Children's Legal Rights Journal

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

Jennifer Hoult, J.D.*

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 peerreview 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 syndrome²⁶ 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 childcustody 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 diagnosis³⁶ 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 precedentbearing cases originating in twenty-five states³⁹ 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 legislation⁴² 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 intrafamilial 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 rules⁵¹ 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-yearold 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 ruling⁶³ 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 unpublished⁶⁷ 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

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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 exwife 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 support¹⁰³ 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 chil-

dren'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 factfinder.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: Reliability¹¹⁵

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 admissibility.¹¹⁸ determine 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 liberty¹³⁷ 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 custody¹³⁹ and brain-washing techniques¹⁴⁰ 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 abuse¹⁶⁵ 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 child¹⁶⁸ 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 preexisting scientific validity."¹⁸⁵ While Gardner firmly believed that empirical evidence and interrater 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 interrater reliability testing. Using ambiguous criteria, failing to distinguish between healthy and pathological behavior, pathologizing nonpathological 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 balanced²⁰⁴ 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 peerreviewer for the same publication.²⁰⁶ However, perhaps in order to protect against interference with reviewers during the review process, wellreputed 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 peerreview 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 metareviews provide one measure of the likelihood of meaningful peer-review in a given journal, the criteria used to determine the existence of peerreview 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 peerreviewed 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 peerreview 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 peerreviewed 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 PAS's existence. Instead, for 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*, cofounded and self-published by its editors, Hollida Wakefield and her husband Ralph Underwager.²²⁷ This journal's website does not mention peerreview,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 peerreviewers.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-yearold 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 websitepublished 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 peerreview.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 selfpublished 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 advice²⁶¹ 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 peerreview. 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 selfcitation 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 selfcitation and uncited republication.

b. Articles That Received No Peer-Review

According to their editors and publishers, the remaining 11 cited articles were not peerreviewed. 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 multivolume psychiatry reference text whose contents were solicited by invitation, and not peerreviewed.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 selfpublished 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 Ân 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,

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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 men³²⁶ 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 victims³⁶³ 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 Advocacy³⁷¹

Gardner's views about adult-child sex parallel those of advocates for the legalization of adultchild sexual contact³⁷² 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

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harmfulness of adult-child sex after scholars reported the article's methodological deficiencies and inaccuracies.³⁸⁴ Ignoring evidence that adultchild 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 adultchild 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 norms³⁹⁵ 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 embarrassing chapter in the history of an evidentiary law. It reflects the wholesale failure of legal professionals entrusted with evidentiary gatekeeping 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).
- 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).
- 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).
- Coursey v. Superior Court (Coursey), 194 Cal. App. 3d 147; 239 Cal. Rptr. 365; 1987 Cal. App. LEXIS 2029 (Cal. Ct. App. 1987).
- Perlow v. Berg-Perlow, 816 So. 2d 210; 2002 Fla. App. LEXIS 6179; 27 Fla. L. Weekly D 1108 (Fla. Dist. Ct. App. 2002).
- 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).
- 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).
- 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).
- 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).
- 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).
- 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).

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- 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
- 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).
- 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

- 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
- 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 (III. Dom. Rel. Ct. Mar. 20, 2000)).⁴¹³

- 37. *Wilkins v. Wilkins* (cited as No. 90792 (La. Fam. Ct. Nov. 2, 2000)).⁴¹⁴
- 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
- 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

- 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).
- 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).

 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).
- Plate v. Alaska, 925 P.2d 1057; 1996 Alas. App. LEXIS 47 (Alaska Ct.App. 1996).

Arkansas

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

California

- 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).
- 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).
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- 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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- 9. Priscilla Steward, Eighth Annual Philip D. Reed Memorial Issue: 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 (Nov. 1997).
- Anita Vestal, Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model, 37 FAM. & CONCIL. CTS. REV. 487 (Oct. 1999).
- 11. Cheri L. Wood, Notes and Comments: *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367 (Spring 1994).

APPENDIX D: PEER-REVIEWED ARTICLES LISTED ON GARDNER'S WEB SITE

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

- 1. Richard Gardner, *Recent Trends in Divorce and Custody Litigation*, Acad. Forum, 29(2)3–7 (1985).
- Richard Gardner, *Child Custody*, BASIC HAND-BOOK OF CHILD PSYCHIATRY, Vol. V, 637–46 (J.Noshpitz, ed. 1987).
- 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).
- 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).
- 6. Richard Gardner, *Recommendations for Dealing* with Parents Who Induce a Parental Alienation Syndrome in Their Children, Issues in Child Abuse Accusations, 8(3),174–78 (1997).

- Richard Gardner, Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in Their Children, Jrnl. of Divorce & Remarriage, 28 (3/4),1–23 1998).
- 8. Richard Gardner, *Differentiating Between the Parental Alienation Syndrome and Bona Fide Abuse/Neglect*, Am. Jrnl. of Fam. Therapy, 27(2), 97–107 (1999).
- 9. Richard Gardner, *Family Therapy of the Moderate Type of Parental Alienation Syndrome*, Am. Jrnl. of Fam. Therapy, 27(3), 195–212 (1999).
- Richard Gardner, Guidelines for Assessing Parental Preference in Child-Custody Disputes, Jrnl. of Divorce & Remarriage, 30(1/2), 1–9 (1999) at http://www.rgardner.com/refs/ar4.html (last visited May 25, 2004).
- 11. Richard Gardner, *The Parental Alienation Syndrome: Sixteen Years Later*, Acad. Forum, 45(1), 10–12 (2001).
- 12. Richard Gardner, Should Courts Order PAS Children to Visit/Reside with the Alienated Parent? A Follow-up Study, Am. Jrnl. of Forensic Psychol. 19(3), 61–106 (2001).
- 13. Richard Gardner, Sollten Gerichte anordnen, daß an PAS leindende Kinder den antfremdeten Elternteil besuchen bzw. bei ihm wohnen?, DAS ELTERLICHE ENTFREMDUNGSSYNDROM. ANREGUNGEN FÜR GERICHTLICHE SORGE- UND UMGANGSREGELUNGEN, 23–95 (2002) at <http:// www.rgardner.com/refs/ar8_deutsche.html> (last visited May 25, 2004).
- Richard Gardner, *The Empowerment of Children* in the Development of the Parental Alienation Syndrome, Am. Jrnl. of Forensic Psychol., 20(2), 5–29 (2002).
- 15. Richard Gardner, Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?, Am. Jrnl. of Fam. Therapy, 30, 93–115 (2002).
- 16. Richard Gardner, *Denial of the Parental Alienation Syndrome (PAS) Also Harms Women*, Am. Jrnl. of Fam. Therapy, 30(3), 191–202 (2002).
- 17. Richard Gardner, *Does DSM-IV Have Equivalents for the Parental Alienation Syndrome (PAS) Diagnosis?*, Am. Jrnl. of Fam. Therapy, 31(1), 1–21 (2002).
- 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).

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

- 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).
- 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

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

- 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).

⁸In 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).

¹²Daubert 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/arllw.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.

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

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.

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⁶⁰ Fortin I, 706 N.Y.S.2d at 612.

⁶² Fortin I, 706 N.Y.S.2d at 613–14.

⁶³ *Fortin II*, 289 A.D.2d at 591.

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⁶⁹Truax 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 noncustodial 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 illwill 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.

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*, <<u>http://www.rgardner.com/refs/pas_intro.html</u>> (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 welldocumented 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,

Children's Legal Rights Journal

⁷⁷ Id.

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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, Issues in Sexual Abuse Allegations Forensic 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).

⁹⁰Book 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. 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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. MATRI-MONIAL 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

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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, Developments 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 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 "parental alienation data to support so-called 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 noncompliance. 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-yearold 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 courtappointed 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 fivepage 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

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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 exhusband. *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 wellrecognized 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).

¹⁹⁷Gardner, *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.

¹⁹⁹Gardner, *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 Peerreview, 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.*

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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 peerreviewer, 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 Peerreview, 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").

 $2^{\overline{15}}$ *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 Peerreview, 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.

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).

²²² Id.

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).

²³²Hollida 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 INTERDISCI-PLINARY 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.vwbverlag.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, <<u>http://www.tandf.co.uk/journals/</u> titles/01926187.asp> (last visited May 25, 2004).

²⁴⁸ Id.

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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 peerreviewed," 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., <h t t p : // w w w . 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 nonpeer-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.paskonferenz.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.vwbverlag.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. <<u>http://</u> www.apa.org/psycinfo/about/covinfo.html> (last visited June 11, 2004); *compare* 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/bull004 4.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, <<u>http://www.rgardner.</u> 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.htmb (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

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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 nonstandard 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-(discussing differences between incarcerated 58 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 peerreview. *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 propedophilia 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 MULTIDISCI-PLINARY 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 OVER-WHELMING 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 twentyseven 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).

