding ESTs has made enormous strides in informing therapists and the public which therapies have the best support *and* which treatments cause harm (Lambert & Miller, 2001; Lilienfeld, 2007; Rhule, 2005). In fact, one scholar has created a list (similar to EST lists) of treatments that have actually made clients worse (Lilienfeld, 2007). It is, therefore, important for judges and lawyers to understand that RCTs (the Gold Standard in treatment evaluation) is the primary source of evidence for identifying therapies that cause harm.

Lack of EST Evidence for Family Law Interventions

Studies of evidence-based practices that relate to family law issues are beginning to appear (see other articles in issue), but most interventions used in family law have not been

subjected to RCT research (Beck & Sales, 2001). For example, careful review of mediation research found that in 20 years of research, there were remarkably few studies that used random assignment, much less any of the remaining criteria for RCTs (Beck & Sales, 2001). Thus, interventions in family law lag far behind research regarding traditional psychotherapy interventions, in terms of both understanding what works and what could potentially cause harm. Without more rigorous research, we do not know if family law intervention programs work, are ineffective or actually cause harm (Beck & Sales, 2001).

PURSUIT OF JUSTICE

PURSUIT OF JUSTICE IN LAW

Two types of justice are important within the legal arena. Procedural justice refers to ensuring that the legal *procedures* used for resolving disputes are transparent and fair and that the participants have a voice in determining the outcome (Lind & Tyler, 1988). Distributive justice refers to the process of *decision-making*. For decisions to be fair, they should be arrived at through thoughtful review of the applicable law (codes, statutes and rules) and the application of these laws to case specific truths (Tomkins & Applequist, 2007).¹ Therefore, legal justice refers to both execution of a fair process (i.e., procedural justice) and execution of fair judicial decision-making (i.e., distributive justice) in relation to particular cases. The logic used in arriving at case-specific decisions is then used in subsequent cases with similar adjudicative facts or legal issues (case precedent). Oversight of procedural and distributive justice is provided by higher courts through the appellate process.

PURSUIT OF JUSTICE IN SOCIAL SCIENCE

Similarly, consideration of justice in social science research relates to both procedural and distributive justice. Several sets of ethical codes exist that govern research (American Psychological Association, 2000; Department of Health, Education and Welfare, 1979 (hereinafter “Belmont Report”); World Medical Association Declaration of Helsinki, 2000). Within the Belmont Report is a clear definition of justice as applied to research with human subjects, as well as clear definitions of requirements researchers must follow regarding issues such as informed consent, assessment of risks and benefits of the study, and selection of subjects for research studies. Risks and burdens associated with research involve both the subjects’ real-time and subjective experience when participating in a study (e.g., sitting in a room with a therapist) and the broader issue of who is selected as a research subject to bear the burden of the risks (Belmont Report, 1979). The experience of participating in the research, like participating in legal procedures, must be fair and transparent and the subjects must have a voice, particularly in making informed choices about participation in research and in ending participation in studies if so desired. Those selected to participate as research subjects must also be scrutinized to determine if certain classes of subjects are being systematically selected because they are readily available and in a compromised position (prisoners, mental ward patients, uneducated) or easily manipulated into participating (economically poor) (Belmont Report, 1979). These concerns must be balanced against the overall importance or benefit of the research for society. Additionally, if the benefits of the

research include improved procedures or programs, justice demands that the classes of subjects selected to participate in the research must also benefit directly from the improved procedures or programs, not simply those that can afford it (Belmont Report, 1979). It is important for judges and lawyers to understand that empirical research cannot be conducted without significant oversight, and approval of the research, by numerous agencies and experts that consider several sets of ethical codes and legal standards.

Oversight of Justice in Social Science Research: Institutional Review Boards (IRBs)

University-based research undergoes review to ensure the application of the specific ethical codes that govern research with human subjects. All study proposals must be submitted to a university-wide IRB that is required, by federal law, to assess the proposal to determine if (1) the risks to subjects are minimized, (2) the risks to subjects are reasonable, (3) the selection of subjects is equitable, (4) informed consent is obtained and documented, (5) the research plan includes monitoring data collected to ensure subjects are safe, and (6) the privacy of the subjects and confidentiality of the data are adequately protected (45 CFR 46, 46.111). If the study is funded, most federal funding agencies (i.e., National Institute of Justice, National Institute of Mental Health) also conduct a rigorous ethics review process by a committee of scholars to determine if the proposal can proceed.

