The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy

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Abstract

Since 1985, in jurisdictions all over the United States, fathers have been awarded sole custody of their children based on claims that mothers alienated these children due to a pathological medical syndrome called Parental Alienation Syndrome ("PAS"). Given that some such cases have involved stark outcomes, including murder and suicide, PAS's admissibility in U.S. courts deserves scrutiny.

This article presents the first comprehensive analysis of the science, law, and policy issues involved in PAS's evidentiary admissibility. As a novel scientific theory, PAS's admissibility is governed by a variety of evidentiary gatekeeping standards that seek to protect legal *fora* from the influence of pseudo-science. This article analyzes every precedent-bearing decision and law review article referencing PAS in the past twenty years, finding that precedent holds PAS inadmissible and the majority of legal scholarship views it negatively. The article further analyzes PAS's admissibility under the standards defined in *Frye v. United States*, *Daubert v. Merrell Dow Pharmaceuticals*, *Kumho Tire Company v. Carmichael*, and Rules 702 and 704(b) of the Federal Rules of Evidence, including analysis of PAS's scientific validity and reliability; concluding that PAS remains an *ipse dixit* and inadmissible under these standards. The article also analyzes the writings of PAS's originator, child psychiatrist Richard Gardner—including twenty-three peer-reviewed articles and fifty legal decisions he cited in support of his claim that PAS is scientifically valid and legally admissible—finding that these materials support neither PAS's existence, nor its legal admissibility. Finally, the article examines the policy issues raised by PAS's admissibility through an analysis of PAS's roots in Gardner's theory of human sexuality, a theory that views adult-child sexual contact as benign and beneficial to the reproduction of the species.

The article concludes that science, law, and policy all support PAS's present and future inadmissibility.

I. Introduction

In jurisdictions throughout the United States, courts have severed maternal contact with chidren based on expert testimony diagnosing mothers with a novel psychological syndrome called Parental Alienation Syndrome ("PAS") that purportedly results in the alienation of children from their fathers.[1] Such cases have led to disturbing outcomes for women and children.[2] A Maryland man shot and killed his ex-wife, blaming PAS.[3] A Pennsylvania teenager hung himself after a court ordered him into PAS treatment.[4] A North Carolina court incarcerated a teenager who refused to visit her father.[5] A New Jersey court ordered an eight-year-old to visit his wife-battering father, ignoring the child's fear.[6] An Indiana court, based on the testimony of an expert who testified to this father's fitness, granted sole custody to a father whose "emotional problems [were] so severe [that] he [was] totally disabled and unable to work" (despite the fact that this expert never met the father and based his testimony primarily upon notes made by another therapist who also never met the father).[7] A New York court granted a father sole custody and suspended the mother's contact with their two children despite that court's recognition that the decision would cause "foreseeable emotional upset and possible trauma" to the children.[8] In each instance, PAS played a central role despite the syndrome's dubious scientific basis and lack of evidentiary legitimacy.

First described in 1985 by child psychiatrist Richard Gardner, PAS has had widespread influence in family and criminal courts. Given its link to such stark outcomes, its evidentiary admissibility deserves close examination. This article provides the first comprehensive analysis of PAS's evidentiary admissibility under the leading standards for the evidentiary admission of novel psychological theories.

Part I defines Parental Alienation ("PA") and presents Gardner's definition of Parental Alienation Syndrome ("PAS").[9]

Part II analyzes all precedent-setting American case law and law review coverage referencing

PAS since 1985, finding that, despite the prominent role PAS has played in the outcome of many cases, precedent currently holds PAS inadmissible and the majority of legal scholarship views PAS negatively.[10]

Part III analyzes PAS's admissibility under the leading evidentiary admissibility tests defined in *Frye v. United States*,[11] *Daubert v. Merrell Dow Pharmaceuticals*,[12] *Kumho Tire Company v. Carmichael*,[13] and Federal Rules of Evidence ("FRE") 702 and 704(b).[14] This Part includes an analysis of PAS's claims of scientific validity and reliability, and an analysis of twenty-three peer-review articles cited by Gardner. I conclude in this Part that PAS is inadmissible under all the leading evidentiary tests because it remains a mere *ipse dixit*.

Part IV examines policy considerations for PAS's admissibility.[15] Examining PAS's theoretical roots, I find that PAS is derived from a theory that construes pedophilia and incest as benign, non-abusive conduct, and that mirrors the advocacy positions of pro-pedophilia activists. I conclude that these facts render PAS's admissibility in legal *fora* against public policy.

Concluding, I find that science, law, and policy support PAS's present and future inadmissibility under relevant evidentiary law.[16]

II. Defining Parental Alienation

In a perfect world, a child has close and abiding attachments to both parents.[17] However, healthy children do not consistently express their love for their parents and may not always be equally allied with both parents.[18] Parental Alienation ("PA") describes a child who demonstrates strong dislike or antipathy for one parent. While PA may seem pathological by definition, it can be a healthy adaptive response to unhealthy or violent parental behavior. A child may become justifiably alienated from a parent who is unfaithful, violent, unreliable, abuses drugs or alcohol, or abandons the family. Similarly, PA may be a sign of normal childhood development like toddler tantrums, teenage rebellion,[19] or the natural responses to divorce.[20]

PA can also result from parental influence. Parents routinely present their children with inconsistent communications that reflect the parents' different values and opinions about discipline, character, and conduct. Such divergent opinions are often expressed as disparaging comments about the other parent. Negative parental comments can express parental frustration, anger, disagreement, or disappointment about others, including the other parent. All disparaging comments, regardless of how significant the subject,[21] implicitly convey the message that a child should take the side of the speaker; thus every negative comment by one parent about the other parent can be characterized as an attempt to encourage the child to think poorly of, or alienate the child from, the other parent.[22] Negative comments may involve claims that are objectively false wherein the criticism is undeserved, claims that are objectively true wherein the criticism is warranted, or simply the divergent opinion of the speaking parent. Both justifiable and unjustifiable comments may result in alienation. When a child's alienation is a reasonable response to parental behavior or warranted criticism of such behavior, or within the range of normal development, such alienation may be considered adaptive. The concern lies in cases wherein a child demonstrates alienation that is neither part of normal development nor a reasonable response to parental behavior. Of particular concern is the case wherein a child demonstrates alienation as a result of unwarranted negative parental comments

1. PAS: A Pathological Subset of Parental Alienation

PA occurs along a spectrum. PAS is alleged to be a specific pathological subset of PA.[23] Child psychiatrist Dr. Richard Gardner first described PAS in 1985 in response to the dramatic increase in reports of intra-familial child abuse that occurred in the 1980s.[24] Gardner identified PAS in the context of his development of tools to distinguish true and false allegations of child sex abuse.[25] Since his work is the foundation of all subsequent PAS scholarship, it deserves close scrutiny.

Gardner defined PAS as a pathological medical syndrome[26] manifested by a child's unjustifiable "campaign of denigration against a parent" that results from the "programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent."[27] Under his definition, a PAS diagnosis

requires both unjustified parental programming and unjustified vilification by the child.[28]

Gardner claimed that PAS was a form of "child abuse" arising "almost exclusively in child-custody disputes" during divorce.[29] Gardner also claimed PAS is predominately instigated by mothers and described PAS as a pathological "*foli a deux*" between the mother and the child.[30] He claimed that PAS caused psychopathy in the mother and child.[31] Because PAS is characterized by the "exaggeration of minor weaknesses and deficiencies," the diagnosis is applicable "only when the target parent has *not* exhibited anything close to the degree of alienating behavior that might warrant the campaign of vilification exhibited by the children."[32] The alienated parent is a pure victim of this pathology,[33] and thus the diagnosis is inapplicable when parents engage in mutual vilification.

Further, Gardner stated that "[w]hen true parental abuse and/or neglect is present," the child's hostility "may be justified" and the PAS diagnosis is thus inapplicable.[34] When a child is justifiably alienated from a parent, Gardner specified that PA, not PAS, is the applicable term.[35] PA indicates a child's disaffection towards a parent; it is not a medical diagnosis[36] and does not explain the cause of alienation.[37] While some professionals use the terms PA and PAS interchangeably, Gardner defined PAS as a unique and pathological subset of PA. Furthermore, unlike PA, a PAS diagnosis mandates specific legal action.[38]

III. Legal Precedent and Scholarship

PAS testimony appears primarily in family court, and occasionally in criminal court. By July 19, 2005, twenty years after Gardner first described it, PAS was referenced in sixty-four precedent-bearing cases originating in twenty-five states[39] and in 112 law review articles.[40] Given the rarity of written decisions and appellate review of family court decisions, these numbers indicate PAS's substantial influence in American courts.[41] Additionally, as the subject of both proposed legislation[42] and continuing legal education, PAS appears to have influence among legislators and within the Bar.[43]

PAS allegations usually arise in the subset of divorce cases involving contested custody or intra-familial violence; cases that are characterized by substantial bilateral spousal wrath and heated cross-allegations of wrongdoing.[44] While they may represent as little as ten percent of a court's caseload, such cases may demand as much as ninety percent of the court's time.[45] They routinely force American family and criminal courts to mediate episodes of emotional "warfare,"[46] requiring that judges make time consuming and difficult determinations about custody and visitation. To resolve these cases, judges must evaluate complex evidentiary situations that include parents who cannot get along and place their children in the midst of their discord,[47] parents with psychiatric illness,[48] and cases of domestic, physical, and sexual abuse.[49]

When child abuse is alleged, the court's responsibility is awesome. If the abuse is real, the court must protect the child from future harm. The court must determine whether any continued contact between child and parent is advisable, because granting custody or visitation to an abuser may expose the child to unfettered and ongoing harm. If the allegations are false, the court must protect the parental rights of the accused and the parent-child relationship. The consequences of a faulty evidentiary determination in either direction are daunting.[50]

1. American Precedent Holds PAS Inadmissible

Because unreliable scientific claims pose a unique risk of undue influence and prejudice in the courtroom, the evidentiary admissibility of novel scientific material is governed by gate-keeping rules[51] that are intended to ensure that such testimony meets adequate standards of reliability.[52] As a novel scientific theory, PAS's admissibility is governed by these gate-keeping rules. Gardner published the claim that fifty American decisions set precedent holding PAS admissible under the relevant evidentiary rules.[53] A closer examination reveals this claim to be unfounded; current U.S. precedent holds PAS inadmissible.

By July 19, 2005, sixty-four precedent bearing cases referenced PAS.[54] Only two of these decisions, both originating in criminal courts in

New York State, set precedent on the issue of PAS's evidentiary admissibility; both held PAS inadmissible.[55]

In 1997, *People v. Loomis*[56] concerned a father charged with sexually abusing his children. The defense sought to compel the witnesses to submit to psychiatric examinations by Gardner to determine if the sexual abuse allegations were "fabrications" motivated by PAS.[57] The court denied this motion, noting that children's susceptibility to undue influence by a parent was common knowledge, and that PAS testimony was inadmissible because it purported to determine an ultimate issue of fact, impermissibly invading the province of the trier of fact.[58]

In 2001, *People v. Fortin* involved a man charged with sexually assaulting his wife's 13-year-old niece.[59] The defense sought to admit PAS testimony to support the claim that the child had lied and fabricated the abuse allegations.[60] At a hearing requested by the People to determine the admissibility of PAS, Gardner was the only witness for the defense. Applying *Frye v. United States*,[61] the trial court held PAS inadmissible, finding it lacked general acceptance within the relevant professional community.[62] The appellate court upheld this ruling[63] and confirmed that the trial judge had been correct in considering Gardner's "significant financial interest in having his theory accepted."[64]

Despite extant legal precedent, Gardner claimed that PAS was admissible, publishing a list of fifty U.S. decisions under the heading, "Recognition of PAS in Courts of Law."[65] Other materials on this web site indicate that Gardner intended this list to represent decisions that set precedent holding PAS admissible under the evidentiary tests defined in *Frye* and *Daubert v. Merrell Dow Pharmaceuticals*.[66] However, none of these fifty decisions set precedent holding PAS admissible. Forty-six of the fifty cited decisions either set no precedent, or set precedent on issues other than PAS's admissibility. Nearly half of the decisions, twenty-three, were unpublished[67] and set no precedent.[68] The remaining twenty-seven decisions fall into several categories: thirteen contained factual histories that did not satisfy Gardner's definition of PAS because they involved sexual or physical abuse, domestic violence, bilateral alienation by both parents, or a lack of evidence of either parental alienation or the child's involvement;[69] eight decisions mentioned PAS only in reference;[70] one decision assessed whether the expert testified within the guidelines of his profession but did not contest the admissibility of PAS;[71] and one decision did not mention PAS at all.[72]

The four remaining decisions discussed the admissibility of PAS,[73] but none set precedent on this issue. While the lower court in *In re Marriage of Bates* ruled that PAS had "gained general acceptance in the field of psychology" and was therefore admissible under the *Frye* test, that issue was not appealed and thus the appellate decision set no precedent on the issue of PAS's admissibility.[74] In fact, the appellate court specifically "[threw] out the words 'parental alienation syndrome'" and focused on the "willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the parents and the child."[75] In *Perlow v. Berg-Perlow*, the appellant-father claimed that PAS did not meet the evidentiary standards required by *Frye* and that the admission of expert testimony on PAS was an error.[76] The appellate court held the issue waived for appellate review because the father had failed to raise it at trial.[77] The father in *In re Marriage of Rosenfeld* contested the admissibility of PAS as an unreliable theory, but the appellate court specifically chose not to address "the issue of whether [PAS] is a reliable theory."[78] The appellate court in *Karen "PP" v. Clyde "QQ"* sidestepped a decision on PAS's admissibility by holding that the family court's *sua sponte* reference to "a book on parental alienation syndrome that was neither entered into evidence nor referred to by any witness" was not grounds for reversal, "especially in light of all the testimony elicited at the hearing."[79]

Among his citations, Gardner highlighted *Kilgore v. Boyd*, claiming that *Kilgore* held that PAS "satisfied [the] Frye Test criteria for admissibility in a court of law" because it found PAS had "gained enough acceptance in the scientific community to be admissible in a court of law."[80] Gardner claimed that *Kilgore* "will clearly serve as a precedent and facilitate the admission of the PAS in other cases—not only in Florida, but elsewhere." [81] In fact, *Kilgore* set no precedent. The cited *Kilgore* decisions were neither published nor

issued in written form, and the holdings were limited to affirmations and denials of the litigants' motions.[82]

Contrary to Gardner's claim, none of the fifty cited decisions set precedent holding PAS admissible.

2. Law Review Coverage of PAS Is Predominately Negative

Since PAS appears primarily in family court where written decisions often are not issued and few decisions are published, its appearance in precedent-bearing decisions may underestimate its influence in American courts. Another measure of its legal impact is the frequency with which PAS appears in legal scholarship. As of July, 19 2005, 113 law review articles referenced PAS.[83] Few of these articles focus solely on PAS, but such substantial referencing may indicate the extent of PAS's influence.[84]

In this literature, the reportage of PAS was positive in thirty articles, neutral in fifteen articles, and negative in sixty-nine articles.[85] Thirty articles expressed a favorable view of PAS: twenty-one cited Gardner's work unquestioningly,[86] eight authors essentially republished Gardner's claims,[87] and one author alleged his ex-wife had abducted his daughter.[88]

PAS received neutral mention in fifteen articles: two reports on legislative initiatives to compel judicial consideration of PAS in custody cases,[89] two book reviews,[90] one PAS Continuing Legal Education course advertisement,[91] two case comments,[92] three editorial introductions,[93] three comments on the legal status of PAS,[94] and two passing references.[95]

Sixty-nine articles described PAS negatively. The negative coverage focused on several areas of law: twenty-three on divorce,[96] thirteen on child sexual abuse,[97] ten on domestic violence,[98] eight on expert testimony,[99] seven on general family law issues,[100] five on PAS as a defense strategy,[101] and two on parental child abduction.[102]

The majority of law review articles view PAS negatively. Scholars report that PAS has no empirical support[103] and is inadmissible under both *Frye* and *Daubert*. They describe PAS as a defense strategy for abusive fathers, facilitating these men's projection of blame for their children's alienation onto mothers as a counter-claim to, and evidentiary shield against, allegations of abuse.[104] They note PAS's gender bias and the bind it creates for battered women and mothers of abused children:[105] If these women fail to report abuse, they may lose custody for failing to protect their children, and if they report abuse, they may lose custody due to claims that they are abusing the child by alienating them.[106] Scholars also indicate that practitioners diagnosing PAS may make incorrect diagnoses because PAS's diagnostic criteria sanction incomplete investigation of family dynamics. Scholars note that PAS's claim to "diagnose" the truth of legal allegations is an improper invasion of the province of the fact-finder.[107]

IV. PAS and Evidentiary Admissibility Standards

Since the admissibility of novel psychological theories is governed by the standards defined in *Frye v. United States*, *Daubert v. Merrell Dow Pharmaceuticals*, *Kumho Tire Co. v. Carmichael*,[108] FRE 702 and 704(b) and variants thereof, I will assess PAS's admissibility under these standards.

1. Frye: General Acceptance

The 1923 *Frye* "general acceptance" test remains the standard gate-keeping test for the evidentiary admissibility of new science in many state jurisdictions.[109] The *Frye* court observed that the point in time "when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define," and thus required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[110]

All generally recognized psychiatric syndromes are compiled in the American Psychiatric Association's Diagnostic and Statistical Manual ("DSM"). Inclusion in the DSM occurs after scientific testing has proven the existence of the syndrome and the reliability and replicability of its diagnostic criteria.[111] PAS is not included in the DSM.[112]

PAS is also not recognized as a valid medical syndrome by the American Medical Association, the American Psychiatric Association, or the

American Psychological Association ("APA"). The 1996 APA Presidential Task Force on Violence and the Family ("APA Task Force") specifically noted that there is no data supporting PAS's existence.[113] Following the 2005 airing of a film about PAS on the Public Broadcasting Service, the APA issued a statement indicating that the organization takes no official position on this "purported syndrome."[114] While Gardner claimed PAS is admissible under *Frye*, PAS lacks any indicia of general acceptance by major medical institutions making it inadmissible under *Frye*.

2. *Daubert* & *Kumho Tire*: Reliability[115]

In *Daubert*, the United States Supreme Court held that FRE 702 superseded *Frye* in federal court. *Daubert* defined an admissibility test whose "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission."[116] Defining "scientific knowledge," *Daubert* noted that "the word 'knowledge' connotes more than subjective belief or unsupported speculation" and specified that to qualify as knowledge "an inference or assertion must be derived by the scientific method."[117] The Court intended *Daubert*'s test to be more flexible than the *Frye* test, allowing courts to consider several factors to determine admissibility.[118] Relevant factors include whether the theory can be and has been tested, whether it has been the subject of publication and the scrutiny of the scientific community through peer-review, and its known or potential error rate.[119] While *Daubert* claimed to discard *Frye*'s "general acceptance" standard, the decision includes "widespread acceptance" as a relevant factor, noting that "a known technique which has been able to attract only minimal support within the community" may properly be viewed with skepticism.[120]

The relevant factors for determining whether PAS is admissible under *Daubert* are PAS's lack of widespread acceptance discussed above under the *Frye* standard, an analysis of whether it is a valid medical syndrome, the error rate of its diagnostic criteria, the results of inter-rater reliability testing, and the nature of peer-review reportage.

A. PAS Is Not a Medical Syndrome

A medical "syndrome" defines a "distinct" correlation between a set of symptoms and a particular pathology.[121] Determining whether PAS is a valid medical syndrome requires an assessment of whether it is an existing pathology and whether its diagnostic criteria correlate accurately with that pathology.

i. PAS's Etiology Is Legal, Not Medical

Gardner claimed that the cause of PAS was maternal programming stemming from laws that threaten to take children from their mothers.[122] He claimed that PAS only existed in countries that use an adversary legal system,[123] and that judges, lawyers, guardians *ad litem* ("GALs"), children's counsel, and therapists promulgate PAS.[124] Gardner claimed that legal processes cause PAS and make mothers and children psychopathic,[125] and that adversary proceedings "intensify psychopathology" generally.[126] However, he provided no evidence that laws or litigation can or do cause medical pathology, and no evidence that women and children become psychopathic as a result of adversarial litigation.[127]

ii. PAS Is Diagnosed Based on Third-Party Symptoms

Medical pathology is properly diagnosed by observing symptoms of ill health in the sufferer, yet Gardner's Differential Diagnostic Criteria ("DDC") [128] for PAS diagnoses mothers based on examination of their children, and mandates treatment for children based on an examination of their mothers.[129] While PAS allegedly causes "enormous grief" in the rejected father,[130] he remains the one family member not diagnosed with PAS. Gardner provides no empirical evidence that women or children diagnosed with PAS display any symptoms of pathology.[131]

iii. PAS Pathologizes Women's Exercise of Legal Rights

PAS's diagnostic criteria for determining a child's treatment focus on maternal legal actions, evaluating the mother for:

1. presence of severe psychopathology prior to [marital] separation,
2. frequency of programming thoughts,

3. frequency of programming verbalizations,
4. frequency of exclusionary maneuvers,
5. frequency of complaints to police and child protection services,
6. litigiousness,
7. episodes of hysteria,
8. frequency of violation of court orders,
9. success in manipulating the legal system to enhance the programming, and
10. risk of intensification of programming if granted primary custody.[132]

With the exception of the first criterion, there is no evidence that any of these criteria indicate pathology.[133] Women are entitled to exercise their legal rights, and as mothers they are expected to protect their children from paternal abuse. Many divorced women hold and express negative opinions about their ex-husbands. Such expressions are protected under the First Amendment.[134] Many people, including successful litigators, satisfy Gardner's definition of "hysteria," which includes "intensification of symptoms in the context of lawsuits," "emotional outbursts, dramatization, attention-getting behavior, release of anger with scapegoatism."[135] In effect, the DDC diagnose women with PAS primarily when they exercise their legal rights. Because the DDC do not examine the father's conduct, his psychiatric history, violent conduct, and exercise of legal rights are not construed as symptoms of pathology.

iv. PAS Treatment Is Legal Coercion, Not Medical Treatment

Successful medical and mental health treatment alleviates symptoms of ill health and allows the patient to live a normal, healthy life. In contrast, Gardner states that successful PAS treatment requires that mother and child refrain from expressing neutral or negative views about the father, forcing them to act with affirmative affection toward him.[136] To accomplish this goal, PAS treatment uses court-ordered threats of legal deprivations of custody, visitation, property, and liberty[137] to coerce the mother and child into behavioral compliance with rejected men's demands for love and respect. "PAS therapist[s]"[138] are instructed to use threats of loss of primary custody[139] and brain-washing techniques[140] to force mothers to stop their alienating behaviors. Only specialized "PAS therapists" may treat women and children diagnosed with PAS because those who "consider it therapeutically contraindicated to pressure or coerce a patient" are not qualified.[141]

While legal coercion can motivate people to change chosen behavior, there is no evidence that it can cure medical disease.[142] It is perhaps not surprising that the scientific literature overwhelmingly reports that PAS treatment fails, [143] reporting only three instances of successful treatment.[144] Furthermore, it is unclear how such success can be measured. There is no evidence that legal coercion can create love or respect,[145] nor is there a way to distinguish genuine changes of affection from charades feigned for survival. Like prisoners of war and battered women, abused children whose survival depends on placating their abusers often feign submission or affection to survive. PAS treatment's reliance on legal coercion indicates that PAS is chosen behavior, not pathology.[146]

v. PAS Treatment Violates Medical and Legal Duties of Care

Medical professionals have a legal duty to act in the best interest of their patients.[147] While standard psychiatric practice provides a separate therapist for each family member, with each therapist having duties of care to his individual client, PAS treatment requires that one PAS therapist treat the entire family.[148] Additionally, Gardner instructs PAS therapists to act, not in privity with the interests of the mother or child, but as state agents who promote the interests of the father.[149] He instructs therapists to violate their patients' confidentiality,[150] to ignore and deny children's reports of abuse (violating mandated reporting laws), [151] and to threaten the children into compliance with their abusers.[152] Additionally, while coercive medical treatments are used in emergencies for patients who pose risks to themselves or others, there is no evidence that alienated children or women who express negative views of their ex-husbands pose such risks. Using coercive treatment in non-emergency situations circumvents women and children's legal

rights to refuse treatment. Given these violations of medical ethics and legal duties, PAS treatment appears to constitute *per se* medical malpractice.

Gardner similarly instructs attorneys for children diagnosed with PAS to violate child abuse reporting laws; instead of instructing attorneys to "align themselves" with their child-client's interests, Gardner instructs attorneys to coerce their clients into unwanted contact with the rejected.[153] Gardner claims that attorneys who act in their client's interest contribute to the client's pathology, thus he argues that attorneys in PAS cases must "unlearn" the principle of zealous advocacy.[154] These suggestions require that attorneys violate the rules of professional conduct.

B. PAS's Error Rate Is Unacceptably High

Valid diagnostic criteria for unique medical syndromes distinguish the set of symptoms for the specified syndrome from other similar sets of symptoms with a high degree of accuracy.[155] To satisfy *Daubert's* reliability requirement, the rate of inaccurate diagnosis, or "error rate," must be low. Because there are no published studies measuring PAS's error rate, I will examine whether Gardner's DDC can reliably diagnose PAS according to his definition.

i. PAS Tautologically Presumes Pathology & Lack of Justification

Gardner defined PAS as pathological and unjustified alienation. Since PAS is allegedly a subset of PA, the DDC must accurately distinguish between PA and PAS; between adaptive and pathological alienation. Furthermore, according to Gardner's definition, it must distinguish between justified and unjustified alienation.

Under Gardner's definition, adaptive alienation and pathological alienation appear to be distinguished by symptoms relating to severity, duration, and causation. However, these factors may not clearly distinguish between PA and PAS. The severity, or acuteness, of alienation at one time cannot predict intransigence or relative permanency of PA.[156] During divorce, children often strongly align themselves with one parent, depending on their developmental stage. These children may show intense PA that resolves naturally over time.[157] Their refusal to visit a parent may not represent pathology, but a normal developmental reaction to divorce.[158] Consequently, it appears that severity alone is not clear evidence of pathological alienation; substantial duration is also required. Protracted duration that amounts to permanence can only be observed over a lengthy period of time. It is unclear what duration indicates pathological alienation. Adolescents may be alienated from their parents for years,[159] and some adults are estranged from their parents for decades. There is no evidence, however, that either form of alienation is pathological.

Gardner did not indicate a means of distinguishing between adaptive and pathological alienation based on severity or duration. From his writings, it appears that the factor distinguishing adaptive from pathological alienation, PA from PAS, is the lack of a justifiable cause. When alienation is a logical response to external stimuli, it is adaptive. Only when there is no logical cause for the alienation can it be termed pathological. Only a thorough examination of possible causes can identify whether a child's alienation is an adaptive *response* to stimuli (justifiable alienation) or a pathology that *causes* alienation.[160] The distinction between unjustifiable and justifiable alienation can thus be characterized as one of cause and effect.

By thus ignoring causes that may justify alienation, the DDC cannot distinguish between justified and unjustified alienation. The diagnostic symptoms for the child include the child's "animosity," "campaign of denigration (may or may not include a false sex-abuse accusation)," "lack of ambivalence," "absence of guilt," "transitional difficulties at time of visitation," and "behavior during visitation." [161] But each of these diagnostic criteria can be either a *cause* or contributor to unjust alienation, or a *response* to stimuli warranting justifiable alienation.

While Gardner's definition of PAS indicates that it is inapplicable if there is justification for the child's alienation,[162] the DDC never assess the "alienated" parent, even if there is documented evidence of domestic violence or child abuse.[163] Children are assessed for a "campaign of denigration," which includes "false sex-abuse allegations," and alienating parents are assessed for "hysteria" which includes "assumption of danger when it does not exist."[164] By thus ignoring causes that may justify alienation, the DDC provide no way

to distinguish between adaptive responses to abuse and pathological causes of alienation.

Had Gardner intended the DDC to distinguish between justified and unjustified alienation, he might have defined the diagnostic criteria along the lines of the following: "animosity *unjustified by the alienated parent's conduct*," or "rationalizations for deprecation *unsupported by reasonable causal factors including abusive, neglectful, or otherwise harmful conduct by the alienated parent*." By omitting any inquiry into causation and justification, the DDC tautologically presume their diagnostic conclusion that alienation is pathological and unjustified. This explains why PAS has been diagnosed in cases involving sexual violence and physical abuse[165] and in cases where both parents engage in mutual hostility and attempted alienation,[166] circumstances rendering a PAS diagnosis inappropriate under Gardner's definition.

ii. PAS Tautologically Presumes Parental Programming

By definition, PAS requires contribution from *both* the child and the "alienating" parent.[167] However, the DDC specify that a PAS diagnosis is made solely based on evaluation of the child[168] and thus, the DDC cannot diagnose PAS according to Gardner's definition.

Certainly, a child who exhibits no symptoms of alienation is not alienated, regardless of the conduct of the parent,[169] and a parent's deprecatory comments do not necessarily create alienation since children often ignore such comments.[170] While the DDC specify that the child be evaluated for the following symptoms:

1. the campaign of denigration (may or may not include a false sex-abuse accusation),
2. weak, frivolous, or absurd rationalizations for the deprecation,
3. lack of ambivalence,
4. the independent thinker phenomenon,
5. reflexive support of the alienating parent in the parental conflict,
6. absence of guilt,
7. borrowed scenarios,
8. spread of the animosity to the extended family and friends of the alienated parent,
9. transitional difficulties at time of visitation,
10. behavior during visitation,
11. bonding with the alienator, and
12. bonding with the alienated parent prior to the alienation,[171]

PAS has nonetheless been diagnosed in cases lacking any evidence that the child is alienated.[172]

By diagnosing PAS solely on the basis of the child's symptoms, the DDC tautologically presume pathology, parental contribution, and lack of justification, the very factors that Gardner claimed distinguish PAS from other forms of PA. Without any ability to reliably diagnose PAS according to Gardner's definition, the error rate for PAS diagnoses is unacceptably high under a *Daubert* analysis.

iii. PAS's Diagnostic Criteria Are Ambiguous and Undefined [173]

To uniquely correlate with a specific pathological entity, diagnostic criteria must be unambiguous and well defined. However, the symptoms in the DDC are ambiguous and undefined. Terms like "weak," "frivolous," and "absurd" require subjective evaluation and cannot guarantee consistent or reliable diagnoses even in cases with starkly opposing facts. The DDC deem both verified sexual abuse and a false allegation of sexual abuse "frivolous" or "absurd" because it does not examine the conduct of the alleged abuser or veracity of abuse allegations.