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 Pedophile and Child INT'L 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

³⁷⁵ Id.

³⁷⁶ Id.

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 adultchild 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 nonpenetrative 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 adultchild 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

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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 (III. 2001) (unpublished table decision) and *In re* Marriage of Tetzlaff, 800 N.E.2d 888 (III. 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 (III. 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.

⁴¹⁷A 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 sonamed 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.

What Are Our Children Doing in Cyberspace? Resolving the Conflict between Freedom of Expression in Schools and the Use of the Internet

by Rommel Salvador*

"David Knight's life at school [was] hell. He was teased, taunted and punched for years ... the final blow was the humiliation he suffered every time he logged onto the Internet. Someone set up an abusive website about him that made life unbearable."1 David's case is not an isolated one. For one middle-school girl, it was a rumor, circulated via text messaging, that she had contracted SARS while on a trip to Toronto.² She returned to school and found nobody would come near her.³ For an overweight boy in Japan, it was cellphone pictures, taken of him on the sly while he was changing in the locker room and then sent to his peers.⁴ And for students at Calabasas High School in California, it was a website on which vicious gossip and racist and threatening remarks grew so rampant that most of the school was affected.⁵

The actions themselves—rumors, threats, gossip, humiliation-are nothing new. But among today's adolescents-a generation of instant messengers, always connected, always wiredbullies are moving beyond slam books and whisper campaigns to e-mail, websites, chat rooms, and text messaging.⁶ The dawn of new technologies, especially the Internet, creates a whole new world of social communications for young people. The Internet is now being used for an old purpose: bullying and harassing others.⁷ Today's young Internet users have created an interactive world away from adult knowledge and supervision. Research shows that fifty percent of kids say they are alone online most of the time.⁸ Only sixteen percent of kids say they talk to their parents a lot about what they do online.9 Bullies tend to harass their victims away from the watchful eyes of adults, therefore, the Internet is the perfect tool for reaching others anonymously -any time, any place. For many children, this means home is no longer a refuge from the cruel peer pressures of school.¹⁰

In Canada, ninety-nine percent of students use the Internet and forty-eight percent use it for

a least an hour a day.¹¹ In a CBS special report in New York, more than half of fourth to eighth grade students say they have been bullied online, making logging on to a computer a frightening experience for some high school students.¹² According to Nancy Willard from the Center for Safe and Responsible Internet Use, fifty-seven percent of the students in fourth to eighth grade said that someone had said mean or hurtful things to them online, with thirteen percent saying that it occurred quite regularly.¹³

Bullying is defined as one or more individuals inflicting physical, verbal, or emotional abuse on another.¹⁴ In the technology age, bullying is often using the Internet.¹⁵ accomplished This phenomenon, known as cyber-bullying, is the use of the Internet to bully peers.¹⁶ In this cyber-age, Internet websites, chat rooms, anonymous electronic bulletin boards, instant messaging, and other web devices quickly and widely disseminate harassing content.¹⁷ Because cyber-bullying is such a new phenomenon, its effects have not been widely studied. Some experts believe that, given the similarities in content and intent, cyberbullying has the same negative effects as traditional bullying.¹⁸ The only real difference between cyber-bullying and traditional bullying is that cyber-bullying takes place on the Internet.¹⁹ Moreover, cyber-bullying results in greater impact because Internet content is widely distributed and more public than traditional bullying.²⁰

Cyber-harassment denotes the targeting of adult members of the school community on the Internet.²¹ As with cyber-bullying, cyber-harassment involves profane and often humiliating depictions of a targeted individual, in this case teachers and administrators.²² The use of the Internet in cyber-harassment is similar to that of cyber-bullying except that bullying behavior assumes the bully and the victim are peers.²³ With cyber-harassment, the purpose remains the same: to cause distress to the targeted individual and to derive power from that distress.²⁴ Students may target teachers in retaliation for disciplinary action taken against the student at school,²⁵ or may target teachers against whom a student carries a personal vendetta.²⁶

The anonymity of online communications means young people feel freer to do things online they would never do in the real world.²⁷ Even if they can be identified online, young people can accuse someone else of using their screen name.²⁸ They do not have to own their actions, and if a person cannot be identified with an action, fear of punishment is diminished.²⁹ Furthermore, the technology can affect a young person's ethical behavior because it does not provide tangible feedback about the consequences of his or her actions on others.³⁰ This lack of feedback minimizes feelings of empathy or remorse.³¹ Young people say things online that they would never say face-to-face because they feel removed from the action and the person at the receiving end.³²

Just as online cruelty may be intensified by the distance separating perpetrator and victim, it also changes the face of bullying itself.³³ Children no longer have the safety of going home and escaping bullying. Children spend so much time on the computer: whether to shop, do research for schoolwork, play games, or hang out with friends, that they become easy targets of abuse.³⁴

Internet bullying involves a population that is largely middle-class, usually known as the "good kids" who are "on the right track" or "the ones you'd least expect" to bully or degrade others.³⁵ The Internet foments outrageous behavior in part because it is a "gray area" for social interactions.³⁶ According to Rebecca Kullback, a Montgomery County psychotherapist and former counselor at Sidwell Friends School, the Internet deletes social inhibitions and allows young people to say and do things that they wouldn't do face-to-face.³⁷ They feel like they will not be held accountable in the same way and the Internet gives them a false sense of security and power.³⁸

As the number of children and young adults who use the Internet increases, more websites authored by students will populate the World Wide Web.³⁹ Current estimates suggest that one third of all personal web pages are posted by students, many of whom are minors.⁴⁰

The rise of cyber-bullying and cyber-harassment places schools in an uneasy position of balancing the duty of creating an environment conducive to learning and protecting the freedom of expression of their students. Cyber-bullying and cyber-harassment usually involve members of the school, therefore, several questions may arise. How far may school officials discipline their student for actions taken in cyberspace? Is there any convergence between cyberspace and school premises? Will a student's acts in cyberspace have any nexus with the school environment? Are cyber-bullying and cyber-harassment defensible under freedom of expression? These are the questions school officials face with students' overwhelming utilization of this technology.

The increasing number of students who create and access web pages raises difficult free speech issues. This paper will examine the constant dichotomy between the school's authority to discipline its students for the creation and promotion of an environment conducive to learning, and the students' right to freely express themselves. This paper embraces the question of whether cyber-bullying and cyber-harassment are defensible under freedom of expression or whether school authorities have the power to limit such expressions. However, litigation in this area occurs mostly in the United States, thus the analysis will focus for the most part on the U.S. experience. The analysis begins with a survey of courts' interpretation of students' freedom of expression in the traditional context.⁴¹ A survey of cases involving students' freedom of expression on the Internet follows.⁴² This survey reveals the argument that the principles derived from traditional free speech cases are sufficient to address the issues posed by expression on the Internet.43

I. Students' Traditional Freedom of Expression in the United States

The United States has a long and rich history of freedom of expression enjoyed by students. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁴⁴

From this provision, it is clear that freedom extends to all individuals. Students do not shed this constitutional right simply by entering the school premises. This right is fundamental and attaches to each and every person.

Nowhere is the vigilant protection of constitutional freedoms more vital than in the community of American schools.⁴⁵ As elucidated by the Supreme Court, "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, than through any kind of authoritative selection.'"⁴⁶

In 1969, the U.S. Supreme Court ruled on students' freedom of expression.⁴⁷ In the landmark case *Tinker v. Des Moines Independent Community School District*,⁴⁸ petitioners John, Christopher and Mary Beth, ages fifteen, sixteen and thirteen respectively, belonged to a group determined to publicize objections to the hostilities in Vietnam and show support for a truce by wearing black armbands.⁴⁹ The students wore black armbands to school, but were all sent home and suspended from school until they removed the armbands prior to returning.⁵⁰ They did not return to school until after the planned period for wearing armbands had expired.⁵¹ They filed suit, alleging a violation of their First Amendment rights.⁵²

The Supreme Court ruled for the students and noted that the record did not demonstrate any facts that might reasonably lead school authorities to forecast a substantial disruption of or material interference with school activities.53 Furthermore, no disturbances or disorders on the school premises occurred.⁵⁴ The students merely went about their ordained rounds in school.55 Their only deviation consisted of wearing a black band of cloth, not more than two inches wide, on their sleeve.⁵⁶ They wore it in disapproval of the Vietnam hostilities to advocate for a truce and to influence others to adopt their position.57 They neither interrupted school activities nor sought to intrude in school affairs or the lives of others.⁵⁸ They caused discussion outside the classrooms, without interference with work or order.⁵⁹ Thus, the Supreme Court held, their expression was protected by the First Amendment, holding that:

[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights that the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁶⁰

In Bethel School District No. 403 v. Fraser,⁶¹ a public high school student delivered a speech at a voluntary assembly, nominating a fellow student for a student elective office.⁶² The voluntary assembly was held during school hours as part of a school-sponsored educational program in self-Approximately 600 government.⁶³ students attended the assembly, many of whom were fourteen years old.⁶⁴ During the entire speech, the student referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.⁶⁵ Some of the students at the assembly hooted and yelled during the speech, mimicking the sexual activities alluded to in the speech, while others appeared bewildered and embarrassed.⁶⁶ He was suspended, and subsequently filed suit through his father, alleging a violation of his First Amendment right to freedom of speech.⁶⁷

The Court ruled in favor of the school administration, with the premise that First Amendment jurisprudence acknowledges limitations on the otherwise absolute interest of the speaker, when the speech is sexually explicit and the audience may include children.⁶⁸ This premise recognizes the obvious concern on the part of parents and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.⁶⁹

The Court held that the school district acted entirely within its permissible authority in imposing sanctions upon the student in response to his offensively lewd and indecent speech.⁷⁰ The First Amendment does not prevent the school officials from determining whether a vulgar and lewd speech, such as the respondent's, would undermine the school's basic educational mission.⁷¹ A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.⁷² Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.⁷³

Finally, in *Hazelwood School District v. Kuhlmeier*,⁷⁴ the Court resolved concerns about the extent of editorial control that educators may exercise over the contents of a high school newspaper produced as part of the school's journalism curriculum.⁷⁵

Respondents were three former Hazelwood East students, who were staff members of the school newspaper, The Spectrum.⁷⁶ They contended that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983 issue of The Spectrum.⁷⁷ The articles were written and edited by the Journalism II class at Hazelwood East, and published approximately every three weeks during the 1982–1983 school year.78 More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.⁷⁹ The Board of Education allocated funds from its annual budget for the printing of The Spectrum, and these funds were supplemented by proceeds from sales of the newspaper.⁸⁰

Before publication, proofs of the paper were delivered to the principal, who objected to two of the articles scheduled to appear in that edition.⁸¹ One of the stories described three Hazelwood East students' experiences with pregnancy and the other discussed the impact of divorce on students at the school.⁸² Although the pregnancy story used false names to keep the identity of these girls a secret, the concern was that the pregnant students might still be identifiable from the text.⁸³ He believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school.⁸⁴ In addition, the principal was concerned that a

student identified by name in the divorce story gave statements about her parents, who should have been given an opportunity to respond to these remarks or to consent to their publication.⁸⁵ Respondents subsequently commenced suit, seeking a declaration that their First Amendment rights had been violated.⁸⁶

The Court clarified that if school facilities—in this case the school paper-are reserved for some intended purposes, "communicative or otherwise," then no public forum is created.⁸⁷ Therefore, school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.⁸⁸ Educators are entitled to exercise greater control over school sponsored student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.⁸⁹ A school must be able to set high standards for the student speech that is disseminated under its auspices-standards that may be higher than those demanded by some newspaper publishers in the "real" world-and may refuse to disseminate student speech that does not meet those standards.⁹⁰ In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.⁹¹ Schools would otherwise be unduly constrained from fulfilling their role as "principal instrument[s] in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."92

These important cases all point to the fact that while freedom of expression in schools falls under the First Amendment protection, that right is never absolute. This is consistent with the definition of freedom of expression in the general context. Courts have categorically stated that the right of free speech is not absolute at all times and under all circumstances. The prevention and punishment of certain well defined, narrowly limited circumstances do not raise any constitutional problem.⁹³ These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those that by their very utterance inflict injury or tend to incite an immediate breach of the peace.⁹⁴ In fact, the Court reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.⁹⁵

Four conclusions are clearly discernible from these cases. First, from Tinker, it is clear that in determining whether school authorities may regulate students' freedom of expression, courts look at the substantial disruption of or material interference with the speech or expression with school activities. Limiting students' freedom of expression is defensible, so long as school boards prove that there was clearly a threat or actual and substantial disruption of the affairs of the school. This is very similar to the clear and present danger rule devised by the Court in Schenck v. United States.⁹⁶ In that case, the Court emphatically ruled that the question is whether the words are used in such circumstances and are of such a nature so as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.⁹⁷ Second, in Fraser, the Court looked at the nature of the speech and the intended audience. The Court considers the type of speech being asserted and the audience to whom such speech was directed, when limiting students' freedom of expression.98 If the speech is inconsistent with the goals of the school and inappropriate for the audience, then the freedom of expression cannot prevail over the school's right to regulate such speech.⁹⁹ Third, from Hazelwood, schools retain authority over school sponsored speeches and expressions. Thus, schools can limit students' freedom of expression so long as it proves that the speech or expression was under the sponsorship of the school.¹⁰⁰ Finally, common to all these cases is that the expressions were made on-campus, where school authorities exercise more control over the speech or expression.¹⁰¹ However, as one goes off-campus, school justifications for restricting the speech have to be clearly identifiable.¹⁰²

II. Students' Freedom of Expression in the Context of the Internet

Having laid down the Court's interpretation of students' freedom of expression in the traditional context, we now look at applications of these interpretations in the context of the Internet. It is clear that the same First Amendment analysis should be done, regardless of the nature of the Internet as a medium. If the First Amendment were to apply differently to the Internet than to other media, its significance as a source of protection for individual rights would be undermined.¹⁰³ Professor Laurence Tribe writes:

The Constitution's architecture can too easily come to seem quaint, irrelevant, or at least impossible to take very seriously, in the world as reconstituted by the microchip ... [But] the Framers of our Constitution were very wise indeed. They bequeathed us a framework for all seasons, a truly astonishing document whose principles are suitable for all times and all technological landscapes.¹⁰⁴

There are a number of cases regarding students' freedom of expression in the context of the Internet to provide an analysis of how courts apply the First Amendment vis-à-vis the technology.

In J.S. v. Bethlehem Area School District, 105 decided by the Pennsylvania Supreme Court, J.S., an eighth grade student, created a website on his home computer and on his own time.¹⁰⁶ The website, titled "Teacher Sux," consisted of several web pages that made derogatory comments about his algebra teacher, Mrs. Fulmer, as well as his school principal, Mr. Kartsotis.¹⁰⁷ The website contained a disclaimer stating that by entering the site, the visitor agreed not to tell any employees of the school district about the site, was not a member of the school district's "Staff," would not disclose the website to school district employees or administration, and would not disclose the identity of the website creator or intend to cause trouble for that individual.¹⁰⁸ The disclaimer, however, did not prevent access to the website and the site was not protected by a password, and thus any visitor could access the site.¹⁰⁹

What Are Our Children Doing in Cyberspace?

J.S. created a picture of Fulmer with her head cut off and blood dripping from her neck. Accompanying the illustration was the question, "Why Should She Die?" directly above a statement that said, "Take a look at the diagram and the reasons I give, then give me \$20.00 to help pay for the hitman."¹¹⁰ Below the statement, the page offered "Some Words from the writer" and listed 136 times "F You Mrs. Fulmer. You Are A B _____. You Are A Stupid B _____." ¹¹¹ The site was rife with profanity, displayed a photograph of Fulmer morphing into Hitler, and a cartoon bullet hitting the likeness of Mr. Kartsotis.¹¹² The Web page shook the entire school community, particularly Mrs. Fulmer.¹¹³ J.S. was expelled for threatening, harassing, and disrespecting a teacher and principal, but he challenged his expulsion on free speech grounds.¹¹⁴

Considering the totality of the circumstances, the court found that the statements made by J.S. did not constitute a true threat.¹¹⁵ The Court interpreted "true threat" as the communication of a serious expression of intent to inflict harm.¹¹⁶ The website, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody.¹¹⁷ However, it did not reflect a serious expression of intent to inflict harm.¹¹⁸ This conclusion was supported by the fact that the website focused primarily on Mrs. Fulmer's physique and disposition and utilized cartoon characters, hand drawings, a song, and a comparison to Hitler.¹¹⁹ Distasteful and highly offensive communication does not necessarily fall under First Amendment protection as a true threat simply because of its objectionable nature.120

The consideration of whether the statements in the "Teacher Sux" website constituted a true threat did not end the Court's inquiry.¹²¹ Even though the statements made by J.S. did not amount to true threats, the Court considered whether the school district should nevertheless punish J.S. for making such statements, without running afoul of the dictates of the First Amendment.¹²²