Justice in Law and Social Science

While there is great overlap in the overall goals and pursuit of justice across law and social science, there are important differences. Ensuring justice in social science research is accomplished through a set of important ethical considerations that must be addressed by layers of review processes before any study can be conducted. Research, especially RCT studies, frequently takes a long time to conduct (e.g., examining the long-term impact of an intervention). Thus, social science proceeds at a slow, methodical pace. Justice in law is most often an end-point decision made by judges applying the best evidence possible to a particular set of facts. Because of the need to resolve cases within a reasonable timeframe, the adversarial process, compared to social science, proceeds at a relatively rapid pace. This difference in timing causes frustration for both disciplines. Social scientists argue that decisions are made without appropriate social science data; judges argue that they cannot wait several years (or decades) to ensure that a particular decision is backed by the best social science data.

JUDGES AND RESEARCHERS COLLABORATING: ISSUES, CONCERNS, AND POTENTIAL ROADBLOCKS

JUDICIAL CONCERNS REGARDING RESEARCH

A major concern for family court judges is what happens to information obtained in research studies. Both judges and social scientists take seriously the concern that litigants' information be kept secure.

Confidentiality and Privilege

Judges are concerned that the information provided in studies never be used against the litigants who participate in research. Likewise, social scientists are concerned that subject

information never be revealed in such a way that individual subjects can be identified. Professional and legal requirements of confidentiality essentially obligate mental health professionals not to discuss information about a client, without that specific client providing permission to do so (Koocher & Keith-Spiegel, 2008). Although the right of confidentiality belongs to the client, there are limits to circumstances surrounding confidentiality (e.g., child abuse and neglect) in both social science and law.

Certificate of Confidentiality. At times researchers want to conduct studies on sensitive topics (e.g., intimate partner violence) and want to provide participants with assurance that participation will not lead to criminal prosecution. Certificates of Confidentiality are one mechanism to provide this assurance. Statutory authority for certificates of confidentiality is provided under section 301(d) of the Public Health Service Act (42 U.S.C. 241(d)) (National Institute of Health, 2008). Under this statute, the Secretary of Health and Human Services may authorize researchers to protect the privacy of individuals who are the subjects of that research. This authority has been delegated to the National Institutes of Health (NIH). Thus, researchers who obtain a certificate from NIH should be able to protect the privacy of research subjects. This means that the research should not be subject to discovery in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify study participants by name or other identifying characteristic (National Institute of Health, 2008). NIH encourages researchers to obtain certificates to ensure client information is protected; however, the legal authority of these certificates is not absolute and has not been challenged in court.

Privilege is rooted in law and pertains to communications that are protected in specific relationships in some states (e.g., doctor–patient, priest–parishioner, attorney–client, therapist–client) (Koocher & Keith-Spiegel, 2008). When this privilege exists, it can only be waived by the person who is subject to the court process and cannot be waived by the professional. Attorney–client privilege is one of the strongest, most privileged relationships available under the law and is considered a foundation of a client’s constitutional right to effective assistance of counsel in legal cases. Therapist–client privilege has been repeatedly challenged in courts, and states vary concerning the strength of this privilege.

Confidentiality and privilege all relate to client-specific information but are rooted in different disciplines and are not interchangeable. For social scientists, as noted above, layers of review processes are required before any study is approved and can be conducted. A major concern for judges is that the attorney-client privilege be honored, as it is fundamental to the legal process. Judges and attorneys justifiably become apprehensive when social science researchers discuss or seek to obtain possibly incriminating information from clients (e.g., perpetration of domestic violence, criminal activity, etc.).

One way to ensure the protection of participant information is to insist that the information be provided anonymously—in that a subject’s name never be attached to the information provided. Anonymous studies can help researchers assess the prevalence of certain behaviors. For some types of research, however, follow-up interviews or surveys are essential to make defensible conclusions about the long-term impact of programs. Unfortunately, studies that do not include identifying information do not allow long-term follow-up and thus severely limit the conclusions that can be drawn from the research.