The DDC do not define the durations that distinguish adaptive and pathological alienation.[174] They include "frequency" as an undefined component of five of the ten diagnostic criteria for the parent.[175] However, while frequency is a relevant factor in many medical diagnoses, its specific meaning varies by pathology; a single heart attack is clearly diagnostic, but high cholesterol is only relevant when it occurs for some duration of time. Additionally, it is unclear how a clinician can measure "frequency of programming thoughts" since this seems to measure whether and how often the parent holds a particular thought. The DDC do not require examinations of either the

child or the parent over time, and thus cannot assess whether symptoms observed at the time of examination are pathological or simply adaptive responses to an immediate stressor such as a pending divorce. Transient behavior resulting from the stress of divorce is no more representative of pathology than children's fears around Halloween are indicative of anxiety disorders.[176]

The DDC infer the central diagnostic issue of "programming" from ambiguous indicators in the child and the personal opinions of the "alienating" parent. They assess the child for symptoms like "borrowed scenarios," but do not distinguish between or define borrowing versus learning or personal opinion. They do not specify from whom a "borrowed scenario" is borrowed: a teacher, book, movie, another child, a corporation marketing to children, a religious institution, a school, or the other parent. The DDC do not distinguish a "borrowed scenario" from a view the child has learned or adopted for himself or his personal opinion.[177] Since all learned and personal beliefs originate as "borrowed" beliefs, borrowing a belief is not an unambiguous indicator of pathology. A child learns not to touch a hot stove because he borrows the belief that it is dangerous. Without borrowing knowledge, children cannot learn. Through learning, children develop into adults who think independently. However, the DDC deem "independent thinker phenomenon" a symptom of pathology.[178] By pathologizing children's learning, independence, and opinions, the DDC conflate children's healthy development and independence as indicated by learning, knowledge, opinions, and independent thought, with allegedly pathological views allegedly derived from parental programming.

The DDC diagnose the negative opinions divorced women hold of their ex-husbands as pathological regardless of whether they are accurate. Thus, it deems pathological the negative views ex-wives have of men who batter, rape, sexually abuse children, are unfaithful, or abuse drugs or alcohol. Without any evaluation of the husband, the DDC tautologically presume negative opinions about him lack justification.

The DDC cannot even distinguish between a child who is alienated from a parent, and a child who is deeply attached to that parent. Deeming "transitional difficulties at the time of visitation" a sign of pathology, the DDC do not specify the cause or types of difficulties involved. They deem a child's distress during a visit as pathological, regardless of whether the child is resisting visitation, has a wet diaper, or does not want to interrupt an activity he is enjoying.[179] Since the DDC do not specify that these "difficulties" demonstrate estrangement from the target parent, pathology is found both when a child balks at visitation with the "alienated" parent, and when he does not want to leave the "alienated" parent at the end of a visit. The DDC deem any sign of distress during visitation pathological.[180]

The DDC's use of ambiguous criteria means that they can diagnose PAS in all of the following: cases of severe child abuse, cases of alienation caused by psychiatric illness, cases lacking contribution by the "alienating" parent, cases in which the "alienating" parent defends her legal rights and makes normative litigation choices, cases of adaptive or developmentally normal alienation, and cases involving mutual parental denigration.[181] The only instances in which the DDC will not yield a PAS diagnosis are those in which the child never shows any signs of alienation, including adaptive alienation like toddler tantrums or teenage rebellion. Furthermore, since some abused and neglected children are completely subjugated to their abusers, experiencing something like *Stockholm Syndrome*, a negative PAS diagnosis does not necessarily correlate with a lack of abuse or neglect.

This analysis of the DDC indicates that their diagnostic error rate is unacceptably high. It is unclear what, if anything, the DDC can reliably diagnose. Given Gardner's tautological and ambiguous diagnostic criteria, as well as the fact that his DDC cannot diagnose PAS according to his definition,[182] it is not surprising that leading scholars question whether PAS exists.[183]

C. No Inter-Rater Reliability Tests Have Confirmed PAS's Existence

Just as double-blind studies are the gold standard for testing the efficacy of medications, inter-rater reliability studies are considered the gold-standard proof of the existence of a proposed medical syndrome. These studies assess whether a valid pathology exists, whether there is an accurate correlation between diagnostic criteria and the

pathological phenomenon, and whether the rate of misdiagnosis reflects an acceptably low error rate.[184]

In 1985, Gardner described PAS as a theory based on his personal opinions and personal clinical observations. In 1993, he stated that PAS was "an initial offering [that] cannot have pre-existing scientific validity."[185] While Gardner firmly believed that empirical evidence and inter-rater reliability studies would one day prove PAS to be a valid scientific and medical syndrome,[186] his statements identified PAS as "subjective [belief] and unsupported speculation," and are therefore inadmissible under *Daubert*.[187]

Twenty years after Gardner first described PAS, no inter-rater reliability or validity studies have been conducted on PAS.[188] PAS proponent Richard Warshak acknowledged this, stating that "the reliability of PAS cannot be supported by reference to the research literature" because no "systematic research" has demonstrated acceptable reliability of the PAS diagnosis.[189] Lacking positive inter-rater reliability verification, PAS remains an unproven hypothesis, amounting to the "unsupported speculation" that is inadmissible under *Daubert*.[190] PAS is merely an *ipse dixit*.

Because the DDC cannot diagnose PAS as Gardner defined it, they preclude positive inter-rater reliability testing. Using ambiguous criteria, failing to distinguish between healthy and pathological behavior, pathologizing non-pathological behavior, and presuming two of PAS's three definitional requirements, the DDC cannot logically satisfy the scientific rigor of such testing.[191] Diagnoses based on the DDC are logically and scientifically void because they do not correlate with any identifiable pathology. Furthermore, since the DDC are the only set of diagnostic criteria for PAS, diagnoses of PAS that are not based on the DDC are medically void. Nonetheless, in 2001 Gardner claimed PAS was a valid and existing medical syndrome despite his earlier stipulation that PAS was merely a theory.[192] Lacking any empirical support for this claim, he bolstered it by conflating the observation of a phenomenon with the process of scientific verification.

Observation is the precursor to, not a synonym, for scientific verification. While observed phenomena may ultimately be verified as science, such a correlation is by no means assured since rigorous scientific testing can disprove erroneous theories based on observation. Observation can be misleading, inaccurate, and incomplete. Just as the observations of five blind men each touching a different part of the elephant led to incomplete and contradictory definitions of the elephant, the observation of a child and parent who hold negative views of the other parent may be an incomplete observational basis for the scientific verification of PAS.[193]

As scientifically verified entities, medical syndromes are more than observed phenomena. Designation as a medical syndrome results after rigorous scientific testing verifies the existence of a unique pathology, and the accuracy of its diagnostic criteria in distinguishing it from similar pathologies. While observed pathologies of unknown etiology can be observed prior to scientific verification, medical syndromes are only recognized after they have been scientifically verified.[194] Designation as a medical syndrome, as represented by inclusion in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), represents a proxy for scientific verification.[195] Thus, Warshak's claim that "The DSM is not a test of whether a disorder exists" is misleading because it conflates the observation (existence) of childhood alienation with the scientific verification and resulting recognition (existence) of a medical syndrome.[196]

Such faulty logic and conflations appear frequently in PAS scholarship. Both Gardner and Warshak liken PAS to AIDS, claiming that AIDS existed prior to its designation as a medical syndrome.[197] But prior to scientific verification, what "existed" was a terminal illness or group of illnesses of unknown etiology that, through scientific verification, we have come to know and define as AIDS. Warshak claims that the observation of PA supports the existence of PAS as a medical syndrome, proving that PAS is not a mere "theory."[198] But PAS is a subset of PA, and the existence of the superset does not prove the existence of any of its subsets. Illogical reasoning that PAS exists simply because alienation is observed is no substitute for scientific verification.[199] PAS is a theory that proposes an explanation for an observed phenomenon. Lacking

scientific verification, PAS remains a hypothesis, not science or medicine.

D. Peer-Review Has Not Demonstrated PAS's Reliability or Validity

"Peer-review" refers to a process in which new scientific theories are rigorously reviewed for accuracy, validity, and reliability by peers within the relevant scientific community.[200] Meaningful peer-review "evaluates the clarity of hypotheses, the validity of the research design, the quality of the data collection procedures, the robustness of the methods employed, the appropriateness of the methods for the hypotheses being tested, the extent to which the conclusions follow from the analysis, and the strengths and limitations of the overall product" and should "filter out biases and identify oversights, omissions, and inconsistencies."[201] The process "improves both the quality of scientific information and the public's confidence in the integrity of science."[202] *Daubert* uses peer-review as a proxy for verification of a new theory's reliability and validity.

i. The Concept of Peer-Review Lacks a Verifiable Standard

Surprisingly, there is no verifiable methodological definition for meaningful peer-review.[203] The lack of such a verifiable standard is partly because meaningful review varies greatly depending on the field and project under review. For example, particle physics experiments and new psychological diagnoses may require different review methods. Additionally, two traditions used to protect the integrity of the peer-review process cloak inquiries about the review process in secrecy.

Meaningful peer-review requires balanced[204] and competent reviewers. Appropriate reviewers have relevant expertise, balanced viewpoints, independence, and lack any conflicts of interest.[205] Potential reviewers should be screened for potential conflicts, such as any financial interest, recent advocacy, and recent status as a peer-reviewer for the same publication.[206] However, perhaps in order to protect against interference with reviewers during the review process, well-reputed publications use anonymous reviewers, thus there is no way to ensure the quality or even the existence of the alleged review panel. Also, reviewers are theoretically given a specific mandate, or charge, for each article they review. A sound mandate should ensure appropriate scrutiny and result in a trustworthy assessment of validity and reliability.[207] However, as part of internal editorial processes, these mandates are not publicly available, thus there is no way to determine their validity or existence.

The practices of reviewer anonymity and mandate secrecy protect the integrity of peer-review from interference by authors and other interested parties, but also create classic problems of lack of transparency.[208] Reviewer anonymity can hide incompetence, imbalance, and conflicts of interest. Mandate secrecy hides inadequate or inappropriate mandates and makes it impossible to audit panel effectiveness.

The result of this lack of transparency is that, particularly in the era of desktop publishing and the internet, anyone can publish a journal and claim that it is peer-reviewed. There is no way to directly challenge a claim of peer-review because there is no external methodological standard against which such claims can be audited. Recognizing this problem, academics correlate journal reputation with review quality, and look only to reputable journals for reliable science. To determine which journals are reputable, a small industry ranks peer-review journals.[209] While recognition and high ranking within these meta-reviews provide one measure of the likelihood of meaningful peer-review in a given journal, the criteria used to determine the existence of peer-review may rely on unfounded assumptions.

For example, the American Psychological Association's ("APA") PsycInfo database requires that included journals are peer-reviewed and contain original submissions.[210] To be included in this database, journals must: be peer-reviewed; have an identifiable sponsoring body, editor, and editorial board; contain original submissions; adhere to a minimum publication schedule; contain all standard bibliographic elements; identify an archive where paper copies will be held; and have assigned ISSNs.[211] The PsycInfo staff designates a journal as "peer-reviewed" if the "front matter" of the journal includes an instruction that authors must submit three or more copies of the article without identifying information to the editor for review.[212] The PsycInfo staff "[takes] that as a confirmation that

the submitted articles will be reviewed by experts in the field in an anonymous, masked fashion."[213] PsycInfo does not assess the existence, qualifications, bias, and balance of reviewers; the existence and appropriateness of specific review mandates; or the existence of an actual review. Additionally, the database is not wholly composed of peer-reviewed journals and does not verify that all articles are original submissions.[214] Given these limitations, it is unclear what meaning should be drawn from inclusion in this database. The net result of reviewer anonymity and mandate secrecy is that journals using substandard peer-review can benefit from the unverifiable claim of peer-review and thereby present unproven theories as science in legal fora.

The potential harm of substandard peer-review is substantial. Both the legal and legislative branches of the government rely on peer-review as a hallmark of scientific validity.[215] The government's standards for peer-review are more defined that those publicly available from journals. To evaluate potential conflicts, the federal government requires transparency of reviewer identities and reviewer mandates.[216] These requirements create a means of auditing peer-review claims within the context of federal research and policy. But some government assumptions, while in keeping with the goals of peer-review, may not reflect journals' practices. For example, the government assumes that scientific journal editors use "reviewer comments to help determine whether a draft scientific article is of sufficient quality, importance, and interest to a field of study to justify publication," [217] and prohibits reviewers from making policy recommendations because "[s]uch considerations are the purview of the government."[218] There is no evidence that all peer-review journals use these practices.

ii. *Daubert* Uses Peer-Review as a Proxy for Reliability and Validity

Daubert rightly observed that the mere fact of peer-review is not dispositive evidence of a theory's validity or reliability.[219] Nonetheless, *Daubert* listed peer-review as a relevant factor for determining evidentiary admissibility.[220] Essentially, *Daubert* treats peer-review as a proxy for meaningful scientific assessment of reliability and validity.[221] Unfortunately, courts consider only claims that a theory was peer-reviewed, rather than evaluating whether a review of meaningful quality was actually conducted.[222] Peer-review claims thus provide proponents of pseudo-science a simple and insidious entrée into U.S. courts.

The only way to assess the validity and reliability *Daubert* seeks is through a careful analysis of reviewed material. Such analysis must seek evidence that reviewers were competent and balanced, that they provided adequate and appropriate scrutiny, and that the material demonstrates requisite validity and reliability. Since peer-review essentially means "having adequate empirical support," unsupported hypotheses should never qualify as peer-reviewed material. Indicia of meaningful peer-review of a new theory include empirical evidence, inter-rater reliability testing, and support from extant science.

Valid new science builds on extant science. Authors of valid new theories generally cite extensively to extant literature by other authors. By contrast, "author self-citation," which refers to the practice of an author citing his or her own past work in present publications, should be viewed with caution.[223] Self-citation is appropriate and valuable in instances when the cites refer to studies providing empirical support for a theoretical claim. However, when an author self-cites to earlier unsubstantiated claims in an effort to support a similarly unproven hypothesis, it is only a circular bolstering of unproven claims through reiteration.

iii. Gardner's Cited Peer-Reviewed Articles Provide No Empirical Support for PAS

To support his claim that PAS was legally admissible, Gardner cited twenty-three peer-reviewed articles about PAS.[224] Eleven of these articles appeared in peer-reviewed journals, eleven articles received no peer-review, and one article appeared in a peer-reviewed journal, but was not about PAS. None of the cited articles cite any inter-rater reliability testing or empirical support for PAS's existence. Instead, they are characterized by virtually complete reliance on self-citation to Gardner's self-published works, lacking citation to any empirical evidence, and containing extensive redundant and verbatim

uncited republication of portions of Gardner's earlier self-published works.[225] By contrast, Gardner's earlier scholarly work cited heavily to extant science.[226] The cited articles simply and circularly republish Gardner's unsupported claim that PAS exists. If peer-review is a proxy for reliability and validity, the above factors suggest that the cited articles received no meaningful peer-review.

a. Articles That Received No Meaningful Peer-Review

One article receiving no meaningful peer review appeared in *Issues in Child Abuse Accusations*, co-founded and self-published by its editors, Hollida Wakefield and her husband Ralph Underwager.[227] This journal's website does not mention peer-review,[228] and the journal is not recognized as peer-reviewed through inclusion in the PsycInfo database or the Institute of Scientific Information ("ISI") rankings. The article is not an original work: Gardner's footnote cites it as a reprint of a self-published addendum to one of his books.[229] Its only sources are author self-citations. Nonetheless, Ms. Wakefield claims that Gardner's article was peer-reviewed by two anonymous peer-reviewers.[230]

While peer-review requires balanced viewpoints,[231] Ms. Wakefield stated in the journal's first volume that the journal has a specific point of view: that of its editors who reject any approach they deem "irrational or irresponsible."[232] They revealed their viewpoint in a 1993 interview in a Dutch pedophilia journal.[233] Therein, Mr. Underwager stated that "pedophilia is an acceptable expression of God's will for love and unity among human beings," arguing that pedophiles should fight for decriminalization, likening this to the struggle for civil rights, while Ms. Wakefield proposed a twenty-year longitudinal study of men in "loving" sexual relationships with twelve-year-old boys. [234] One noted forensic psychologist described Underwager as "a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment."[235] The article's prior self-publication, lack of citation to external authority or empirical support, and the editorial bias of the journal undermine the claim of meaningful peer-review.

Eleven of the cited articles appeared in three peer-reviewed journals: *Journal of Divorce & Remarriage*, *American Journal of Family Therapy*, and *American Journal of Forensic Psychology*. These journals are included in the American Psychological Association's ("APA") PsycInfo database.[236] However, these articles contain extensive uncited republication, lack of citation to external sources, circular reasoning and ill logic, and lack any empirical support for Gardner's claims.

Of these eleven articles, one is not about PAS.[237] In the other ten, Gardner republished extensive, verbatim material without citation to his earlier, primarily self-published, works. In some cases he used identical titles for separately published, but redundant, articles.[238] Within the articles, large sections of previously published text appear verbatim without citation.[239] One article is an uncited copy of Gardner's website-published DDC chart,[240] which appears in many of his articles without citation.[241] Other website-published material also appears verbatim and without citation in subsequent publications.[242] Self-published material claiming PAS is a medical syndrome appears verbatim, uncited and without empirical support.[243] Although most of his republication is not cited, Gardner did specify that one article had been previously published, citing the original publication. [244] However, his website appears to list these two publications as distinct items.[245] By extensively republishing verbatim text without citation, Gardner created the illusion of a body of extant literature about PAS, when the amount of unique material in the articles is minimal, composed only of unsupported claims. These articles lack any empirical support, and their extensive uncited self-citation raise doubts about meaningful peer-review.

Six articles, the most in any single journal and nearly twenty-five percent of those cited as peer-reviewed, appeared in *The American Journal of Family Therapy*.[246] The journal's website does not mention peer-review.[247] The journal's "Instructions for Authors" direct authors to submit three copies of their articles, but do not specify peer-review.[248] They also specify that the author must sign a statement that the article "has not been published elsewhere."[249] The journal's website states that "The [ISI] Journal Citations Report for 2002 ranks The American Journal of Family

Therapy 74th out of 83 journals in Clinical Psychology (Social Science) and 26th out of 33 journals in Family Studies, with an impact factor of 0.259."[250] The ISI selects journals for inclusion in its rankings based on the quality of their current publication and the value of their scientific contribution in their field.[251] None of the other journals in which Gardner was published have been selected for ranking by ISI. This journal is also included in the APA's PsycInfo.

Five of the six articles published in *The American Journal of Family Therapy* contain material republished from other uncited sources, including redundant uncited material published in this same journal, an apparent violation of their own rule against publishing previously published works.[252] Three of these articles represent almost verbatim redundant and uncited text that Gardner had previously published on his website.[253] One of them echoes material in one of Gardner's self-published books.[254] The sixth article proposes court-ordered brainwashing for children diagnosed with PAS.[255] Since Gardner provides no empirical evidence that such brainwashing is an accepted or effective medical practice, the article appears to advocate the court-ordered practice of experimental medicine.[256] In 2003, the editorial board of this journal posthumously appointed Gardner as a permanent honorary member of their editorial board.[257] None of the articles contain any empirical support for Gardner's republished hypotheses.

Three of the cited articles appeared in the *American Journal of Forensic Psychology*.[258] This journal's website states that manuscripts are "submitted to peer-review upon receipt."[259] The most striking feature of these articles is their apparent advocacy for practice that violates the rules of professional conduct. For example, Gardner specifies that guardians *ad litem* ought to be agents of the state, representing the interest of the alienated parent instead of the interest of the child,[260] a practice that appears to constitute *per se* malpractice. While Gardner elsewhere claims that PAS is widely accepted in U.S. courts, his statement that no court has followed his treatment advice[261] may more accurately reflect PAS's status in legal practice. These articles contain no empirical evidence supporting Gardner's theory.

Two articles appeared in the *Journal of Divorce & Remarriage*.[262] The journal's web page does not mention peer-review or any standards for peer-review. [263] The directions for article submission require neither a specified number of copies, nor that submitted articles be unidentifiable, nor that the work be previously unpublished.[264] The journal's publisher claims that they publish various journals, all of which are peer-reviewed, but stipulates that specific peer-review standards and processes are determined by each journal's editor, and that such standards may change when a new editor takes charge of the particular publication.[265] One of the two cited articles in this journal was not about PAS: it refers to PAS once in passing, citing Gardner's self-published material,[266] and also contains uncited material from an earlier published article.[267] The second article is a slightly expanded version of an earlier self-published addendum to one of Gardner's books that he previously published both as a book addendum and as an article in another journal.[268] As with his other articles, extensive self-citation and a lack of empirical support cast doubt on the alleged peer-review.

In sum, the twelve cited articles contain nothing more than self-cited republications of Gardner's original, unsupported hypotheses, which are exactly the kind of "subjective beliefs and unsupported speculation" that are inadmissible under *Daubert*.[269] Through circular self-citation and redundant republication, Gardner created the illusion of a body of scholarly work on PAS where none existed. Lacking both empirical support and inter-rater reliability testing, these articles provide no evidence for PAS's reliability or validity. The peer-reviewers for these journals published unsupported hypothesis as science, demanding no empirical support for Gardner's hypotheses, without questioning extensive self-citation and uncited republication.

b. Articles That Received No Peer-Review

According to their editors and publishers, the remaining 11 cited articles were not peer-reviewed. Five such articles appeared in three journals: Academy Forum, [270] New Jersey Family Lawyer, [271] and Court Review. [272] Two articles appeared in the published proceedings from a PAS conference.[273] One article is a chapter in a multi-

volume psychiatry reference text whose contents were solicited by invitation, and not peer-reviewed.[274] One article is a chapter in one of Gardner's non-peer-reviewed books that is actually a German translation of another article on Gardner's list.[275] One article is a verbatim copy of the DDC chart Gardner published on his website in 2003, that was published on a website that encourages readers to lobby for PAS's inclusion in the next DSM manual.[276] Finally, one article Gardner cited as "in press" appears to be unpublished as of this writing.[277]

The stark lack of scientific rigor and empirical foundation in these articles raises the question of how Gardner convinced the publishers and editors to publish his work. One possibility is the fact that all the articles cite Gardner's affiliation with Columbia's College of Physicians and Surgeons.[278] Perhaps publishers and editors used this affiliation as a proxy for Gardner's scientific competence and ethics. Curiously, the contact address Gardner provided to readers was not a Columbia office, but the address of his self-publishing company, Creative Therapeutics.[279]

E. Reliability Cannot Be Inferred from Gardner's Alleged Professional Affiliation

Professional affiliation represents achievement, standing, and recognition in the relevant field and is thus relevant to expert certification and credibility.[280] Gardner claimed that he was a full professor at Columbia University's College of Physicians and Surgeons,[281] and he is described as such in his cited peer-reviewed articles, in legal decisions,[282] and in law reviews.[283] While this title may have led judges to believe that Gardner was a paid and tenured professor,[284] bolstering his bid for expert qualification in some 400 cases,[285] Gardner was neither paid, tenured, nor a full professor at Columbia.[286] His affiliation there, from 1963 to 2003,[287] was as an unpaid volunteer.[288]

Appointment to a tenured professorship relies on positive peer-evaluation of the candidate's research and teaching.[289] Hence, *Daubert* uses this type of "impressive [credential]" as a proxy for positive peer-evaluation of expert's credibility.[290] In juxtaposition, Gardner's volunteer appointment, lacking reliance on any peer assessment of his research, provided no such proxy. In fact, Gardner largely insulated his work from peer scrutiny by self-publishing, using his personal publishing company, and republishing his self-published materials.[291] When peers did evaluate his work, they discredited it.[292]

Lacking both positive peer assessment of PAS's reliability and an affiliation serving as a proxy for such reliability, Gardner bolstered his bids for expert certification with *ipse dixit* claims that PAS and his other theories were accepted science.[293] He claimed his protocols for differentiating between true and false allegations of child sexual abuse were "generally viewed as the most comprehensive series of protocols yet published,"[294] when they had been discredited within the field.[295] He claimed that he "successfully testified" in *Frye* and *Daubert* hearings on PAS and his Sex Abuse Protocols, when both theories lack empirical support and no precedent holds either admissible.[296] An examination of the documents Gardner cited for legal precedent, peer-review, and PAS's existence reveals that none of the documents support his claims.

Additionally, Gardner made contradictory audience-dependent claims about PAS's scientific status. Within Columbia, he asserted that PAS and his other theories were personal opinions rather than research or established science.[297] Outside Columbia, he claimed PAS was an actual psychiatric syndrome, "not a theory, [but] a fact."[298] The Columbia faculty was apparently unaware that Gardner claimed PAS was valid science, just as courts were unaware that Gardner claimed PAS was merely personal opinion. It appears that these audience-dependent misrepresentations helped Gardner retain his volunteer status at Columbia while bolstering his lucrative career as an expert witness.

Loomis, a case in which a Gardner was the only expert witness, may reflect the extent of his success.[299] Discussing the admissibility of PAS, that court cited seventeen cases in support of the statement that PAS "has been admitted" in other courts.[300] In fact, none of these cases set precedent holding PAS admissible, and several, including the first two cases listed, are unpublished. Notably, Gardner lists all but two of these cases on his website.[301] Apparently, the *Loomis* attorneys,

clerks, and judge never read these cases before citing them.

Ironically, it may be the very magnitude of his misrepresentations that fueled Gardner's success in gaining expert certification and presenting his hypothesis as scientific fact. It appears that attorneys and judges all over the U.S. shirked their obligation to review the voluminous documents he cited, perhaps credulously assuming that no professional would engage in such wholesale misrepresentation.[302] By exploiting legal professionals' trust in authority figures, Gardner embodied the very risk that worried the Court in *Daubert*, combining a false claim of tenured professorship at an elite institution with a voluminous set of citations to foil evidentiary gate-keeping.[303] Had attorneys revealed that Gardner was an unpaid Columbia volunteer whose theories were self-published and scientifically discredited, it is likely judges would not have certified him as an expert, and PAS would not likely have entered U.S. courts.

F. Lacking Reliability, PAS Is Inadmissible under Daubert & Kumho Tire

PAS cannot satisfy *Daubert* or *Kumho Tire* for several reasons. As a hypothetical "proposed syndrome" without supporting empirical evidence, PAS remains "unsupported speculation"[304] rather than "scientific knowledge."[305] By design, the DDC can neither diagnose PAS according to Gardner's definition, distinguish adaptive from pathological alienation, nor logically diagnose any definable pathological entity. Its design leads logically and inexorably to an extraordinarily high error rate. These factors reveal the lack of scientific methodology and empirical evidence underlying PAS.[306] Lacking scientific foundation, PAS cannot logically or scientifically qualify as a medical syndrome. Inter-rater reliability testing cannot demonstrate its reliability because, by design, the DDC do not correlate with any pathology. Scholars question PAS's existence as a medical syndrome,[307] and it is neither recognized by relevant professional organizations, nor included in the DSM, further indicating its lack of support within its relevant scientific community.[308] The peer-reviewed articles Gardner cited present nothing beyond Gardner's "subjective beliefs and unsupported speculation," failing to provide the peer support for the reliability and validity that *Daubert* demands.[309] PAS is thus inadmissible under *Daubert* and *Kumho Tire*.[310]

3. FRE 702: Reliable and Permissible Expert Testimony

FRE 702 stipulates that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue," expert testimony may be admissible.[311] Because the role of the expert is to provide material outside the fact-finder's ken to assist the fact-finder in reliably assessing the evidence,[312] matters of common knowledge are not the proper province of expert testimony. One of the two precedent-bearing decisions that hold PAS inadmissible stated that it is inappropriate expert testimony because it concerns the common knowledge that some children are alienated and that some parents place their children in the midst of marital conflicts.[313]

While FRE 702 allows the qualification of an expert by virtue of "knowledge, skill, experience, training, or education," and admits scientific testimony that relies on sufficient facts and a reliable underlying principle,[314] Gardner's volunteer position at Columbia and PAS's lack of empirical support would be insufficient for both expert certification and admissibility.

FRE 702 limits experts' testimony to their field of knowledge. Because PAS's etiology and treatment are legal, not medical, PAS is not a permissible subject for medical expert testimony.[315] While medical professionals may form personal opinions about the cause of and treatment outcomes for their patient's injuries,[316] they may not attribute legal fault, weigh evidence under evidentiary standards, or mandate legal actions because such testimony usurps the roles of jury and judge. The DDC impermissibly diagnose the falsity of child abuse allegations, ascribe legal fault,[317] and mandate legal sanctions.[318]

4. FRE 704(b): Expert Opinion on Ultimate Issues

FRE 704(b) prohibits expert testimony about an ultimate issue of fact relating to an element of the crime or an applicable defense, because this invades the province of the fact-finder.[319] The

Advisory Committee Notes on this rule note that scientific experts have an aura of inviolability, and their testimony thus creates a unique risk of usurping the role of the fact-finder by "merely [telling] the jury what result to reach."[320] When experts use psychological syndromes to diagnose fault or an underlying legal claim, such as child abuse or spousal battering, such testimony may be particularly likely to have undue influence because the expert's assessment of credibility is presented as a scientific finding rather than a personal opinion and, thus, may appear inviolable to the judge or jury.[321] Claiming to diagnose false abuse allegations, PAS clearly bears this risk.

Rule 704(b) limits psychiatric experts to "presenting and explaining their diagnoses," and bars their opinions on "ultimate issues" such as whether a criminal defendant is legally insane.[322] Gardner stated that PAS is a form of child abuse.[323] The DDC diagnose legal fault and mandate legal responses. While *Loomis* was a state court decision setting no precedent on admissibility under Rule 704(b) of the FRE, that court held PAS inadmissible, observing that New York practice does not permit an expert to testify to an ultimate issue of fact, and noting that Gardner "[purported] to make such a determination by determining if a particular accusation has the criteria of a truthful accusation or a false accusation."[324]

V. Policy Considerations: PAS's Theoretical Roots

As the analysis *supra* indicates, twenty years after Gardner first described PAS, it remains an *ipse dixit*. To understand the policy implications involved in its admissibility requires an examination of its theoretical roots.