The Court determined whether the speech in this case was on-campus or off-campus.¹²³ Using the test enunciated in *Tinker* where a school district might, within constitutional bounds, prohibit speech and punish a student for speech, the court

analyzed whether the school sustained its burden of establishing that the student speech materially disrupted class work, created substantial disorder, invaded the rights of others, or was reasonably foreseeable to do so.¹²⁴ In resolving this question, the court noted that although the website was created off-campus, J.S. accessed and showed it to a fellow student at school.¹²⁵ While it is uncertain exactly what portions of the website the student viewed, nevertheless, J.S. facilitated the oncampus nature of the speech by accessing the website on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the website.¹²⁶ Moreover, faculty members and the school administration also accessed the website at school.¹²⁷

The significant issue was that the website was not aimed at a random audience, but at the specific audience of students and others connected with this particular school district, namely Mrs. Fulmer and Mr. Kartsotis.¹²⁸ Thus, it was inevitable that the contents of the website would pass from students to teachers, inspiring circulation of the web page on school property.¹²⁹

The court categorically stated that when speech is aimed at a specific school or its personnel and is brought onto the school campus or accessed at school by its originator, the speech is considered on-campus speech.¹³⁰ Thus, the Court found a sufficient nexus between the website and the school campus to consider the speech as occurring on-campus.¹³¹ This interpretation covers student expressions on the Internet: a space not geographically located within the school premises.¹³² Perhaps this liberal construction of on-campus status is calculated to give courts flexibility when deciding the level of deference afforded to schools.¹³³ Because it is not a true boundary, the pseudogeography physical attributed to Internet speech should not bar schools from moderating student expression.¹³⁴ Speech should not be defined by the computer where it originates.¹³⁵ Courts should instead apply the principle that is intuitive to most Internet users: Internet speech resides in cyberspace, which is borderless and exists wherever there is a connection to the Internet.¹³⁶

As to the material disruption or substantial interference test, the court found that the website

disrupted the entire school community-teachers, students and parents.¹³⁷ The most significant disruptions caused by the website postings were the direct and indirect effects of Mrs. Fulmer's emotional and physical injuries.¹³⁸ Mrs. Fulmer suffered physical and mental damage so severe that she was unable to complete the school year.¹³⁹ Her twenty-day absence at the end of the school year necessitated the use of three substitute teachers that unquestionably disrupted student instruction and adversely impacted the education environment.¹⁴⁰ Students were personally impacted; certain students expressed anxiety about the website, while others were concerned for their safety, and still others visited counselors.¹⁴¹ There was a feeling of helplessness and low morale among the staff and students.¹⁴² The atmosphere of the entire school community was as if a student had died.¹⁴³ Finally, the disruption also involved parents, some who understandably voiced concerns for school safety and questioned the delivery of instruction by substitute teachers.¹⁴⁴

In Killion v. Franklin Regional School District,¹⁴⁵ the plaintiff, Paul, was a student at Franklin Regional High School.¹⁴⁶ Apparently angered by a denial of a student parking permit in addition to the imposition of various rules and regulations for members of the track team, of which Paul was a member, he compiled a "Top Ten" list about the athletic director, Robert Bozzuto.¹⁴⁷ The Bozzuto list contained, among other things, statements regarding Bozzuto's appearance, including the size of his genitals.¹⁴⁸ After consulting with friends, Paul composed and assembled the list after school while at home.¹⁴⁹ In late March or early April, Paul e-mailed the list to friends from his home computer.¹⁵⁰ However, Paul did not print or copy the list to bring it onto school premises because, after copying and distributing similar lists in the past, he had been warned that he would be punished if he brought another list to school.¹⁵¹ Several weeks later, copies of the Bozzuto Top Ten list were found in the Franklin Regional High School teachers' lounge and the Franklin Regional Middle School.¹⁵² An undisclosed student reformatted the original e-mail and distributed the document on school grounds.¹⁵³ Plaintiffs sought summary judgment contending that defendants violated Paul's First Amendment right of free expression by suspending Paul for speech that was made off school grounds and in the privacy of his home.¹⁵⁴

Recognizing a right to expression, the court imposed a significant burden on the school to demonstrate that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.¹⁵⁵ There was little evidence that school authorities could base a forecast of disruption, or that the students' behavior created any actual disruption in the school, the Court held that the school had not satisfied its burden.¹⁵⁶ According to the Court, it was not constitutionally adequate for the school to rely on undifferentiated fear or apprehension of disturbance.¹⁵⁷ Instead, the school needs evidence that such a disruption did occur or was likely to occur.158

The Court did not further examine whether or not the speech was on-campus and argued that the overwhelming weight of authority had analyzed student speech (whether on or off campus) in accordance with *Tinker*.¹⁵⁹ Moreover, *Tinker* applied because the expression—the Bozzuto list —was brought on campus, albeit by an unknown person.¹⁶⁰

There is no evidence that teachers were incapable of teaching or controlling their classes because of the Bozzuto Top Ten list.¹⁶¹ Indeed, the list was on school grounds for several days before the administration became aware of its existence, and at least one week passed before the defendants took any action.¹⁶² Further, the speech at issue was not threatening, and, although upsetting to Bozzuto, did not cause any faculty member to take a leave of absence.¹⁶³ Although intended audience was undoubtedly the connected to Franklin Regional High School, the absence of threats or actual disruption led the court to conclude that Paul's suspension was improper.¹⁶⁴ Admittedly, the target of the expression found it to be rude, abusive and demeaning.¹⁶⁵ However,

[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker* ... [and] the mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech under *Tinker*.¹⁶⁶ However, if a school can
point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.¹⁶⁷

In Beussink v. Woodland R-IV School District,¹⁶⁸ a student created a homepage, which he posted on the Internet.¹⁶⁹ There is no evidence that the student, Beussink, used school facilities or school resources to create his homepage.¹⁷⁰ The homepage was created at home on Beussink's own computer.¹⁷¹ The homepage was not created during school hours.¹⁷² Beussink created the homepage using a program that he found on the Internet.¹⁷³ The homepage was highly critical of the administration at Woodland High School.¹⁷⁴ Beussink used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage.¹⁷⁵ The homepage invited readers to contact the school principal and communicate their opinions regarding Woodland High School.¹⁷⁶

The Court ruled in favor of the student, holding that in order for school officials to justify prohibition of a particular expression of opinion, it must show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.¹⁷⁷ Certainly, when there is no finding or showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.¹⁷⁸ Although speech may be limited based upon a fear of such disruption, that fear must be "reasonable" and not an "undifferentiated fear" of а disturbance.179

Finally, in *Emmett v. Kent School District No.* 415,¹⁸⁰ an eighteen-year-old senior at Kentlake High School posted a web page on the Internet that was created from his home, on his time, without using school resources.¹⁸¹ The web page was entitled the "Unofficial Kentlake High Home Page," and included disclaimers warning a visitor that the site was not sponsored by the school, and was for entertainment purposes only.¹⁸² The page posted mock "obituaries" of at least two of the plaintiff's friends.¹⁸³ A creative writing class inspired the obituaries the previous year, when

students were assigned to write their own obituary.¹⁸⁴ The mock obituaries became a topic of discussion at the high school among students, faculty, and administrators.¹⁸⁵ In addition, the plaintiff allowed visitors to the website to vote on who would "die" next—that is, who would be the subject of the next mock obituary.¹⁸⁶

The court found that the plaintiff's speech was neither at a school assembly nor in a school-sponsored newspaper.¹⁸⁷ It was not produced in connection with any class or school project.¹⁸⁸ Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.¹⁸⁹ The school presented no evidence that the mock obituaries and voting on the website were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.¹⁹⁰ This lack of evidence, combined with the findings regarding the out-of-school nature of the speech, led the court rule in favor of the student.¹⁹¹

The J.S. case is most instructive because it goes through the different tests devised by the United States Supreme Court that determine whether students' freedom of expression prevails over the schools' right to regulate. Most notable is the court's interpretation of Internet activity as occurring on-campus.

On its face, the Internet compounds the already difficult nature of the on-campus/offcampus dichotomy. Many scholars recognize that, "the Internet renders vestigial the concept of physical location."¹⁹² Leora Harpaz argues that "[n]ot surprisingly ... the usual line between oncampus and off-campus speech is much more elusive in the context of the Internet. Once posted, the speech is instantly available everywhere, including the school building, without any special effort on the part of the student author."¹⁹³

In the *J.S.* case, the court ruled that where speech aimed at a specific school or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.¹⁹⁴ The website was aimed not at a random audience, but at the specific audience of students and others connected with that particular school.¹⁹⁵ The court concluded that the contents of the website would inevitably pass from students to teachers and circulate on school property.¹⁹⁶ Thus, the court found a sufficient nexus between the website and the school campus to consider the speech as occurring on-campus.¹⁹⁷ Even if the Internet activity failed the on-campus activity test, it did cause substantial disruption of school activities. Based upon that criteria alone, school regulation of the student's expression was justified.