Concerns Regarding Terminology

Social science researchers and judges have each developed discipline-specific terminology that is not easily accessible to others (Kelly & Ramsey, 2007; Shuman & Sales, 1999). Attempts to work together have often been stymied by confusion concerning the common understanding (and misunderstanding) of discipline-specific terminology such as “experiment,” “psychoeducation,” and, as noted above, “privilege,” “scientific method,” and “confidentiality.”

For judges and lawyers, the term “experiment” can conjure visions of litigants not being allowed to have access to important legal processes or interventions that might help them, potentially compromising essential constitutional rights such as due process. It also worries lawyers and judges that litigants may not be provided adequate information to provide informed consent to participate. Having clients or litigants participate in experiments, no matter how well designed, removes a level of control from the hands of lawyers and judges and places it in the hands of others, which can be uncomfortable and unsettling. Judges are accustomed to having control over their calendars and courtroom dockets, and lawyers are accustomed to having control of the information provided to their clients, as issues that reach the court system tend to be serious and have long-lasting effects. It is entirely reasonable that judges and lawyers would want to carefully consider whether to allow research “experiments” with their clients or in their courtrooms.

In contrast, for social scientists, the term “experiment” is a very positive term that means a carefully designed study that includes important scientifically rigorous procedures. Because social scientists understand the clear needs and benefits of conducting RCTs, judicial hesitance in allowing them to conduct randomized trials can be frustrating. As noted above, RCTs are the gold standard in determining cause-and-effect relationships. Thus, if judges want to learn if a particular program works and why (e.g., custody/parenting time mediation, parenting education, case management, parenting coordination), it is essential to provide access to social scientists conducting this type of research.

Concerns Regarding Discipline-Specific Procedures

Central to rigorous research designs for social science researchers is the ability to gain access to subject populations and the ability to randomize research subjects to at least two well-developed interventions that can be closely monitored. Social scientists, however, must understand why requests for judges and courts to adjust the way they work to accommodate rigorous research designs are not generally met with overwhelming enthusiasm.

Judges are bound by rules of civil and criminal procedure that dictate, among other things, time periods for processing cases, the documents that can and must be filed and in what order, and the issues that can and cannot be addressed. These procedures are standardized so that litigants in various jurisdictions are treated as similarly as possible and so that cases proceed through the legal system in a reasonably, timely and orderly fashion. Without cooperation from other judges in the jurisdiction or without a state-wide change in the procedures for all jurisdictions, it may be difficult for individual judges to take it upon themselves to make adjustments to accommodate rigidly controlled studies. As with any complex system, changes in one part of a system (an individual judge’s caseload) will have domino effects on the caseload of other judges within the jurisdiction who may (or may not) appreciate why changes are being made.

For judges, control over calendars and legal procedures and authority over outcomes of individual cases are central to conducting business in an orderly and judicious manner. Judges are not scientists; they have legally defined scopes of authority and need to make decisions within those limits. Individual judges are often uncomfortable agreeing to random assignment of litigants to interventions, particularly without the endorsement of other judges in the jurisdiction. The court workload is a closed system; changes or additional duties taken on by one judge may have ripple effects on other judges working in the system.

In addition, agreeing to research protocols without approval by a centralized authority at a jurisdictional or state level may be uncomfortable for a judge. It can open the judge to potential claims of preferential treatment for some litigants or accusations that procedural justice and due process are compromised or absent. Thus, when possible, researchers can help judges who are willing to engage in research in particular jurisdictions by working with legal institutions that provide oversight (e.g., state supreme courts and state-wide family court projects). The benefit of this centralized approval is that it protects individual judges by requiring protocols be changed across a jurisdiction or a state. A drawback is that when programs become too institutionalized, they become less flexible, and researchers are thus less able to test new interventions. In addition, the size and budgets of jurisdictions vary greatly across a state. Requiring that additional services be provided in small, rural districts often is not feasible.

Thus, unless researchers can make a compelling case regarding the clear benefits of the research for judges in better managing cases or producing clearly superior outcomes for families, it may not be realistic to expect that requests to further adjust procedures to accommodate rigid controls necessary for RCT research will be warmly welcomed. The sheer number of family law cases puts the courts under tremendous pressure to process cases quickly and efficiently.