The 1980s revealed a previously unimagined epidemic of child sexual abuse. Increased awareness of intra-familial abuse resulted in a concomitant increase in the frequency of incest allegations arising during divorce, the majority of which were found to be true.[325] Burgeoning social and legal response to child abuse raised both the possibility of care and protection for abused children and the spectre of legal accountability for crimes that had previously been committed with impunity. The majority of the accused perpetrators were men[326] who deflected claims of abuse with counter-claims of maternal coaching.[327] Abusive fathers remain twice as likely as nonviolent fathers to seek sole physical custody, and if they lose custody, they are likely to continue to threaten and harass mothers using legal actions.[328] Battering fathers are "three times as likely to be in arrears in child support and are more likely to engage in protracted legal disputes over all aspects of the divorce."[329]

Gardner's child sex abuse work responded to this emerging social consciousness and increased litigation over child sex abuse, which he deigned a modern "hysteria."[330] He delineated the foundation of PAS and his other tools, that purport to differentiate between true and false allegations of child sexual abuse, in his theory of human sexuality appearing in his self-published work, *True and False Allegations of Child Sexual Abuse*.[331]

In this work, which cites no empirical support, Gardner argued that all human sexual paraphilias (deviant behaviors) are natural adaptive mechanisms that foster human procreation, thereby enhancing the species' survival. Thus, pedophilia, sadism, rape, necrophilia, zoophilia (sex with animals), coprophilia (sex with feces), and other paraphilias served to enhance the survival of the human species by increasing procreation.[332] Construing men as sperm donors and females as sperm recipients, he claimed these "atypical" sexual behaviors served to "[keep the male's] juices flowing and increasing, thereby, the likelihood of heterosexual involvement with a person who is more likely to conceive," [333] and characterized any situation where a female was a sperm recipient as fostering the survival of the species.[334] He asserted that human females are naturally "passive," and that the role of rape or incest victim was a natural extension of this passivity,[335] stating that "by merely a small extension of permissible attitudes," women's sexual passivity leads them to become masochistic rape victims who "gain pleasure from being beaten, bound, and otherwise made to suffer," as "the price they are willing to pay for gaining the gratification of receiving the sperm."[336] He claimed that incest was not harmful in itself, but, citing Shakespeare, claimed only "thinking makes it so."[337]

He claimed that sexual activities between adults and children were "part of the natural repertoire of human sexual activity," [338] and that adult-child sex was a positive procreative practice because pedophilia sexually "[charges] up" the child, making the child "highly sexualized" and more likely to "crave" sexual experiences that will result in increased procreation.[339] Since his analysis focused on male paraphiliacs, Gardner thus claimed that homosexual sex increases the species' reproduction despite the fact that homosexuals generally do not engage in heterosexual (i.e. reproductive) sex.[340]

Gardner claimed that any harm caused by sexual paraphilias is not a result of the paraphilic conduct itself but, instead, solely a result of extraneous social stigma, and argued that paraphiliacs deserved social respect and sympathy.[341] This explains his seemingly contradictory statements that real abuse absolutely precludes PAS,[342] that real abuse "may" justify alienation,[343] that PAS may exist in cases of real abuse,[344] and that PAS "may be even worse than other forms of abuse," including physical abuse, sexual abuse, and neglect.[345] Gardner's theory, holding male sexual violence to be reproductively beneficial to the species, does not construe sexual violence as abuse.[346] This theoretical structure may explain PAS's presumption that abuse allegations are always false. If incest is not abuse, then it can never be the basis for justified alienation, and a mother's attempt to prevent a father's sexual contact with his children harms species' survival.[347]

1. Gardner Claimed That Pedophilia and Incest Are Not Child Abuse

The increase in reported incest during the 1980s led to allegations of a hysterical epidemic of false child abuse allegations. Gardner claimed that "hundreds (and possibly thousands)" are currently incarcerated in the U.S. for sex crimes they did not commit,[348] without citing even one case to support this claim.[349] The New Yorker ran an article claiming that "thousands" of people had been accused of child sex abuse based on false memories,[350] but when a leading psychiatrist asked how many of these "thousands of cases" the reporter had documented, he cited one case in which a man confessed to sexually abusing his two daughters and pled guilty to criminal charges.[351]

In fact, there is no evidence of an epidemic of false child abuse allegations, whether in intact or divorcing families. The APA Task Force reported that "[c]ontrary to widespread beliefs, research findings suggest that reports of child sexual abuse do not increase during divorce and actually occur in only about 2% to 3% of the cases," noting that during custody disputes, less than ten percent of cases involve child sexual abuse allegations, further noting that these reports are "as likely to be confirmed as reports made at other times."[352] In keeping with studies indicating that approximately twenty-five percent of American girls and ten percent of American boys are sexually abused, most in their own homes,[353] Gardner claimed that "probably over [ninety-five percent]" of all sex abuse allegations are valid.[354] He acknowledged that "intact" intra-familial settings are at "quite high risk for sex abuse" but, nonetheless, maintained that the majority of sex abuse allegations in "vicious custody dispute[s]" are false,[355] premising PAS on the alleged "epidemic" of false child sex abuse allegations created by divorcing women.[356]

While Gardner vociferously denied that his work was sexist,[357] he claimed that women project "their own sexual inclinations" onto their divorced husbands, fueling false sex abuse accusations and PAS, and are driven by the "'hell hath no fury like a woman scorned' phenomenon;"[358] that divorced women seek female therapists who are themselves "antagonistic toward men;"[359] that professional Child Advocates are primarily "overzealous women" who act "in the service of venting rage upon men;"[360] and that "[f]ueling the program of vilification is the proverbial 'maternal instinct'… Throughout the animal kingdom mothers will literally fight to the death to safeguard their offspring and women today are still influenced by the same genetic programming."[361] Throughout his PAS publications, Gardner portrayed women as paranoid, irrational, selfish, and psychopathic liars,[362] and men as the hapless, passive victims[363] of unjustified female rage.

Gardner's attempt to distinguish between true and false allegations of child sex abuse led to his creation of various tools including PAS and the Sexual Abuse Legitimacy Scale ("SALS").[364] In fact, SALS does not actually measure whether an

allegation is true or false. Gardner designed it to grade some real cases of abuse as "false" by using a "legal preponderance" standard.[365] While Gardner specified that SALS was not designed for use in extra-familial child abuse cases,[366] neither this limiting statement nor SALS' preponderance standard are mentioned in the SALS diagnostic definition. Thus, practitioners and legal professionals might be unaware of its limitations. Like PAS, SALS appears to have a high error rate. One author applied SALS to a case involving oral sex and attempted rape of a six-year-old, crimes that were witnessed by a neighbor, and to which the perpetrator confessed. SALS graded the claim as predictive of a false claim and indicated the child's mother's behavior was evidence that the "sex abuse allegation is extremely likely to have been fabricated."[367]

Since Gardner's child sex abuse assessment tools purport to determine legal fault under the guise of medical diagnosis, it is not surprising that legal precedent holds them inadmissible. The court in *Page v. Zordan* held that SALS "was not supported by any evidence concerning its recognition and acceptability within the scientific community," and that its admission was one basis for reversible error.[368] The *Loomis* decision, one of the two cases that set precedent holding PAS inadmissible, cited *Page* noting that SALS had been found to be "*not* generally accepted" and thus inadmissible under *Frye*.[369] The court in *Tungate v. Commonwealth of Kentucky* held inadmissible Gardner's twenty-four "indicators for pedophilia," which purported to identify pedophiles, because the testimony impermissibly addressed the issue of guilt or innocence and the profile did not satisfy either *Frye* or *Daubert*.[370]

2. Gardner's Theory Mirrors Pro-Pedophilia Advocacy[371]

Gardner's views about adult-child sex parallel those of advocates for the legalization of adult-child sexual contact[372] and pro-pedophilia advocacy groups like the North American Man Boy Love Association ("NAMBLA").[373] Founded in 1978, NAMBLA describes itself as a "political, civil rights, and educational organization" whose goal is to "end the extreme oppression of men and boys in mutually consensual relationships."[374] The organization claims it, "does not engage in any activities that violate the law, nor do we advocate that anyone else should do so."[375] NAMBLA provides publications and support to incarcerated sex offenders, construing them as "unjustly imprisoned" for allegedly "consensual, loving relationships between younger and older people," rather than incarcerated for violations of law and harm against children. [376]

Both Gardner and NAMBLA claim that adult-child sex is biologically natural, not inherently harmful to the child, and that any resultant harm is caused by social stigma rather than the sexual contact itself.[377] Gardner claimed the sole "determinant as to whether these experiences [i.e. a sexual encounter between an adult and a child] will be traumatic is the social attitude towards these encounters"[378] and stated:

> [M]any societies have been unjustifiably punitive to those who exhibit these sexual paraphilic variations [e.g. pedophiles, rapists, etc.] and have not been giving proper respect to the genetic factors that may very well be operative. Such considerations may result in greater tolerance for those who exhibit these atypical sexual proclivities. My hope is that this theory will play a role (admittedly small) in bringing about greater sympathy and respect for individuals who exhibit these variations of sexual behavior. [Further,] they do play a role in species survival.[379]

While Gardner claimed that "repeat offenders must be removed from society," he advocated that they only be imprisoned after treatment has failed, advocating that they not be imprisoned with "hardened criminals," or be subjected to lengthy sentences.[380] As a political advocate, Gardner lobbied to abolish mandated reporting of child abuse, to abolish immunity for reporters of child abuse, and for the creation of federally funded programs to assist individuals claiming to be falsely accused.[381] Like Gardner, NAMBLA claims that adult-child sex is normal, healthy, and beneficial for children, and advocates for increased respect for pedophiles and the eradication of sanctions through the legalization of pedophilia.[382] While NAMBLA cites an article that claims that adult-child sex is generally not harmful to boys,[383] the U.S. Congress condemned this article and passed a resolution specifically recognizing the

harmfulness of adult-child sex after scholars reported the article's methodological deficiencies and inaccuracies.[384] Ignoring evidence that adult-child sex harms the majority of male and female children affected, pro-pedophilia activists and scholars argue that children are generally not harmed by sexual contact by adults and that not allowing children to have sex with adults denies children's rights.[385]

Despite his passionate advocacy, Gardner claimed he did not condone or recommend adult-child sexual contact, maintaining he was "only describing the reality of the world."[386] He maintained that he was "opposed to [NAMBLA's] primary principles," claiming that adult men having sex with boys are "exploiting them, corrupting them, and contributing to the development of sexual psychopathology in them," and stating that pedophiles belong in prison.[387] However, both Gardner and NAMBLA published the view that adult-child sex is generally benign or beneficial. Both claim to abhor exploitative, coercive sexual conduct,[388] and neither defines what constitutes child sexual abuse.[389]

NAMBLA claims the distinguishing factor between legal and illegal adult-child sex is the consent of the child,[390] ignoring the common law's recognition of the developmental limitations that render children incapable of giving meaningful consent. Gardner claimed that coercion of a "weaker and/or younger" person, including pedophilia, is *per se* "exploitation of an innocent party."[391] He described NAMBLA's view that if the child consents, pedophilia is "acceptable and even desirable" as a "rationalization for depravity."[392] Gardner indicated he did not believe a child could give consent, but he often describes adult sexual contact with children as a benign social norm that is not inherently harmful.[393] Simultaneously asserting that pedophilia and incest are not inherently harmful, and that they *are* inherently harmful, Gardner claimed we are all nascent pedophiles.[394] Despite his few claims to the contrary, Gardner's theoretical work is largely consistent in the view that adult-child sex is benign or beneficial.

The fact that PAS is rooted in theory that can fairly be described as "pro-pedophilia" raises policy concerns for our legislature and judiciary. PAS's roots and functional use demonstrate that it is a political-legal tool designed and used to shield child abusers from liability, and to promote their unfettered access to their children through judicial orders of sole paternal custody.

In essence, PAS describes women and children offending as patriarchical norms[395] by showing disrespect or refusing to show affirmative respect for men.[396] It presumes all reports of male violence are false, ignoring empirical evidence that men inflict far more harm through violence than women,[397] and mirrors patriarchic law, under which male violence towards women and children is legal. It punishes women who exercise their legal rights, mirroring women's lack of legal rights under a patriarchical system. Gardner called PAS a form of child abuse worse than the child's death.[398] Certainly, while a dead child cannot withhold fealty from his father, a living child who does so challenges and undermines his power as the patriarchic. Under a patriarchical system, a child's disrespect to his father is outrageous because the child is the father's "possession."[399] While PAS allegedly harms children,[400] the only PAS-caused harm Gardner documented is the rejected male's grief.[401] Posing as a medical syndrome, PAS diagnoses as pathological women's and children's rejection of men. While such behavior is not pathological, it does represent the ultimate narcissistic insult to male authority. Thus, PAS seeks to use coercive state action to force women's and children's compliance with male demands for affirmative displays of respect,[402] and seeks to protect the unfettered access of intra-familial sex offenders to their victims through the award of sole paternal custody. Alarmingly, undaunted by PAS's lack of scientific validity, and determining to use PAS in court, PAS proponents advise one another to circumvent evidentiary admissibility standards by testifying about PAS without calling it by name.[403] Both PAS's underlying theory and functional use in court demonstrate that its admissibility violates public policy with regards to women's and children's legal rights and well being.

VI. Conclusion: Science, Law, and Policy Support PAS's Inadmissibility

As a legal matter, PAS's inadmissibility is appropriate given its lack of scientific validity and reliability.[404] As a policy matter, its inadmissibility is appropriate given its structural roots in an unsubstantiated patriarchical theory that advocates for child sex offenders' access to their victims. The continued misrepresentation of PAS's scientific and legal status by its proponents, including proponents' deliberate circumvention of legal gate-keeping by testifying about PAS under other names, should place legal professionals on alert for continued attempts to bring this unsubstantiated hypothesis into American courts.

PAS's twenty-year run in American courts is an embarrassing chapter in the history of evidentiary law. It reflects the wholesale failure of legal professionals entrusted with evidentiary gate-keeping intended to guard legal processes from the taint of pseudo-science. Courts entrusted with divorce, custody, and child abuse cases may have found PAS attractive because it claimed to reduce these complex, time-consuming, and wrenching evidentiary investigations to medical diagnoses. The goals inherent in PAS's origins and legal use demonstrate the policy risk of unquestioningly accepting simplistic answers to complex human problems. The unique dynamics of any given dysfunctional family are unlikely to yield to pat diagnoses.[405] Given that most PA is adaptive and resolves naturally in time, our legislature and courts must determine under what circumstances legal intervention is an appropriate or efficacious response to PA. The answers to this complex question will likely be found in empirically proven science in the fields of psychology and developmental biology, not in unsubstantiated hypotheses grounded in theories that violate public policy.

Two decades after Gardner first described PAS, an analysis of the materials he cited in support of PAS's existence demonstrates that PAS remains merely an *ipse dixit*. As a matter of science, law, and policy PAS is, and should remain, inadmissible in American courts.

APPENDIX A: CASES LISTED ON GARDNER'S WEB SITE

<http://www.rgardner.com/refs/pas_legalcites.html> (last visited on Sept. 30, 2003)

Published Cases

1. *Pearson v. Pearson*, 5 P.3d 239; 2000 Alas. LEXIS 69 (Alaska 2000).
2. *Chambers v. Chambers*, 2000 Ark App. LEXIS 476 (Ark. Ct. App. June 21, 2000).
3. *In re Marriage of Edlund*, 66 Cal. App. 4th 1454; 78 Cal. Rptr. 2d 671; 1998 Cal. App. LEXIS 827; 98 Cal. Daily Op. Service 7552; 98 Daily Journal DAR 10449 (Cal. Ct. App. 1998).
4. *In re John W. v. Phillip W.*, 41 Cal. App. 4th 961; 48 Cal. Rptr. 2d 899; 1996 Cal. App. LEXIS 17; 96 Cal. Daily Op. Service 205; 96 Daily Journal DAR 283 (Cal. Ct. App. 1996).
5. *Coursey v. Superior Court (Coursey)*, 194 Cal. App. 3d 147; 239 Cal. Rptr. 365; 1987 Cal. App. LEXIS 2029 (Cal. Ct. App. 1987).
6. *Perlow v. Berg-Perlow*, 816 So. 2d 210; 2002 Fla. App. LEXIS 6179; 27 Fla. L. Weekly D 1108 (Fla. Dist. Ct. App. 2002).
7. *Blosser v. Blosser*, 707 So. 2d 778; 1998 Fla. App. LEXIS 79; 23 Fla. L. Weekly D 257 (Fla. Dist. Ct. App. 1998).
8. *Tucker v. Greenberg*, 674 So. 2d 807 (Fla. App. 5 Dist. 1996).
9. *Schutz v. Schutz*, 522 S.2d 874; 1988 Fla. App. LEXIS 411; 13 Fla. L. Weekly 387; 13 Fla. L. Weekly D 387 (Fla. Dist. Ct. App. 1988).
10. *In Re Marriage of Bates*, 342 Ill. App. 3d 207; 794 N.E.2d 868; 2003 Ill. App. LEXIS 879; 276 Ill. Dec. 618 (Ill. App. Ct. 2003) (unpublished in part).
11. *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198; 719 N.E.2d 375; 1999 Ill. App. LEXIS 750; 241 Ill. Dec. 514 (Ill. App. Ct. Oct. 22, 1999) (partly unpublished).
12. *In re Violetta B.*, 210 Ill. App. 3d 521; 568 N.E.2d 1345; 1991 Ill. App. LEXIS 312; 154 Ill. Dec. 896 (Ill. App. Ct. 1991).
13. *White v. White*, 655 N.E.2d 523; 1995 Ind. App. LEXIS 1087 (Ind. App. 1995).
14. *In re Marriage of Rosenfeld*, 524 N.W.2d 212; 1994 Iowa App. LEXIS 104 (Iowa Ct. App. 1994).
15. *Truax v. Truax*, 110 Nev. 437; 874 P.2d 10; 1994 Nev. LEXIS 60 (Nev. 1994).

16. *In the matter of J.F. v. L.F.*, 181 Misc. 2d 722; 694 N.Y.S.2d 592; 1999 N.Y. Misc. LEXIS 357 (N.Y. Fam. Ct. 1999).
17. *Karen B. v. Clyde M.*, 151 Misc. 2d 794; 574 N.Y.S.2d 267; 1991 N.Y. Misc. LEXIS 463 (N.Y. Fam. Ct. 1991), *affd. sub nom Karen "PP" v. Clyde "QC"*, 197 A.D.2d 753; 602 N.Y.S.2d 709; 1993 N.Y. App. Div. LEXIS 9845 (N.Y. App. Div. 1993).[406]
18. *Krebsbach v. Gallagher*, 181 A.D.2d 363; 587 N.Y.S.2d 346; 1992 N.Y. App. Div. LEXIS 9832 (N.Y. App. Div. 1992).
19. *Karen B. v. Clyde M.*, 151 Misc. 2d 794; 574 N.Y.S.2d 267; 1991 N.Y. Misc. LEXIS 463 (N.Y. Fam. Ct. 1991) (this case was subsequently revisted in *Karen "PP" v. Clyde "QC"*, 197 A.D.2d 753; 602 N.Y.S.2d 709; 1993 N.Y. App. Div. LEXIS 9845 (N.Y. App. Div. 1993)).[407]
20. *Pathan v. Pathan*, 2000 Ohio App. LEXIS 119 (Ohio Ct. App. Jan. 21, 2000).
21. *State v. Koelling*, 1995 Ohio App. LEXIS 1056 (Ohio Ct. App. Mar. 21, 1995).
22. *Conner v. Renz*, 1995 Ohio App. LEXIS 176 (Ohio Ct. App. Jan. 19, 1995).
23. *Sims v. Hornsby*, 1992 Ohio App. LEXIS 4074 (Ohio Ct. App. Aug. 10, 1992).
24. *Toto v. Toto*, 1992 Ohio App. LEXIS 157 (Ohio Ct. App. Jan. 16, 1992).
25. *Pisani v. Pisani*, 1998 Ohio App. LEXIS 4421 (Ohio Ct. App. 1998).
26. *Ochs v. Martinez*, 789 S.W.2d 949; 1990 Tex. App. LEXIS 1652 (Tex. App. 1990).
27. *McCoy v. State*, 886 P.2d 252 (Wyo. 1994).

Unpublished Cases

28. *Berry v. Berry*, No. DR-96-761.01 (Ala. Cir. Ct. Jan. 6, 2001)).[408]
29. *Oosterhaus v. Short*, No. 85DR1737-Div III (Colo. Dist. Ct.)).[409]
30. *Metza v. Metza*, 1998 Conn.Super LEXIS 2727 (Conn. Super. Ct. Sept. 25, 1998).
31. *Case v. Richardson*, 1996 Conn.Super. LEXIS 1836 (Conn. Super. Ct. July 16, 1996).
32. *McDonald v. McDonald* (cited as No. D-R90-11079 (Fla. Cir. Ct. Feb. 20, 2001)).[410]
33. *Loten v. Ryan* (cited as No. CD 93-6567 FA (Fla. Cir. Ct. Dec. 11, 2000)).[411]
34. *Boyd v. Kilgore*, 773 So. 2d 546 (Fla. Dist. Ct. App. Nov. 15, 2000).
35. *Blackshear v. Blackshear* (cited as No. 95-08436 (Fla. Dist.Ct.)).[412]
36. *Tetzlaff v. Tetzlaff* (cited as No. 97D-2127 (Ill. Dom. Rel. Ct. Mar. 20, 2000)).[413]
37. *Wilkins v. Wilkins* (cited as No. 90792 (La. Fam. Ct. Nov. 2, 2000)).[414]
38. *In the Matter of Amber Spencley*, 2000 Mich App. LEXIS 1770 (Mich. Ct. App. April 7, 2000) (Gardner cites as *Spencley v. Spencley*).
39. *Lubkin v. Lubkin* (cited as 92-M-46LD (N.H. Dist. Ct. Sept. 5, 1996)).[415]
40. *Lemarie v. Oliphant* (cited as No. FM-15-397-94 (N.J. Ch. Dec. 11, 2002)).[416]
41. *Rosen v. Edwards*, N.Y.L.J., Dec 11, 1990, at 27–28.[417]
42. *Oliver V. v. Kelly V.*, *Husband Is Entitled to Divorce Based on Cruel and Inhuman Treatment,* N.Y.L.J., Nov. 27, 2000 at 25.
43. *Sidman v. Zager* (cited as No. V-1467-8-9-94 (N.Y.Fam.Ct.)).[418]
44. *Popovice v. Popovice* (cited as No. 1996-C-2009 (Pa. Ct. Com. Pl. Aug. 11, 1999)).[419]
45. *Waldrop v. Waldrop* (cited as No. 138517 (Va. Cir. Ct. April 26, 1999)).[420]
46. *Ange v. Chesapeake Dep't of Human Services*, 1998 Va. App. LEXIS 59 (Va. Ct. App. Feb.3, 1998).
47. *Rich v. Rich* (cited as No. 91-3-00074-4 (Wa. Super. Ct. June 11, 1993)).[421]
48. *Matter of A.R. (S.E.)*, *Rather Than Custody to Father, Court Orders Family Therapy*, N.Y.L.J., Dec. 11, 1990 at 21.
49. *Janell S. v. J.R.S.*, 571 N.W.2d 924 (Wis. Ct. App. 1997).
50. *Fischer v. Fischer*, 584 N.W.2d 233 (Wis. Ct. App. 1998).

APPENDIX B: PRECEDENT-BEARING CASES BY JURISDICTION

Federal

1. *Edwards v. Williams*, 170 F.Supp.2d 727; 2001 U.S. Dist. LEXIS 18360 (E.D.Ky. 2001).

States

Alabama

2. *K.B. v. Cleburne County Department of Human Resources*, 897 So. 2d 379; 2004 Ala. Civ. App. LEXIS 740, **9 (Ala. Civ. App. October 1, 2004).
3. *C.J.L. v. M.W.B.*, 2003 Ala. Civ. App. LEXIS 100 (Ala.Civ.App. Feb. 28, 2003) (to be reported); 2003 WL 21488740 (Ala. Civ. App., June 27, 2003).

4. *M.W.W. v. B.W.*, 900 So. 2d 1230; 2004 Ala. Civ. App. LEXIS 700 (Ala. Civ. App. September 10, 2004).

Alaska

5. *Pearson v. Pearson*, 5 P.3d 239; 2000 Alas. LEXIS 69 (Alaska 2000).
6. *Plate v. Alaska*, 925 P.2d 1057; 1996 Alas. App. LEXIS 47 (Alaska Ct.App. 1996).

Arkansas

7. *Chambers v. Chambers*, 2000 Ark App. LEXIS 476 (Ark.Ct.App. June 21, 2000).

California

8. *In re Marriage of Condon*, 62 Cal. App. 4th 533; 73 Cal. Rptr. 2d 33; 1998 Cal. App. LEXIS 231; 98 Cal. Daily Op. Service 2108; 98 Daily Journal DAR 2924 (Cal.Ct.App. 1998).
9. *Coursey v. Superior Court (Coursey)*, 194 Cal. App. 3d 147; 239 Cal. Rptr. 365; 1987 Cal. App. LEXIS 2029 (Cal.Ct.App. 1987).
10. *In re the Marriage Edlund*, 66 Cal. App. 4th 1454; 78 Cal. Rptr. 2d 671; 1998 Cal. App. LEXIS 827; 98 Cal. Daily Op. Service 7552; 98 Daily Journal DAR 10449 (Cal.Ct.App. 1998).
11. *In re John W. v. Phillip W.*, 41 Cal. App. 4th 961; 48 Cal. Rptr. 2d 899; 1996 Cal. App. LEXIS 17; 96 Cal. Daily Op. Service 205; 96 Daily Journal DAR 283 (Cal.Ct.App. 1996).

Connecticut

12. *Ruggiero v. Ruggiero*, 76 Conn. App. 338; 819 A.2d 864; 2003 Conn. App. LEXIS 181 (Conn.App.Ct. 2003).

Delaware

13. *Ford v. Ford*, 2000 Del. Fam. Ct. LEXIS 104 (Del. Fam. Ct. Dec. 19, 2000).

Florida

14. *Blosser v. Blosser*, 707 So. 2d 778; 1998 Fla. App. LEXIS 79; 23 Fla. L. Weekly D 257 (Fla.Dist.Ct.App. 1998).
15. *In Interest of T.W.M..*, 553 So. 2d 260; 1989 Fla. App. LEXIS 6591; 14 Fla. L. Weekly 2733 (Fla.Dist.Ct.App. 1989).
16. *Perlow v. Berg-Perlow*, 816 So. 2d 210; 2002 Fla. App. LEXIS 6179; 27 Fla. L. Weekly D 1108 (Fla.Dist.Ct.App. 2002).
17. *Schutz v. Schutz*, 522 S.2d 874; 1988 Fla. App. LEXIS 411; 13 Fla. L. Weekly 387; 13 Fla. L. Weekly D 387 (Fla.Dist.Ct.App.1988).

Illinois

18. *In re Violetta B.*, 210 Ill. App. 3d 521; 568 N.E.2d 1345; 1991 Ill. App. LEXIS 312; 154 Ill. Dec. 896 (Ill. App. Ct. 1991).
19. *In Re Marriage of Bates*, 212 Ill. 2d 489; 819 N.E.2d 714; 2004 Ill. LEXIS 1619; 289 Ill. Dec. 218 (Ill. October 28, 2004); 342 Ill. App. 3d 207; 794 N.E.2d 868; 2003 Ill. App. LEXIS 879; 276 Ill. Dec. 618 (Ill. App. Ct. 2003) (partly unpublished).
20. *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198; 719 N.E.2d 375; 1999 Ill. App. LEXIS 750; 241 Ill. Dec. 514 (Ill.App.Ct. Oct. 22, 1999) (partly unpublished).

Indiana

21. *In re Paternity of V.A.M.C.*, 768 N.E.2d 990; 2002 Ind. App. LEXIS 808 (Ind. Ct. App. 2002) (also cited as *Moden v. Corr*).
22. *Hanson v. Spolnik*, 685 N.E.2d 71; 1997 Ind. App. LEXIS 1205 (dissent) (Ind. App. 1997).
23. *Kirk v. Kirk*, 759 N.E.2d 265; 2001 Ind. App. LEXIS 2067 (Ind. App. 2001).
24. *White v. White*, 655 N.E.2d 523; 1995 Ind. App. LEXIS 1087 (Ind. App. 1995).

Iowa

25. *In re Marriage of Rosenfeld*, 524 N.W.2d 212; 1994 Iowa App. LEXIS 104 (Iowa Ct. App. 1994).

Louisiana

26. *Hollingswoth v. Semerad*, 799 So. 2d 658; 2001 La. App. LEXIS 2444 (La. Ct. App. 2001).
27. *White v. Kimrey*, 847 So. 2d 157; 2003 La. App. LEXIS 1411 (La. Ct. App. 2003).

Maryland

28. *Barton v. Hirschberg*, 137 Md. App. 1; 767 A.2d 874, 2001 Md. App. LEXIS 27; (Md. Ct. Spec. App. March 1, 2001).

Mississippi

29. *Ellis v. Ellis*, 840 So. 2d 806; 2003 Miss. App. LEXIS 195 (Miss. Ct. App. 2003).

Missouri

30. *Kuehne v. State*, 107 S.W.3d 285; 2003 Mo. App. LEXIS 258 (Mo. Ct. App. 2003).

New York

31. *Karen B. v. Clyde M.*, 151 Misc. 2d 794; 574 N.Y.S.2d 267; 1991 N.Y. Misc. LEXIS 463 (N.Y. Fam. Ct. 1991) *affd. sub nom Karen "PP" v. Clyde "QC"*, 197 A.D.2d 753; 602 N.Y.S.2d 709; 1993 N.Y. App. Div. LEXIS 9845 (N.Y.App.Div. 1993).
32. *People v. Bimonte*, 185 Misc. 2d 390; 712 N.Y.S.2d 829; 2000 N.Y. Misc. LEXIS 339 (N.Y. 2000).

33. *Smith v. Bombard*, 294 A.D.2d 673; 741 N.Y.S.2d 336; 2002 N.Y. App. Div. LEXIS 4726 (N.Y. App. Div. 2002).
34. *Dorothy A. DeMeyer v. Advantage Auto*, 2005 NY Slip Op 25252; 2005 N.Y. Misc. LEXIS 1288 at *6, *(N.Y. Sup. Ct.* June 27, 2005).
35. *In the matter of J.F. v. L.F.*, 181 Misc. 2d 722; 694 N.Y.S.2d 592; 1999 N.Y. Misc. LEXIS 357 (N.Y. Fam. Ct. 1999).
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45. *Bates v. Bates*, 2001 Ohio 8743; 2001 Ohio App. LEXIS 5428 (Ohio Ct. App. Dec. 7, 2001).
46. *Conner v. Renz*, 1995 Ohio App. LEXIS 176 (Ohio Ct.App. Jan. 19, 1995); 1994 Ohio App. LEXIS 6079 (Ohio Ct. App. Dec. 29, 1994).
47. *Doerman v. Doerman*, 2002 Ohio 3165; 2002 Ohio App. LEXIS 3183 (Ohio June 24, 2002).
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49. *State v. Koelling*, 1995 Ohio App. LEXIS 1056 (Ohio Ct. App. Mar. 21, 1995).
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APPENDIX C: LAW REVIEW ARTICLES REFERENCING PAS[422]

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3. Dana Royce Baerger et al, *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIMONIAL LAW. 35 (2002).
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5. Mary Becker, *Access to Justice: The Social Responsibility of Lawyers: Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL'Y 63 (2003).
6. Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U.L. REV. 75 (1996).
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21. Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N. DAK. L. REV. 323 (1999).
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23. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (Spring 2002).
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41. Wendy A. Jansen, *Children and the Law: Children and Divorce: How Little We Know and How Far We Have to Go*, 80 MI BAR JNL. 50 (Sept. 2001).
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52. Karl Kirkland, Ph.D., *Advancing ADR in Alabama: 1994–2004: Efficacy of Post-Divorce Mediation and Evaluation Services*, 65 ALA. LAW. 186 (May, 2004).
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63. Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 CT. REV. 12 (Spring 1998).
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65. Joan S. Meier, *Symposium: Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657 (2003).
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71. Daniel Pollack & Susan Mason, *Parenting Plans and Visitation: Mandatory Visitation: In the Best Interest of the Child*, 42 FAM. CT. REV. 74 (Jan. 2004).
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78. Paula D. Salinger, *Review of Selected 2000 California Legislation: Family Law True or False Accusations?: Protecting Victims of Child Sexual Abuse During Custody Disputes*, 32 MCGEORGE L. REV. 693 (Winter 2001).
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87. Jo-Anne M. Stoltz & Tara Ney, *Child Alienation in Divorce: Resistance to Visitation: Rethinking Parental and Child Alienation*, 40 FAM. CT. REV. 220 (April 2002).
88. Matthew J. Sullivan, *A Celebration of Canadian Family Law and Dispute Resolution: Article: Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576 *(*July 2004).
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90. SYMPOSIUM: Collaborative Family Law the Big Picture, *4 Pepp. Disp. Resol. L.J. 401 (*2004).
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92. Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U.L. REV. 111 (1999/2000).
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94. Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE UNIV. L. R. 453 (Fall 2003).
95. Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATRIMONIAL LAW. 131 (2002).
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97. Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (Spring 2000).
98. Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273 (Summer 2003).
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7. Shannon Dean Sexton, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761 (Spring 1999/Spring 2000).
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APPENDIX D: PEER-REVIEWED ARTICLES LISTED ON GARDNER'S WEB SITE

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3. Richard Gardner, *Judges Interviewing Children in Custody/Visitation Litigation*, N.J. Fam. Law., 7(2), 26ff. (1987).
4. Richard Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families: When Psychiatry and the Law Join Forces*, Ct. Rev., 28(l), 14–21 (1991).
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18. Richard Gardner, *The Judiciary's Role in the Etiology, Symptom Development, and Treatment of The Parental Alienation Syndrome (PAS)*, Am. Jrnl. of Forensic Psychol., 21(1), 39–64 (2003).