In the *Killion* case, there was no question of whether the expression was on or off-campus because physical paper was brought into the school.¹⁹⁸ The Court simply focused on the question of substantial interference.¹⁹⁹ The nature of the expression did not necessitate regulation by school authorities.²⁰⁰ The speech at issue was not threatening, and although upsetting to the victim, did not cause any faculty member to take a leave of absence as in the *J.S.* case.²⁰¹

In the *Beussink* case, although the court went through great lengths to stress that the expression was neither on-campus activity nor school sponsored, it still applied the substantial interference test.²⁰² If the court believed that being off-campus or not being school sponsored was sufficient to restrict the school's right to regulate the expression, it should have stopped the analysis at that stage.²⁰³ According to the court's analysis, determination of whether an expression is oncampus or off-campus is simply a preliminary stage.²⁰⁴ If the court determines that the expression was off-campus, the school is more limited in its right to regulate the speech.²⁰⁵ On the other hand, if the expression is on-campus, schools are given more latitude in regulating the student expression.²⁰⁶

Finally, in the *Emmett* case, the combination of all the tests pointed to the conclusion that the student's freedom of expression was violated.²⁰⁷ There was absolutely no connection between the school and the Internet expression and no evidence that the expression caused any material interference to any school activity.²⁰⁸

From these cases various conclusions can be drawn. *First*, the preliminary task is to determine whether the Internet speech or expression was oncampus or off-campus. If the expression was oncampus, then courts give schools more latitude in restricting students' freedom. If the expression was off-campus, then schools have to clearly show that the restriction is justified for some pressing and substantial reasons.

Second, the use of the Internet can be considered on-campus if schools prove a sufficient nexus between the expression and school premises.²⁰⁹ If a website is aimed at a specific audience of students or teachers, then it is reasonable to conclude that the contents of the website would inevitably circulate on school property.

Third, the courts must consider the totality of the circumstances surrounding the speech or expression. This includes an analysis of the nature of the speech and the circumstances under which it was made, said or done. This involves an analysis of whether the speech or expression lies within the core values of the freedom of expression, or whether it has absolutely no value (therefore, allowing the schools the right to restrict it).

Fourth, the most crucial test is the substantial interference test. Even if a school holds no property interest in a student's website, it should be allowed a limited amount of regulatory authority if the site creates a substantial disturbance in the school.²¹⁰ For example, a school should be allowed to regulate expression if other students are reasonably likely to know of the site, and as a result, students undermine classroom order and instruction through widespread tardiness, absences, rioting, or other disruptive behavior.²¹¹

Fifth, these tests must be considered in conjunction with one another because one cannot treat regulation of expression lightly, since it is a fundamental constitutional right.²¹²

Sixth, the tests are equally applicable to the different forms of communication including the Internet.²¹³ Courts assess cyber-bullying and cyber-harassment based on these tests. There is no need to devise a different set of tests specifically for the Internet. Technology alone "does not change the nature of the balance between the competing interests of freedom of speech and protection from harm."²¹⁴ Although "the Internet is physically and technologically different than previous media of communication … this should not necessarily relax the scrutiny afforded restrictions placed on expression 'within' it."²¹⁵ Like the Court's conclusion in *Turner Broadcasting System, Inc. v. Federal*,²¹⁶

although cable transmission is different from other media, cable speech does not require the alteration of settled principles of our First Amendment jurisprudence.²¹⁷ Recognizing Internet hazards does not equate to finding a need to rewrite existing First Amendment standards.²¹⁸

Seventh, the burden of proof is on the school to prove that their regulation of the expression is justified. Accordingly, the right of the students to freedom of expression is presumed unless regulation is proven justified.

III. Conclusion

One cannot overemphasize the importance of freedom of expression in a democratic society. But like all other rights, freedom of expression is never absolute. No right is ever maintained to unilaterally trample upon other fundamental rights. Thus, in guaranteeing these rights, the framers of the Constitution did not intend any rights to be self-destructive. As enunciated, the fundamental rights enshrined therein are subject to such reasonable limits prescribed by law as can be justified in a free and democratic society.

With the arrival of the Internet, an international network of interconnected computers makes it possible for millions of people to communicate with one another in cyberspace and to access vast amounts of information from around the world.²¹⁹ Children are connected not only through their classrooms but also through cyberspace. They have moved their interactions with one another to a space without borders. Their world has been enlarged. With this phenomenon, the power that they wield has also burgeoned. Thus, schools have been put in a position of either flowing with the tide of borderlessness or asserting its authority to guard against the evils of the technology.

The school setting is indeed unique, perhaps even *sui generis*, as recognized by the courts. Schools are given the monumental charge of molding our children into responsible and knowledgeable citizens. Part of a school's awesome charge is to balance the exercise of rights that enrich learning with curtailing these privileges in order to assure a safe and productive school environment. Such a premise underlies the basic dilemma of the balancing done by school authorities. Consciously or otherwise, teachersand indeed older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.²²⁰ Thus, in restricting the cyber-bullying phenomena of and cvberharassment, it may find solace in its role of teaching the shared values of a civilized social order.

Endnotes

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¹*Cyber-Bullying*, (CBS News television broadcast Oct. 10, 2002), *available at* <http://www.cbs.ca/ national/news/cyberbullying>.

² Amanda Paulson, *Internet Bullying*, THE CHRISTIAN SCIENCE MONITOR, Dec. 30, 2003, *available at* <http://www.csmonitor.com/2003/1230/p11s01-legn.html>.

⁶ Id.

⁷ Challenging Cyber-Bullying, Media Awareness Network, <http://www.media-awareness.ca> (follow "English," search "Challenging Cyber-Bullying," follow "Challenging Cyber Bullying- Backgrounder") [hereinafter Media Awareness Network].

¹⁰ *Id.*

¹¹ Internet Usage: Facts and News, <http://www. cyberbullying.ca> (last visited Feb. 8, 2006).

¹² "Stopping Cyber Bullies," *A CBS 2 Special Report* (September 7, 2004), online: CBS 2 New York, <http://cbsnewyork.com/investigates/local_story_2510 43805.html>.

¹⁴Renee L. Servance, *Cyber-Bullying, Cyber-Harassment,* and the Conflict Between Schools and the First Amendment, WIS. L. REV., 1213, 1213–14 (2003) (discussing free speech in school environment). ¹⁵ Id.

 $^{^{3}}$ Id.

 $^{^{4}}$ Id.

⁵ Id.

 $^{^{8}}$ Id.

⁹ *Id.*

¹³ Id.

⁷¹

 16 Id ¹⁷ Id. at 1219. 18 *Id*. ¹⁹ Servance, *supra* note 14, at 1219. 20 *Id*. 21 Id. ²² Id. 23 *Id*. ²⁴ Servance, *supra* note 14, at 1219. ²⁵ Id. 26 *Id*. ²⁷ Media Awareness Network, *supra* note 7. 28 *Id*. ²⁹ Id. ³⁰ Id. ³¹ *Id.* ³² Media Awareness Network, *supra* note 7. ³³ Rachel Simmons, Cliques, Clicks, Bullies and Blogs, WASH. POST, Sept. 28, 2003, at B01. ³⁴ *Id*. ³⁵ Id. ³⁶ Id. ³⁷ Id. ³⁸ Simmons, *supra note 33*, at *B01*. ³⁹ Rhoda J. Yen, Censorship of Student Expression on the Internet and the First Amendment, 2000 UCLA J. L. & TECH. 1, 1 (2000). ⁴⁰ *Id*. ⁴¹ See infra p. 6. ⁴² See infra p. 12. ⁴³ See infra p. 22. ⁴⁴ U.S. CONST. AMEND. I. ⁴⁵ Shelton v. Tucker, 364 U.S.479, 487 (1960). ⁴⁶ Keyishian v. Bd. of Regents, 385 U.S. 591, 603 (1967).⁴⁷ Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503-04 (1969). ⁴⁸ *Id.* at 503. ⁴⁹ *Id*. ⁵⁰ Id. ⁵¹ *Id*. at 504. ⁵² Tinker, 393 U.S. at 504. ⁵³ *Id.* at 503. ⁵⁴ *Id.* at 508. ⁵⁵ Id. ⁵⁶ Id. ⁵⁷ Tinker, 393 U.S. at 508. ⁵⁸ Id. ⁵⁹ Id. ⁶⁰ *Id.* at 511. ⁶¹ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675 (1986). 62 Id. at 677. ⁶³ *Id*.

