

# Science in the Courtroom: Vital to Best Interests and Reasonable Efforts

By Judge Cindy Lederman

## ABSTRACT

This essay was adapted from a speech presented by the author on February 12, 2008 at a Colloquium entitled "What's Best for Children? How Judges Use Neuroscience to Break the Cycle of Child Maltreatment." The colloquium was sponsored by the Harvard Center on the Developing Child and held at Harvard Law School. It focuses on the wealth of knowledge that has been discovered about infant and child development and the importance of incorporating that knowledge into judicial decision making in child maltreatment cases.

I work in a place overwhelmed by human suffering.

I work with children whose first words are "no" and "stop." I work with mothers who do not know that when their babies cry they should pick them up, that calming their babies is not spoiling them. I work with families whose idea of a family activity is shoplifting together. I work with 13-year-old mothers. When I ask if they have been to the pediatrician, the response is, "Who, me or my baby?"

Rarely in my 15 years of daily handling abuse and neglect cases in juvenile court do I see a loving touch or positive interaction between a parent and her child. Rarely do I see the expression of parental pride in something a child has done.

Every week in the Miami Juvenile Court, each of the seven judges who exclusively handle abuse, neglect, and termination of parental rights cases sees between 100 and 150 families in his or her courtroom. These are families who do not open their doors, who rarely seek help, and who often do not understand why their children have been removed.

We make hundreds of decisions every day in a matter of minutes; decisions that can have a profound effect on the life of a child. One colleague, a Registered Nurse who went

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to law school, practiced law, and was later elected to the bench, remarked on her first day as a judge, “This looks like the Emergency Room.”

She’s right. Because of myriad issues from poverty, lack of education, mental health issues, drug and alcohol abuse, and/or generational abuse and neglect, we are the institution of last resort.

What the juvenile court really does is clinical work in a legal setting with the most disadvantaged population—families who have to come to us far too late for effective intervention. Despite the fact that judges generally only have a legal education, we try, with the help of service providers and for only for a short time, to teach a mother to smile, talk, and read to her baby, to pick her baby up when she cries, to praise, sit on the floor and play with her, and not shake her. Although these acts seem straightforward for any parent, they are new and novel to many of the parents we see.

If the juvenile court is going to be successful in achieving our legal mandate to reunify and rehabilitate, our goals must really be **to change human behavior, to protect, and to heal**. The goals are not traditional judicial functions, which, by comparison, are simple. It is easier to divide assets in a divorce, to send someone to prison in order to punish and hopefully deter further criminal conduct, or to interpret a contract than it is to help people change their behavior for the benefit of their children. In fact, based on what we are learning or, more likely, not learning, the work to achieve our goals becomes more difficult every day.

How do judges make these difficult decisions? How do we help teach a child who has become a mother and never felt safe or nurtured to make her child feel safe and loved? Why do we assume motherhood is innate knowledge or can be learned in a class? How do we teach a baby who has been harmed by those who are supposed to love and protect him that the world is a safe place? How do we rehabilitate a teenager who, despite whatever interventions she receives, must return to her impoverished environment and criminogenic family? How can we break the intergenerational transmission of child maltreatment? Daily we make decisions based on what we think rather than what social science tells us. Yet, using this scientific knowledge is the key to meeting our goals to change family behavior.

Our nation’s laws and legal system focus on the adjudication of rights, the assignment of liability, the determination of guilt and innocence.<sup>1</sup> The juvenile court is, however, not the typical court. In addition to deciding whether a child is dependent, the juvenile court judge has to determine what services should be put in place to help the family achieve reunification; whether the child should be placed with a relative or foster family; and when and if parental rights should be terminated. And all of these decisions have to consider “the best interests of the child.”

Typically, other courts measure their success by the speed at which they close cases, whether by settlement, mediation, plea, motion, or trial. The juvenile court could use a similar metric and claim success after a dependency finding and after parental rights have been terminated, but that would ignore reality. Such a metric would ignore the reality for

<sup>1</sup> THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* (Harper Collins, 2004).

the child, his placement, care, and nurturing, and his future if he becomes available for adoption. Such a metric would also ignore the reality for the family because they are given the opportunity, however briefly, to try to learn how to properly care for their children, how to address their many needs, whether housing, employment, mental health, addiction, and others. Merely saying we've done our job would perpetuate the neglect that society has fostered onto these children and families.

Instead, juvenile court judges make, often in a matter of minutes, monumental decisions that will shape the future of the child and family. These decisions, often based on limited, inadequate, and inaccurate information, are also influenced by the judge's personal experiences in and out of the courtroom.