<http://www.rgardner.com/refs/ar11w.html> (last visited May 25, 2004).

19. Richard Gardner, *The Parental Alienation Syndrome: Past, Present, and Future*, THE PARENTAL ALIENATION SYNDROME: AN INTER-DISCIPLINARY CHALLENGE FOR PROFESSIONALS INVOLVED IN DIVORCE, 89–125 (W. von Boch-Gallhau, U. Kodjoe, W Andritsky, and P. Koeppel, eds., 2003).
20. Richard Gardner, *How Denying and Discrediting the Parental Alienation Syndrome Harms Women*, 121–42 (W. von Boch-Gallhau, U. Kodjoe, W Andritsky, & P. Koeppel, eds., 2003).
21. Richard Gardner, *The Relationship Between the Parental Alienation Syndrome (PAS) and the False Memory Syndrome (FMS)* (in press) (2003).
22. Richard Gardner, *The Three Levels of Parental Alienation Syndrome Alienators* (in press) (2003).
23. Richard Gardner, *The Parental Alienation Syndrome and the Corruptive Power of Anger* (in press) (2004).

Endnotes

[*] Law Guardian, Kings County, N.Y.; J.D., magna cum laude, New York University School of Law, 2003; B.A., Barnard College, Computer Science & Religion, 1986; B.M., Manhattan School of Music, Harp, 1982. The work on Part II. A was funded by a generous grant to the author from the New York University School of Law Furman Fund and sponsored by the Leadership Council on Interpersonal Violence and Child Abuse. I am grateful to Richard Chefetz, Stephanie Dallam, Irene Dorzback, Victoria Eastus, Lynne Henderson, Wendy Murphy, Alan Scheflin, Joyanna Silberg, and the Leadership Council's Board for their support. Thanks to those who provided information and documents: Lauren Allerti, Carol Bruch, Paula Caplan, Ross Cheit, Stephanie Dallam, Thomas Daniel, Dolores dela Fuente, Martha Deed, David Gleaves, David Gray, Pat Judge, The Hon. Steve Leben, Danya Ledford, Sejal Sanghvi, Nancy Spiegel, and Hollida Wakefield. My sincere thanks to the legal and medical professionals who reviewed the article prior to publication: Richard Chefetz, Ross Cheit, Stephanie Dallam, Ronnie Dane, Ward Farnsworth, Paul Fink, Martin Guggenheim, Lynne Henderson, Ray Kimmelman, Wendy Murphy, Alan Scheflin, David Spiegel, and Joyanna Silberg. The author presented a portion of this paper at the May 2004 Law and Society Conference. The views herein, and any mistakes, were and are solely those of the author. This article is dedicated to Darius G., an alienated child.

[1] Mackenzie Carpenter & Ginny Kopas, *Maverick Expert Exerts Wide Influence on Custody Cases,* PITTSBURGH POST GAZETTE, May 31, 1998, *available at* <http://www.post-gazette.com/custody/ partthree.asp>.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565, 807 (Feb. 2000) (citing a New Jersey case involving wife-battering husband whose eight-year-old son refused visitation, expressing fear of the father, but the court-appointed psychologist diagnosed PAS, and the judge forced visitation).

[7] Hanson v. Spolnik, 685 N.E.2d 71, 85 (Ind. App. 1997) (dissent).

[8] *In re* J.F., 694 N.Y.S.2d 592, 600 (N.Y. Fam. Ct. 1999).

[9] *See infra* Part I (discussing the origin and characteristics of PA and PAS).

[10] *See infra* Part II (providing a comprehensive list and description of all precedent-setting cases and law review articles that discuss PAS).

[11] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[12] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593–94 (1993).

[13] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (holding that *Daubert* also applies to "technical" and "other specialized" knowledge and thus novel psychological evidence is governed by *Daubert*).

[14] *See infra* Part III (providing an overview of the evidentiary law governing admissibility and finding that, under these standards, PAS is not admissible in court).

[15] *See infra* Part IV (detailing PAS's theoretical roots and arguing that PAS is antithetical to prevailing public policy).

[16] *See infra* Part V (finding that PAS has been properly held inadmissible and should continue to be excluded from the courtroom).

[17] One PAS proponent states that " [a]ny reasonable and empathetic parent sincerely believes in the value of his or her children having a healthy relationship with both parents," ignoring the negative effects of myriad parental behaviors including infidelity, abandonment, alcohol and drug abuse, domestic violence, physical abuse, sexual abuse, and emotional abuse. Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N. DAK. L. REV. 323, 323 (1999).

[18] Joan B. Kelly & Janet R. Johnston, Special Issue, Alienated Children in Divorce, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM.

CT. REV. 249, 251–54 (2001) (describing a spectrum of types of normal child-parent relationships).

[19] Gardner acknowledged that teenagers exhibit alienation. Richard Gardner, *Does DSM-IV Have Equivalents for the Parental Alienation Syndrome (PAS) Diagnosis?*, 31 AM. J. FAM. THERAPY 1, 2 (2002) [hereinafter Gardner, *DSM-IV*]. Nonetheless, he advocated that recalcitrant teens be placed in psychiatric hospitals or detention centers. Richard Gardner, *The Empowerment of Children in the Development of the Parental Alienation Syndrome*, 20 AM. J. FORENSIC PSYCHOL. 5, 19 (2002) [hereinafter Gardner, *Empowerment of Children*].

[20] Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 530 (2001).

[21] The subject of negative comments can range from issues like allowing sweets before dinner and routine tardiness, to intra-familial violence, adultery, abandonment, and substance abuse. The Clawar & Rivlin study construes all disparaging remarks to be evidence of programming, even if they are objectively true, thus defining all parents as programmers. Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 Fam. L.Q. 273, 289 (Summer 2003) [hereinafter Warshak, *Parental Alienation*].

[22] The judiciary may hold a grave view of disparaging parental remarks, making no distinction between warranted and unwarranted criticism. One judge said: "Your children have come into this world because of the two of you . . . Every time you tell your child what an idiot his father is, or what a fool his mother is . . . you are telling the child that half of him is bad. This is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to their emotions . . . Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or they will suffer." Linda D. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 546 (2001) (citing Burke v. Burke, No. M2000-0111-COA-R3-CV, 2001 WL 921770, at *10 (Tenn. Ct. App. Aug. 7, 2001) (quoting Judge Haas of Walker, Minn.)).

[23] PA is not illegal. Making it illegal would essentially resurrect the obsolete *alienation of affection* tort, replacing parent and child for the two spouses as those who affection would be legally protected. *See* Kathleen Niggemyer, Comment, *Conceiving the Lawyer as Creative Problem Solver: Parental Alienation Is Open Heart Surgery: It Needs More Than a Band-Aid to Fix It*, 34 CAL. W. L. REV. 567, 580–82 (1998); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability,* 27 LOY. L.A. L. REV. 1386, 1387–89 (1994).

[24] Richard Gardner, *Recent Trends in Divorce and Custody Litigation*, ACAD. F. 3, 5 (1985) [hereinafter Gardner, *Recent Trends*].

[25] RICHARD A. GARDNER, TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE xxxvii (1992) [hereinafter GARDNER, TRUE AND FALSE].

[26] Richard Gardner, *Basic Facts About the Parental Alienation Syndrome, Definition of the Parental Alienation Syndrome* (2006), <http://www.rgardner.com/refts/pas_intro.html> [hereinafter Gardner, *Basic Facts*].

[27] *Id.* Richard Warshak, stipulates that PAS is defined by three elements: a *campaign of rejection* or denigration of one parent where such rejection is *unjustified* and the rejection is partly a result of the *"non-alienated" parent's influence*. Richard Warshak, *Current Controversies Regarding Parental Alienation Syndrome*, 19 AM. J. FORENSIC PSYCHOL. 29, 29 (2001).

[28] Richard Gardner, *Child Custody*, *in* 5 BASIC HANDBOOK OF CHILD PSYCHIATRY 243–44 (J.D. Noshpitz ed., 1987) [hereinafter Gardner, *Child Custody*].

[29] Richard Gardner, *The Judiciary's Role in the Etiology, Symptom Development, and Treatment of the Parental Alienation Syndrome (PAS)*, 21 AM. J. FORENSIC PSCYCHOL. 39, 39 (2003) [hereinafter Gardner, *Judiciary*], *available at* <http://www.rgardner.com/refs/ar11w.html>; Gardner, *Basic Facts*, *supra* note 29. Gardner claimed PAS was caused by changes in custody law that increasingly favored joint custody over sole maternal custody. He claimed that, as women faced the risk of losing custody, they and their children developed a pathological mental illness called PAS. While Gardner initially defined PAS in gender-specific terms, defining mothers as alienators, and fathers as the hapless victims of unjustified vilification, he later claimed that either parent could be an alienator. Richard Gardner, *Misinformation Versus Facts About the Contribution of Richard A. Gardner, M.D.* (2002), <http://rgardner.com/refs/misconceptions_versus_facts.html> [hereinafter Gardner, *Misconceptions*].

[30] Richard Gardner, *Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in their Children*, 28 J. OF DIVORCE & REMARRIAGE (1998), *available at* <http://www.rgardner.com/refs/ar3.html> [hereinafter Gardner, *Recommendations*]; Richard Gardner, *Addendum II: Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in Their Children*, 8 ISSUES IN CHILD ABUSE ACCUSATIONS (1996), *available at* <http://www.ipt-forensics.com/journal/volume8/j8_3_6.htm> [hereinafter Gardner, *Recommendations II*].

[31] Richard A. Gardner, *Denial of Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 191, 200 (2002) ("There is no question that follow-up studies of these children will reveal significant psychopathological residua from these early experiences") [hereinafter Gardner, *Denial*]; Richard Gardner, *Differentiating Between the Parental Alienation Syndrome and Bona Fide Abuse/Neglect*, 27 AM. J. FAM. THERAPY 97, 103 (1999) (claiming women with PAS become psychopathic, but only in the sphere of life related to parenting) [hereinafter Gardner, *Differentiating*].

[32] Gardner, *Basic Facts, supra* note 28.

[33] Gardner, *Empowerment of Children*, supra note 21, at 5. If the target parent contributes in any way to the child's alienation it is only due to his passivity. *Id.*

[34] *Id*.

[35] Gardner, *Basic Facts, supra* note 28.

[36] Elrod, *supra* note 25, at 510–11; Gardner, *Misconceptions*, *supra* note 31 (Gardner states that PAS is not in the DSM-IV).

[37] Gardner, *Basic Facts, supra* note 28.

[38] *Id.* Mandated responses to PAS include incarceration, denial of visitation, denial of alimony, and denial of custody. Richard Gardner, *Differential Management and Treatment of the Three Levels of Parental Alienation Syndrome (PAS) Alienators for Each of the Child's Symptom Levels, Introductory Material: Parental Alienation Syndrome Diagnosis and Treatment Tables* (2006), <http://www.rgardner.com/refs> [hereinafter Gardner, *Differential Management*].

[39] *See* Appendix B, *supra*.

[40] *See* Appendix C, *supra*.

[41] *See, e.g.* People v. Sullivan, Nos. H023715, H025386, 2003 WL 1785921, at *12 (Cal. Ct. App. Apr. 3, 2003) (noting an expert's claim that he testified about PAS in more than twenty cases, none of which are reported).

[42] *See* Elizabeth P. Coughter & Ronald R. Tweel, *Family Law*, 37 U. RICH. L. REV. 155, 156 (2002) (noting the defeat of two Virginia legislative initiatives to force judges to consider PAS in custody cases: H.B. 417, Va. Gen. Assembly (Reg. Sess. 2002) and H.B. 1132, Va. Gen. Assembly (Reg. Sess. 2002)).

[43] *See Last Chance Video: In Austin, Dallas, Houston, and San Antonio*, 64 TEX. B. J. 1023, 1023 (2001) (advertising a Texas Continuing Legal Education course on PAS).

[44] Ron Neff & Kat Cooper, *Progress in Parent Education: Parental Conflict Resolution: Six-, Twelve-, and Fifteen-Month Follow-Ups of a High-Conflict Program*, 42 FAM. CT. REV. 99, 99 (2004).

[45] *Id.*

[46] *In re* Rosenfeld, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994) (noting that children suffered while parents engage in emotional "warfare").

[47] Loll v. Loll, 561 N.W.2d 625, 629 (N.D. Ill. 1997) (observing the two spouses' mutual efforts perpetuating "unnecessary conflict"); Tucker v. Greenberg, 674 So. 2d 807, 808 (Fla. Dist. Ct. App. 1996) (observing that mutual ill-will between the divorced parents rendered visitation a "vexatious problem"); *Rosenfeld*, 524 N.W.2d at 213 (observing that both parents have "engaged in childish behavior," attributed "outrageous behavior" to each other, and "focused on building a case against the other").

[48] Case v. Richardson, No. FA 910446348S, 1986 LEXIS 1836 (Conn. Super. Ct. July 16, 1996) (involving a welfare mother diagnosed with Munchhausen by Proxy Syndrome who accused the three fathers of her children with sexual abuse).

[49] Finster v. Finster, No. 02-3060, 2003 LEXIS 788 (Wisc. Ct. App. Aug. 26, 2003) (domestic violence); Smith v. Smith, No. FA 010341470S, 2003 Conn. Super. LEXIS 2039 (Conn. Super. Ct. July 15, 2003) (domestic violence); *In re* Condon, 73 Cal. Rptr. 2d 33, 47 (Cal. Dist Ct. App. 1998) (domestic violence); *In re* John W., 48 Cal. Rptr. 2d 899, 900 (Cal. Dist Ct. App. 1996) (child sex abuse); State v. Koelling, Nos. 94APA06-866 and 94APA06-868, 1995 Ohio App. LEXIS 1056 (Ohio Ct. App. Mar. 21, 1995) (child sex abuse); Conner v. Renz, No. 93CA1585, 1995 Ohio App. LEXIS 176 (Ohio Ct. App. Jan. 19, 1995) (child sex abuse); McCoy v. State, 886 P.2d 252 (Wyo. 1994) (child sex abuse).

[50] *In re* Karen B., 574 N.Y.S.2d 267, 270 (N.Y. Fam. Ct. 1991) (weighing the consequences of exposing the child to future abuse against the consequences of denying a falsely accused parent a relationship with his child).

[51] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 585 (1993).

[52] *Id.* at 589 (noting that, under the Federal Rules of Evidence, prior to admission, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

[53] Gardner, *Basic Facts, supra* note 28.

[54] *See* Appendix B, *supra*.

[55] People v. Fortin (*Fortin II*), 289 A.D.2d 590, 591 (N.Y. App. Div. 2001); People v. Fortin (*Fortin I*), 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000); People v. Loomis, 658 N.Y.S.2d 787, 787 (N.Y. Co. Ct. 1997).

[56] *Loomis*, 658 N.Y.S.2d at 788.

[57] *Id.*

[58] *Id.* at 788–89.

[59] *Fortin II*, 289 A.D.2d at 591–92; *Fortin I*, 706 N.Y.S.2d at 612.

[60] *Fortin I*, 706 N.Y.S.2d at 612.

[61] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *See infra* Part III.A (discussing the admissibility standard established by *Frye*).

[62] *Fortin I*, 706 N.Y.S.2d at 613–14.

[63] *Fortin II*, 289 A.D.2d at 591.

[64] *Id.*

[65] Gardner, *Basic Facts, supra* note 28; Gardner, *Misconceptions, supra* note 31.

[66] Gardner, *Basic Facts, supra* note 28; Gardner, *Misconceptions, supra* note 31. Gardner was familiar with the concept of legal precedent, having spent 98–99% of his professional practice conducting "forensic analysis and testimony." *Fortin II*, 706 N.Y.S.2d at 612. Throughout the website, Gardner consistently used "court recognition" and "accepted by the court" as synonyms for "precedent bearing." Gardner, *Basic Facts, supra* note 28; Gardner, *Misconceptions, supra* note 31.

[67] I was unable to locate many of the decisions or cases Gardner cited. Where I could not locate cases based on his citation, I have used the citation information he provided. *See supra* Appendix A. Gardner cited the following cases, but I could not find them: Berry v. Berry, No. DR-96-761.01 (Ala. Cir. Ct. 2001); Oosterhaus v. Short, No. 85DR1737-Div III (Colo. Dist. Ct.); Loten v. Ryan, No. CD 93-6567 FA (Fla. Cir. Ct. 2000); Boyd v. Kilgore, 773 So. 2d 546 (Fla. Dist. Ct. App. 2000) (see discussion *infra* Part II.A); Tetzlaff v. Tetzlaff, No. 97D-2127 (Ill. Dom. Rel. Ct. Mar. 20, 2000); Wilkins v. Wilkins, No. 90792 (La. Fam. Ct. Nov. 2, 2000); Lubkin v. Lubkin, 92-M-46LD (N.H. Dist. Ct. Sept. 5, 1996); Lemarie v. Oliphant, No. FM-15-397-94 (N.J. Ch. Dec. 11, 2002); Sidman v. Zager, No. V-1467-8-9-94 (N.Y. Fam. Ct.); Waldrop v. Waldrop, No. 138517 (Va. Cir. Ct. April 26, 1999); Rich v. Rich, No. 91-3-00074-4 (Wa. Super. Ct. June 11, 1993).

Gardner cited the following cases and articles that were not published or were published without a written opinion: McDonald v. McDonald, No. D-R90-11079 (Fla. Cir. Ct. 2001) (published without written opinion); Blackshear v. Blackshear, No. 95-08436 (Fla. Dist. Ct.) (reported decision without a written opinion); Rosen v. Edwards, N.Y.L.J., Dec. 11, 1990, at 27-28 (unpublished in any reporter*); Oliver V. v. Kelly V., Husband is Entitled to Divorce Based on Cruel and Inhuman Treatment,* N.Y.L.J., 25 (2000) (unpublished in any reporter); Popovice v. Popovice, No. 1996-C-2009 (Pa. Ct. Com. Pl. 1999) (unpublished decision without a written opinion); *Matter of A.R. (S.E.), Rather Than Custody to Father, Court Orders Family Therapy*, N.Y.L.J., 21 (1990) (unpublished in any reporter); Janell S. v. J.R.S., 571 N.W.2d 924 (Wis. App. 1997) (unpublished and uncitable under local rules); Fischer v. Fischer, 584 N.W.2d 233 (Wis. 1998) (unpublished and uncitable under local rules). Once again, I used the citations he provided.

Gardner cited the following cases that were published with written opinions: Metza v. Metza, No. FA 920298202S, 1998 Conn. Super LEXIS 2727 (Conn. Super. Ct. Sept. 25, 1998) (denying father's motion for a change of custody, and reporting an expert's claim of partial PAS, with contributions from both parents); Case v. Richardson, No. FA 910446348S, 1996 Conn. Super. LEXIS 1836 (Conn. Super. Ct. July 16, 1996) (transferring custody to father in a case where mother was diagnosed with PAS and Munchausen by Proxy Syndrome); *In re* Amber Spencley, No. 219801, 2000 Mich. App. LEXIS 1770 (Mich. Ct. App. Apr. 7, 2000) (Gardner cites this as *Spencley v. Spencley*) (claiming mother waived issue of PAS admissibility by failing to challenge it at trial, and that PAS was not used as a theory, but to describe her behavior)*; Ange v. Chesapeake Dep't of Human Serv.*, No. 0676-97-1, 1998 Va. App. LEXIS 59 (Va. Ct. App. Feb. 3, 1998) (affirming placement of children with foster parents after termination of paternal parental rights).

[68] While it is beyond the scope of this article to analyze the effect of increased access to unpublished, unprecedential decisions, the influence of easy access to such decisions on subsequent decisions and the creation of precedent may be substantial. The proper use of unpublished decisions, whether for persuasion or analogy, depends on local rules of practice. Even lacking binding authority, their influence through persuasion or analogy, cornerstones of common law practice and precedential evolution, may be significant. While such decisions were once difficult to obtain, LEXIS and WESTLAW's publication of unreported decisions has facilitated access, perhaps resulting in a blurring of the traditional bright line of precedent by increasing the practical reliance on unreported decisions. This effect may be disproportionate in courts that are overburdened and under funded, like family courts and criminal courts. Reliance on these decisions may be a time-saving device for an overburdened judiciary, resulting in unquestioning adoption of arguments and analysis of uncertain quality. While the presentation of uncontested novel scientific testimony does not set a precedent of admissibility, its use in unpublished decisions may thus foster further circumvention of evidentiary admissibility standards. This article does not provide analysis of all unpublished decisions involving PAS primarily due to the difficulties in compiling a complete set of such cases. However, the influence of unreported decisions on precedent and practice should not be overlooked.

[69]Truax v. Truax, 874 P.2d 10 (Nev. 1994); McCoy v. State, 886 P.2d 252 (Wyo. 1994); Chambers v. Chambers, No. CA99-688, 2000 Ark App. LEXIS 476, at *1 (Ark. Ct. App. June 21, 2000); Pathan v. Pathan, No. 17729, 2000 Ohio App. LEXIS 119 (Ohio Ct. App. Jan. 21, 2000); Bates v. Bates, No. 2000-A-0058, 2001 Ohio App. LEXIS 5428 (Dec. 7, 2001); *In re* John W., 48 Cal. Rptr. 2d 899, 900 (Cal. Ct. App. 1996);White v. White, 655 N.E.2d 523, 526 (Ind. Ct. App. 1995); Conner v. Renz, No. 93 CA 1585, 1995 Ohio App. LEXIS 176 (Ohio Ct. App. Jan. 19, 1995); State v. Koelling, Nos. 94APA06 and 94APA06-868, 1995 Ohio App. LEXIS 1056 (Ohio Ct. App. Mar. 21, 1995); Krebsbach v. Gallagher, 587 N.Y.S.2d 346, 349 (N.Y. App. Div. 1992); Sims v. Hornsby, No. CA 92-01-007, 1992 Ohio App. LEXIS 4074 (Ohio Ct. App. Aug. 10, 1992); Toto v. Toto, No. 62149,1992 Ohio App. LEXIS 157 (Ohio Ct. App. Jan. 16, 1992) (cited by Gardner as *Zigmont v. Toto*); *In re* Violetta B., 568 N.E.2d 1345, 1346 (Ill. App. Ct. 1991); *In re* Karen B., 574 N.Y.S.2d 267, 268 (N.Y. Fam. Ct. 1991).

[70] None of these decisions contested admissibility.

In *Pisani v. Pisani*, custody was awarded to the father and the appellant mother temporarily lost visitation due to her unspecified "behavior." No. 74373, 1998 Ohio App. LEXIS 4421, at *11–*12 (Ohio Ct. App. 1998). She was subsequently granted supervised visitation. *Id.* The court-appointed psychologist diagnosed the children with PAS. *Id.*

In *Blosser v. Blosser*, the only mention of PAS in the appeal is in the final report by the psychologist who interviewed the parties. She stated that the children showed no signs of PAS "which is sometimes seen with children who are shunted between separated parents in divorce situations." 707 So. 2d at 780 (Fla. Dist. Ct. App. 1998). The report further states that the child exhibited "loving, caring, affectionate relationships with Mother, Father, and her stepmother." *Id.*

In re Marriage of Edlund involved a divorced father's opposition to the mother's petition to move to another state with their child. 78 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1998). PAS is mentioned only in a parenthetical reference to another case in which the divorced mother was permitted to move out of state with her children "despite" the father's expert's offer of testimony regarding PAS. *Id.* at 683 (referencing *In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 44 (Cal. Ct. App. 1998).

Ochs v. Martinez, discussed the admissibility of certain types of expert testimony about "general characteristics of child victims," contrasting these types of testimony with "credibility testimony," which is inadmissible. 789 S.W.2d 949, 958 (Tex. Ct. App. 1990) (cited by Gardner as *Ochs et al v. Myers*). The court cites *Allison* which held "child sexual abuse accommodation syndrome" was admissible based on the expert testimony of three clinical experts who described the syndrome. Allison v. State, 346 S.E.2d 380, 385 (Ga. Ct. App. 1986). The court mentions Gardner's precursor of PAS, the Sex Abuse Legitimacy Scale ("SALS"), as an example of material that is admissible as expert testimony, but cited no cases supporting the admissibility of SALS. *Ochs* refers to SALS only in dicta, and to PAS only in a footnote.

Schutz v. Schutz references PAS only in a footnote citing another footnote. 522 S.2d 874, 875 n.3 (Fla. Dist. Ct. App. 1988). The court's supplied emphasis in this footnote highlights Gardner's claim that, "The parent who expresses neutrality regarding visitation is essentially communicating criticism of the non-custodial parent." While Gardner claims that the decision set precedent on the admissibility of PAS, *Schutz* did not involve PAS, a fact that was specifically noticed by another court. *In re* T.W.M., 553 So. 2d 260, 262 (Fla. Dist. Ct. App. 1989) (noting that the *T.W.M.* expert claimed PAS was the subject of at least one reported Florida case, citing *Schutz*, but observing that PAS was not the "subject" of *Schutz*, but rather the subject of "a *footnote to a footnote*" in a case in which Gardner's texts were the only authority referenced with respect to the syndrome).

The court in *Coursey v. Superior Court* mentions that the teen-aged daughter's therapist claimed that the child suffered from PAS. 239 Cal. Rptr. 365, 366 (Cal. Ct. App. 1987). PAS is not addressed, alleged, or contested in the appeal.

In *Pearson v. Pearson*, the trial court heard testimony from two experts, both of whom agreed PAS could occur, but disagreed about whether it had occurred in the instant case. 5 P.3d 239, 243 (Alaska 2000). The appellate court noted that "[PAS] is not universally accepted." *Id.* The court found the mother's expert more credible, and found no evidence that she was attempting to alienate the children from their father. *Id.* Neither party contested the admissibility of PAS. *Id.*

In *In re J.F.*, two children were diagnosed by two expert witnesses as suffering from PAS, but the decision does not rely on PAS, nor does it address the admissibility of PAS. 694 N.Y.S.2d 592, 594 (N.Y. Fam. Ct. 1999). The court noted that PAS is a "controversial" theory, and that, in custody and visitation cases, New York courts, "rather than discussing the acceptability of PAS as a theory, have discussed the issue in terms of whether the child has been programmed to disfavor the noncustodial parent, thus warranting a change in custody." *Id.* The decision thus focuses heavily on weighing the allegations of the mother's alleged interference with visitation, ultimately

finding she "poisoned" the children against their father, and awarding him sole custody. *Id.* at 599–600.

[71] *In re* Marriage of Divelbiss, 719 N.E.2d 375, 379 (Ill. App. Ct. 1999). In *Divelbiss*, the court-appointed psychologist found the child was suffering from PAS against her father. The child testified that she did not want to live at her father's house. *Id.* at 380. The mother unsuccessfully appealed, arguing that the expert had not testified within the guidelines of his profession. *Id.* at 384.

[72] Tucker v. Greenberg, 674 So. 2d 807 (Fla. Dist. Ct. App. 1996). *Tucker* involved allegations that mutual ill-will between the divorced parents rendered visitation a "vexatious problem." *Id.* at 808. The father's petition for a modification of custody based on substantial changes in circumstances was granted by the trial court and upheld by the appellate court. *Id.* at 808–09. The appeal mentions expert testimony, but does not cite any experts or the nature of their testimony. *Id.* at 808. The court specifically mentions conflicts in expert testimony, and testimony that the children "would suffer adverse effects from the parents' behavior regardless of residency." *Id.* In upholding the trial court's modification, the appellate court noted that the trial court could have corrected the wife's behavior through contempt proceedings instead of a change of custody, but refused to substitute their perception of the testimony and other evidence for that of the trial court. *Id.* at 809. The decision does not mention PAS.

[73] *In re* Marriage of Bates, 794 N.E.2d 868, 871 (Ill. App. Ct. 2003); Perlow v. Berg-Perlow, 816 So. 2d 210, 215 (Fla. Dist. Ct. App. 2002); *In re* Marriage of Rosenfeld, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994); Karen "PP" v. Clyde "QQ", 602 N.Y.S.2d 709, 710 (N.Y. App. Div. 1993).

[74] *Bates*, 794 N.E.2d at 870–71 (unpublished in part). Gardner cites this case as: *Bates v. Bates* Case No. 99D958 (18th Judicial Circuit, Dupage County, IL, Jan. 17, 2002). The appellate court mentioned the determination of the admissibility of PAS in the background section of the decision, not in the published holdings. *Id.* at 871–74 (granting in part and denying in part petitioner's motion to strike portions of respondent's cross reply brief, denying respondent's motion to dismiss the appeal for lack of jurisdiction, affirming the award of custody to father, and affirming the judgment declining to terminate unallocated support).

[75] *Id.* at 871.

[76] *Berg-Perlow*, 816 So. 2d at 215.

[77] *Id.*

[78] *Rosenfeld*, 524 N.W.2d at 215 (affirming transfer of physical care to the children's mother).

[79] Karen "PP" v. Clyde "QQ", 602 N.Y.S.2d 709, 710 (N.Y. App. Div. 1993), *aff'g* Karen B. v. Clyde M., 574 N.Y.S.2d 267 (N.Y. Fam. Ct. 1991). For an excellent discussion of the problems that arise when judges fail to assess the scientific validity of evidence presented by scientific experts, *see* Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the* Daubert *Era*, 59 U. MIAMI L. REV. 1 (2004).

[80] Richard A. Gardner, *Basic Facts About the Parental Alienation Syndrome: Recognition of PAS in Courts of Law*, <http://www.rgardner.com/refs/pas_intro.html> (last visited February 7, 2006) [hereinafter Gardner, *PAS in Courts*].

[81] *Id.*

[82] Kilgore v. Boyd, 798 So. 2d 735 (Fla. Dist. Ct. App. 2001) (denying Petitioner's petition for writ of prohibition and emergency motion for stay, and Respondent's motion to strike and motion for attorney fees and costs), *aff'g* 783 So. 2d 257 (Fla. Dist. Ct. App. 2001) (denying Petitioner's petition for writ of certiorari and motion for appellate attorneys' fees and costs, and Respondent's motion to dismiss and motion for appellate attorneys' fees and costs, and lifting stay entered by the court Dec. 22, 2000); Kilgore v. Boyd, 773 So. 2d 546 (Fla. Dist. Ct. App. 2000) (denying Petitioner's writ of prohibition).