⁶⁴ Id. 65 Id. at 677-78. 66 Fraser, 478 U.S. at 678. ⁶⁷ *Id.* at 678–79. ⁶⁸ Id. ⁶⁹ *Id*. ⁷⁰ *Id.* at 685. ⁷¹ Fraser, 478 U.S. at 685. ⁷² Id. ⁷³ Id. ⁷⁴ Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988). ⁷⁵ Kuhlmeier, 484 U.S. at 262. ⁷⁶ Id. ⁷⁷ Id. ⁷⁸ Id. ⁷⁹ Id. ⁸⁰ Kuhlmeier, 484 U.S. at 262. ⁸¹ *Id.* at 263. ⁸² Id. ⁸³ Id. ⁸⁴ Id. ⁸⁵ Kuhlmeier, 484 U.S. at 264. ⁸⁶ Id. at 267. ⁸⁷ Id. ⁸⁸ Id. ⁸⁹ Id. at 271. ⁹⁰ Kuhlmeier, 484 U.S. at 271–72. ⁹¹ *Id.* at 272. 92 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). 93 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). ⁹⁴ Id. at 572. 95 New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). ⁹⁶ Schenck v. United States, 249 U.S. 47, 52 (1919). ⁹⁷ Id. ⁹⁸ Id. 99 Fraser, 478 U.S. at 685-86. ¹⁰⁰ Id. ¹⁰¹ Id. ¹⁰² Id. ¹⁰³ Yen, *supra* note 39, at 2. ¹⁰⁴ Laurence H. Tribe, First Conference on Computers, Freedom & Privacy, Keynote Address: The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Fronteir (Mar. 26, 1991), available at <http://www.epic.org/free-speech/tribe. html>. ¹⁰⁵ J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850 (Pa. 2002). 106 *Id*. ¹⁰⁷ Id. at 851. ¹⁰⁸ Id. ¹⁰⁹ Id. ¹¹⁰ J.S., 807 A.2d at 851.

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 111 Id ¹¹² *Id*. ¹¹³ Id. at 852. ¹¹⁴ *Id.*. ¹¹⁵ J.S., 807 A.2d at 859. ¹¹⁶ Id. ¹¹⁷ *Id*. ¹¹⁸ *Id*. ¹¹⁹ *Id.* at 852. ¹²⁰ J.S., 807 A.2d at 852. ¹²¹ Id. ¹²² *Id.* at 860. ¹²³ *Id.* at 865. ¹²⁴ *Id.* at 861–62. ¹²⁵ J.S., 807 A.2d at 865. 126 *Id*. ¹²⁷ Id. ¹²⁸ Id. ¹²⁹ Id. ¹³⁰ J.S., 807 A.2d at 865. ¹³¹ *Id.* 132 *Id*. ¹³³ Servance, *supra* note 14, at 1234. ¹³⁴ *Id*. ¹³⁵ Id. ¹³⁶ Id. ¹³⁷ J.S., 807 A.2d at 869. ¹³⁸ *Id.* ¹³⁹ *Id*. ¹⁴⁰ Id. 141 Id. ¹⁴² J.S., 807 A.2d at 869. ¹⁴³ *Id.* 144 *Id*. ¹⁴⁵ Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp 2d 446, 448 (2001). ¹⁴⁶ Id. ¹⁴⁷ *Id.* ¹⁴⁸ Id. ¹⁴⁹ Id. ¹⁵⁰ *Killion*, 136 F. Supp. 2d at 448. ¹⁵¹ *Id.* ¹⁵² Id. at 448–49. ¹⁵³ *Id.* at 449. 154 *Id* at 450. ¹⁵⁵ Killion, 136 F. Supp. 2d at 452 (citing Tinker, 393 U.S. at 509). ¹⁵⁶ *Id.* at 452. ¹⁵⁷ Id. at 452 (citing Tinker, 393 U.S. at 508). ¹⁵⁸ *Id.* at 452. ¹⁵⁹ *Id.* at 455. ¹⁶⁰ *Killion*, 136 F. Supp. 2d at 455. ¹⁶¹ Id. 162 *Id*.

¹⁶³ Id. ¹⁶⁴ *Id*. ¹⁶⁵ *Killion*, 136 F. Supp. 2d at 455. ¹⁶⁶ Killion, 136 F. Supp. 2d at 455 (citing Sorze v. State Coll. Area. Sch. Dist. 240 F.3d 200, 212 (3d Cir. 2001)). ¹⁶⁷ *Id.* at 455. ¹⁶⁸ Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178 (1998). 169 *Id.* at 1177. 170 Id. ¹⁷¹ *Id*. ¹⁷² *Id*. ¹⁷³ Beussink, 30 F.Supp.2d at 1177. ¹⁷⁴ Id. ¹⁷⁵ Id. ¹⁷⁶ Id. ¹⁷⁷ *Id.* at 1180. ¹⁷⁸ Beussink, 30 F.Supp.2d at 1180. ¹⁷⁹ Id. ¹⁸⁰ Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1088 (2000). ¹⁸¹ Id. at 1089. 182 *Id*. ¹⁸³ Id. ¹⁸⁴ Id. ¹⁸⁵ Emmett, 92 F. Supp. 2d at 1089. ¹⁸⁶ Id. ¹⁸⁷ Id. at 1090. ¹⁸⁸ *Id*. ¹⁸⁹ *Id*. ¹⁹⁰ Emmett, 92 F.Supp.2d at 1090. ¹⁹¹ *Id*. ¹⁹² Leora Harpaz, Comment, Internet Speech and the First Amendment Rights of Public School Students, 2000 BYU EDUC. & L.J. 123, 161 (2000). ¹⁹³ *Id*. ¹⁹⁴ J.S., 807 A.2d at 865. ¹⁹⁵ *Id.* at 869. ¹⁹⁶ Id. ¹⁹⁷ Id. ¹⁹⁸ Killion, 136 F. Supp. 2d at 448-49. ¹⁹⁹ Id. at 455. 200 *Id*. ²⁰¹ Id. ²⁰² Harpaz, *supra* note 192, at 161. ²⁰³ Id. 204 *Id*. ²⁰⁵ Id. ²⁰⁶ *Id*. ²⁰⁷ Emmett, 92 F. Supp. 2d at 1089. ²⁰⁸ Id. ²⁰⁹ Id.

²¹⁰ Yen, *supra* note 39, at 46.

²¹¹ Id.

²¹² Id.

²¹³ Id.

²¹⁴ Frank Iacobucci, *Recent Developments Concerning* Freedom of Speech and Privacy in the Context of Global Communications Technology, 48 U. NEW BRUNSWICK L.J. 189, 220 (1999).

²¹⁵ Garner Weng, Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet, 20 HASTINGS COMM. & ENT. L.J. 751, 794 (1998).

²¹⁶ Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994).

²¹⁷ *Id*.

²¹⁸ Weng, *supra* note 215 at 796.

²¹⁹ Reno v. ACLU, 521 U.S. 844, 850 (1997).

²²⁰ *Fraser*, 478 U.S. 675 at 683.

by Brendan J. Dolan

I. Introduction

On July 25, 2005, Governor Rod R. Blagojevich and the State of Illinois passed the Violent Video Games Law,¹ positioning itself to be the first state to successfully restrict minors' access to violent and sexually explicit video games. As Governor Blagojevich stated:

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I'm pleased the General Assembly recognizes the importance of this common sense legislation The [Illinois Violent Video Games Law] will protect our children from violent and sexually explicit video games, making parents' jobs easier and our children's lives healthier. . . . This law is all about empowering parents and giving them the tools they need to protect their kids. And giving them the ability to make decisions on the kinds of games their kids can play.²

Nevertheless, on July 25, 2005, the Entertainment Software Association, Video Software Dealers Association, and the Illinois Retail Merchants Association filed a lawsuit against the enactment of the Violent Video Games Law.³ On December 2, 2005, the Eastern Division of the U.S. District Court for the Northern District of Illinois held that the statute violated the First Amendment, permanently enjoining its enforcement.⁴

The United States Supreme Court has yet to decide whether video games constitute speech under the First Amendment.⁵ Furthermore, the Court has not attempted to differentiate the types of protected speech for the purposes of deciding how much protection and scrutiny is needed.⁶ The federal courts have applied several types of scrutiny when they have held a video game protected speech under the First Amendment.⁷

The Second,⁸ Seventh,⁹ Eighth,¹⁰ and Ninth¹¹ Circuits apply a strict scrutiny standard of review. The Tenth¹² and Eleventh¹³ Circuits have used a reduced level of scrutiny, requiring that the government establish only a legitimate purpose for the regulation, because "although the regulations are content-based and presumptively invalid, they

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are nevertheless a quasi-time, place, and manner restriction."¹⁴ The Fourth Circuit follows the straight time, place, and manner approach.¹⁵

Over the past twenty-five years, "federal district and circuit court decisions have been split on the issue of whether video games constitute speech under the First Amendment."¹⁶ The subject of video game protection under the First Amendment arises largely in two contexts. The first involves local governmental bodies' attempts to regulate minors' use of video games.¹⁷ The second deals with tort liability and the protection given to video game manufacturers and distributors of violent video games.¹⁸ The former will be discussed in greater detail comparing other local ordinances and case law concerning those regulations to the Illinois Violent Video Games Law.