The law, the information judges receive, and their judicial and personal experiences may not be enough to make the best possible decisions, may not be enough to fulfill our mandate to protect, rehabilitate, and heal. I would argue that the missing component is science—the science from decades of child development research.

## INCORPORATING SCIENCE ON THE BENCH

Although judges have limited time, they need to be students of child development research as much as they are students of relevant appellate decisions involving procedure, evidence, and substantive law. Judges need to understand the characteristics of the people they are trying to help, including their risk factors, protective factors, and level of functioning. Judges need to understand the history of the families they see in order to understand how to help them. Judges need to know about their behavior, the traumas they have suffered, and especially their resilience.

Judges need to understand, and appreciate, the fundamental need for healthy attachments. Professor Megan Gunnar from the University of Minnesota's Institute of Child Development spoke in 2008 at the National Summit on America's Children convened by U.S. Speaker of the House Nancy Pelosi about her studies involving rats, noting that rats that are licked more often by their mothers are more able to withstand stress.

Human babies are similarly affected by the strength—or weakness—of their attachments. Research in early childhood development has revealed that babies can be depressed, that they have long-term memory of trauma, and that they are significantly affected by just the mood and affect of their caretaker, who may often be depressed or emotionally unavailable when the child is in the child welfare system. As a result, once a parent has been diagnosed for depression, the court may need to order services to address the depression so that it does not continue to adversely impact the child and the opportunity for reunification. Have you ever heard a caseworker or foster parent say that “the child doesn't want to go to her mother”? If a depressed mother is not nurturing her child, why would the child want to go to someone who isn't meeting her emotional needs?

Similarly, our failure to appreciate the science of child development among maltreated infants and toddlers has resulted in the failure of judges to even request that children younger than five years old be evaluated because we assumed we couldn't learn

anything from them until they were verbal. The truth is that young children are very communicative even before they can talk: They have different cries for different needs; their eyes light up when they are happy; their play can communicate a lot about them and their families; their willingness to be held by a stranger tells us about the strength of their attachment to their primary caretaker.

### Valuable Resources are Available

An indispensable tool for judges is *From Neurons to Neighborhoods: The Science of Early Childhood Development*, published in 2000, by the National Academy of Sciences, which summarizes the science of early childhood development. It should be on the bench next to any benchbook, rules of evidence, or other tomes.

Another essential tool is science training. Our court, for example, worked with Zero to Three, the National Center on Infants, Toddlers and Families, to develop a child development DVD entitled "Helping Babies from the Bench: Using the Science of Early Childhood Development in Court." The DVD highlights an experiment known as "the still face" where infants were videotaped with their mother in the face-to-face "still-face" paradigm developed by Tronick, Als, Adamson, Wise, and Brazelton. The paradigm involves a two-minute face-to-face play interaction with the mother, a two-minute still-face session during which the mother looks at the child but is unresponsive, followed by another two-minute session involving play interaction between mother and infant.

The experiment has been used extensively to evaluate young infants' communicative abilities, sensitivity to changes in maternal behavior, ability to cope with interpersonal disturbances, and capacity to regulate affective states.<sup>2</sup> During the still-face phase, mothers are asked to look at their infants but not to touch, smile, or talk to them. The mothers' face, position, and eye contact signal the infants that social interaction is forthcoming, while their expressionless face and lack of response communicate the opposite. The mothers remain expressionless even after the infants try to reinstate the interaction. The DVD shows the baby avert her gaze, pull at her clothing, point, and scream to try to make her mother to respond to her, and become extremely distressed and deteriorate as her mother, present but non-responsive, fails to meet the child's expectations. The behavior, which is foreign in a healthy mother-child relationship, puzzles and disturbs the child who is otherwise accustomed to having her needs met. Judges who have seen the DVD learn that a mother's affect has a profound impact on her child.

Based on results of child development and related research, judges must change the way they do their work. For example, judges must learn when, how, and why they must intervene when they learn that a child is fussy during a visit with a parent or otherwise demonstrates that she does not want to visit the mother. Judges need to try to help the mother appreciate how much her behavior impacts her child. If the mother wants visits with her child to go well, the mother needs to change her behavior for her child's health and well-being. Without the mother's cooperation, there is no hope for family reunification.

<sup>2</sup> ED TRONICK, *THE NEUROBEHAVIORAL AND SOCIAL-EMOTIONAL DEVELOPMENT OF INFANTS AND CHILDREN* (W. W. Norton & Company, 2007).