[83] A LEXIS search conducted on January 26, 2006 searching for "parent! w/3 alien! w/3 syndrom!" in all U.S. Law Reviews and Journals yielded 118 articles.

[84] In contrast, "battered woman syndrome," a well-documented syndrome, is referenced in 1320 law reviews and 1274 reported cases, "false memory syndrome," another alleged psychological syndrome, is referenced in ninety-seven law reviews and forty-five reported cases, and "shaken baby syndrome" is referenced in eighty-six law reviews and 809 reported cases. LEXIS searches 1/26/06 on "false w/3 memor! w/3 syndrom!", "batter! w/3 wom! w/3 syndrom!", and "shak! w/3 bab! w/3 syndrom!" in all law reviews and all state and federal courts.

[85] *Infra* nn. 89–105.

[86] Stephanie N. Barnes, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 626 (1999) (claiming sole custody increases the risk of PAS); Alison Beyea & Frank D'Alessandro, *Guardians Ad Litem in Divorce and Parental Rights and Responsibilities Cases Involving Low-Income Children*, 17 MAINE B. J. 90 (2002) (citing PAS as a characteristic of high conflict disputes based on CARLA B. GARRITY & MITCHELL A. BARRIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH CONFLICT DIVORCE 43 (1994); Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to be Used by Judges,*

Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases, 22 U. ARK. LITTLE ROCK L. REV. 501, 516–18 (2000) (acknowledging the lack of empirical evidence for PAS, but claiming it satisfies their undefined criteria for "scientific approach" and claiming that when an abused child makes negative comments about a parent, it is because "alienation ploys are usually lurking behind the scenes," for example, "the child is actually upset about something trivial that happened recently, i.e., the parent would not allow the child to see a certain movie"); Kimberly B. Cheney, Feature, *Joint Custody: The Parents' Best Interests are in the Child's Best Interests*, 27 VER. B. J. & L. DIG. 33, 35 (2001) (citing Gardner in support of the claim that mothers can lose custody if their anger rises to the level of actively alienating the child; also describing mothers as more likely to be angry during divorce); Rhonda Freeman, *Parenting After Divorce: Using Research to Inform Decision-Making About Children*, 15 CAN. J. FAM. L. 79, 104–06 (1998) (citing Gardner's work and presuming its validity); Renee Goldenberg & Nancy S. Palmer, *Guardian Ad Litem Programs: Where They Have Gone and Where They are Going*, 69 FLA. B. J. 83, 87 (1995) (citing Gardner's work in regard to GAL duties); Stephen R. Henley, Military Justice Symposium I, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, 1997 ARMY LAW. 92, 104 n.143 (1997) (citing Gardner's PAS work claiming that the "vast majority" of children who voice sex abuse allegations are "fabricators"); Barbara L. House, Comment, *Considering the Child's Preference in Determining Custody: Is It Really in the Child's Best Interest?*, 19 J. JUV. L. 176, 181, 188–94 (1998) (accepting Gardner's claims about PAS, and using them as the basis for guidance to the judiciary); Wendy A. Jansen, *Children and the Law: Children and Divorce: How Little We Know and How Far We Have to Go*, 80 MICH. B. J. 50, 52–53 (2001) (juxtaposing the increase in child sex abuse allegations and an alleged increase in PAS cases in an argument for presumptive joint custody); Alan J. Klein, *Forensic Issues in Sexual Abuse Allegations in Custody/Visitation Litigation*, 18 L. & PSYCHOL. REV. 247, 250 (1994) (uncritically citing Gardner's assertion that most claims of child abuse are unfounded); Douglas D. Knowlton & Tara Lea Muhlhauser. *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N. DAK. L. REV. 255, 257 (1994) (citing Gardner's claim that false child abuse allegations and PAS are common results of high conflict divorces); Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 211 n.8 (1995) (citing Gardner's work on PAS in a footnote on the difficulty of estimating the actual percent of false sexual abuse allegations); Louann C. McGlynn, Case Comment, *Parent and Child—Custody and Control of Child: Parental Alienation: Trash Talking The Non-Custodial Parent is Not Okay* Hendrickson v. Hendrickson, 2000 ND 1, 603 N.W.2D 896, 77 N. DAK. L. REV. 525, 532–37 (2001) (applying PAS to a case where the father had essentially abandoned the children prior to the divorce); Cynthia A. McNeely, Comments, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 894 n.15 (1998) (claiming that the effect of gender stereotypes on custody disputes harms the father-child relationship and the child, citing Gardner's identification of parental alienation syndrome, defining PAS as one parent "brainwashing" the child to reject the other parent); Daniel Oberdorfer, Larson v. Dunn: *Toward a Reasoned Response to Parental Kidnapping*, 75 MINN. L. REV. 1701, 1707 n.42 (1991) (citing Gardner for the proposition that, like parental kidnapping, bitter divorces lead to PAS and are bad for children; and focusing on a case in which both domestic violence and child sex abuse were alleged and the father claimed the mother was a liar and was given custody); Daniel Pollack & Susan Mason, *Parenting Plans and Visitation: Mandatory Visitation: In the Best Interest of the Child*, 42 FAM. CT. REV. 74, 81–82 (2004) (citing Gardner to support proposition that in intact families it is ideal to maximize the participation of both parents in a child's life); Heather J. Rhoades, Note and Comment, Zamstein v. Marvasti: *Is a Duty Owed to Alleged Child Sexual Abusers?*, 30 CONN. L. REV. 1411, 1411–12 n.3 (1998) (citing John Myers in article claiming that there is a substantial problem of false child sex abuse reports made during divorce, but also stating the reporting rate is two to seven percent of divorce cases); Shannon Dean Sexton, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 775 (1999–2000) (citing PAS as "[o]ne of the greatest dangers to a child of divorce"); Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308, 319 nn.67–69 (1997) (designating PAS as an abducting parent speaking negatively about the other); Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION CTS. REV. 487 (1999) (ABA prize-winning article accepting Gardner's claims and concluding that mediation will not work in PAS cases).

[87] J. Michael Bone & Michael R. Walsh, Family Law: *Parental Alienation Syndrome: How to Detect It and What to Do About It*, 73 FLA. B. J. 44, 48 (1999); Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N. DAK. L. REV. 323, 323–38 (1999) (reformulating PAS based on his book, focusing solely on any interruption of the child's relationship with the parent, and presuming that, regardless of domestic violence or real abuse, contact ought to be encouraged); Trish Oleksa Haas, *Child Custody Determinations in Michigan: Not in the Best Interests of Children or Parents*, 81 U. DET. MERCY L. REV. 333, 338 (2004) (citing to Bone and Walsh that it is best for children to have close relationships with both their parents); Karl Kirkland, *Advancing ADR in Alabama: 1994–2004: Efficacy of Post-Divorce Mediation and Evaluation Services*, 65 ALA. LAW. 187, 192–93 (2004) (citing only Gardner's self-published work in claiming that PAS is increasingly accepted); Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATRIMONIAL LAW. 131, 132–50 (2002); Michael R. Walsh & J. Michael Bone, *Family Law: Parental Alienation Syndrome: An Age-Old Custody Problem*, 71 FLA. B. J. 93, 93–96 (1997); Richard A. Warshak, *Social Science And Children's Best Interests In Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 102–09 (2000); Warshak, *supra* note 24, at 277–303.

[88] Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 136–37 (2000).

[89] Coughter & Tweel, *supra* note 45, at 156 (noting defeat of two Virginia legislative initiatives to force judges to consider PAS in custody cases, H.B. 417, Va. Gen. Assembly (Reg. Sess. 2002); H.B. 1132, Va. Gen. Assembly (Reg. Sess. 2002)); Robert E. Shepherd, Jr., *Legal Dispute Resolution in Child Custody: Comments on Robert H. Mnookin's "Resolving Child Custody Disputes" Conference Presentation I,* 10 VA. J. SOC. POL'Y & L. 89, 95 n.23 (2002) (citing HB 417, 2002 Gen. Assem. of Va. (Va. 2002) which added factors, including parental alienation syndrome, to be considered by a court in making a custody decision).

[90] Book Review, 76 FLA. B. J. 76, 77 (2002) (summarizing DEAN TONG, ELUSIVE INNOCENCE: A SURVIVAL GUIDE FOR THE FALSELY ACCUSED (2002), which discusses PAS in the context of distinguishing between true and false child abuse and domestic violence allegations); The Resource Page: Focus on Domestic Violence: Books, 39 CT. REV. 50, 50 (2002) (describing PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2002), a custody dispute resolution book that includes a discussion of PAS).

[91] *Last Chance Video: In Austin, Dallas, Houston, and San Antonio*, 64 TEX. B. J. 1023, 1023 (2001) (advertising a Texas CLE course on PAS).

[92] Case Comment, *North Dakota Supreme Court Review*, 77 N. DAK. L. REV. 589, 620 (2001) (noting PAS was alleged in *Hendrickson v. Hendrickson*, 603 N.W.2d 896, 898 (N.D. 2000)); *Recent Cases*, 35 U. OF LOUISVILLE J. OF FAM. L. 857, 871 (1996–1997) (briefing White v. White, 655 N.E.2d 523 (Ind. Ct. App. 1995)).

[93] Janet R. Johnston & Joan B. Kelly, *Guest Editorial Notes*, 39 FAM. CT. REV. 246, 246 (2001) (introduction to special volume on "Alienated Children in Divorce," which claims to investigate both alienation based on abuse, and alienation based on parental programming); Andrew Schepard, *Editorial Notes*, 39 FAM. CT. REV. 243, 243 (2001) (highlighting the critical importance of an interdisciplinary and collaborative approach to addressing controversial family law problems); Andrew Schepard, Editorial Note, *The Last Issue of the Twentieth Century*, 37 FAM. & CONCIL. CTS. REV. 419, 420 (1999) (citing Vestal article in editorial overview of journal's contents).

[94] Veronica B. Dahir et al., *Judicial Application of* Daubert *to Psychological Syndrome and Profile Evidence: A Research Note*, 11 PSYCH. PUB. POL. & L. 62, 71 (2005) (finding that judges generally admit expert testimony, citing the expert's qualifications, the syndrome's general acceptance, and relevance of PAS to foundational issues in the case as the factors they consider); Robert J. Goodwin, *Fifty Years of* Frye *in Alabama: The Continuing Debate Over Adopting the Test Established in* Daubert v. Merrell Dow Pharmaceuticals, Inc., 35 CUMB. L. REV. 231, 253 n.98 (2004–2005) (citing PAS's admissibility under Frye as undetermined in the context of *C.J.L. v. M.W.B*, 879 So. 2d 1169 (Ala. Civ. App. 2003)); Ramsey & Kelly, *supra* note 82, at 2–36 (discussing the practical problems of judges' failure to assess the scientific validity of testimony by social science experts testifying under the gloss of scientific knowledge).

[95] Elizabeth C. Barcena, Kantaras v. Kantaras: *How a Victory for One Transsexual May Hinder the Sexual Minority Movement*, 12 BUFF. WOMEN'S L.J. 101 (2003–2004); Symposium, *Collaborative Family Law: The Big Picture*, 4 PEPP. DISP. RESOL. L.J. 401, 464 (2004).

[96] Barbara A. Atwood, Symposium, *Hearing Children's Voices: The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 630 n.3 (2003) (citing Barbara House article for proposition that judges must investigate causes of PAS); Jerry A. Behnke, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28

LOY. L.A. L. REV. 699, 739 n.317 (1995) (citing Cheri Wood's article for the claim that judges' discretion in best interest inquiries has sometimes harmed children); Bruch, *supra* note 22, *passim*; June Carbone, *Has the Gender Divide Become Unbridgeable? The Implications for Social Equality*, 5 J. GENDER RACE & JUST. 31, 56–57 (2001) (analyzing changes in gender equity during divorce, focusing on Mary Ann Mason, *The Custody Wars: Why Children are Losing the Legal Battle and What We Can Do About It* (1999), which notes that Gardner's theory has "won an audience" in describing the historical favoring of an abusive father's rights over the best interests of the child, the strategy of abusive father to claim that abuse allegations are false, and blaming maternal "alienation" in order to gain custody); June Carbone, Symposium, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1113 (1999) (noting that joint custody laws grew out of fathers' lobbying against ex-wives they claimed sought sole custody as a manifestation of PAS, and that under most joint custody arrangements, the mothers provide the vast majority of actual child care); Karen Czapanskiy, Symposium, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 1017 n.133 (1999) (noting that PAS can be used to enforce visitation rights even when the father's conduct vis a vis his children is substandard); Elrod, *supra* note 25, at 511–12 (describing alienation as a symptom of serious familial problems, and noting that there is debate about whether alienation is a syndrome); Daniel J. Hynan, *Parent-Child Observations in Custody Evaluations*, 41 FAM. CT. REV. 214, 215 (2003) (citing Kelly's reformulation); Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 462–63 (2000) (noting that therapists working only with one parent may arrive at differential diagnoses based on the claims of their clients, juxtaposing diagnosis of an abused child with PAS) [hereinafter Johnston, *Multidisciplinary Professional Partnerships*]; Janet R. Johnston et al., Special Issue, *Alienated Children in Divorce: Therapeutic Work With Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 316 (2001) (describing Gardner's treatment mandates as "coercive and punitive"); Kelly & Johnston, *supra* note 20, at 249–51, 258 (noting Gardner's PAS is tautological, lacks empirical evidence, and cannot be considered a diagnostic syndrome, and assuming that even in child abuse cases, "normal" parents will not encourage the complete rejection of the abusive parent); Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 371 n.323 (1994) (noting that parents may use claims of PAS to subvert the value of a child's expressed custody choices, and advising courts against admitting such claims without a steep evidentiary showing); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 154 nn.145, 147 (2002) (self-citing to 39 FAM. CTS. REV. 249 at 251 in support of claim that children who are "pathologically alienated" may, unlike most children, want and enjoy the power of a judge's attention during a private interview in chambers, while most children will find such a situation psychologically "untenable"); Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 41 n.46 (2002) (noting that post-divorce parental relocation does not generally involve hidden spiteful motives or PAS); Anita K. Lampel, *Child Alienation in Divorce: Assessing for Alienation and Access in Child Custody Cases: A Response to Lee and Olesen*, 40 FAM. CT. REV. 232, 232 (2002) (noting that children may be "alienated or realistically estranged," citing Kelly's reformulation of PAS); S. Margaret Lee & Nancy W. Olesen, Special Issue, *Alienated Children in Divorce: Assessing for Alienation in Child Custody and Access Evaluations*, 39 FAM. CT. REV. 282, 283 (2001) (noting that PAS creates oversimplified evaluations of family dynamics); Ron Neff & Kat Cooper, *Progress in Parent Education: Parental Conflict Resolution: Six-, Twelve-, and Fifteen-Month Follow-Ups of a High-Conflict Program*, 42 FAM. CT. REV. 99, 99–100 (2004) (citing controversy over Gardner's designation of PAS as a "clinical syndrome"); Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401, 2454 n.150 (1995) (citing Gardner and Cheri L. Wood regarding judicial intervention aimed at supporting whichever parent will foster the child's relationship with the other parent); Jo-Anne M. Stoltz & Tara Ney, *Child Alienation in Divorce: Resistance to Visitation: Rethinking Parental and Child Alienation*, 40 FAM. CT. REV. 220, 220 (2002) (analyzing a reformulation of Gardner's PAS, which the authors describe as "simplistic"); Matthew J. Sullivan & Joan B. Kelly, Special Issue, *Alienated Children in Divorce: Legal and Psychological Management of Cases With an Alienated Child*, 39 FAM. CT. REV. 299, 312 (2001) (citing Gardner for proposition that some child alienation cases are unlikely to respond to intervention); TJAGSA Practice Notes, Family Law Note, *A QuickLook at Parental Alienation Syndrome*, 2002 ARMY LAW. 53, 53–54 (2002) (noting controversy about validity of PAS as well as frequent appearance in court); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52

U. MIAMI L. REV. 79, 127 n.154 (1997) (calling Gardner's PAS theory "controversial"); Lewis Zirogiannis, Student Note: Special Issue, *Alienated Children in Divorce: Evidentiary Issues With Parental Alienation Syndrome*, 39 FAM. CT. REV. 334, *passim* (2001) (arguing that PAS is inadmissible under *Daubert* because, as social-science evidence, rather than technical evidence, it must satisfy empirical testing).

[97] Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75, 145–46 (1996) (citing PAS as one of many syndromes purporting to diagnose the truth or falsity of abuse allegations, used by expert witnesses to "diagnose" truthfulness); Thea Brown, Special Issue: Separated and Unmarried Fathers and the Courts, *Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce*, 41 FAM. CT. REV. 367, 370–71 (2003) (PAS stereotype of falsely accused father is unsupported by research); Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce,* 22 U. ARK. LITTLE ROCK L. REV. 429, 431 (2000) (noting that health professionals have taken Gardner's claims at face value, despite the lack of empirical evidence for PAS); Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 513 n.134 (1997) (citing increased pressure to disprove children who report sexual abuse, and Gardner's claim that those who falsely report suffer from PAS); Joy Lazo, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1350 n.25, 1360 n.82 (1995) (citing Cheri Wood's article in regards to PAS as a scientifically unfounded means of attacking child sex abuse claims); Theo S. Liebmann, *Confidentiality, Consultation, and the Child Client*, 75 TEMPLE L. REV. 821, 834–35 (2002) (discussing a hypothetical case involving a sexually abusive father's counterclaim that the sex abuse allegations resulted from PAS, and citing Bruch on lack of acceptance of PAS in the scientific community); John E. B. Myers, *New Era of Skepticism Regarding Children's Credibility*, 1 PSYCH. PUB. POL. & L. 387, 392 (1995) (citing Gardner's claim that most children fabricate child sex abuse as an "inflammatory statement"… "at the margin of responsibility"); Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 CT. REV. 12, 18 n.40 (1998) (noting that both PAS and SALS are entirely self-published by Gardner and have not been subjected to peer scientific scrutiny); Colleen McMahon, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 CATH. LAW. 153, 193 n.246 (1999) (noting that PAS may have particular influence on expert testimony in child sex abuse cases); P. Susan Penfold, *Questionable Beliefs About Child Sexual Abuse Allegations During Custody Disputes*, 14 CAN. J. FAM. L. 11, 14 n.7, 21–22 & n.31 (1997) (citing Gardner's claim that most abuse accusations arising during child custody disputes are false and are the result of programming by vindictive and hostile mothers, and noting that Gardner's theory has not been subjected to "objective scientific study"); Paula D. Salinger, Review of Selected 2000 California Legislation, *Family Law True or False Accusations?: Protecting Victims of Child Sexual Abuse During Custody Disputes*, 32 MCGEORGE L. REV. 693, 701–02 (2001) (noting the lack of scientific acceptance of PAS as well as the use of PAS as a counter-allegation by fathers accused of child sex abuse); Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 573–74 (2000) (citing Gardner's claim that child sex abuse allegations during divorce are false, but noting that that just because such allegations arise during divorce does not mean they are false); Cheri L. Wood, Notes and Comments, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1411–13 (1994) (arguing that PAS is not admissible under *Frye* or *Daubert*).

[98] Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, 39 CT. REV. 12, 16 (2002) (noting that mothers who fail to report abuse may be deemed incompetent and that those who report it may be labeled with PAS); Dana Royce Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIMONIAL L. 35, 70–71 (2002) (noting the relationship between alienation and domestic violence, and the overreaching of therapists who make conclusions based on insufficient information, i.e., without interviewing the putative abuser); Mary Becker, Access to Justice, *The Social Responsibility of Lawyers: Access to Justice for Battered Women*, 12 WASH. U. J. L. & POL'Y 63, 65 n.3 (2003) (noting that the mother may lose custody when children are alienated from the father because of his violence, citing discussions and critiques of Gardner's theory); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCIL. CTS. REV. 273, 285–87 & n.53 (1999) (citing Gardner's work on PAS as "pathologizing" the proposed phenomenon of PAS and citing literature discussing a lack of evidence that PAS exists, in presenting the difficulties children face in reporting violence in their homes and the insidious harm that occurs when a professional diagnoses PAS instead of believing the credibility of the report of violence); Merritt McKeon, *The Impact of Domestic*

Violence on Child Custody Determination in California: Who Will Understand?, 19 WHITTIER L. REV. 459, 477 (1998) (noting that PAS is unaccepted in its field and used to give a "veneer of credibility" to reports ignoring domestic violence); Joan S. Meier, Symposium, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 688 (2003) (noting that PAS is a gender-biased tool used to give batterers custody, and that it is increasingly used in court despite its lack of scientific merit); Evan Stark, *A Failure to Protect: Unraveling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29, 58 (1999–2000) (describing a case in which the court-appointed psychologist diagnosed the mother as causing PAS, resulting in a transfer of custody to the father, even though the alienation had been caused by the formerly battering father's own "intimidating and coercive" actions towards the mother and child); Nat Stern & Karen Oehme, *The Troubling Admission of Supervised Visitation Records in Custody Proceedings*, 75 TEMPLE L. REV. 271, 285 n.105 (2002) (citing the use of unscientific claims like PAS as one reason judges fail to credit or take seriously reports of domestic); Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565, 807 (2000) (citing a New Jersey case involving wife-battering husband whose eight-year-old son refused visitation, expressing fear of the father, but the court-appointed psychologist's diagnosed PAS, and the judge forced visitation); Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 158 (1999–2000) (noting that PAS is unproven and not accepted by the psychological or psychiatric communities, and is used to attack claims of domestic violence and child sexual abuse).

[99] Steven Alan Childress, *The "Soft Science" of Discretion: A Reply to Ghosh's "Search for Scientific Validity"*, 8 DIG. 31, 32 n.2 (2000) (citing PAS in a footnote on various forms of contested and novel expert testimony); Henry F. Fradella et al., *The Impact of* Daubert *on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 405 n.12 (2003) (noting that *Daubert*'s application has been criticized, citing PAS as an example, but finding that overall *Daubert* is working); Stephen P. Herman, Issue Forum, *Child Custody Evaluations and the Need for Standards of Care and Peer-Review*, 1 J. CENTER CHILD. & CTS. 139, 147 (1999) (noting that PAS is not scientifically based, but appears frequently in courts, usurping the role of the fact-finder); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1074–77 (1999) (discussing Gardner and Underwager's work, noting that neither considers child sex abuse inherently harmful and that both are almost exclusively concerned with false convictions rather than child protection); Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 490–91 (1997) (citing PAS as one form of psychological syndrome evidence contested under *Daubert*); Daniel P. Ryan, *Expert Opinion Testimony and Scientific Evidence: Does M.C.L. 600.2955 "Assist" the Trial Judge in Michigan Tort Cases?*, 75 U. DET. MERCY L. REV. 263, 295 (1998) (citing PAS as the subject of expert testimony); Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE U. L. R. 453, 489–90, 522 (2003) (describing PAS as a defense strategy to attack abuse allegations, and arguing that only psychological syndromes that are in the DSM should be admitted in court and that all others subject to *Frye*); R. James Williams, Special Issue, *Alienated Children in Divorce: Should Judges Close the Gate on PAS and PA?*, 39 FAM. CT. REV. 267 *passim* (2001) (noting that PAS does not meet admissibility standards of either American or Canadian law).

[100] Michael C. Gottlieb, Special Issue, Troxel v. Granville *and its Implications for Families and Practice: A Multidisciplinary Symposium: Introduction to the Special Issue*, 41 FAM. CT. REV. 8, 9 (2003) (citing generally Kelly and Johnson's article on PAS); Lyn R. Greenberg et al., Issue Facing Family Courts, *Effective Intervention with High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court*, 4 J. CENTER CHILDREN & CTS. 49, 55 (2003) (citing an article on PAS and noting that therapists may become the unwitting representatives of one parent if they fail to investigate all sides of family dynamics); Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 56 (2004) (arguing that the use of PAS in court is harmful to children's interests); Katheryn D. Katz, *2001–2002 Survey of New York Law: Family Law*, 53 SYRACUSE L. REV. 579, 587 (2003) (noting that despite the lack of scientific evidence for PAS, it is widely used in court); Niggemyer, *supra* note 26, at 576–77 (noting PAS's lack of empirical support and acceptance); Peter Salem & Ann L. Milne, *The Association of Family and Conciliation Courts: Forty Years of Leadership and Interdisciplinary Collaboration*, 41 FAM. CT. REV. 147, 153 (2003) (describing Gardner's PAS as "controversial" in the context of Johnston and Kelly's reformulation); Matthew J. Sullivan, A Celebration Of Canadian Family Law and Dispute Resolution, Article,

Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases, 42 FAM. CT. REV. 576, 576–81 (2004) (citing Kelly's reformulation of PAS).

[101] Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 140–41 (2002) (describing PAS as essentially pro-pedophilia theory that provides a defense in the cases with the most evidence of abuse); Paul C. Giannelli, Ake v. Oklahoma, *The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1320, n.89 (2004) (citing Bruch regarding the use of syndrome evidence in criminal prosecution); Stephen R. Henley, D*evelopments in Evidence III—The Final Chapter*, 1998 ARMY LAW. 1, 16 n.146 (1998) (citing PAS as one of many justification defenses available to defendants to avoid legal responsibility); Linda C. Neilson, Special Issue: A Celebration of Canadian Family Law and Dispute Resolution, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 424–25 (2004) (noting that PAS is used by abusive parents to divert attention from their violence); Lisa S. Scheff, People v. Humphrey: *Justice for Battered Women or a License to Kill?*, 32 U.S.F. L. REV. 225, 251 n.250 (1997) (citing authorization of PAS as an excuse defense).

[102] Dr. Ursula Kilkelly, Symposium, Families and Children in International Law, *Effective Protection of Children's Rights in Family Cases: An International Approach*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 335, 345–46 n.69 (2002) (noting discussion in Britain over court's "apparent acceptance" of the existence of PAS; also stating that the European Court does not enforce the child's participation under Article 12 of the United Nations Convention on the Rights of the Child, but sees a violation of a father's rights under Article 8 if evidence of both the child's wishes and expert testimony about those wishes is not presented, thus failing to fully recognize the independent rights of the child); Rhona Schuz, *Families and Children in International Law: The Hague Child Abduction Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 443–46 n.236 (2002) (noting that courts generally subjugate the interests of the child to parental rights under the Hague Child Abduction Convention, but citing one Israeli PAS case wherein a parent's rights were outweighed by a child's best interests in that the child was not returned to the non-abducting parent because the child threatened suicide if so returned, and noting that these facts triggered the "grave risk of harm" exception).

[103] Faller, *supra* note 99, at 431; Lazo, *supra* note 99, at 1360 n.82; McDonald, *supra* note 99, at 18 n.40; Salinger, *supra* note 99, at 702; Wood, *supra* note 99; Dalton, *supra* note 99, at 285 n.53; McKeon, *supra* note 99, at 477; Meier, *supra* note 100, at 688; von Talge, *supra* note 100, at 158; Katz, *supra* note 102, at 587; Niggemyer, *supra* note 25, at 576–77; Bruch, *supra* note 21, 537–39, 550; Elrod, *supra* note 24, at 511 n.68; Kelly & Johnston, *supra* note 101, at 489, 522; Zirogiannis, *supra* note 98; Herman, *supra* note 101, at 147; Trowbridge, *supra* note 101, at 489, 522; Williams, *supra* note 101, at 276–77.

[104] Ducote, *supra* note 103, at 141; Henley, *supra* note 103, at 16 n.146; Liebmann, *supra* note 99, at 834–35; Salinger, *supra* note 99, at 701–02; Meier, *supra* note 100, at 688; Stark, *supra* note 100, at 58; Carbone, *supra* note 98, at 56.

[105] Aiken, *supra* note 99, at 16; Meier, *supra* note 99, at 688; Bruch, *supra* note 22 *passim*; Carbone, *supra* note 98, at 56.

[106] PRESIDENTIAL TASK FORCE ON VIOLENCE & THE FAMILY, AM. PSYCHOL. ASSOC., VIOLENCE AND THE FAMILY 40 (1996) [hereinafter VIOLENCE AND THE FAMILY]; Aiken, *supra* note 100, at 16.

[107] Becker, *supra* note 99, at145; Faller, *supra* note 99, at 431; Baerger, *supra* note 100; Greenberg, *supra* note 102, at 55; Johnston, *supra* note 98, at 463.

[108] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Frye v.United States, 293 F. 1013 (D.C. Cir. 1923).

[109] *Daubert*, 509 U.S. at 586 (citing *Frye*, 293 F. at 1014).

[110] *Frye*, 293 F. at 1014.

[111] Gardner, *DSM-IV*, *supra* note 21, at 5 (acknowledging that research must prove the reliability of new clinical entities prior to admission in the DSM); Richard Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. OF FAM. THERAPY 93, 101–02 (2002) [hereinafter Gardner, *PAS v. PA*]. This is not to say that DSM inclusion is a purely scientific matter. Due to the decision-making procedures at the American Psychiatric Association, politics may affect inclusion in the DSM. The inclusion of minority science may thus face higher hurdles to admission. In the past, political pressure has resulted in the DSM's inclusion of behaviors that are not pathological, such as homosexuality. I am not claiming that the DSM is an inviolate source of sound science. Instead, I am recognizing that it represents a standard of general acceptance within psychiatry.

[112] The Massachusetts Supreme Judicial Court treats inclusion in the DSM as sufficient proof of general acceptance for evidentiary admissibility, holding that syndromes that are not included in the DSM require

admissibility hearings. Commonwealth v. Frangipane, 433 Mass. 527, 538 (Ma. 2001).

[113] VIOLENCE AND THE FAMILY, *supra* note 108, at 40 (noting that despite the fact that there is no data supporting "the phenomenon called [PAS]," the term "is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations"). Gardner claimed that the APA had recognized PAS's validity in 1994, by including references to several of his books in an official publication. Gardner, *PAS v. PA*, *supra* note 113, at 104. However, the APA's 1996 statement supersedes the 1994 publication.

[114] The APA issued this statement following PBS' 2005 airing of *Breaking the Silence: Children's Stories.* The American Psychological Association (APA) believes that all mental health practitioners as well as law enforcement officials and the courts must take any reports of domestic violence in divorce and child custody cases seriously. An APA 1996 Presidential Task Force on Violence and the Family noted the lack of data to support so-called "parental alienation syndrome," and raised concern about the term's use. However, we have no official position on the purported syndrome. Press Release, Am. Psych. Assoc., Statement on Parental Alienation Syndrome (Oct. 28, 2005), *available at* <http://www.apa.org/releases/passyndrome.html>.

[115] For further analysis of PAS's failure to satisfy *Daubert*, *see* Wood, *supra* note 25, at 1387–89.

[116] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594–95, 598 (1993) (citing FED. R. EVID. 702, which states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

[117] *Id.* at 590.

[118] *Id.* at 594.

[119] *Id.* at 593–94.

[120] *Id.* at 594 (citing United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

[121] CONCISE MEDICAL DICTIONARY 645 (Oxford Univ. Press 6th ed. 2002).

