The Anti-Transgender Medical Expert Industry

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Abstract: Civil rights attorneys challenging laws restricting transgender rights and access to healthcare often encounter anti-transgender medical experts in litigation at various stages. The experts often maintain dubious credentials in the relevant area of medical or scientific expertise which presents a challenge that undermines equitable access to justice by introducing pseudoscience into court proceedings. This commentary will discuss the phenomenon and propose a normative path forward.

I. Introduction

Medical and scientific expertise are often essential for factual development in the American legal system. When used as intended, medical and scientific experts are able to provide context and expertise to discern difficult issues of fact and to establish a common baseline for the court. However, given the adversarial system, each party to a lawsuit seeks to use witnesses that will support their perspective and will discredit the opposition's experts. To ensure a minimum baseline of scientific rigor and professional credentials, the *Daubert* standard is used by federal courts to measure the admissibility of expert witness testimony. While this standard may often keep the unqualified cranks and quacks out of the legal system, it is not a difficult standard to meet, and many contrarian medical and scientific experts are often allowed to testify in court despite lacking the consensus of the relevant scientific community. This often presents a quandary where incongruous opinions held by otherwise qualified experts are admitted into court along with the opinions of more reputable experts explaining the scientific consensus view. This has often been the case in LGBTQ civil rights litigation for decades, but it has taken more urgency in the recent years as transgender rights cases have become increasingly litigated.

This comment will focus on the role of incongruent outlier experts and their use in civil rights litigation, particularly in the context of transgender civil rights.

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I will use my experience litigating several major trans rights cases in federal court to provide context to this issue. The first part will discuss the history and structure of the *Daubert* standard in evidence. The second part will discuss anti-transgender experts and their roles. The third part will analyze how anti-transgender parties in litigation are able to establish a veneer of professional credibility through the use of a limited number of incongruent experts who share similar views and appear to make a living solely out of their role as a scientific expert in litigation.[1] Finally, the conclusion will make a normative argument against the use of these experts in court and the admissibility of their testimony and a legal argument that courts should rigorously apply the standard set by Rule 702.

This comment will focus on the role of incongruent outlier experts and their use in civil rights litigation, particularly in the context of transgender civil rights. I will use my experience litigating several major trans rights cases in federal court to provide context to this issue.

II. Testimony by Expert Witnesses

Rule 702 of Federal Rules of Evidence sets the standard for which witnesses may qualify as an expert and the requirements they must demonstrate to be permitted to testify as such.[2] Expert witness testimony gives an opportunity for the trier of fact to hear from experts in the relevant field who are able to provide the context for questions of scientific and medical facts. The relevant factors under Rule 702 are:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The judge is the ultimate arbiter and serves as the "gatekeeper" of what constitutes sufficient qualifications to meet expert testimony under Rule 702.[3] The current standard under Rule 702 enumerated in *Daubert*, sets a highly flexible standard that looks to several factors. This flexible standard gives courts wide leeway into what is admissible which can lead to disparate outcomes if counsel does not sufficiently challenge expert testimony that does not meet the requirements of rule 702.

The relative flexibility of these standards can often lead to pseudo-science or outlier experts providing testimony if they are not vigorously challenged by opposing counsel. There is often a hesitation to challenge these experts by opposing counsel because blatantly bad expert testimony can be viewed as beneficial to their client's case. However, this is a mistake since those bad foundations can serve as a basis for a hostile appellate judiciary to decide in favor of the anti-trans side as was the case in *Doe v. Snyder*.[4] On the contrary, the plaintiff's in *Kadel* zealously challenged the defendant's expert testimony and was successful in striking the vast majority of it from the record.[5] Nothing less than vigorous challenging of pseudo-science in the context of gender affirming care is required to push back against the concerted effort to launder misinformation, pseudo-science, and bias into the courtroom through "experts." The effort in *Kadel* to use *Daubert* motions to challenge the admission of testimony from defendant's testimony serve as an effective model.