This article first examines the history of the First Amendment and the levels of protection afforded to video games.¹⁹ It then describes the Illinois Violent Video Games Law,²⁰ followed by an analysis of the Act in light of the case law concerning the regulation of violent video games sold to minors and the constitutionality of such regulations.²¹ It also offers other alternatives to governmental regulation for limiting minors' use and access to violent video games.²² Finally, the note concludes that the Illinois Violent Video Games Law, while meant to protect children from violent video games and further a legitimate state interest, will ultimately be defeated by the judicial construction of the First Amendment.²³

II. History

1. First Amendment Overview

The Free Speech Clause of the First Amendment states, "Congress shall make no law ... abridging the freedom of speech, or of the press."²⁴ "Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children."²⁵ In protecting against the propensity of expression to cause violence, states may only regulate speech which is "directed to inciting or

producing imminent lawless action and is likely to incite or produce such action."²⁶ Additionally, the state may place reasonable and content-neutral restrictions on the time, place and manner of public speech."²⁷

Any law restricting the content of protected speech will be reviewed under a strict scrutiny standard and thus, classification of video game content as speech is important.²⁸ Under this standard, the proponents of the law have the burden to demonstrate that a compelling interest exists and that the legislation is the least restrictive means to further that interest.²⁹ The Supreme Court has stated that in order for the legislation to pass constitutional review, the state must prove that the legislation will in fact achieve its goal and purpose.³⁰ Also, in assessing a state's legislative intent, the courts do not demand of the legislature scientific and empirically-guided proof.³¹

The Court has held that "regulations enacted for the purpose of restraining speech [based on] its content presumptively violate the First Amendment."³² On the other hand, the Court has also held that content-neutral regulations, which place a restriction on the time, place, and manner of speech, "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."³³

2. Video Game History as Unprotected Speech

Beginning in the 1980s, federal and state courts held that video games were not protected speech.³⁴ Local zoning ordinances and other government legislation directed at restricting access to video games were upheld.³⁵ Video games during this time were viewed as "pure entertainment with no informational element" and therefore "not speech because they more closely resembled a pinball game, a game of chess, or a game of baseball."³⁶ The only case in which the Seventh Circuit held video games to be unprotected speech is *Rothner v. City of Chicago*.

A. Rothner v. City of Chicago

In *Rothner*, a distributor and operator of video games brought suit challenging a city ordinance prohibiting minors under seventeen years of age from playing video games during school hours.³⁷

The plaintiffs argued that the ordinance restricted speech under the First Amendment, but the district court concluded that "video games lacked [the] informative element and thus found the first amendment inapplicable."³⁸

As previously stated, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are justified without reference to the content of the regulated speech.³⁹ The court allowed the enactment of this government regulation of expressive activity because it was contentneutral.⁴⁰ The ordinance applied to all video games, irrespective of any message, theme, or plot.⁴¹ The regulation placed restrictions on video game play during school hours fulfilling the time and place requirements.

The *Rothner* court also applied the rule set forth in *Ward v. Rock Against Racism*, requiring the content-neutral regulation be narrowly tailored to serve a significant governmental interest.⁴² Because the regulation "only prohibited persons under seventeen from playing video games during school hours," the court clearly believed the regulation fulfilled the "narrowly tailored" requirement.⁴³ Furthermore, the regulation advanced the city's compelling interest to encourage all minors to complete at least a high school education and to discourage truancy.⁴⁴

3. Video Game History as Protected Speech

Unlike the "pinball" video games of the 1980s, the courts currently recognize that video games "frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience."45 "While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."46 The leading case in the Seventh Circuit providing First Amendment protection to violent video games is American Amusement Machine Association v. Kendrick.47 This article will also discuss Video Software Dealers Association v. Maleng, holding unconstitutional a Washington statute very similar to the Illinois Violent Video Game Law. $^{\rm 48}$

A. American Amusement Machine Association v. Kendrick

In this case, "manufacturers of video game and their trade association sought to enjoin, as a violation of freedom of expression, the enforcement of an Indianapolis ordinance that sought to limit the access of minors to video games that depicted violence."49 For the first time, the court held unconstitutional an ordinance enacted based on a belief that video game images are harmful to minors.⁵⁰ The court asserted that "[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low."51 Furthermore, shielding children from the "exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."52

B. Video Software Dealers Association v. Maleng

Other state legislative bodies "have proposed, and continue to propose, the enactment of video game ordinances."53 Before the Illinois Violent Video Games Law, the State of Washington was the only state to pass a statute regulating the sale of violent video games to minors.⁵⁴ According to Washington statute RCW 9.91.180, a person who sells, rents, or permits to be sold or rented, any video or computer game he or she knows is violent to any minor commits a class one civil infraction subject to a fine of \$250 to \$500.55 Claiming that the law violated the First Amendment, a lawsuit was brought by video game manufacturers, distributors, retailers, and software associations seeking to enjoin enforcement of the statute.⁵⁶ The Washington statute would undergo the constitutional scrutiny received by other state regulations in the past.

The Washington legislature noted its dual intent in promoting and enacting this legislation: "to curb hostile and antisocial behavior in Washington's youth" and "to foster respect for public law enforcement officers."⁵⁷ To prove that the regulation passes constitutional muster, the government must demonstrate that the harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.⁵⁸

The state argued that these violent video games fell outside of the protection of the First Amendment because of their obscene material.⁵⁹ However, the court stated that, unlike sexually-explicit materials, depictions of violence "have been used in literature, art, and the media to convey important messages throughout our history, and there [has been] no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation."⁶⁰ The courts must again analyze this obscenity issue in determining whether the Illinois Violent Video Games Law is constitutional.

III. Description of the Illinois Violent Video Games Law

1. Legislative Intent and Purpose

The Illinois Violent Video Games Law restricts constitutional expression rights in the video game industry due to the effect of video games on minors under the age of eighteen. The stated legislative purpose of the Act is to prevent violent, aggressive, and asocial behavior as well as safeguard minors who play violent video games from psychological harm.⁶¹ According to the Act, prohibiting the sale of violent video games will "eliminat[e] any societal factors that may inhibit the physiological and neurological development of its youth" and "facilitat[e] the maturation of Illinois' children into law-abiding, productive adults."62 The Act further states that the restrictions are justified by the State's "compelling interest in assisting parents' in protecting their minor children from violent video games."63

2. Violent Video Game Provisions

To prevent issues of vagueness, the Act attempts to define "violent" video games as follows: "depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human" where serious physical harm "includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape."⁶⁴

It is unlawful for any person to "sell, rent, or permit to be sold or rented, any violent video game to any minor" as set forth above in the definition of violent video games.⁶⁵ The Act also requires any person who sells or rents a violent video game using an electronic scanner to "program the electronic scanner to prompt sales clerks to check identification before the sale or rental transaction is completed."⁶⁶ Sales or rentals of such games may not be made through a "selfscanning checkout mechanism."⁶⁷ Finally, a person who violates any of the above provisions is liable for a petty offense under the Illinois Criminal Code, and subject to a \$1000 fine.⁶⁸

3. Labeling, Signage, and Brochure Provisions

Not only does the Act ban the sale or rental of violent video games to minors, and regulate the method of sales and rentals of such games, it also imposes burdens on retailers through labeling, posting, and brochure requirements.⁶⁹ The Act requires any video game retailer, defined as a person who "sells or rents video games to the public,"⁷⁰ to label all video games "with a solid white '18' outlined in black."⁷¹ Failure to comply with this labeling requirement "is a petty offense punishable by a fine of \$500 for the first [three] violations and \$1000 for every subsequent violation."⁷²

The Act requires any retailer to post a sign notifying customers that the Entertainment Software Ratings Board (ESRB) ratings system exists.⁷³ Also, Section 12B-35 requires that a retailer "make available upon request a brochure to customers that explains the [ESRB] ratings system."⁷⁴ Failure to comply with either requirement is a petty offense punishable by a fine as described above.⁷⁵

IV. Analysis of the Illinois Violent Video Games Law

1. Will the Statute Pass Constitutional Muster?

A. Freedom of Expression

The Illinois Violent Video Games Law restricts minors from purchasing video games solely based upon the games' violent content. However, the content of the expression is not obscene, nor does it fall within any other category of expression that may be regulated under the First Amendment based upon its content. The Act is not a contentneutral regulation, which places a restriction on the time, place, and manner of speech.