[122] Richard A. Gardner, *Judges Interviewing Children In Custody/Visitation Litigation*, VII(2) N.J.Fam. Law., 26ff, 9 (1987) [hereinafter Gardner, *Judges*]; Gardner, *DSM-IV*, *supra* note 21, at 4, 6 (claiming the cause of PAS is parental programming, or, alternatively, the adversary system); Barnes, *supra* note 89, at 622 (claiming sole custody increases the risk of PAS).

[123] Gardner, *Judiciary*, *supra* note 31, at 61. Since PAS is used primarily as a counter-claim in child abuse cases, countries with less vigilant response to child abuse may see fewer such counterclaims. Oberdorfer, *supra* note 88, at 1707, 1717–18 (citing Gardner for the proposition that bitter divorces lead to PAS and are bad for children; discussing a case in which domestic violence and child sex abuse were alleged and the father was awarded custody after claiming the mother was a liar).

[124] Gardner, *Judiciary*, *supra* note 31, at 60 (claiming that lawyers who zealously advocate for their clients are "promulgating and entrenching the PAS").

[125] Gardner, *DSM-IV*, *supra* note 21, at 2. Gardner claims that women with PAS become psychopathic, but only in the sphere of life related to parenting. Gardner, *Differentiating*, *supra* note 33, at 103. Since psychopathy, like other pathologies, is not diagnosed based on differential behavior in different spheres of life, just as a measles' rash does not appear and disappear depending on where one is located, Gardner's depiction of psychopathic behavior that occurs in differential spheres of life indicates chosen behavior, not pathology. Gardner, *DSM-IV*, *supra* note 21, at 4.

[126] Gardner, *DSM-IV*, *supra* note 21, at 12.

[127] Gardner, *Judiciary*, *supra* note 31, at 61; Gardner, *DSM-IV*, *supra* note 21, at 12.

[128] Ignoring the DDC, Warshak cites to Gardner's other work when discussing PAS's diagnostic criteria. Warshak, *supra* note 30, passim.

[129] Richard Gardner, *Differential Diagnosis of the Three Levels of Parental Alienation Syndrome (PAS) Alienators*, <http://www.rgardner.com/refs/pastable.pdf> (last visited Feb. 6, 2006) [hereinafter Gardner, *Differential Diagnosis*] (stating "whereas the *diagnosis* of PAS is based upon the level of symptoms in the child, the court's decision for custodial transfer should be based primarily on the *alienator's symptom level* and only secondarily on the child's level of PAS symptoms") (emphasis in original).

[130] Gardner, *Denial*, *supra* note 33, at 201 (describing the grief of the rejected father documented in his study of "PAS children" based on interviews with the alienated parents).

[131] Gardner, *DSM-IV*, *supra* note 21, at 12 (stating only that psychopathology intensifies in general); Gardner, *Empowerment of Children*, *supra* note 21, at 8 (stating that PAS children are taught to be psychopathic); Gardner, *Differential Diagnosis*, *supra* note 131 (referencing severe psychopathology *prior* to the separation, but not during it).

[132] Gardner, *Differential Diagnosis*, *supra* note 131 (emphasis added).

[133] *Id.* at n.1.

[134] U.S. CONST. amend. I.

[135] Gardner, Differential Diagnosis, *supra* note 131.

[136] Schutz v. Schutz, 522 S.2d 874 (Fla. Dist. Ct. App. 1988) (citing Gardner's claim that, "The parent who expresses neutrality regarding visitation is essentially communicating criticism of the non-custodial parent" in support of an order that the mother make affirmative, positive statements about her ex-husband); Gardner, *Child Custody*, *supra* note 30, at 642 (claiming that "The parent who expresses neutrality regarding visitation is basically communicating criticism of the non-custodial parent," and that neutrality can be used to "foster and support alienation"); Gardner, *Empowerment of Children*, *supra* note 21, at 17–18 (claiming that judicial orders are insufficient to prevent negative communications); Warshak, *Parental Alienation*, *supra* note 23, at 294–97.

[137] Gardner, *Recommendations*, *supra* note 32, at 12 (claiming that there can be no cure for PAS without legal sanctions and coercive therapy). Claiming that both PAS and refusal to pay court-ordered alimony or child support are forms of child abuse, Gardner advocated legal coercion against mothers for PAS that parallels legal sanctions against fathers who renege on alimony and child support. Gardner, *Recommendations*, *supra* note 32, at 7–8. Both child abuse, a crime against the state, and refusal to pay court-ordered alimony or child-support, contempt of court, trigger legal sanctions. However, there is no evidence that PA or PAS constitute any other violation of law. Johnston, *supra* note 98 (describing Gardner's treatment mandates as "coercive and punitive").

[138] Gardner, *Differential Management, supra* note 40.

[139] Richard Gardner, *Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndrome Families: When Psychiatry and the Law Join Forces*, 28 FAM CT. REV., 14, 21 (1991) [hereinafter Gardner, *Legal and Psychotherapeutic Approaches*].

[140] Gardner's description of "transitional sites" for children mimic incarceration conditions, using cult brainwashing techniques. Gardner, *Recommendations*, *supra* note 32, at 15–21. Likening PAS to cult indoctrination, Gardner ignores the fact that custody cases rarely involve the systematic sensory deprivation involved in cult indoctrination, namely protracted deprivation of food, water, sleep, and contact with the outside world. Gardner claims that forced hospitalized brainwashing is legal under doctrines that allow forcible commitment; Gardner, *DSM-IV*, *supra* note 21, at 16 (likening PAS to cult brainwashing). While forcible commitment results only after due process safeguards are provided in a competence hearing, Gardner advocates commitment for children without any due process, and without any showing that PAS represents a threat to the child's safety or the safety of others. Gardner, *Judiciary*, *supra* note 31, at 40; Richard Gardner, *Family Therapy of the Moderate Type of Parental Alienation Syndrome*, 27(3) AM. J. FAM. THERAPY 195, 205–06 (1999) [hereinafter Gardner, *Family Therapy*] (claiming PAS children need brainwashing, comparing them to Moonies and POWs).

[141] Gardner, *Legal and Psychotherapeutic Approaches*, *supra* note 141, at 16, 21 (claiming "only the court has the power to order these mothers to stop their manipulations and maneuvering"); Gardner, *Judiciary*, *supra* note 31, at 58.

[142] Warshak, *Parental Alienation*, *supra* note 23, at 298 (citing various studies reporting that treatment is ineffective, and one study reporting only three cases wherein treatment resulted in the "elimination of PAS").

[143] While Gardner mandates PAS therapy for mother and child in the DDC, he claims elsewhere that therapy for the mother is a mockery, Richard Gardner, *Legal and Psychotherapeutic Approaches*, *supra* note 141, at 17 (likening therapy for the mother to a court order to force "a frigid wife to have an orgasm or an impotent husband to have an erection"). Gardner, *Judiciary*, *supra* note 31 (acknowledging that courts have not followed his treatment mandates).

[144] Warshak, *Parental Alienation*, *supra* note 23, at 295–96 (citing various studies that report that treatment is ineffective, and one study that reported three cases wherein treatment resulted in the "elimination of PAS").

[145] One court recognized the harm it was inflicting on the children by forcing them into the unwanted sole custody of their father, yet still presumed that this coercion would result in their loving the father. *In re J.F.*, 694 N.Y.S.2d 592, 601 (N.Y. Fam. Ct. 1999).

[146] In describing the shift of PAS from mothers to fathers, Gardner claims fathers "have decided to use" PAS techniques, another indication that PAS is not pathology, but chosen behavior. Gardner; *Denial*, *supra* note 34, at 198. Gardner, *PAS v. PA*, *supra* note 113, at 93–94 (stating that PAS is "designed" to strengthen a legal position, and has this as its "goal"). Others have noted that Gardner's PAS describes legal non-compliance. *See* Stoltz & Ney, *supra* note 99, at 224 (noting that Gardner presents PAS as a problem of legal non-compliance, and thus the solution is the use of traditional legal methods of coercion). Gardner, *Judiciary*, *supra* note 31 at 40 (stating that the "primary motive of the alienating parent for inducing the campaign of denigration is to gain leverage in the court of law"); Gardner, *DSM-IV*, *supra* note 21 (claiming programming gives parents leverage in court).

[147] Gardner berates female therapists who "champion" the mother's cause without "[hearing the father's] side of the story," ignoring the fact that, both

medically and legally, a therapist owes a duty of care to his patient, not to anyone else except under *Tarasoff* situations. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (finding a duty to third parties in a situation where a psychologist had sole information that his client threatened a third-party's life). *See also* Cynthia Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Litigation*, 109 HARV. L. REV. 549, *passim* (1996) (discussing policy considerations arising form the creation of therapists' duties of care to third parties).

[148] Gardner, *Empowerment of Children*, *supra* note 21, at 24 (noting the importance of the therapist having access to both parents); Gardner, *Family Therapy*, *supra* note 142, at 195–96 (recommending the use of only one therapist); Gardner, *Legal and Psychotherapeutic Approaches*, *supra* note 141, at 6.

[149] Gardner, *Legal and Psychotherapeutic Approaches*, *supra* note 141, at 6–7.

[150] Gardner, *Judiciary's Role*, *supra* note 31, at 57 (stating that PAS therapists "must be comfortable with waiving traditional confidentiality," and must use "authoritarian techniques[,] which are clearly at variance with traditional approaches").

[151] *Id.*; Gardner, *Family Therapy*, *supra* note 142, at 202 (instructing therapists to tell clients who report sex abuse, "That didn't happen!").

[152] Gardner, *Family Therapy*, *supra* note 142, at 203 (describing a case where Gardner threatened a 6-year-old that her mother would be incarcerated until the child visited her father).

[153] Gardner, *Judiciary, supra* note 31, at 58.

[154] Gardner, *Empowerment of Children*, *supra* note 21, at 12, 15 (noting GALs can be used to gain access to documents from one parent for the alienated parent's benefit, and claiming that children's attorneys who zealously advocate for their clients "produce significant psychopathology" in those children); Gardner, *Judiciary*, *supra* note 31, at 58 (specifying that GALs must "do the opposite of what the client requests" and "unlearn" the principle of zealous advocacy for their clients' interests).

[155] Since symptoms may suggest several possible diagnoses ("differential diagnoses"), reliable diagnostic criteria must have a low error rate and accurately distinguish conditions that have similar symptoms. For example, reliable diagnostic criteria distinguish between skin rashes caused by measles, Lyme disease, poison ivy, allergic reactions, and cancer.

[156] Toddlers who want to live on a diet of chocolate milk, or teenagers who want unfettered access to the car may exhibit PA towards the parent who denies their wishes for what can feel like substantial period of time.

[157] One study of divorced children found that all the children's observable alienation reversed naturally within two years. Bruch, *supra* note 21, at 534.

[158] Kelly & Johnston, *supra* note 20, at 251 (noting that there are many reasons that a child refuses visitation, and few of these qualify as alienation).

[159] Claims that PAS causes alienation of a few years' duration are not evidence of permanent harm or pathology. Warshak, *Parental Alienation*, *supra* note 23, at 273. Many people are estranged from family or friends for periods of years, without this indicating pathology or permanence.

[160] Baerger et al., *supra* note 100 (noting the overreaching of therapists who make conclusions with insufficient information, i.e. without interviewing the putative abuser); Johnston, *Multidisciplinary Professional Partnerships*, *supra* note 98 (noting that therapists working only with one parent may arrive at an incorrect diagnosis, and juxtaposing diagnosis of PAS in an abused child).

[161] *Id.*

[162] Gardner, *Basic Facts*, *supra* note 28.

[163] Thus, the DDC contradicts Gardner's claim that "one cannot say who is the *better* parent unless one has had the opportunity to evaluate *both*." Gardner, *Child Custody*, *supra* note 30, at 645. Despite this lack of investigation into the health of the rejected parent, Gardner claims that by forcing the child to live with the rejected father, the child will "at least be living with the healthier parent." Gardner, *Legal and Psychotherapeutic Approaches*, *supra* note 141.

[164] Gardner, *Differential Diagnosis*, *supra* note 131.

[165] Gardner stipulated that, "[w]hen bona fide abuse does exist, then the child's responding alienation is warranted and the PAS diagnosis is *not* applicable." Gardner, *Basic Facts*, *supra* note 28. The following five cases cited by Gardner in support of PAS's admissibility involved allegations of sexual violence, sometimes in conjunction with other factors that preclude a PAS diagnosis.

In re John W. was a "bitter child custody" case involving allegations of child molestation against the father and allegations of PAS against the mother. 48 Cal. Rptr. 2d 899, 901 (Cal. Ct. App.). The mother made five reports alleging child sexual abuse against the father, none of which was substantiated. *Id.* at 901–02. After the fourth report, physical evidence in the form of anal lesions was found. *Id.* at 902. However, the court-appointed expert concluded no child abuse had occurred, but diagnosed the allegations as a result of PAS by the mother. *Id.* The juvenile court remarked that neither the child abuse, nor the PAS allegation was resolved. *Id.* The appellate court noted that "[p]edophiles have no business being around children," and

pointed to the necessity of expeditious findings in molestation allegations. *Id.* at 909. But, contradicting the lower court observation that there had been no determination regarding the child abuse or the PAS, the appellate court nonetheless found that a determination had been made. *Id.* at 908. Instead of making a determination on either the child abuse allegation or the PAS allegation, the appellate court held that the two issues must have been determined "as a practical matter," presuming that juvenile court hearing officers would not have returned the boy to either a child molester or a parent who bribed the child to make false abuse allegations. *Id.* at 907.

Rather than address the alleged abuse or PAS, the appellate court framed the case as being about the misuse of the juvenile dependency system, expressing a clear distaste for the affluent parents' extensive use of taxpayer-funded attorneys and psychological counseling. *Id.* at 908. Combined with the court's opinion that divorce cases pose a "serious danger that abuse allegations will be used as a weapon against a party," the court appears to have been motivated to make a perfunctory "determination" that the abuse and PAS issues had already been resolved in order to remand the case to a court wherein the affluent parents would not benefit from taxpayer-funded attorneys and psychologists. *Id.* By remanding the case to family court, rather than juvenile dependency court, the appellate court closed the inquiry into the abuse issue by characterizing that undecided issue as already determined. *Id.* at 907–09.

Despite the father's indictment for "gross sexual imposition and rape" of his two children, and his guilty plea to a misdemeanor, the court-appointed therapist in *Conner v. Renz* claimed the mother had induced PAS in the children. No. 93-CA-1585 1995 Ohio App. LEXIS 176, at *3 (Ohio Ct. App. Jan. 19, 1995) (described this as "one of the more protracted and acrimonious proceedings that has ever been before this court").

The father in *State v. Koelling* successfully appealed his 1992 criminal conviction for rape and sexual battery against his two daughters and son, but he was re-convicted at a second trial in 1994. Nos. 94APA06-866, 94APA06-868, 1995 Ohio App. LEXIS 1056, at *1–46 (Ohio Ct. App. Mar. 21, 1995). Three children testified in detail about the father's sexual abuse. *Id.* at *8–13. A "political psychologist" testified about PAS, but the court found there was no evidence that the mother brainwashed her children into falsely alleging sexual abuse. *Id.* at *16, *37.

McCoy v. State involved a father convicted for repeatedly raping and sexually abusing his daughter. 886 P.2d 252 (Wyo. 1994). A "pediatrician and member of the hospital's Child Advocacy and Protection team" who examined the child at the age of 12 concluded that "the physical evidence showed repeated sexual intercourse over a period of time and past sexual abuse." *Id.* at 254. One defense expert opined that, while some of the physical findings were inconclusive as to sexual abuse, the "condition of the [child's] hymen indicated repeated sexual intercourse." *Id.* The father's defense strategy was to cast doubt on his identity as the rapist by alleging the accusation "arose from anger at her father" because of his filing for divorce. *Id.* Notably, the father filed for divorce *after* learning of the allegations. *Id.* At trial, the state's expert testified that "parental coaching is called 'parental alienation syndrome'". *Id.* at 257. However, the expert found no evidence that the child's charges were fabricated or the result of coaching. *Id.* The defendant's appeal argued ineffective assistance of counsel based on defense counsel's failure to secure an expert to counter the state's expert's testimony regarding PAS. *Id.* The appellate court noted that the defendant did not provide any evidence that expert testimony was available to prove incorrect the state's expert's conclusion that PAS was not involved. *Id.* at 257.

Karen B. v. Clyde M. recognized the "potentially enormous" consequences of weighing the evidence of conflicting expert opinions regarding alleged sexual abuse and the concomitant "potential for future harm" and injustice of potentially placing the child in the custody of a sexually abusive father. 574 N.Y.S.2d 267, 270 (N.Y. Fam. Ct. 1991), *affd. sub nom*. Karen "PP" v. Clyde "QQ", 602 N.Y.S.2d 709 (N.Y. App. Div. 1993). However, despite several experts' contradictory opinions regarding the veracity of the mother's sexual abuse allegation, the lower court found the record "essentially devoid of credible evidence that the child had been sexually abused" by her father, and concluded the mother had "programmed" the child to make the abuse allegations in order to obtain sole custody. *Id.* at 267–68. The court relied heavily on Gardner's PAS theory, citing his self-published work for a full page in the five-page opinion, and apparently introducing this evidence *sua sponte*. *Id.* at 271. Awarding sole custody to the father, the court denied the mother any contact with the daughter until "no further danger is presented to the child." *Id.* at 272. Despite this "conflicting testimony," the appellate court upheld the lower court decision, and further set a precedent that a parent who falsely alleges child sex abuse is presumed unfit. *Karen "PP"*, 602 N.Y.S.2d at 754. The appellate court further held that the lower court's reference to Gardner's "book on parental alienation syndrome that was neither entered into evidence nor referred to by any witness" was not grounds for reversal, "especially in light of all the testimony elicited at the hearing." *Id.* By claiming the reference to the PAS book was not part of the case

evidence, the court effectively sidestepped a decision on admissibility.

Based on a case whose experts reached conflicting determinations about the sexual abuse allegations, *Karen "PP"* can hardly be called a case of clear "false allegations." At best it represents a case of unfounded allegations. The court's holding that "any parent what would denigrate the other by casting false aspersions of child sex abuse and involving the child to achieve his or her selfish purpose is not a fit parent" thus conflates real abuse that is unsubstantiated with false allegations of abuse. *Oliver V. v. Kelly V.*, *Husband Is Entitled to Divorce Based on Cruel and Inhuman Treatment,* N.Y.L.J., Nov. 27, 2000, at 25 (citing *Karen B.*, 574 N.Y.S. 2d at 267). Because of this lack of evidentiary differentiation, a parent who alleges real abuse that is not substantiated will be deemed unfit, and may lose custody for attempting to protect a child from real abuse. While abusive parents are presumptively unfit because they cause children potentially life-long medical and psychological trauma, it is unclear that a false allegation of abuse causes similar harm. As a policy matter, this precedent weighs child abuse and false allegations of abuse equally, when the harm they cause is not at all comparable.

Gardner's definition of PAS expressly excludes situations where physical abuse is involved. Since it requires a lack of justification, mutual parental hostility and alienation attempts preclude its diagnosis. Cases where there is no evidence of a child's alienation or parental contribution similarly do not qualify as PAS. The following cases cited by Gardner in support of PAS's admissibility therefore cannot involve PAS.

In *Bates v. Bates*, the mother's expert found PAS caused by the father, while the father's expert concluded there was no PAS, crediting allegations that the mother was physically abusive to the older boy. No. 2000-A-0058, 2001 Ohio App. LEXIS 5428, at *3–4 (Ohio App. Ct. Dec. 7, 2001). Affirming the court order to transfer physical custody of the children to the mother, the court observed that the expert's opinions were at odds, "creating an evidential conflict best resolved by the trier of fact." *Id.* at *1, *4.

In *Truax v. Truax*, the divorced father claimed an abuse of discretion by the trial court for discounting his expert's testimony on PAS, rather than the court-appointed special advocate's ("CASA") investigation of the children. 874 P.2d 10, 11 (Nev. 1994). The appellate court noted that the CASA found violations of the court order, supported by physical evidence of abuse in the form of a "severe bite mark" on one son. *Id.* The bite mark was allegedly caused in the father's home by a daughter from another marriage. *Id.* A third testifying expert similarly found there was no evidence of PAS. *Id.*

[166] *Chambers v. Chambers* affirmed the lower court's decision permitting, but not compelling, visitation. The court cited the fact that the child did not wish to see her father. The chancellor cited the mutuality of the hostility and conflict between the parents. The court cited the father's recognition, through his expert, that compelled visits would be "traumatic and painful" for the child, and posed a substantial risk of harm to the child. Both parents were engaged in mutual, bilateral hostility, thus the case does not meet Gardner's definition that one parent be the instigator of the alienation. *Chambers*, 2000 Ark. App. LEXIS 476, at *4.

The *Toto v. Toto* court found no evidence that the mother was alienating the children. Three Guardian ad litems found that visitation problems were caused by the father, not the mother. PAS was diagnosed, but apparently the term was used to refer to the conflict between the parents, not brainwashing by one parent, violating Gardner's definition. *Toto*, 1992 Ohio App. LEXIS 157, at *2.

In re Rosenfeld, 524 N.W.2d 212, 215 (Iowa App. 1994) (finding PAS in a case where the parents engaged in mutual attempts to alienate the children); Wiederholt v. Fischer, 169 Wis.2d 524, 485 N.W.2d 442, 443 (App. 1992) (diagnosing children as alienated due to behavior of both parents); Loll v. Loll, 561 N.W.2d 625, 629 (N.D. 1997) (noting mutual parental alienation attempts); Hanson v. Spolnik, 685 N.E.2d 71 (Ind. App. 1997) (finding mutual alienation but basing custody transfer to father on PAS diagnosis by an expert who never met with the father); *Pisani*, 1998 Ohio App. LEXIS 4421, at*1 (noting mother lost custody due to unspecified "behavior," father was later diagnosed as causing PAS in the children, but he retained custody); *Kirk v. Kirk*, 759 N.E.2d 265, 270 (Ind. App. 2001) (noting both parents suffer from "serious character pathology").

[167] Gardner, *Basic Facts*, *supra* note 28. Warshak similarly claims that the term PAS is "inapplicable" if any of the three elements are absent. Warshak, *Current Controversies*, *supra* note 29, at 29; Gardner, *Recommendations II, supra* note 32, at 4 (stating that PAS is diagnosed based on "*the degree to which the indoctrinating attempts have been successful*").

[168] Gardner, *Differential Diagnosis, supra* note 131; Gardner, *Recommendations, supra* note 32, at 22 (specifying that diagnosis is made based only on "degree of [programming] 'success'" observed in the child).

[169] Some professionals thus focus on the alienated child, rather than the alienating parent. Joan B. Kelly & Janet R. Johnston, *Special Issue: Alienated Children in*

Divorce: The Alienated Child: A Reformulation of Parental Alienation Syndrome, 39 FAM. CT. REV. 249 *passim* (July 2001).

[170] Gardner, *Differential Diagnosis, supra* note 32; Warshak, *Parental Alienation, supra* note 23, at 289 (claiming that a PAS diagnosis requires the parental contribution and that negative parental influence cannot be inferred from a child's alienation). Warshak elsewhere cites Clawar and Rivlin's definition of programming and brainwashing, which includes any derogatory comment by one parent of the other, even if the comment is objectively true. STANLEY CLAWAR & BRYNNE RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN, 7–8 (ABA 1991) (cited in Warshak, *Parental Alienation, supra* note 23, at 289).

[171] Gardner, *Differential Diagnosis, supra* note 32.

[172] The following cases cited by Gardner lacked evidence that the children were alienated:

Blosser v. Blosser, 707 So. 2d 778, 780 (Fla. App. 1998) (finding no evidence that the child was alienated).

At the age of four months, *Violetta B.* was placed with a foster mother while her parents were awaiting trial on charges they murdered her four-year-old sister. *In re* Violetta B., 568 N.E.2d 1345, 1346 (Ill. App. Ct. 1991). *In re Violetta B.* involved an ultimately unsuccessful petition by the child's paternal grandmother for custody. *In re Violetta B.*, 568 N.E.2d at 1359 The appeal was brought on the respondent minor child's behalf, arguing for continued custody by the foster mother. *Id.* at 1346. The child's expert testified that the child was, "experiencing parental alienation syndrome." *Id.* at 1350. The expert claimed the child was, "becoming depressed, combative and aggressive when faced with visiting" the grandmother. *Id.* There was no evidence the child disliked or was alienated from her grandmother. No evidence indicated that either adult was coaching or programming the child to vilify the other adult. One expert specifically testified that the foster mother was "very cooperative" regarding the child's visits with her grandmother. *Id.* at 1351. Two experts explained the cause of the child's distress being the trauma of potential separation from the only parent she had ever known. *Violetta B.*, 568 N.E.2d at 1347–48, 1350.

In *Sims v. Hornsby*, the father's expert diagnosed PAS caused by the mother, describing PAS as a phenomenon, "wherein one parent attempts to alienate a child from the other parent." Sims v. Hornsby, No. CA92-01-007, 1992 Ohio App. LEXIS 4074, at *3 (Ohio Ct. App. Aug. 10, 1992). The court-appointed expert examined the parents, their current spouses, and the child, finding no serious alienation by the mother and no signs of alienation towards her father. *Id.* at *3.

In *Krebsbach v. Gallagher*, the court-appointed psychiatrist found no evidence of PAS instigated by the mother. Krebsbach v. Gallagher, 587 N.Y.S.2d 346, 367 (N.Y. App. Div. 1992). He testified that the mother "did not mind sharing her children with the father," while, in contrast, the father was a "manipulative and controlling personality who [was] not content unless he [got] his own way." *Id.* at 367–68. This evidence suggested that the father, who alleged PAS caused by the mother, provoked many of the visitation problems. *Id.* at 367.

In *Pathan v. Pathan*, the mother's counsel asked for Gardner to be appointed to assess the child for PAS allegedly caused by the father. Gardner instead found PAS caused by the mother, and opined she was a child abuser. Pathan v. Pathan, No. 17729, 2000 Ohio App. LEXIS 119 (Ohio Ct. App. Jan. 21, 2000). The basis for this charge was the mother's alleged placing the daughter in the midst of her conflict with her ex-husband. *Id.* at 23–24. The father testified to his good relationship with his daughter. No evidence was presented to show the child's involvement in the alienation, thus Gardner ignored his own definition in making the diagnosis. *Id.* at *4.

In *White v. White*, the trial court heard expert testimony alleging PAS instigated by the mother. White v. White, 655 N.E.2d 523, 526 (Ind. Ct. App. 1995). The expert testified only about the mother's alleged attempts to alienate the children from the father. *Id.* at 526. According to Gardner, this violates the requirement that the child contribute to the alienation. *Id.* at 526.

The following examples are not cited by Gardner: *Smith v. Smith*, No. FA 0103414705 2003 Conn. Super. LEXIS 2039, at *20 (Ct. Superior. July 15, 2003) (unreported) (finding no evidence the child was alienated despite father's claim of PAS); Kaiser v. Kaiser, 23 P.3d 278, 281 (Okla. 2001) (claiming maternal alienation based solely on the mother's request to relocate to a new state for employment and finding no evidence of alienation despite father's claim of PAS); Ruggiero v. Ruggiero, 819 A.2d 864, 867 (Conn. App. 2003) (diagnosing PAS but finding no evidence of alienation by the mother as alleged by the father).

[173] Faller, *supra* note 99, at 100–15 (discussing the structural and scientific flaws in PAS's design).

[174] Warshak specifies that the child's denigration must rise to the level of a "campaign" rather than "occasional episodes," but neither he, nor the DDC, defines "campaign." Warshak, *Current Controversies, supra* note 29, at 29.

[175] Gardner *Differential Diagnosis, supra* note 132 (stating "whereas the *diagnosis* of PAS is based upon the level of symptoms in the child, the court's decision for custodial transfer should be based primarily on the *alienator's symptom level* and only secondarily on the child's level of PAS symptoms") (emphasis in original).

[176] Email correspondence, Richard Chefetz, M.D. (May 12, 2004).

[177] Virtually any belief can be construed as either learned or "borrowed," including a belief in God; the fact that "2+2=4"; evolution; creationism; liking chocolate milk; hating olives; choices of playmates, toys, or hobbies; political views, etc.

[178] Gardner, *Differential Diagnosis*, *supra* note 131.

[179] A toddler might not want to stop playing with a toy; a teenager might want to see the end of his favorite TV show.

[180] Joan B. Kelly & Janet R. Johnston, *Special Issue: Alienated Children in Divorce: The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 Fam. Ct. Rev. 249, 251 (July 2001) (noting that there are many reasons that a child refuses visitation, and few of these qualify as alienation).

[181] Gardner, *Differential Diagnosis*, *supra* note 131.

[182] Gardner, *Basic Facts, supra* note 28; Warshak, *Current Controversies, supra* note 29, at 29. In 2001, Gardner maintained PAS was a valid medical "syndrome" defined by unjustifiable alienation caused by a brainwashing mother with contributions by the child. He stipulated that real abuse precludes a PAS diagnosis, and likened it to recognized medical conditions like Down's Syndrome and AIDS. Gardner *Differential Diagnosis, supra* note 132; Gardner, *Basic Facts, supra* note 28. In 2002, Gardner admitted that real sex offenders use PAS as a means of deflecting attention and inquiry from their crimes. Gardner, *Misinformation, supra* note 29, at 7; Gardner, *Denial, supra* note 33, at 195. Gardner claimed he was not to blame for the fact that some professionals misuse PAS to "[exonerate] bona fide abusers by claiming that the children's animosity toward [the abuser] is a result of PAS indoctrinations by the other parent." Gardner, *Misinformation, supra* note 29, at 7.

On Jan. 13, 2003, shortly before his death, Gardner revised his DDC. *Id.*; Gardner, *Differential Diagnosis*, *supra* note 131. Given that he had directly addressed criticism about PAS as a diagnostic tool, and its misuse by sex offenders, he could have revised the DDC to make clear that real abuse precludes a PAS diagnosis and that a diagnosing clinician must assess both parent's conduct and rule out PAS if any reasonable causes of alienation existed. Involving no such stipulations, it appears that Gardner chose to define the DDC such that it does not diagnose PAS in accordance with his own definition.

[183] *See e.g.,* Lucy Berliner & Job Conte, *Sex Abuse Evaluations: Conceptual and Empirical Observations*, CHILD ABUSE & NEGLECT, 17m. 114 (1993); Scott Sleek, *Is Psychologists' Testimony Going Unheard?*, Am. Psychol. Ass'n Monitor, Vol. 29, No. 2 (Feb. 1998).

[184] Warshak, *Parental Alienation, supra* note 23, at 281–82, 289. An illness' etiology and means of effective treatment need not be completely understood before a set of symptoms is recognized as defining a unique medical pathology. Warshak, *Parental Alienation, supra* note 23, at 281.

[185] Richard Gardner, *Evaluate Child Sex Abuse in Context*, N.J.L.J. at 16 (May 10, 1993) [*hereinafter* Gardner, *Evaluate*].

[186] Gardner, *Denial, supra* note 33, at 195; Gardner, *DSM-IV, supra* 21, at 4.

[187] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593–94 (1993).

[188] Given Gardner's conviction that PAS would be proven valid through inter-rater reliability testing, and his insistence that it represented sound science, it is unclear why he did not instigate any such studies on PAS in the nineteen years between his first reporting it and his death.