III. The Anti-Transgender Experts: The Usual Suspects

There are so few medical experts willing testify against the well-established and accepted standards of care for gender dysphoria that most trans rights litigator can name them from memory. Some of these experts are Dr. Stephen B. Levine, Dr. Paul McHugh, and Dr. Michael Laidlaw. Combined, they have served as experts on dozens of cases,[6] often appearing together. This is not an exhaustive list but consists of some the most prolific and notable. Additionally, several anti-trans organizations have recently sprung up to provide a veneer of legitimacy to the transphobic views of these experts. These orgs include the Society for Evidence Based Medicine, Genspect, and the Pediatric and Adolescent Gender Dysphoria Working Group. These groups do not publish peer-reviewed original

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research and simply amplify research that aligns with their views such as work published by Lisa Littman and Kenneth Zucker.

A. The "Experts"

Dr. Steven B. Levine is a Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine and one of the most prolific anti-transgender medical expert in the country.[7] Dr. Levine is involved in nearly every single major trans rights case in the country as a medical expert for the party opposed to transgender rights.[8] Dr. Levine is able to maintain a veneer of expertise on transgender issues as he was a former committee chair of the Harry Benjamin International Gender Dysphoria Association, the predecessor of the World Professional Association for Transgender Health (WPATH) and he created and practiced at a gender identity clinic at Case Western Reserve in 1974 that later became independent from the university in 1993.[9]

However, much of his work around "gender exploratory therapy" is considered by some to be conversion therapy since it presumes that patients suffering gender dysphoria have underlying causes other than being transgender.[10] Similar practices in the context of sexual orientation conversion therapy have been found to be ineffective and fraudulent.[11] Levine got his initial start serving as an expert to deny medical care to trans people in the case of Michelle Kosilek, an incarcerated transgender woman in Massachusetts seeking gender affirming surgery.[12] From there, Levine rapidly expanded his work as a state expert to deny trans people in prison gender affirming care.[13] His background as a previous committee chair for WPATH and practice with "gender exploratory therapy" for decades bolsters his credibility before the courts despite being out of sync with the medical consensus that supports the affirmative model.[14] Despite claims to the contrary, Stephen Levine has not published peer-reviewed research in the relevant field and he relies solely on anecdotal data from his own books and prior work with patients with gender dysphoria. These idiosyncratic views have resulted in multiple courts diminishing the value of his expert opinions on their decisions.[15]

Dr. Paul R. McHugh is a psychiatrist infamous for his role in opposing the treatment of gender dysphoria in the United States.[16] In the 1960s Johns Hopkins had established a world leading center to treat gender dysphoria.[17] Similar clinics started to appear around the country and a growing acceptance of gender affirming medicine began to become more prevalent. However, Dr. McHugh was serving as Johns Hopkins Hospital's head of psychiatry, used his influence to shut down the clinic in 1979. Two years later in 1981, Dr. McHugh lobbied the Centers for Medicaid and Medicare services along with the anti-trans feminist Janice Raymond to declare gender affirming procedures as experimental.[18] This lobbying effort succeeded. Within a short time, nearly all gender clinics in the country shut down and transgender medicine was set back for nearly three decades.[19] Since that time, Dr. McHugh served as an expert in several gay rights cases stating that gay relationships were harmful to children and that homosexuality was a result of childhood trauma. He famously supported California's Prop 8.[20] Since the major win of same-sex marriage in *Obergefell* in 2015, Dr. McHugh has shifted his role as medical expert in trans rights cases.[21] This is despite being over 90 years old, retired, and not actively practicing medicine.