Concerns Regarding Ease of Implementation and Affordability of Interventions

Both judges and social scientists are concerned about the ease with which treatment programs can be implemented. Legislative mandates often require certain programs be provided at low or no cost (e.g., custody/parenting time mediation, parenting coordination). In an era of shrinking state and local budgets, continued funding for these programs is difficult to maintain, and judges are understandably reluctant to require additional programs be instituted. Social scientists are concerned with ensuring subjects obtain enough of the treatment (dosage) to reap the benefits while making those benefits affordable for both the clients and the courts.

Concerns Regarding Limited Research on Family Law Topics

If issues unique to judges and social science researchers are overcome, and rigorous research is conducted concerning intervention programs in family court, an important issue to consider is what to do with the results of such research. In particular, what can be done if interventions are found to be ineffective or to cause harm? Will courts be willing to stop using these programs? It may come as a surprise to many that short education programs (less than 4 hours) for divorcing couples, which are mandated by many states, have limited empirical backing (Blaisure & Geasler, 2006). In terms of causing harm, RCTs

investigating programs such as “Scared Straight” and boot-camp interventions for adolescents diagnosed with conduct disorder found that these programs *increased* conduct problems (Lilienfeld, 2007). In addition, when the anti-drug program DARE was investigated using RCTs it was found to *increase* (as opposed to decrease) adolescent intake of alcohol and other substances (Lilienfeld, 2007).

There may, however, be good reasons to continue programs that are less than perfect. Judges are often expected to be proactive in addressing such important social problems as intimate partner violence and divorce-related parental conflict. Legislatures representing constituents mandate intervention programs be instituted in family courts before social science research can be conducted to assess effectiveness. Mediation, parent education, and parenting coordination programs were all implemented before social science research could be conducted. Judges have little or no control over these legislative mandates. In addition, if parent education programs are ineffective, what does social science research indicate that would be more effective? Are there viable alternative programs to fill the gap? Would continuing unproven interventions be better than to do nothing? At this point in time, these questions are not being addressed by available empirical research. Thus, some would argue that given that an important message from the family law bench to parents is that parents need to keep the best interests of the children as the focus of the divorce process, at the very least, parent education programs may provide one more venue where this message is driven home to parents.

EXAMPLES OF WHAT SOCIAL SCIENTISTS CAN DO TO IMPROVE THE USEFULNESS OF RESEARCH AND ASSIST JUDGES IN MAKING DECISIONS

Judges must make decisions about individual families and the closer the research is to the characteristics of the individual families that come before the judges, the more useful the research will be for judges in making those decisions. Social scientists could include careful descriptions of study participant characteristics so that this information can then be used by judges in making decisions about individual cases. Carefully describing the characteristics of participants who improve with certain interventions, as well as those who do not, would be helpful for judges and practitioners making decisions regarding particular families and particular interventions. In addition, traditionally, research is conducted with middle class, white participants. Social science researchers should strive to study more culturally diverse samples of participants so that the recommendations from research will generalize to the broader population that judges are likely to see.

To ease study participation for a wide range of individuals, social scientists could also consider making participation in research more convenient. While social scientists may be comfortable in a psychology building or a justice building, these are foreign (and perhaps negative) places for many study participants. Conducting research trials in common community settings, such as a library, a church basement, a store front or the participant’s home, might create extra work for researchers but perhaps increase cooperation by participants.

EXAMPLES OF WHAT JUDGES CAN DO TO INCREASE THE MEANINGFULNESS OF SOCIAL SCIENCE RESEARCH FOR LEGAL DECISION MAKING

Judges are well-respected members of the community; as such, they could help educate the public and other community leaders about the problems and needs of families involved

in the legal system. Judges could promote the value of social science research as an important tool that the courts can use to assist in adjudicating family law cases and insuring that the children of divorce are not further harmed by the legal process. Judges have access to community leaders and government officials and thus could be a valuable ally to social science researchers in their quest for access to subjects in the community. Change through public education does not happen overnight, but over time judges can have an important influence on public perceptions of the value of social science research addressing important legal issues.

IN CONCLUSION

There is a fundamental tension between the disciplines of philosophical approaches to establish truth, consider justice, and in the evidence necessary to meet the requirements of both. Social scientists must be cognizant of the fact that judges have immense responsibility to ensure the litigants' legal rights are protected. Allowing social science researchers experimental control of interventions and access to research subjects is not at the top of judges' day-to-day agendas. However, judges should be educated to understand that rigorous social science research is essential to ensure that the family law interventions (whether mandated by legislatures or developed in-house) are effective and do no harm.