[189] Warshak, *Current Controversies, supra* note 29, at 35–36. Warshak's claim that one study of 700 children "provides some empirical support for the validity of PAS" is unfounded. Warshak, *Parental Alienation, supra* note 23, at 285–86. (citing STANLEY CLAWAR & BRYNNE RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN (ABA 1991)). Clawar and Rivlin's work does not support the existence of PAS because their definition of alienation is inconsistent with Gardner's definition PAS. Their definition includes any type of parental action that may create alienation in the child. It focuses solely on parental action, does not require the child's participation, makes no distinction between justified and unjustified alienation, and does not use Gardner's DDC. CLAWAR & RIVLIN, at 7–10. The study groups together any type of parental programming, including attempts of abusive parents to alienate the child against non-abusive parents, and attempts of non-abusive parents to protect children from real physical or sexual abuse by abusive parents. *Id.* at 94, 161–62. Like Warshak and Gardner, Clawar and Rivlin use the term "syndrome" to describe patterns of behavior that are not recognized as medical syndromes, including "Denial of Existence Syndrome," "The 'Who, Me?' Syndrome," "Middle-Man Syndrome," "Circumstantial Syndrome," "'I Don't Know What's Wrong With Him' Syndrome," "The Ally Syndrome," "The Morality

Syndrome," "Threat of Withdrawal of Love Syndrome," "'I'm The Only One Who Really Loves You' Syndrome," "You're an Endangered Species' Syndrome," "Rewriting-Reality Syndrome," and "Physical Survival Syndrome." *Id.* at 15–36; *see also* Warshak, *Parental Alienation, supra* note 23, at 283. (citing "Red Wine Headache Syndrome," to support the claim that PAS exists as a medical syndrome). Like Gardner and Warshak, Clawar and Rivlin claim that women are more likely than men to program or brainwash their children, but also note that men who program and brainwash children generally had a history of physical, social, or psychological abuse against the children's mothers, and that they used programming/brainwashing as a "new tool of abuse against the woman." CLAWAR & RIVLIN at 155–62.

[190] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 590 (1993).

[191] Two authors nonetheless claim PAS is valid science. Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases*, 22 U. ARK. LITTLE ROCK L. REV. 501, 516–18 (Spring 2000) (acknowledging the lack of empirical evidence for PAS, but claiming it satisfies their undefined criteria for "scientific approach").

[192] Gardner, *Misinformation, supra* note 29, at 2–3.

[193] S. Margaret Lee & Nancy W. Olesen, *Special Issue: Alienated Children in Divorce: Assessing for Alienation in Child Custody and Access Evaluations*, 39 FAM. CT. REV. 282, 283 (July 2001) (noting that PAS relies on oversimplified evaluations of family dynamics).

[194] Warshak, *Parental Alienation, supra* note 23, at 289 (stating that the term "syndrome" is appropriate only once empirical testing on validity and reliability show positive results).

[195] Emerging scientific theories may later be proven invalid. Inclusion in the DSM expresses a point in the evolution of rigorous scientific inquiry at which there is general acceptance that a new theory has adequately proven its empirical existence and reliability. This parallels *Frye*'s recognition that general acceptance occurs at some point in the evolution of scientific inquiry. Frye v.United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs").

[196] Warshak, *Parental Alienation, supra* note 23, at 290 (claiming Tourette's Syndrome existed as a syndrome prior to its DSM inclusion).

[197]Gardner, *Misinformation, supra* note 29, at 4–5; Warshak, *Parental Alienation, supra* note 23, at 288; Warshak, *Current Controversies, supra* note 29, at 36; *see also* Warshak, *Parental Alienation, supra* note 23, at 283 (citing another purported syndrome, "Red Wine Headache Syndrome," to support the claim that PAS exists as a medical syndrome).

[198] Warshak cites a study of PA in support for PAS's existence. But since PAS is a subset of PA, observations of PA do not prove PAS. Warshak, Parental Alienation, *supra* note 23, at 285–86.

[199]Gardner, *Misinformation, supra* note 29; Warshak, *Parental Alienation, supra* note 23, at 290; Warshak, *Current Controversies, supra* note 29. Warshak argues that PAS is a valid medical syndrome even if all children exposed to alienating behavior do not develop PAS, arguing that post-traumatic stress disorder ("PTSD") is not disqualified as a valid syndrome simply because not all rape victims do not develop PTSD. Warshak, *Current Controversies, supra* note 29. However, PTSD does not diagnose rape. Thus Warshak is simply saying PTSD does not diagnose something it does not claim to diagnose. The issue is not whether PAS is *not* what it does *not* say it is, but whether it *is* what it says it is. PAS is defined by the symptoms of the child and the "alienating" parent. Warshak elsewhere acknowledged his logical error, stating that "diagnoses carry no implication that everyone exposed to the same stimulus develops the condition," specifically noting that not all rape victims develop PTSD. Warshak, *Parental Alienation, supra* note 23, at 282. Gardner stated that any claim that target parents deserve alienation is the same as saying rape victims deserve being raped. Gardner, *Empowerment, supra* note 21, at 10.

[200] Proposed Bulletin on Peer-review and Information Quality, 68 Fed. Reg. 54023, 54024 (proposed Sept. 15, 2003) (citing "scientifically rigorous review and critique of a study's methods, results, and findings by others in the field with requisite training and expertise").

[201] Revised Information Quality Bulletin on Peer-review, 69 Fed. Reg. 23230 (April 28, 2004) (citing WILLIAM W. LOWRANCE, MODERN SCIENCE AND HUMAN VALUES, 85 (1985).

[202] *Id.*

[203] Although the federal government sets minimum standards for the peer-review processes used by federal agencies, these standards do not prescribe specified methods. *Id.*

[204] Proposed Bulletin on Peer-review and Information Quality, 68 Fed. Reg. 54023, 54027 (proposed Sept. 15, 2003) (noting that if an apparently biased reviewer is appointed, then another reviewer with a contrary bias must be appointed to ensure balance). There are clever ways to circumvent this requirement. For example, an author wanting to preclude a particular individual with opposing views from becoming an anonymous peer-reviewer, need only acknowledge that individual in the work to preclude his/her being invited to become part of the review committee.

[205] Revised Information Quality Bulletin on Peer-review, 69 Fed. Reg. 23230 (April 28, 2004).

[206] Proposed Bulletin on Peer-review and Information Quality, 68 Fed. Reg. 54023, 54024 (proposed Sept. 15, 2003).

[207] *Id.* (noting that reviewers must be given "an appropriately broad mandate," "[framing] specific questions about information quality, assumptions, hypotheses, methods, analytic results, and conclusions" in the product under review).

[208] *Id.*

[209] *See, e.g.,* Thompson Scientific, www.isinet.com (last visited June 11, 2004); PsychInfo Literature Coverage, <http://www.apa.org/psycinfo/about/covinfo.html> (last visited June 11, 2004).

[210] *Id.*

[211] *Id.*

[212] Email correspondence, Myra Holmes, PsycInfo, Am. Psychol. Assn. (June 9, 2004) (on file with author).

[213] *Id.*

[214] Email correspondence, Linda Beebe, Senior Director, PsycInfo, Am. Psychol. Assn. (Aug. 12, 2004) (on file with author) (stating that the requirement for a journal being peer-reviewed was added in 2001, and that inclusion in the database includes "an expectation that primary journals contain mostly original work"); PsychInfo Literature Coverage, <http://www.apa.org/psycinfo/about/covinfo.html> (last visited June 11, 2004) (stating that included journals "must contain original submissions").

[215] *Daubert,* 509 U.S. at 594; <http://www.gao.gov/cgi-bin/getrpt?RCED-99-99> (last visited May 25, 2004); Rules & Regulations, 63 Fed. Reg. 57570 (Dep't of Education Oct. 27, 1998) (citing the importance of evaluating whether products are "well tested and based on sound research"; "the degree to which the recipient's work approaches or attains professional excellence . . . the extent to which . . . The recipient utilizes processes, methods, and techniques appropriate to achieve the goals and objectives for the program of work in the approved application . . . applies appropriate processes, methods, and techniques in a manner consistent with the highest standards of the profession . . . [and] may also consider the extent to which the recipient conducts a coherent, sustained program of work informed by relevant research").

[216] <http://www.gao.gov/cgi-bin/getrpt?RCED-99-99> (last visited May 25, 2004).

[217] Revised Information Quality Bulletin on Peer-review, 69 Fed. Reg. 23230 (April 28, 2004).

[218] *Id.* (citing Mark R. Powell, *Science at EPA: Information in the Regulatory Process*, Resources for the Future, 139 (1999)).

[219] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593 (1993).

[220] *Daubert*, 590 U.S. at 594.

[221] *Id.*

[222] *Id.*

[223] Apoor Gami et al., *Author self-citation in the diabetes literature*, 170 CAN. MED. ASS'N. J., 13 (June 22, 2004).

[224] Gardner, <http://www.rgardner.com/refs> (last visited April 21, 2004) (citing "[PAS] Peer-Reviewed Articles: Crucial for Frye Test Hearings"); Gardner, <http: //www.rgardner.com/refs/pas_peerreviewarticles. html> (last visited Sept. 30, 2003) (stating "[t]he following articles of mine on the PAS have been published or accepted for publication in peer-review journals"); *see* Appendix D, *supra*.

[225] *Id.*

[226] Contrast THE BASIC HANDBOOK OF CHILD PSYCHIATRY, Vol. III, 431–33; Vol. IV, 263, 270, 283 (Joseph Noshpitz, ed. 1979) (citing copious external support for his scholarship) with Richard Gardner, Judges, supra note 124, at 26ff (claiming without support that human evolution involved "preferential selective survival of women who were highly motivated child rearers on a genetic basis," and "the average woman today is more likely to be genetically programmed for child-rearing functions than the average man") and Richard Gardner, *The Detrimental Effects on Women of the Misguided Gender Egalitarianism of Child-Custody Dispute Resolution Guidelines*, ACAD. FORUM, 38 (1/2), 10–13 (1994) ("Fueling the program of vilification is the proverbial 'maternal instinct' . . . Throughout the animal kingdom mothers will literally fight to the death to safeguard their offspring and women today are still influenced by the same genetic programming") [hereinafter Gardner, *Effects on Women*]

[227] Gardner, *Recommendations, supra* note 32.

[228] <http://www.tc.umn.edu/~under006/issues.html> (last visited May 25, 2004).

[229] Institute for Psychological Therapies, <http://www.ipt-forensics/journal/volume8/j8_3_6.htm> (last visited May 26, 2004).

[230] Email correspondence, Hollida Wakefield, editor of Institute for Psychological Theories Journal (Nov. 14, 2003).

[231] Proposed Bulletin on Peer-review and Information Quality, 68 Fed. Reg. 54023, 54027 (proposed Sept. 15, 2003).

[232] Hollida Wakefield, *Editor's Note*, ISSUES IN CHILD ABUSE ACCUSATIONS Vol. 1, No. 1, i–ii (1989).

[233] *Interview: Hollida Wakefield and Ralph Underwager*, Paidika: The Journal of Paedophilia, Vol.3, No.1, Issue 9, 12 (Winter 1993).

[234] *Interview: Hollida Wakefield and Ralph Underwager*, Paidika: The Journal of Paedophilia, Vol. 3, No. 1, Issue 9, 12 (Winter 1993). Paidika's editorial goal is to demonstrate that pedophilia is a "legitimate and productive part of the totality of the human experience." *Id.*

[235] Underwager sued this psychologist, losing on summary judgment. In 1994, the Seventh Circuit upheld the grant of summary judgment, finding no evidence of "actual malice." Underwager v. Salter, 22 F.3d 730 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 351 (1994) (cited in Cynthia Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Litigation*, 109 Harv. L. Rev. 551, 622 n.392 (1996)).

[236] PsychInfo database available at <www.apa.org/psychinfo/publishers/journals.html> (last visited Feb. 20, 2006).

[237] Richard Gardner, *Guidelines for Assessing Parental Preference in Child-Custody Disputes*, Jrnl. of Divorce & Remarriage, 30(1/2), 1–9 (1999) *available at* <http://www.rgardner.com/refs/ar4.html> (last visited May 25, 2004) [hereinafter Gardner, *Guidelines*].

[238] *Compare* Gardner, *Denial, supra* note 33 *with* Richard Gardner, *How Denying and Discrediting the Parental Alienation Syndrome Harms Women*, THE PARENTAL ALIENATION SYNDROME: AN INTERDISCIPLINARY CHALLENGE FOR PROFESSIONALS INVOLVED IN DIVORCE, 121–42 (W. von Boch-Gallhau, U. Kodjoe, W Andritsky, & P. Koeppel, eds., 2003) [hereinafter Gardner, *Denying and Discrediting*]. *Compare* Gardner, *Recommendations, supra* note 32, *with* Gardner, *Recommendations II, supra* note 32.

[239] *Compare, e.g.,* the opening text in Gardner, *PAS v. PA, supra* note 113, at 95 (stating "in association with this burgeoning of child-custody litigation, we have witnessed a dramatic increase in the frequency of a disorder rarely seen previously, a disorder that I refer to as the Parental Alienation Syndrom ('PAS's)") *with* identical language in Gardner, *Judiciary, supra* note 34, at 39, *and* Gardner, *Denial, supra* note 33, at 192.

[240] *Compare* Richard Gardner, The Three Levels of Parental Alienation Syndrome Alienators (2003), <http://www.childcustodycoach.com/pas.html> (last visited June 9, 2004) [hereinafter Gardner, *Three Levels*] *with* Gardner, Differential Diagnosis, supra note 131.

[241] Gardner, *Three Levels, supra* note 242; Gardner, Differential Diagnosis, *supra* note 131; In only one of these articles, the table is cited to his self-published books. Richard Gardner, *Sollten Gerichte anordnen, daß an PAS leindende Kinder den antfremdeten Elternteil besuchen bzw. bei ihm wohnen?*, in DAS ELTERLICHE ENTFREMDUNGSSYNDROM. ANREGUNGEN FÜR GERICHTLICHE SORGE- UND UMGANGSREGELUNGEN, 23, 42–45 (2002) *available at* <http://www.rgardner.com/refs/ar8_deutsche.html> (last visited May 25, 2004) [hereinafter Gardner, *Sollten Gerichte*]; www.vwb-verlag.com/Katalog/m117.html (last visited June 9, 2004); Gardner, *Recommendations, supra* note 32; Gardner, *Family Therapy*, *supra* note 142, at 196.

[242] *Compare* <http://www.rgardner.refs/pas_intro.html>, *supra* note 29 (website—published material) with Gardner, *Judiciary*, *supra* note 31, at 42 (language appearing verbatim starting with "In association with this burgeoning . . ."); Gardner, *Denial, supra* note 33, at 192 (language appearing verbatim, for example section "The Parental Alienation Syndrom"), Gardner, *DSM-IV, supra* note 21, at 1 (language appearing verbatim, for example section "The Parental Alienation Syndrome") and Gardner, *PAS v. PA, supra* note 113, at 94 (language appearing verbatim, for example section "The Parental Alienation Syndrome").

[243] *Compare* <http://www.rgardner.refs/pas_intro.html> *with* Gardner, *DSM-IV, supra* note 21, at 3–4 (beginning with "Is PAS a True Syndrome") and Gardner, *PAS v. PA, supra* note 113, at 96 (beginning with "Is PAS a Syndrome").

[244] Gardner, *Sollten Gerichte, supra* note 243 (citing original publication in Richard Gardner, *Should Courts Order PAS Children to Visit/Reside with the Alienated Parent? A Follow-up Study*, AM. J. OF FORENSIC PSYCHOL., Dec. 2001, at 61 [hereinafter Gardner, *Courts*].

[245] Gardner, *Peerreviewarticles.html, supra* note 242 (compare items listed as number 12 and 12(1)).

[246] Richard Gardner, *The Relationship Between the Parental Alienation Syndrome (PAS) and the False Memory Syndrome (FMS*), AM. J. OF FAM. THERAPY, Mar. – Apr. 2004, at 79 [hereinafter Gardner, *Relationship*]; Gardner, *DSM-IV, supra* note 21, at 1; Gardner, *Denial, supra* note 33; Gardner, *PAS v. PA, supra* note 113, at 93; Gardner, *Family Therapy, supra* note 142, at 195; Gardner, *Differentiating, supra* note 33.

[247] Brunner-Routledge Title: American Journal of Family Therapy, <http://www.tandf.co.uk/journals/titles/01926187.asp> (last visited May 25, 2004).

[248] *Id.*

[249] Brunner-Routledge Title: Instructions for Authors, <http://www.tandf.co.uk/journals/authors/uaftauth.asp> (last visited June 10, 2004). In contrast, another journal published by the same publisher, *Advances in Physics*, specifies that articles are "independently peer-reviewed," that articles must not have been published elsewhere, and if they were, the author will be "charged all costs" incurred by the publication, and the article will not be published. Taylor and Francis, Instructions for Authors, <http://www.tandf.co.uk/journals/authors/tadpauth.asp> (last visited June 11, 2004).

[250] <http://www.tandf.co.uk/journals/titles/01926187.asp> (last visited June 14, 2004). By contrast, *Advances in Physics* is "the number-one ranked journal in its field, with an Impact factor of 13.4." <http://www.tandf.co.uk/journals/authors/tadpauth.asp> (last visited June 11, 2004).

[251] <www.isinet.com> (last visited June 11, 2004).

[252] Gardner, *Relationship, supra* note 248; Gardner, *DSM-IV, supra* note 21; Gardner, *PAS v. PA, supra* note 113; Gardner, *Denial, supra* note 33; Gardner, *Differentiating, supra* note 33.

[253] *Compare* <www.rgardner.refs/pas_intro.html> (last visited Sept. 30, 2003), Gardner, *DSM-IV, supra* note 21, at 2–6, Gardner, *PAS v. PA, supra* note 113, at 94–98, *and* Gardner, *Denial, supra* note 33, at 195 (each beginning section "The Parental Alienation Syndrome").

[254] *Compare* RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME (2d ed. Creative Therapeutics 1998) *with* Gardner, *Differentiating*, *supra* note 33.

[255] Gardner, *Family Therapy, supra* note 142, at 206.

[256] *Id.*

[257] Richard Warshak, *Dedication to Richard A. Gardner, M.D.*, AM. J. OF FAM. THERAPY, 32, 77 (2004) [hereinafter Warshak, *Dedication*].

[258] Gardner, *Judiciary, supra* note 31, at 39; Gardner, *Empowerment, supra* note 36; Gardner, *Courts, supra* note 246.

[259] American Journal of Forensic Psychology, <http://www.forensicpsychology.org/journalpg.html> (last visited May 25, 2004).

[260] Gardner, *Judiciary, supra* note 31, at 58; *see* Goldenberg & Nancy, *supra* note 89, at 7, n.11.

[261] Gardner, *Judiciary, supra* note 31.

[262] Gardner, *Guidelines*, *supra*, note 239; Gardner, *Recommendations II*, *supra* note 34.

[263] The Hawarth Press, Inc., <http://www.haworthpressinc.com/web/JDR> (last visited May 25, 2004).

[264] The Hawarth Press, Inc., Manuscript Submission Information, <http://www.hawarthpressinc.com/journals> (last visited May 25, 2004).

[265] Telephone Interview, Zella Ondrey, Journal Production Manager, Hazelton/Haworth Press (May 25, 2004). This publisher is currently publishing a non-peer-reviewed book on PAS for which Gardner was an editor THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME: CONCEPTUAL, CLINICAL, AND LEGAL CONSIDERATIONS (Richard Gardner, S. Sauber, & Demosthenes Lorandos, eds. 2004).

[266] Peer Revew Articles, *supra* note 242; Gardner, *Guidelines*, *supra* note 239.

[267] *Compare*, Gardner, *Effects on Women, supra,* note 244, at 10–13 and Gardner, *Guidelines, supra* note 239 (each beginning at "The Stronger-Healthy-Psychological . . .").

[268] *Compare,* Gardner, *Recommendations, supra* note 32 *with* Gardner, *Recommendations II, supra* note 34 (each beginning at "Mild Cases of PAS").

[269] Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593–94 (1993).

[270] Richard Gardner, *The Parental Alienation Syndrome: Sixteen Years Later*, 45 ACAD. F., 10 [hereinafter Gardner, *Sixteen Years Later*]; Gardner, *Effects on Women, supra* note 228, at 10–13; Richard Gardner, *Recent trends*, *supra* note 26, at 3; Written correspondence, from Mariam Cohen, M.D. Psy. D., Editor (June 2, 2004). The publisher's website states that, "All manuscripts are subject to editing for style, clarity and length." <http://aapsa.org/academy_forum.html> (last visited May 25, 2004). Nonetheless, Warshak claims this publication is peer-reviewed. Warshak, *Current Controversies, supra* note 29, at 29.

[271] Gardner, Judges, supra note 124, at 26; Telephone interview, Pat Judge, Editor, New Jersey Family Lawyer (June 14, 2004). Published by the Camden County Family Law Committee. Articles are edited only for grammar and citation verification as in law review journals; no scientific or panel review is involved.

[272] Gardner, *Legal and Psychotherapeutic Approaches, supra* note 141, at 14; Present Editor District Judge Leben specified that this journal "is not 'peer-reviewed' in the way that scientific or social-science journals are." Instead, published articles receive the kind of editorial review that is applied by student editors to law review publications. Judge Leben is "certain" that no psychologists would have reviewed the work on behalf of *Court Review* prior to its 1991 publication, and further stated that, had he been editor, he would not have published "an article by Mr. Gardner, had [he] been the editor, because of the lack of acceptance of his work in the psychological community." Email correspondence, from District Court Judge Steve Leben (June 9, 2004); American Judges Association, <http://aja.ncsc.dni.us> (last visited May 25, 2004).

[273] Email correspondence, from Editor VWB-Verlag für Wissenschaft und Bildung (June 21, 2004) (stating that these articles were not peer-reviewed). <www.pas-konferenz.de/f/dok/Fly_neu.pdf> (last visited June 6, 2004). Gardner, *Denying and Discrediting, supra* note 240; Richard Gardner, *The Parental Alienation Syndrome: Past, Present, and Future*, in THE PARENTAL ALIENATION SYNDROME: AN INTERDISCIPLINARY CHALLENGE FOR PROFESSIONALS INVOLVED IN DIVORCE (W. von Boch-Gallhau, U. Kodjoe, W Andritsky, and P. Koeppel, eds., 2003) [hereinafter Gardner *Past, Present, and Future*]; Das Povental Alienation Syndrom, <http://www.vwb-verlag.com/Katalog/m202.html> (last visited June 22, 2004) and <www.pas-konferenz.de> (last visited June 11, 2004).

[274] Gardner, *Child Custody*, *supra* note 30, at 637–46; Warshak, *Dedication, supra* note 259, at 77 (referencing Gardner's invitation to submit articles for this publication). The original editor's preface does not mention any peer-review, and states that "the editors certainly do not [agree with all of the theories included]." Richard Gardner, *Preface*, in BASIC HANDBOOK OF CHILD PSYCHIATRY, Vol. I, xiii, at xiii (J.Noshpitz, ed. 1979).

[275] Email correspondence, from editor VWB-Verlag für Wissenschaft und Bildung (June 21, 2004) (stating the book was not peer-reviewed); Gardner, *Sollten Gerichte, supra* note 243 (citing original publication in AM. JRNL. OF FORENSIC PSYCHOL. 19(3)(2001)); Parental Alienation Syndrome, <www.vwb-verlag.com/Katalog/m117.html> (last visited June 9, 2004).

[276] Gardner, *Three Levels*, *supra*, note 242. I was unable to locate this article elsewhere by searching the internet and the APA PyscInfo database on the title. <http://www.apa.org/psycinfo/about/covinfo.html> (last visited June 11, 2004); c*ompare* Gardner, *Three Levels, supra* note 242; Gardner, Differential Diagnosis, supra note 131 (DDC Chart).

[277] Richard Gardner, *The Parental Alienation Syndrome and the Corruptive Power of Anger* (in press) (2004) [hereinafter Gardner, *Anger*]. There is no record of this article on the Internet, in the APA PyscInfo, or on the Library of Congress website. PsychInfo, <http://www.apa.org/psycinfo/about/covinfo.html> (last visited June 11, 2004); Library of Congress, <http://www.loc.gov> (last visited June 15, 2004).

[278] *E.g.*, Gardner, *Recommendations, supra* note 32; Gardner, *Differentiating, supra* note 33, at 97; Gardner, *Denial, supra* note 33, at 191.

[279] *E.g.*, Gardner, *Recommendations, supra* note 32; Gardner, *Differentiating, supra* note 33, at 97; Gardner, *Denial, supra* note 33, at 191.

[280] FED. R. EVID. 702 (stating that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education").

[281] Gardner claimed that he was promoted to "the rank of full professor" at Columbia in 1983, at which time he was required to "satisfy all the same requirements necessary for the promotion of full-time academicians." Misperceptions versus Facts, <http://rgardner.com/refs/misperceptions_versus_facts.html> (last visited April 21, 2004). According to Columbia, these claims are untrue. Columbia University Bulletin, <http://www.cait.cpmc.columbia.edu:88/dept/ps/bulletin/bull0044.html> (last visited April 8, 2001).

[282] *See* People v. Fortin, 706 N.Y.S.2d 611, 612(N.Y. Co. Ct.) (2000); State v. Stowers, 690 N.E.2d 881, 885 (Ohio 1998); Tungate v. Commonwealth, 901 S.W.2d 41, 42 (Ky. 1995); Stephen L.H. v. Sherry L.H., 465 S.E.2d 841, 846 (W. Va. 1995); State v. Redd, 642 A.2d 829, 831 (Del. Super. Ct. 1993); Ochs v. Martinez, 789 S.W.2d 949, 958.

[283] One student described him as a "leading child psychiatrist" solely based on his self-published biography. McGlynn, *supra* note 89, at 532–33, fn.79.

[284] Faculty Handbook, Instructional Titles, <http://www.columbia.edu/cu/vpaa/fhb/c3/factitle/html> (last visited April 2, 2004).

[285] Qualifications of Richard A. Gardner, M.D. For Providing Court Testimony, <http://www.rgardner.com/pages/cvqual.html> (last visited April 21, 2004).

[286] Columbia University Bulletin, <http://www.cait.cpmc.columbia.edu:88/dept/ps/bulletin/bull0044.html> (last visited April 8, 2001); Bruch, *supra* fn 22, at 534–535 (Fall 2001).

[287] Summary of Curriculum Vitae, <http://www.rgardner.com/pages/cvsum.html> (last visited April 21, 2004).

[288] Columbia gives volunteers the title of "Clinical Professor." Gardner was thus a Columbia Professor, albeit not a tenured or full Professor. Bruch *supra* fn 22, at 535, fn. 26; Columbia University Bulleting, <http://www.cait.cpmc.columbia.edu:88/dept/ps/bulletin/bull0044.html> (last visited April 8, 2001). Clinical Professors are unpaid volunteers who have one-year, renewable appointments. Clinical Professors are appointed for their "bedside teaching" ability rather than their research. Their contract renewals are based solely on a review of their "bedside teaching," not research or other qualifications. Telephone Interview with Carolyn Merten, Director, Faculty Affairs, Columbia University College of Physicians and Surgeons (Apr. 12, 2004). Clinical Professors "permit students to observe their practice," but "[u]nlike the title [of] Professor of Clinical Medicine . . . [the title] indicates neither full faculty membership nor research

accomplishment." Bruch *supra* fn 22, at 535, fn. 26. Full Professors are "scholars and teachers . . . who are widely recognized for their distinction." Faculty Handbook, Instructional Titles, <http://www.columbia.edu/cu/vpaa/fhb/c3/factitle.html> (last visited Apr. 2, 2004). Since Clinical Professors are ineligible for tenure, they are never "full professors." *Id.* While full Professors teach students of varying levels, the Dean of the Faculty of Medicine at Columbia asserted that Gardner had never taught undergraduates, "nor would he be asked to do so." Letter from Herbert Pardes, Vice President for Health Sciences and Dean of the Faculty of Medicine, Columbia University Health Sciences Division, to Valerie Sobel (Nov. 23, 1999).

[289] Faculty Handbook, Appointment to Tenure, <http://www.columbia.edu/cu/vpaa/fhb/c3/facten.html> (late visited April 2, 2004).

[290] Daubert v. Merrell Dow Pharm., 509 U.S.579, 583 (1993) (indicating an expert's "impressive credentials" are a positive factor in assessing credibility).

[291] Prior to his suicide in May 2003, Gardner practiced child psychiatry and adult psychoanalysis. Stuart Lavietes, *Richard Gardner, 72, Dies; Cast Doubt on Abuse Claims*, N.Y. TIMES (June 9, 2003); Stephanie J. Dallam, *Dr. Richard Gardner: A Review of His Theories and Opinions on Atypical Sexuality, Pedophilia, and Treatment Issues*, TREATING ABUSE TODAY, at 14 (1998). Initially ninety-five percent of his work was therapeutic, but by 2000, ninety-eight to ninety-nine percent of his professional work involved forensic analysis and testimony. People v. Fortin, 706 N.Y.S.2d 611, 612 (2000). Gardner wrote more than 250 books and articles with a target audience of "mental health professionals, the legal community, divorcing adults and their children." Rorie Sherman, *Gardner's Law*, N.Y.L.J.. Aug. 16, 1993, at 1, 45–46. His works on child sex abuse were self-published or republications of self-published materials. List of Publications <http://www.rgardner.com/pages/publist.html> (last visited April 21, 2004). He published many of his works using his private publishing company, Creative Therapeutics, and maintained a website advertising his materials. *Dallam*, *supra* note 311, at 15; Richard A. Gardner's website, <http://www.rgardner.com> (last visited Sept. 30, 2003).

[292] Berliner & Conte, *supra* note 198, at 114.

[293] Richard Gardner, "Qualifications of Richard A. Gardner, M.D. for Providing Court Testimony," <http://www.rgardner.com/pages/cvqual.html> (last visited April 21, 2004).

[294] *Id*.

[295] The APA Taskforce notes that use of such non-standard checklists to evaluate child abuse allegations may compromise children's safety and development. VIOLENCE AND THE FAMILY, *supra* note 108, at 12. Gardner's checklist purports to distinguish true and false abuse, and assumes that child abusers are mostly psychopathic, unemployable, impulsive, and angry. Gardner, *Differentiating, supra* note 33. However, studies of sex offenders show that they may not be identified based on these factors. *See, e.g.,* Neil Malamuth, *Criminal and Noncriminal Sexual Aggressors: Integrating Psychopathy in a Hierarchical-Mediational Confluence Model*, in SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT, 33 (Robert Prentky, Eric Janus, & Michael Seto, eds. 2003) at 33–58 (discussing differences between incarcerated offenders and those who are not criminally prosecuted); ANNA SALTER, PREDATORS, PEDOPHILES, RAPISTS, AND OTHER SEX-OFFENDERS, *passim* (2003) (discussing types of sex offenders and the difficulties in identifying them); Berliner & Conte, *supra* note 198.

[296] Summary of Curriculum Vitae, <http://www.rgardner.com/pages/cvqual.html> (last visited April 21, 2004).