Dr. Michael Laidlaw is an endocrinologist who has participated in multiple amicus efforts to deny access to gender affirming care, including a brief in the *Brandt v. Rutledge* case in the 8th Circuit submitted by the Southern Poverty Law Center designated anti-LGBTQ hate group, Alliance Defending Freedom.[22] Dr. Laidlaw has no specific training, board certification, or personal experience working with pediatric or transgender patient populations.[23] This would be a clear indicator that he is insufficient to provide expert opinions within the rule 702 and *Daubert* framework. Dr. Laidlaw is a contributing member of the Pediatric and Adolescent Gender Dysphoria Working Group, a pseudo-medical group with anti-trans medical experts that have an "interest" in the treatment of gender dysphoria in children but advocates for conversion therapy.[24] Despite his lack of experience in treating youth with gender dysphoria, Dr. Laidlaw served as an expert witness in a case in Arizona challenging the exclusion of coverage for gender affirming care in minors.[25] As noted in the reply expert report, Dr. Laidlaw's expert report "made errors that would not have been made by a medical provider that regularly treats transgender patients."[26] This is another clear violation of rule 702.

B. The "Medical Orgs"

Anti-LGBTQ movements are no stranger to creating entire medical organizations to back their discredited and unscientific views on LGBTQ people. For instance, in 2002 opponents of marriage equality created the American College of Pediatricians as a form of protest against the acceptance of LGBTQ families by the American Academy of Pediatricians.[27] The fundamental belief driving these orgs is that being transgender is in of itself, a bad thing that should be avoided at all costs. These organizations are defined by a singular

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purpose, to disseminate outlier contrarian views to manufacture a controversy that is then used to undermine access to care. These tactics are not novel, they have been employed in other contexts to stall public health efforts around smoking and government action in addressing climate change.

The most prominent of the pseudo-scientific organizations in the anti-trans space is the Society for Evidence Based Gender Medicine (SEGM). SEGM posits that the level of medical evidence for the treatment of gender dysphoria in youth is of "low quality" and as a result treatments for gender dysphoria should be barred by law, such as the *Doe v. Snyder* case in Arizona in which it submitted an amicus brief seeking to affirm the denial of a preliminary injunction.[28] They cite to the results of their own advocacy efforts in the UK NHS, and the Swedish Karolinska Hospital which has been subject to substantial public pressure to restrict access to gender affirming care. In a snowball effect, the small successes in their efforts are built up to create momentum to further restrict care for trans youth around the world. Unfortunately, the veneer and "teach the controversy" tactics are beginning to gain traction in the courts. The 9th Circuit cited amici briefs discredited desistance theories as a reason to affirm the denial of preliminary injunction by trans youth in Arizona seeking "top surgery."[29] This rested on a basis of expert testimony at the trial court that was insufficiently challenged and a trial court judge that was partial to the anti-trans side.

IV. The Ouroboros of Anti-Trans Experts and Organizations

At a basic level, the citations and minimal scientific evidence reported by anti-trans experts resemble that of the ouroboros. Research is constantly self-referenced and recycled among many of the anti-trans experts and organizations to create an insular and incestuous self-reinforcing body of work to provide backing for their anti-trans views.

One prominent example is the 2019 study on the widely panned and precarious concept of rapid onset gender dysphoria ("ROGD") conducted by Lisa Littman, which required a correction, has been a catalyst for the anti-trans movement.[30] Every major medical professional organization that deals with psychological and psychiatric health in the United States signed a statement opposing any use of the term ROGD in any clinical or medical setting citing the lack of any rigorous empirical support for its existence.[31] Despite this, several groups, activists, and authors have continued to push the ROGD concept as a means to undermine access to gender affirming care for trans youth. For example, a group calling itself the Parents of ROGD Kids quickly popped up with a flashy website citing an "epidemic" of young girls identifying as trans. The research was quickly cited in a brief before the Supreme Court in *Bostock v. Clayton County* in 2019.[32] SEGM cited Littman's research in their amicus brief in *Doe v. Snyder*.[33] The ROGD concept was then picked up by Dr. Stephen Levine who cited it in his expert declaration in *Kadel v. Folwell* on January 19, 2022.[34]

Perhaps the most notorious example of Littman's research breaking through to the mainstream was inspiring the basis for the book *Irreversible Damage: The Transgender Craze Seducing Our Daughters* by Abigail Shrier, a freelance journalist with no medical training or expertise. Despite the lack of medical expertise or rigorous empirical evidence bolstering Shrier's claims, her book has been cited repeatedly in several briefs from the Supreme Court to multiple circuit courts urging to restrict access to gender affirming care for trans youth and oppose bans on conversion therapy.[35]