Evidence-based practice is an increasingly popular model for assessing and justifying family law programs; however, the elements of EBP (i.e., client/litigant characteristics and culture; clinical judgment/expertise; and, best available research evidence) are weighted considerably differently by social scientists and judges. Little is known about client/litigant characteristics in either social science or law. It is known, however, that major differences occur in the weight given expertise versus research to draw cause-and-effect conclusions. The overarching goal for both disciplines in the family law legal arena is to provide programs and make decisions that are in the best interests of the children. Thus, continuing to work together to solve differences and increase mutually beneficial knowledge is essential to both disciplines.

NOTE

1. Considerations of elements of justice, both procedural and distributive, as applied to both law and social science represent entire scholarly, legal and philosophical discourses of empirical research and are therefore beyond the scope of this article.

REFERENCES

- APA Presidential Task Force on Evidence-Based Practice. (2006). Evidence-based practice in psychology. *American Psychologist, 61*, 271–285.
- Beck, C. J. A., & Sales, B. D. (2001). *Family mediation: Facts, myths and future prospects*. Washington, DC: American Psychological Association.
- Blaisure, K. R., & Geasler, M. J. (2006). Educational interventions for separating and divorcing parents and their children. In M. A. Fine & J. H. Harvey (Eds.), *Handbook of divorce and relationship dissolution* (pp. 575–602). Mahwah, NJ: Erlbaum.
- Bordens, K. S., & Abbott, B. B. (2007). *Research design and methods: A process approach* (6th ed.). Mountain View, CA: Mayfield.

- Braithwaite, R. B. (1953). *Scientific explanation: A study of the function of theory, probability and law in science. Based upon the Tarner lectures, 1946*. New York: Harper & Row.
- Chambless, D. L., & Ollendick, T. H. (2001). Empirically supported psychological interventions: Controversies and evidence. *Annual Review of Psychology, 52*, 685–716.
- Cookston, J. T., Braver, S. L., Griffin, W. A., DeLuse, S. R., & Miles, J. C. (2007). Effects of the Dads for Life Intervention on interparental conflict and coparenting in the two years after divorce. *Family Process, 46*(1), 123–137.
- Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).
- Davis, K. C. (1942). An approach to problems of evidence in the administrative process. *Harvard Law Review, 55*, 364–425.
- Dawes, R. M., Faust, D., & Meehl, P. E. (1989). Clinical versus actuarial judgment. *Science, 243*, 1668–1674.
- Department of Health, Education and Welfare. (1979). *The Belmont Report: Ethical principles and guidelines for the protection of human subjects of research*. National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Retrieved July 8, 2008, from <http://ohsr.od.nih.gov/guidelines/belmont.html>
- Department of Health and Human Services. (2005). Code of Federal Regulations, Title 45—Public Welfare, Department of Health and Human Services, Part 46 Protection of Human Subjects. Retrieved July 11, 2008, from <http://www.hhs.gov/ohrp/documents/OHRPRegulations.pdf>
- Ditto, P. H., Munro, G. D., Apanovich, A. M., Scepansky, J. A., & Lockhart, L. K. (2003). Spontaneous skepticism: The interplay of motivation and expectation in responses to favorable and unfavorable medical diagnoses. *Personality and Social Psychology Bulletin, 29*, 1120–1132.
- Egisdottir, S., White, M. J., Spengler, P. M., Maugherman, A. S., Anderson, L. A., Cook, R. S., et al. (2006). A meta-analysis of clinical judgment project: Fifty-six years of accumulated research on clinical versus statistical prediction. *The Counseling Psychologist, 34*, 341–382.
- Emery, R. E., Otto, R. K., & O'Donohue, W. T. (2005). A critical assessment of child custody evaluations: Limited science and a flawed system. *Psychological Science in the Public Interest, 6*, 1–29.
- Forgatch, M. S., DeGarmo, D. S., & Beldavs, Z. G. (2005). An efficacious theory-based intervention for stepfamilies. *Behavior Therapy, 36*, 357–365.
- Grove, W. M., & Meehl, P. E. (1996). Comparative efficiency of informal (subjective, impressionistic) and formal (mechanical, algorithmic) prediction procedures: The clinical-statistical controversy. *Psychology, Public Policy and Law, 2*, 293–323.
- Grove, W. M., Zald, D. H., Lebow, B. S., Snitz, B. E., & Nelson, C. (2000). Clinical versus mechanical prediction: A meta-analysis. *Psychological Assessment, 12*, 19–30.
- Hicks, S. J., & Sales, B. D. (2006). *Criminal profiling: Developing an effective science and practice*. Washington, DC: American Psychological Association.
- Hilton, N. Z., Harris, G. T., Rice, M. E., Lang, C., Cormier, C. A., & Lines, K. J. (2004). A brief actuarial assessment for the prediction of wife assault recidivism: The Ontario Domestic Assault Risk Assessment. *Psychological Assessment, 16*, 267–275.
- Indiana University. (2007). *For the Sake of the Children: Advances in Family Dispute Resolution*. http://www.law.indiana.edu/front/special/2007_forthechildren/
- Kazdin, A. E. (1994). Methodology, design, and evaluation in psychotherapy research. In A. E. Bergin & S. L. Garfield (Eds.), *Handbook of psychotherapy and behavior change* (4th ed.; pp. 19–71). Oxford, UK: Wiley.
- Kelly, R. F., & Ramsey, S. H. (2007). Assessing and communicating social science information in family and child judicial settings: Standards for judges and allied professionals. *Family Court Review, 45*, 22–41.
- Koocher, G. P., & Keith-Spiegel, P. (2008). *Ethics in psychology and the mental health professions: Standards and cases*. New York: Oxford University Press.
- Lambert, M. J., & Miller, M. J. (2001). Helping prospective patients avoid harmful psychotherapies. *Contemporary Psychology, 46*, 386–388.
- Lilienfeld, S. O. (2007). Psychological treatments that cause harm. *Perspectives on Psychological Science, 2*, 53–70.
- Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice*. New York: Plenum Press.
- Monahan, J., & Walker, L. (1991). Judicial use of social science research. *Law and Human Behavior, 15*, 571–584.
- National Council of Juvenile and Family Court Judges. (2006). *Navigating custody & visitation evaluations in cases with domestic violence: A Judge's guide* (2nd ed.). Reno, NV: Author.