[297] In response to complaints about Gardner's work, Columbia convened a review committee which concluded that he "had been careful to qualify any conclusions as his own opinion and found no evidence of fraudulent or unethical research." Letter from Herbert Pardes, Vice President for Health Sciences and Dean of the Faculty of Medicine, Columbia University Health Sciences Division, to Valerie Sobel (Nov. 23, 1999). As long as he did not falsely or "inappropriately claim that [his views were] facts based on research," Gardner did not violate Columbia's rules on academic freedom. *Id*. The Dean of the Faculty of Medicine acknowledged that many Columbia faculty members disagreed with Gardner's views, and that the Columbia faculty viewed Gardner's theoretical work, not as scholarly research, but as personal opinions they deemed "offensive to some people." *Id.*

[298] <http://rgardner.com/refs/misperceptions_versus_facts.html> (last visited April 21, 2004). Gardner maintained that PAS had not been discredited by peer-review. *Id.*

[299] People v. Loomis, 172 Misc.2d 265, 266 (N.Y. Co. Ct. 1997).

[300] *Loomis*, 172 Misc.2d at 267, n. 1.

[301] *In re* Marriage of Trainor, No. 91-2355 1996 WL 312488 (Wash. Ct. App. June 10, 1996) (unreported decision affirming award of custody to the mother); Wiederholt v. Fischer, 485 N.W.2d 442, 536 (Wis. Ct. App. 1992) (affirming primary placement of children with the mother); *see also* Court Rulings Specifically Recognizing the Parental Alienation Syndrome in the U.S. and Internationally, <http://www.rgardner.com/refs/pas_legalcites.html>.

[302] Science, medicine, and law share an interest in learning and understanding the facts and phenomena we call truth. Once a scientific or medical truth is understood, its description is consistent because truth looks the same from any angle. Gardner's contradictory statements about PAS thus mark it is as propaganda rather than science. His attitude towards those who did not credit his claims has a political tenor. Gardner deprecates those who attorneys who dispute PAS's existence describing them as "deceitful" and "mercenaries." Gardner, *PAS v. PA, supra* note 113, at 108. Warshak claims that those who oppose the use of PAS as a term either deny the existence of alienation caused by a vindictive parent, believe such behavior does not warrant a diagnosis, or believe that all alienation should be given the same descriptor. Warshak, *Parental Alienation, supra* note 23, at 281. He ignores those who recognize that some alienation cases may involve a vituperative parent and that some forms of alienation may be pathological, but find PAS scientifically void. Warshak likens those who refuse to acknowledge the real existence of PAS with those who refused to acknowledge child sex abuse. *Id*. at 300. However, while there is no empirical evidence that PAS exists, there is substantial evidence that child sex abuse exists.

[303] Judges and juries may inappropriately grant experts undue credibility due to the biased belief that authority figures are reliable and trustworthy. *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 595 (1993); Dahir, *supra* note 97, at 73–74 (finding that judges rely primarily on general acceptance and expert qualifications when admitting expert testimony). For an excellent discussion of the problems that arise when judges fail to assess the scientific validity of evidence presented by scientific experts, *see* Ramsey & Kelly, *supra* note 81.

[304] *Daubert,* 509 U.S. at 590; *see also* Warshak, *Parental Alienation, supra* note 23, at 287–88.

[305] *Daubert,* 509 U.S. at 590.

[306] *See* Warshak, *Current Controversies, supra* note 29.

[307] *See e.g.* Berliner & Conte, supra note 198, at 121; Scott Sleek, *Is Psychologists' Testimony Going Unheard?*, AM. PSYCHOL. ASS'N MONITER, Feb. 1998 (citing Robert Geffner, Ph.D).

[308] *Daubert,* 509 U.S. at 594 (citing *United States* v. *Downing*, 753 F.2d 1224, 1238 (3rd Cir. 1985).

[309] *Daubert*, 509 U.S. at 593–94.

[310] Warshak cites Mosteller, claiming that PAS ought to be required to satisfy *Daubert* only when it is introduced as a test of whether certain conduct, like child sex abuse, has occurred, but not if it is admitted "to correct human misunderstandings of the apparently unusual and therefore suspicious reactions of a trial participant." Warshak, *Parental Alienation, supra* note 23, at 289. In fact, Mosteller specifically notes that new science that claims to diagnose fault, requires particularly heightened scrutiny for admissibility. Robert Mosteller, *Syndromes and Politics In Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 470–72 (1996). *Daubert* makes no such distinction in its standards for the admiting novel science.

[311] Fed. R. Evid. 702.

[312] Frye v. United States, 293 F. 1013, 1014; Fed. R. Evid. 704, 169 (2001).

[313] *Frye,* 293 F. at 1014; People v. Loomis, 172 Misc. 2d 265 (1997) ("It is a matter of common understanding and experience" that some parents use their influence to undermine the relationship of a child with the other parent by attempting to denigrate the opinion of the child towards the other parent). *See also* Weinstein, *supra* note 99, at 127 (noting that children may feel pressured to take sides in divorce because parents who are unable to responsibly decide what is best for them place the burden of choice on their children); People v. Sullivan, 2003 WL 1785921, at *13–14 (Cal. App. 6 Dist.) (2003).

[314] FED. R. EVID. 702(1), (2).

[315] Gardner, VIOLENCE AND THE FAMILY, *supra* note 108, at 96; Daubert v. Merrell Dow Pharm., 509 U.S. 597 (1993) (noting the differing goals of science, which presents an evolving search for knowledge and truth, and law, which seeks finality in determinations about past events, noting that this difference inevitably means that admissibility for potentially useful scientific material may lag behind scientific discovery). Under this standard, the admissibility of new science lags behind scientific discovery, using the test of time to ensure reliability. The imperative for swift and final legal determinations means that some litigants will be unable to prove allegations relying on novel science that has not yet achieved the standard required for admissibility.

[316] Berliner & Conte, *supra* note 198, at 121. An expert may testify about his opinion about the patient's treatment without mandating a specific legal outcome, opining that forcing a battered woman to live with the man who appears responsible for harming her may increase the risk of further injuries, or that forcing a refugee from a country immersed in civil war to return home might expose him to further trauma, just as typing in an ergonomically incorrect posture may increase the risk of future repetitive-motion injury. However, such experts cannot mandate legal outcomes like refugee status, citizenship, custody, restraining orders, sanctions, custody, or incarceration, even when they are consistent with sound medical treatment. The DSM thus does not mandate that courts deem

everyone with Down's or Asperger's Syndrome *non compos mentis*.

[317] *See* Becker, *supra* note 100, at 145 (noting that syndrome testimony purports to diagnose the truth or falsity of abuse allegations, thus invading the province of the fact-finder).

[318] *See* Misperceptions versus Facts, <http://www. rgardner . com/refs/misperceptions_versus_facts.html> (last visited April 21, 2004); Gardner, *Differential Diagnosis, supra* note 131. The DDC mandates that mothers be legally deprived of liberty, property, and custody. Criminal convicts can be legally deprived of liberty and property because their due process rights have been upheld. By usurping the roles of fact-finder and judge, the DDC circumvents due process, mandating criminal sanctions against divorced women under the guise of medical diagnosis and treatment.

[319] FED. R. EVID. 704(b).

[320] FED. R. EVID. Advisory Committee's Note on FRE 704, 170 (2001).

[321] Child Sexual Abuse Accomodation Syndrome, which cannot diagnose whether child abuse happened, is compared with Battered Child Syndrome, which Mosteller points to the need for heightened scientific reliability when a diagnosis is used to show that criminal conduct has occurred. Mosteller, *supra* note 330, at 470.

[322] FED. R. EVID. 704(b).

[323] Gardner, *Basic Facts, supra* note 28.

[324] People v. Loomis, 172 Misc. 2d 265, 268 (1997).

[325] Bowman & Mertz, *supra* note 152, at 578 n.178 (citing studies showing an increase in child sex abuse allegations raised during divorce cases from five to ten percent in the early 1980s to thirty percent by 1987—versus a two percent rate of such reporting in the late 1980s—and studies finding that between fifty and eighty percent of incest allegations arising in divorce were found to be true).

[326] Gardner, VIOLENCE AND THE FAMILY, *supra* note 108, at 9 (noting that men perpetrate the majority of intra-familial violence against both their female spouses and their children).

[327] Gardner, VIOLENCE AND THE FAMILY, *supra* note 108, at 40 (noting that when children reject battering fathers, it is common for the batterers and others to blame the mother for alienating the children). This defense strategy is similar to sex offenders' attempts to blame their victims for their violence. Both defense strategies rely heavily on sexist societal biases that assume women fabricate allegations of sexual violence. In a consent defense, the claim is that sex occurred but it was not a criminal act, while in incest cases, the claim is that nothing at all happened. Gardner depicts custody battles as "he said/she said" evidentiary battles and claims that children's programmed lies literally become delusions. Gardner, *Judiciary, supra* note 31, at 53. Claims that children are so deluded that they cannot tell the truth echoe claims that adult survivors of child sex abuse are similarly deluded. *See* Bowman & Mertz, *supra* note 152, at 628–31.

[328] Gardner, VIOLENCE AND THE FAMILY, *supra* note 108, at 40.

[329] *Id.* Gardner expresses outrage at the idea that a father might be obliged to pay child support without receiving the child's love and respect in return. Gardner, *Recommendations, supra* note 32. However, child support is not the purchase of a relationship, but a legal obligation to fiscally support children one has biologically created to protect the taxpayer *fisc* from being burdened by their upbringing. This duty is waived by the state in some situations, such as sperm donation. Its policy rational is similar to forcing polluters to pay clean-up costs. Procreation creates a human being who can burden society's resources; therefore, it is the obligation of the creators to pay the costs of the child's care.

[330] GARDNER, TRUE AND FALSE, *supra* note 27, at xxxvii.

[331] *Id.* at xxxiii.

[332] *Id.* at 20–30.

[333] *Id.* at 29. This argument is reminiscent of one pro-pedophilia advocate's claim that, "A boy is mature for lust, for hedonistic sex, from his birth on; sex as an expression of love becomes a possibility from about five years of age." Stephanie J. Dallam, *Science or Propaganda? An Examination of Rind, Tromovich and Bauserman (1998), in* MISINFORMATION CONCERNING CHILD SEXUAL ABUSE AND ADULT SURVIVORS 123 (Charles L. Whitfield, Joyanna Silberg & Paul J. Fink eds, 2001) [hereinafter Dallam, *Science or Propoganda?*] (citing Edward Brongersma, LOVING BOYS: A MULTIDISCIPLINARY STUDY OF SEXUAL RELATIONS BETWEEN ADULT AND MINOR MALES, Vol. 1, 40 (1986)). Brongersma is a Board member of the Dutch pro-pedophilia journal, Paidika: The Journal for Paedophilia. Dallam, *Science or Propoganda?*.

[334] GARDNER, TRUE AND FALSE, *supra* note 27, at 29. Assuming that male sexual arousal and female exposure to sperm fosters procreation and species' survival, Gardner omitted the fact that approximately thirty-four percent of rapists report impotence, premature ejaculation, or retarded ejaculation when they commit sexual assaults, while they report no such sexual dysfunction during consensual sex. A. NICHOLAS GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER, 88 (1979). For discussions of the normative effects of trauma, and the effect of the trauma of sexual abuse, *see* SANDRA L. BLOOM & MICHAEL REICHERT, BEARING WITNESS:

VIOLENCE AND COLLECTIVE RESPONSIBILITY, 103–05 (1998); SANDRA BLOOM, CREATING SANCTUARY: TOWARD THE EVOLUTION OF SANE SOCIETIES, *passim* (1997); TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY, *passim* (Bessel A. van der Kolk, Alexander L. McFarlane, & Lars Weisaeth eds., 1996); JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 7–130 (1992); ANNA SALTER, TREATING CHILD SEX OFFENDERS AND Victims, *passim* (1988); JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST 22–35 (1981).

[335] GARDNER, TRUE AND FALSE, *supra* note 27, at 26.

[336] *Id.*

[337] *See* Wakefield's argument that pedophilia in the U.S. can only be harmful because of the negative social attitude towards pedophilia. *Interview: Wakefield & Underwager*, *supra* note 252, at 5.

[338] GARDNER, TRUE AND FALSE, *supra* note 27, at 24.

[339] *Id.* Gardner ignored the susbstantial literature that demonstrates that adult-child sex is harmful for the majority of children. *See, e.g.,* Dallam, *Science or Propaganda?, supra* note 335, at 114–16.

[340] GARDNER, TRUE AND FALSE, *supra* note 27, at 32–33.

[341] *Id.* at 42.

[342] Gardner, *Basic Facts supra* note 28 ("[w]hen bona fide abuse does exist, then the child's responding alienation is warranted and the PAS diagnosis is *not* applicable").

[343] *Id* ("When true parental abuse and/or neglect is present, the child's animosity may be justified").

[344] Gardner, *Recommendations II, supra* note 34 (stating that PAS in cases involving real abuse results in "far more deprecation than would be justified" based on the bona fide abuse).

[345] Gardner, *DSM-IV, supra* note 21, at 2.

[346] *See, generally,* Gardner, *DSM-IV*, *supra* note 20.

[347] Gardner claims that mothers will normally attempt to foster their child's relationship with abusive fathers and that false allegations are characterized by mothers who over-protectively attempt to sever the child's relationship with his abuser. Gardner, *Differentiating, supra* note 33, at 102. He further claims that children find police investigations into child sex abuse allegations "ego-enhancing" and that when therapists tell children they are safe because their perpetrators are in prison, this acts, not to quell, but increase the child's fear. Gardner, *Empowerment, supra* note 36, at 22, 25.

[348] GARDNER, TRUE AND FALSE, *supra* note 27, at xxvii. *See also* Gardner, *Judiciary, supra* note 31, at 49–50 (claiming many fathers are in jail for years based on false allegations of abuse); Gardner, *PAS v. PA, supra* note 113, at 107.

[349] Others then cited Gardner for the claim that there was an epidemic of false allegations. Jansen, *supra* note 89, at 52 (juxtaposing the increase in child sex abuse allegations and an alleged increase in PAS cases in an argument for presumptive joint custody); Henley, *supra* note 89, at 104, n.143 (citing Gardner's PAS work claiming that the "vast majority" of children alleging sex abuse allegations are "fabricators"); Klein, *supra* note 89, at 250 (uncritically citing Gardner's claim that most claims of child abuse are unfounded); Knowlton & Muhlhauser, *supra* note 89, at 257 (citing Gardner's claim that false child abuse allegations and PAS are common results of high conflict divorces); Marks, *supra* note 89, at 209, n.8. (citing Gardner's work on PAS in a footnote on the difficulty of estimating the actual percent of false sexual abuse allegations).

[350] Lawrence Wright, *Remembering Satan*, THE NEW YORKER, May 12, 1993, at 76.

[351] Judith Herman, *Presuming to Know the Truth: Based on 3 Questionable Propositions, Journalists Treat Memories of Childhood Abuse as 'Hysteria'*, NEIMAN REPORTS, Spring 1994, at 43.

[352] VIOLENCE AND THE FAMILY, *supra* note 108, at 12. Ignoring these rates of substantiation, Gardner claimed that Child Protective Service workers "overzealously" err on the side of finding allegations true in order to promote a multimillion dollar industry. Gardner, *Empowerment, supra* note 21, at 21.

[353] DOUGLAS W. PRYOR, UNSPEAKABLE ACTS: WHY MEN SEXUALLY ABUSE CHILDREN 2 (1996); VIOLENCE AND THE FAMILY, *supra* note 108, at 12 (citing rates of child sex abuse at thirty-four percent for girls and ten to twenty percent of boys); Lois Timnick, *The Times Poll; 22% in Survey Were Child Abuse Victims*, L.A. TIMES Aug. 25, 1985 (citing rates of child sex abuse at twenty-seven percent for girls and sixteen percent for boys).

[354] RICHARD A. GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED 7, 140 (1991) [hereinafter GARDNER, HYSTERIA]

[355] GARDNER, TRUE AND FALSE, *supra* note 27, at xxv, xxxviii; Gardner, *Misinformation, supra* note 29.

[356] GARDNER, TRUE AND FALSE, *supra* note 27, at xxxiii.

[357] Gardner, *Denial, supra* note 33, at 197; Gardner, *Misinformation, supra* note 29.

[358] Gardner, *Legal*, *supra* note 144.

[359] *Id.*

[360] Gardner, *Empowerment, supra* note 36, at 16.

[361] Gardner, *Detrimental, supra* note 244, at 10–13.

[362] *See, e.g., id.*; Gardner, Judges, *supra* note 124.

[363] Gardner, *Empowerment, supra* note 36, at 9–10.

[364] GARDNER, TRUE AND FALSE, *supra* note 27, at xxiv.

[365] Sherman, *supra* note 311, at 46. The use of a Gardner's personal preponderance standard marks SALS as unscientific. Science is not measured based on preponderance, but on truth.

[366] Martha Deed, *Clinical Conflicts in the Child Sex Abuse Arena*, READINGS: A Journal of Reviews and Commentary in Mental Health, 14 (1988).

[367] *Id.*

[368] Page v. Zordan, 564 So. 2d 500, 502 (Fla. Dist. Ct. App. 1990). Another 1990 case cited SALS in dicta as an example of material that is admissible as expert testimony but provided no support for this statement. Ochs v. Martinez, 789 S.W.2d 949, 958 (Tex. App.) (1990).

[369] People v. Loomis, 172 Misc. 2d 265, 267 (citing Page v. Zorn, 564 S.O.2d 500 (Fla. App. Ca.) (1990)) (emphasis in original).

[370] Tungate v. Com.of Kentucky, 901 S.W.2d 41, 42–43 (Ky. 1995).

[371] By "pro-pedophilia," I mean advocacy for lessening or eradicating legal accountability for child sex abuse through legalization and social normalization, not encouraging people to become pedophiles. While Gardner and NAMBLA share pro-pedophilia advocacy stances, neither advocates that individuals become pedophiles.

[372] *See, e.g.,* SALTER, PREDATORS, *supra* note 315, at 57–65 (discussing scholarly work minimizing child sex abuse and its impact); Mark O'Keefe, *Controversial Studies Push Change in Society's View of Pedophilia* 2002, Newhouse News Service, <http://www.newhouse.com/archive/story1c032602.html> (last visited Aug. 16, 2004) (quoting Levine's positive description of her personal childhood sexual experience with an adult); JUDITH LEVINE, HARMFUL TO MINORS at xxxiii (2002) (arguing that adult-child sex is not inherently harmful).

[373] Dallam, *Science or Propaganda? supra*, note 335, at 122.

[374] NAMBLA, *Who We Are,* <http://www.nambla.org> (last visited Feb. 5, 2006).

[375] *Id.*

[376] *Id*.

[377] GARDNER, TRUE AND FALSE, *supra* note 27, at 670; NAMBLA, *supra* note 376.

[378] GARDNER, TRUE AND FALSE, *supra* note 27, at 670.

[379] *Id.* at 42 (emphasis added).

[380] GARDNER, HYSTERIA, *supra* note 356, at 119.

[381] Richard A. Gardner, written testimony on Proposed Revision of the Child Abuse Prevention and Treatment Act (CAPTA), H.R. 3588, <http://www.christianparty.net/cptagrdn.htm> (last visited Jan. 28, 2006).

[382] NAMBLA, *supra* note 376.

[383] Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples,* 124(1) PSYCHOL. BULL. 22 (1998) [hereinafter Rind, *Meta-Analytic*].

[384] Bruce Rind, Philip Tromovitch & Robert Bauserman, *The Validity and Appropriateness of Methods, Analyses, and Conclusions in Rind et al. (1998): A Rebuttal of Victimological Critique from Ondersma et al. (2001) and Dallam et al.* (2001), 127(6) PSYCHOL. BULL. 734 (2001); Steven Ondersma, et al., *Sex With Children Is Abuse: Comment on Rind, Tromovitch, and Bauserman (1998),*127(6) PSYCHOL. BULL (2001); Stephanie Dallam et al., *The Effects of Child Sexual Abuse: Comment on Rind, Tromovitch, and Bauserman (1998),*127(6) PSYCHOL. BULL Psychological Bulletin, 715(2001); <http://thomas.loc.gov/cgi–bin/query/z?c106:H.+Con.+Res.+107>.

[385] *See, e.g.,* SALTER, PREDATORS, *supra*, note 315 at 57–65 (discussing scholarly work minimizing child sex abuse and its impact); LEVINE, *supra* note 394, at xxxi (arguing that adult-child sex is not inherently harmful); Rind, *Meta-Analytic, supra* note 405 (apparently describing and extrapolating from the author's personal experience); O'Keefe, *supra* note 394 (quoting Levine's positive description of her personal childhood sexual experience with an adult). Prior to the publication of their 1998 article, Rind and Bauserman had published in a pro-pedophilia journal. Robert Bauserman, *Man-Boy Sexual Relationships in a Cross-Cultural Perspective*, PAIDIKA: THE JOURNAL OF PAEDOPHILIA 28 (1989); Bruce Rind, *Book Review of First Do No Harm: The Sexual Abuse Industry*, 3(12) PAIDIKA: THE JOURNAL OF PAEDOPHILIA 79 (1995). Subsequent to the publication of the 1998 article, Rind and Bauserman gave the keynote address at a pro-pedophilia conference. E4 INT'L PEDOPHILE AND CHILD EMANCIPATION NEWSLETTER (Ipce), Jan. 1999*, available at* <http://www.ipce.info/newsletters/n1_e_4.html>.

[386] GARDNER, TRUE AND FALSE, *supra* note 27, at 670.

[387] Gardner, *Misinformation, supra* note 29.

[388] GARDNER, TRUE AND FALSE, *supra* note 27, at 42–43; NAMBLA, *supra* note 396. The distinction between acceptable and unacceptable adult-child sex posited by both Gardner and NAMBLA presumes that some forms of adult-child sex are benign if not beneficial. Both ignore the substantial literature finding that sexual contact by adults is overwhelmingly and profoundly harmful to both male and female children. Dallam, *Science or Propaganda?, supra* note 335, at 114–16. Both Gardner and NAMBLA claim that most adult-child sex is benign while acknowledging that some is harmful. Neither definines the distinction between the two categories. Certainly, some victims of abuse emerge unscathed, just as some people walk away from car crashes or attempted murders unharmed. The fact that not all victims of crime are overtly harmed does not undermine the fact that most victims are severely harmed. By creating the illusion of categories of

harmful and benign adult-child sex, Gardner and NAMBLA create an appearance of reasonableness for political advocacy for adults who impose sexual contact on children. In fact, there is only one category of adult-child sex, and while responses vary, most children are seriously harmed by such contact.

[389] While his works are contradictory and unclear on this point, Gardner seems to distinguish between non-penetrative sexual acts and rape, deeming the former "inconsequential" and the latter "abusive." Gardner, *Child Custody*, *supra* note 30, at 643 (claiming a vengeful parent may "exaggerate a nonexistent or inconsequential sexual contact and build up a case for sexual abuse"); GARDNER, HYSTERIA, *supra* note 356, at 115 (distinguishing "sexual fondling of children" from "rape and other forms of physically destructive sexual encounters").

[390] NAMBLA, *supra* note 376.

[391] GARDNER, TRUE AND FALSE, *supra* note 27, at 42.

[392] *Id.*

[393] GARDNER, TRUE AND FALSE, *supra* note 27, at 676 (claiming the determinant of harm caused by adult-child sex is the "social attitude towards these encounters"); GARDNER, HYSTERIA, *supra* note 356, at 115 (stating that "sexual fondling of children" is an ancient and normative social tradition).

[394] GARDNER, HYSTERIA, *supra* note 356, at 118 (stating that "there is a bit of pedophilia in every one of us. There is no question that an extremely common reaction to the accused pedophilic is: 'There but for the grace of God go I.'").

[395] Courts may use punitive measures towards women who violate patriarchical norms. Hanson v. Spolnik, 685 N.E.2d 71, 83 (Ind. Ct. App. 1997) (dissent) (noting that by granting sole physical and legal custody to the father, denying mother visitation for sixty days, then allowing only two hours of weekly visitation, the court had effectively and impermissibly denied the mother her parental rights).

[396] Gardner, *Empowerment, supra* note 36, at 27 (calling PAS children "uncivilized," "psychopathic," and disrespectful of authority).

[397] LINDA G. MILLS, THE HEART OF INTIMATE ABUSE: NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE, AND HEALTH SETTINGS 12 (1998) (citing studies by Littleton, Mahoney, and Walker showing that fifty percent of American women are victims of domestic violence). Twenty-five percent of girls and ten percent of boys are victims of child sex abuse, primarily within their families. PRYOR, *supra* note 375, at 2 (extrapolating from various studies).

[398] Gardner, *Denial, supra* note 33, at 201 ("I consider losing a child because of PAS to be more painful and psychologically devastating than the death of a child"). Gardner claims that PAS is emotional abuse because it "may . . . produce lifelong alienation from [the] father." Gardner, *Effects on Women*, *supra* note 228, at 10–13. This claim presumes that pathology is implicit in any child who lacks two parents, presumably including adoptees and children of single parents. The apparent basis of Gardner's complaint is the loss of consortium for the father. He thus advocates that a child's rejection of his father eradicate the father's obligation to provide child support. Gardner, *Legal and Psychotherapeutic, supra* note 144; Gardner, *Judiciary, supra* note 31, at 39–40 (claiming poisoning a child against a loving parent is child abuse and that, by failing to protect children from PAS–inducing parents, the courts are complicit in child abuse).

[399] Gardner, *Family Therapy, supra* note 142, at 200.

[400] *See* McNeely, *supra* note 88, at 894 n.15 (claiming that the effect of gender stereotypes on custody disputes harms the father-child relationship and the child).

[401] Gardner, *Denial, supra* note 33, at 201 (describing the grief of the rejected parents documented in his study of "PAS children" based on interviews with the alienated parents).

[402] Gardner, *Child Custody*, *supra* note 30, at 642 (claiming that "[t]he parent who expresses neutrality regarding visitation is basically communicating criticism of the noncustodial parent," and that neutrality can be used to "foster and support alienation"); *Schutz,* 522 So. 2d at 875 n.3 (citing the above claim in support of an order that the mother make affirmative, positive statements about her ex-husband).

[403] Warshak, *Parental Alienation, supra* note 23, at 290. Gardner similarly espoused the deliberate circumvention of legal admissibility standards. Gardner, *DSM-IV, supra* note 21, at 10 (advising practitioners to use alternate DSM diagnoses to circumvent admissibility bars in order to present evidence of PAS); Gardner, *PAS v. PA, supra* note 113, at 112 (describing practice of testifying about PAS without naming it as such). Expert testimony promoting PAS may involve routine misrepresentation of fact. *See, e.g., In Re* Marriage of Bates, 819 N.E.2d 714, 720 (Ill. 2004) (expert witness Christopher Barden testified that PAS is "generally accepted in the relevant scientific community," citing peer-review publications submitted by Dr. Richard Gardner and other authors describing and authenticating PAS despite the fact that PAS has never been "authenticated." He stated that "the concept of PAS is not novel, having been first referenced in 1994 by the American Psychological Association" omitting the fact that the APA's 1994 "reference" to PAS was merely an inclusion of Gardner's self-published books on a list of

publications and omitting the APA's 1996 and 2005 statements about PAS).

[404] Mosteller, *supra* note 330, at 501–02 (arguing that "trash" syndrome evidence is inadmissible both due to its lack of scientific support and its purpose in diagnosing wrongdoing).

[405] Leo Tolstoy, Anna Karenina 3 (Constance Garnett Trans., Random House 1939) (1977) ("Happy families are all alike; each unhappy family is unhappy in its own way").

[406] Although *Karen B. v. Clyde M.* and *Karen "PP" v. Clyde "QQ"* are decisions in the same case, I have followed Gardner's dual listing since both decisions were reported.

[407] *Id.*

[408] A LEXIS search on these party names in Alabama between January 1, 2000 and January 1, 2002 yields one unpublished decision: Berry v. Berry, 822 So. 2d 491 (Ala. Civ. App. 2000).

[409] A LEXIS search on these party names yields no documents in any state or federal court between January 1, 1980 and January 1, 2004.

[410] A LEXIS search on these party names in Florida between January 1, 2000 and January 1, 2002 yields one published decision without a written opinion: McDonald v. McDonald, 784 So. 2d 1119 (Fl. Dist. Ct. App. 2001) (mem. per curiam).

[411] A LEXIS search on these party names yields no documents in any state or federal court between January 1, 1995 and January 1, 2002.

[412] A LEXIS search on these party names in Florida between January 1, 1980 and January 1, 2004 yields one unpublished decision: Blackshear v. Blackshear, 693 So. 2d 35 (Fla. Dist. Ct. App. 1997) (per curiam) (unpublished table decision).

[413] A LEXIS search on these party names in all state and federal jurisdictions between January 1, 1980 and January 1, 2004 yields two unpublished decisions: Tetzlaff v. Tetzlaff, 763 N.E.2d 778 (Ill. 2001) (unpublished table decision) and *In re* Marriage of Tetzlaff, 800 N.E.2d 888 (Ill. App. Ct. 2001) (unpublished table decision). Neither of these decisions was issued in the court or on the date Gardner cites. The search also yields one published opinion: *In Re* Marriage of Tetzlaff, 711 N.E.2d 346 (Ill. App. Ct. 1999) (dismissal of appeal for attorney's fees, making no reference to alienation or PAS).

[414] A LEXIS search on these party names yields no documents in Louisiana between January 1, 1980 and January 1, 2004.

[415] A LEXIS search on these party names between January 1, 1980 and January 1, 2004 yields five published decisions without written opinions in 1985 and 1988 in one New York case, and no cases in New Hampshire in 1996.

[416] A LEXIS search on these party names between January 1, 1980 and January 1, 2004 yields no documents in any state or federal court.

[417]A LEXIS search for "rosen w/s edward!" in N.Y.L.J. between January 1, 1990 and January 1, 1992 yields no mention of this case. A LEXIS search on these party names between January 1, 1980 and January 1, 2004 yields no so-named case in any state or federal court.

[418] A LEXIS search on these party names in all state and federal courts between January 1, 1980 and January 1, 2004 yields no documents.

[419] A LEXIS search on these party names in all state and federal courts between January 1, 1980 and January 1, 2004 yields three unpublished decisions without written opinions: Popovice v. Popovice, 766 A.2d 897 (Pa. Super. Ct. 2000) (unpublished table dcision), Popovice v. Popovice, 754 A.2d 30 (Pa. Super. Ct. 2000) (unpublished table decision), and Popovice v. Popovice, 706 A.2d 1266 (Pa. Super. Ct. 1997) (unpublished table decision).

[420] A LEXIS search on these party names in all state and federal courts between January 1, 1996 and January 1, 1999 yields no so-named case. A LEXIS search on these party names in Virginia between January 1, 1980 and January 1, 2004 yields no so-named case.

[421] A LEXIS on these party names in Washington state between January 1, 1980 and January 1, 2004 yields one table decision without written opinions and one published decision with a written opinion (none in 1993): *In re* Marriage of Rich, 922 P.2d 97 (Wash. 1996) (unpublished table decision) and *In re* Marriage of Rich, 907 P.2d 1234 (Wash. Ct. App. 1996) (reconsideration of visitation order for paternal grandparents making no reference to alienation or PAS).

[422] As of March 12, 2004.