It becomes quickly evident to any reasonable observer that a house of cards was built on a single highly criticized and flawed ROGD study, but it has not stopped anti-trans experts and organizations from citing it. Rather than rigorous empirical peer-reviewed research, these experts rely on dubious conjectures reinforced through popular media written by lay authors with no medical expertise. Attorneys and advocates for trans youth are left combating medical misinformation and intentionally manufactured controversy to impede access to gender affirming care.

V. A Path Forward

It should not take the amicus of every major medical organization in court to validate and support access to gender affirming care while the opposition simply relies on pseudo-scientific theories and manufactured controversy. The ethics of testifying outside of one's expertise to opine on the validity of treatment of transgender youth should be disfavored by professional medical organizations. Greater care should be taken to ensure that medical experts are not using their qualifications to testify outside of their experience. An expert should not testify under these circumstances due to ethical considerations; however, when they try, the legal standards should keep their testimony out of court. It should be considered unethical for doctors such as Paul R. McHugh and Michael Laidlaw, who have absolutely no experience treating transgender youth, to opine on the appropriateness of the treatment in other contexts. Similarly, Dr. Levine, whose

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conversion therapy practice contradicts mainstream medical opinion should not be used by states in court to justify anti-trans policies. While endocrinologists, psychiatrists, and other relevant medical professionals may be able to competently interpret the medical evidence, their personal opinions on treatments they do not have any experience in providing should not be given admitted in the courts under FRCE 702(a).

Attorneys facing these anti-trans experts should not hesitate to challenge their testimony's admissibility in court under the *Daubert* standard as was done in *Kadel v. Folwell*.[36] Additionally, efforts to challenge the weight of expert testimony should be taken as well, which was done to great effect against James Cantor in the challenge against Alabama's felony ban on gender affirming care.[37] Those efforts succeeded and severely limited the testimony of the defendant's expert witnesses as a result of their lack of relevant expertise.[38] Much as the anti-trans side has been able to use their efforts in Europe for persuasive authority, getting anti-trans experts disqualified in a federal district court provides greater persuasive authority in other courts to exclude their testimony. Once an expert is found to lack the proper expertise at the trial court level, it is likely that other courts will adopt similar conclusions. Oftentimes, litigators face strategic questions around the use of *Daubert* motions to exclude witness testimony. These issues can be anything from a prickly judge to a concern about frivolous motions to exclude filed in retaliation. However, pseudoscience needs to be met with vigorous opposition as they have no place in our courts. Courts should be more scrupulous of expert testimony in civil rights litigation, especially when suspect classes are involved in the case.

Finally, professional medical organizations should strongly discourage experts from testifying outside of their experience and expertise in litigation involving civil rights. Without providing pushback within each professions community, we will continue to see a growing cottage industry of anti-trans experts used to roll back the access of transgender people to gender affirming care, restrooms, appropriate identification documents, and the ability to participate in sports. Without an intervention, medical misinformation will continue to spread, and the courts will continue to begin accepting pseudo-scientific opinions and theories. This will ultimately undermine the reliability of medical experts across the country and harm equal access to justice.

Note

Ms. Caraballo reports that she was a staff attorney at the Transgender Legal Defense and Education Fund and was counsel of record in *Kadel v. Folwell*, the case cited multiple times in this comment.

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3. *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1315 (9th Cir. 1995).
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15. See *Kadel, supra* note 5 (finding that Dr. Levine's testimony regarding desistance rates "does not appear to be based on reliable methodology."); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188–89 (N.D. Cal. 2015); *Edmo v. Idaho Dep't of Corr.* 358 F. Supp. 3d 1103, 1125-1126 (D. Idaho 2018) (vacated in part on other grounds in *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019)) (holding that Dr. Levine "is an outlier in the field of gender dysphoria" and place[s] 'virtually no weight' on his opinions.").
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