The Miami Juvenile Court has adopted the philosophy of Dr. Selma Fraiberg, an infant mental health pioneer, who recognized the unique possibilities for young children when she said working with very young children is “a little like having God on your side.”<sup>3</sup> We now understand that maltreated children have disproportionate developmental delays, and that it is the responsibility of the dependency court to do what we can to help these young children. Child development research helps us make better decisions about the type and frequency of visitation because one size does not fit all.

We also use science when making custody decisions. We use it to understand why we must stop the practice of disrupting nurturing placements with foster parents or non-relatives just because a relative has finally appeared, seeking custody. As Professor Elizabeth Bartholet admonishes, should we continue to romanticize heritage or should we really examine the capacity to parent first and foremost?<sup>4</sup>

As a result of child development research, we work hard to carefully choose the first placement for babies and toddlers, and use concurrent planning to assure, whenever possible, that the first placement can be the final placement if reunification fails. We search for and use existing evidence-based programs that we know are effective, like home visitation, Early Head Start, and Head Start, and bring them into our child welfare community as providers. We want programs for our families with empirical evidence of effectiveness.

Judges must realize what researchers learn: Some interventions “work,” some have no effect, and some actually harm the people they were designed to help. Science makes the job of judging more complex and difficult, but judges have the responsibility to ask questions and demand that the services we order for children and families are well designed, well monitored, and well evaluated to determine whether they are beneficial. We must use interventions that are evidence-based.

Perhaps the most compelling example of our failure to provide quality services involves parenting interventions. Traditionally, judges order parents to attend didactic “parenting classes,” even though many are inadequate and non-evidence-based. In most jurisdictions, there is no research-based structured curriculum, little monitoring and training, and no interactive component for the parent to practice with her child the new skills she has learned in the presence of the parenting teacher to exhibit her level of understanding. Other than attendance, the classes do not have structured requirements to measure successful completion. There are no systematic assessments of progress, no observations of parent and child interactions, and no qualitative and quantitative measures to determine if insight has been gained and new practices and beliefs integrated.<sup>5</sup>

One science-based therapy that addresses inter-generational transmission of child maltreatment uses infant-parent psychotherapy. Infant-parent psychotherapy is an individual, intensive clinical intervention developed by Dr. Alicia Lieberman and modified

3 R. N. Emde, *Foreword* to *SELECTED WRITINGS OF SELMA FRAIBERG*, xix (Louis Fraiberg ed., Ohio State University Press, 1987).

4 ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (Beacon Press, 2000).

5 CINDY LEDERMAN & JOY D. OSOFSKY, *FUTURE TRENDS IN STATE COURTS 2007* (National Center for State Courts, 2007).

by Dr. Joy Osofsky for use in the dependency court. The dyadic intervention focuses on the relationship between parent and baby in an effort to help the parent gain insight about how the “ghosts in the nursery” interfere with the parent being able to care for her baby.<sup>6</sup> The infant mental health therapist promotes empathy and models appropriate parenting skills for the parent.

Infant-parent psychotherapy is based on the following concepts:

- The infant has been harmed in the relationship and must be “healed” in the relationship.
- The therapeutic work incorporates a broad range of techniques to enhance the mother’s awareness and responsiveness to her child’s needs.
- Emotional and behavioral problems in infancy and early childhood need to be addressed in the context of primary attachment relationships.
- Promoting growth in the caregiver-child relationship supports healthy development of the child long after the intervention ends.

Research has shown that such intensive evaluation and relationship-based treatment can impact positively on the interactions between very high-risk parents and children and their developing relationship. Findings include:

- Important improvements in both parental sensitivity to the children and in the children’s emotional responsiveness and behaviors.
- No further abuse or neglect
- 86% reunification rate and 100% permanency<sup>7</sup>

Juvenile court judges are some of the most caring and competent in America. They have begun to understand that their ability to make decisions based on what they think or feel can only be enhanced if they also consider **what we KNOW**.

Many days, we pray that our decisions do not cause any more harm to the children for whom we are responsible. I believe some of that pain could be ameliorated by knowing that our decisions were informed by science.

6 Cindy Lederman & Joy Osofsky, *Infant Mental Health Interventions in Juvenile Court*, 10 *PSYCHOLOGY, PUBLIC POLICY AND LAW* (2004).

7 J. Osofsky, M. Kronenberg, J. Hammer, C. Lederman, L. Katz et al. *The Development and Evaluation of the Intervention Model for the Florida Infant Mental Health Pilot Program*, 28 *INFANT MENTAL HEALTH JOURNAL* 259-280 (2007).