- National Institute of Health, U.S. Department of Health & Human Services. (2008). *Certificates of confidentiality: Background information*. Retrieved July 20, 2008, from <http://grants.nih.gov/grants/policy/coc/background.htm>
- Norcross, J. C., Beutler, L. E., & Levant, R. F. (Eds.). (2006). *Evidence-based practices in mental health: Debate and dialogue on fundamental questions*. Washington, DC: American Psychological Association.
- Popper, K. (1959). *The logic of scientific discovery*. New York: Basic Books.
- Popper, K. (1962). *Conjectures and refutations: The growth of scientific knowledge*. New York: Basic Books.
- Rhule, D. M. (2005). Take care to do no harm: Harmful interventions for youth problem behavior. *Professional Psychology: Research and Practice*, 36, 618–625.
- Shuman, D. W., & Sales, B. D. (1998). The admissibility of expert testimony based upon clinical judgment and scientific research. *Psychology, Public Policy, and Law*, 14, 1226–1252.
- Shuman, D. W., & Sales, B. D. (1999). The impact of Daubert and its progeny on the admissibility of behavioral social science evidence. *Psychology, Public Policy, & Law*, 5(1), 3–15.
- Skaggs, E. B. (1945). Personalistic psychology as science. *Psychological Review*, 52, 234–238.
- Tomkins, A. J., & Applegate, K. (2007). Constructs of justice: Beyond civil litigation. In B. H. Bornstein, R. L. Wiener, R. Schopp, & S. L. Willborn, (Eds.). *Civil juries and civil justice: Psychological and legal perspectives* (pp. 257–272). New York: Springer Science Business Media.
- Welchik, S. A., Sandler, I. N., Winslow, E., & Smith-Daniels, V. (2005). Programs for promoting parenting of residential parents: Moving from efficacy to effectiveness. *Family Court Review*, 43, 65–80.
- World Medical Association. (2000). *World Medical Association Declaration of Helsinki: Ethical principles for medical research involving human subjects*. Retrieved on July 8, 2008, from <http://www.wma.net/e/policy/b3.htm>

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