The Act imposes unconstitutional content regulation by prohibiting a person from selling, renting, or permitting to be sold or rented, any video game that meets the definition of "violent" to any person under the age of eighteen.⁷⁶ The Act restricts the freedom of creators, distributors, and publishers of games, as well as purchasers, renters, and other players of such games, to communicate expression that is not constitutionally subject to regulation.⁷⁷

Moreover, evidence does not support the Act's stated purposes and its purposes are insufficient under the First Amendment to justify the broad content discrimination imposed by the Act. Not only does the Act fail to serve a compelling governmental interest, but the Act also is not narrowly tailored to serve any such interest.

Additionally, the Assembly's legislation does not propose the least restrictive means of achieving its goals.⁷⁸ The Act places the burden of determining whether a video games meets the definition of the act on every person who sells, rents, or permits games to be sold or rented, prior to publishing, distributing, or otherwise holding that game out to the public.⁷⁹ The violent video game provisions of the Act would also impose upon every such person the risk of substantial penalties.⁸⁰ The imposition of this burden and risk, therefore, serves no compelling governmental interest, nor is it narrowly tailored to serve that interest.

In addition to these unconstitutional measures, the Act would also compel a person who sells or rents violent video games to label every game that meets the Act's definition of "violent," and to post signs and provide literature concerning the ESRB ratings system.⁸¹ The labeling requirement would compel retailers to disseminate the government's message that minors should be denied access to certain video games. This requirement runs counter to the Act which only prohibits the sale and rental of any violent video game to any minor.

B. Vagueness

Legislative enactments must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."⁸² Many of the provisions of the Illinois Violent Video Games Law are unconstitutionally vague in that many of the terms and phrases, such as, "kills or otherwise causes serious physical harm; depictions of or simulations of; and human-on-human," have no clear meaning in the context of animated and interactive video games.⁸³

Persons of common intelligence are forced to speculate the meaning and scope of the Act. A retail or online "clerk might know everything there is to know about the games," the ratings system, and the regulations under the Act, "and yet not be able to determine whether it can legally be sold to a minor."⁸⁴

The Act's vagueness is also likely to lead to unfair and subjective law enforcement. The statutory defenses worsen, rather than alleviate, the Act's vagueness problems. For instance, the term "complete knowledge" will create confusion because clerks and retailers will not know whether they will qualify for a statutory defense. In terms of scope, the Act does not clarify how a store manager would be treated in comparison to a clerk. In the end, not only will the retail or online stores be likely to withhold all games that could possibly fall within the broad scope of the enacted legislation, but developers and game designers will ultimately move further away from illegal game manufacturing "than if the forbidden are clearly marked."85

C. Seventh Circuit Precedent

The Illinois Violent Video Games Law should be unconstitutional when analyzed under the Seventh Circuit's binding precedent. In *American* Amusement Machine Association, the Court of Appeals addressed an Indianapolis ordinance limiting minors' access to violent video games.⁸⁶ The Court of Appeals of the Seventh Circuit held that video games depicting violence could not be categorized as obscenity, as the city argued, "inasmuch as games' stylized and patently fictitious depictions of violence were not so offensive to be deemed obscene," therefore not entitled to First Amendment protection.⁸⁷ Furthermore, the Seventh Circuit held that violent video games are fully protected by the First Amendment and that a restriction on this protected expression could not be justified by speculative evidence that these games might harm minors who have rights to access them.88

2. Disadvantages of Video Game Legislation

Media violence can be plentifully "found in Shakespeare, Homer, and the Bible" as readily as in *Grand Theft Auto*.⁸⁹ Media violence helps "children to encounter and deal with reality," embrace imagination, and provides an outlet for children to overcome their fears.⁹⁰

A. School Violence Misperceptions

The Secret Service, the Federal Bureau of Investigation, the Surgeon General, and the National Association of Attorneys General, in their reviews of school violence, found that issues such as bullying, dysfunctional families, and access to guns and drugs are factors in school violence, not the media itself.⁹¹ Even in terms of the amount of time spent playing video games, gamers devote more than triple the amount of time (7.4 hours for women; 7.6 hours for men) exercising or playing sports, volunteering in the community, participating in religious activities, creative endeavors, cultural activities and reading, than playing video games.⁹²

B. Deference to Parents

In proposing video game legislation, legislators' and politicians' arguments have been premised on the notion that, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."⁹³ Nevertheless, the courts and

the government must give deference to parents because "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations ... full growth and maturity that make eventual participation in a free society meaningful and rewarding."⁹⁴

C. Standard of Proof

In assessing a state's video game legislation, the court does not demand of the legislature scientific and empirically guided proof. The state can simply report on "studies that merely purport, but do not explicitly demonstrate, a causal connection between the activity and the resulting harm."⁹⁵

The problem with this reasoning is that, to date, the government cannot demonstrate a compelling justification for legislation because the research has not shown a causal connection between violent video games and antisocial behavior in children.⁹⁶ Ultimately, the legislature will likely fail to meet the strict scrutiny test because it will be very difficult to show that "the regulation will in fact alleviate harm in a direct and material way" and will actually "prevent minors' access to violent video games."⁹⁷

Evidence suggests that "youth violence is a result of a number of different factors including the availability of guns, and issues of social class and poverty, but not video game playing."⁹⁸ According to the U.S. Office of Juvenile Justice and Delinquency prevention, between 1994 and 1999, the crime rate for children aged fifteen to seventeen decreased 39%, which coincided with a 50% increase in the sale of computer and video games.⁹⁹ Furthermore, during the period in which gaming has become widespread in America, violent crime has actually fallen.¹⁰⁰

D. Poor "Study" Habits

Another problem arises because studies have examined only the short-term effects of gaming.¹⁰¹ No studies exist that track long-term effects on the players.¹⁰² Also, generalizing about "game play" is meaningless when thousands of games in dozens of genres exist.¹⁰³

A recent study conducted by Dimitri Williams, who specializes in studying the social impact of media at the University of Illinois analyzed the long-term effects of violent video game use.¹⁰⁴ Williams, along with Marko Skoric of the University of Michigan, subjected a group of individuals—none of whom had played this particular video game and many of whom had never played any video games—to play the game "Asheron's Call 2" for a month, for an average of nearly two hours per day.¹⁰⁵ Another group acted as a control.¹⁰⁶ During the course of the month, all participants were asked questions about the frequency of aggressive social interactions, such as arguments with their spouses, to test the idea that gaming makes people more aggressive.¹⁰⁷ The study revealed that game players were no more aggressive than the control group.¹⁰⁸

E. Parents Hold "the Green"

Another reason legislation will not reduce children's exposure to video games is because children are not purchasing the games.¹⁰⁹ A study commissioned under President Clinton found that parents are involved in 83% of video game purchases and children reported that parents were involved with 72% of game purchases.¹¹⁰ In addition, research by the video game industry shows that individuals over the age of eighteen purchase over 90% of console games and 97% of consoles.¹¹¹ Of the children "under the age of eighteen who purchased video games, 84% obtained parental permission before the purchase."¹¹²

F. Purchasing Video Games via the Web

Online ordering is another way for minors to circumvent legislation and ordinances regulating video game access.¹¹³ Because children have easy access to personal computers and the Internet in schools, homes, and shopping malls, online retailers are unable to effectively verify whether the individual is allowed to purchase the violent video game. All that is needed is a parent's credit card, mailing address information, and possibly a social security number to obtain a video game from online retailers.

G. Political Ignorance

Half of the population in the United States plays computer or video games.¹¹⁴ According to Nielsen, a market research firm, most video game players are under the age of forty, while most gaming critics are over forty.¹¹⁵ Many of the gaming critics

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are Democrats trying to appeal to the "centre."¹¹⁶ Also, the fact that video games are now a twentyfour billion dollar global industry can make gaming a very appealing target for politicians.¹¹⁷ These politicians "never seem to let judicial precedent, grounded in constitutional concerns for the First Amendment protection of speech, get in the way of proposing new legislation that has a slim chance to hold in court," with taxpayers left to pay the bill for defending the new laws.¹¹⁸ The President of the Entertainment Software Association states, "[h]eadlines may be good for politicians but they don't help parents do their jobs more effectively."¹¹⁹

3. Advantages of Video Game Legislation

A. The Impact of Modern Speech on Framers' Intent

The Framers of the Constitution envisioned the First Amendment as a tool to protect disgruntled and politically expressive citizen's freedom of speech.¹²⁰ Since Oliver Wendell Holmes' dissenting opinion in Abrams v. United States,¹²¹ judges have been concerned, (in the context of the First Amendment), with "freeing the marketplace of ideas from any censoring impulses of government."122 However, today there should be "a completely different concern" occupying the courts with respect to the First Amendment.¹²³ Today, the real censorship danger is an indirect censorship to political speech caused by legislation attempting to censor movies, video games, and other mediums that will threaten to "choke out" political speech.¹²⁴ These new forms of media present arguments for protection under the First Amendment leading to the enactment of legislation deemed necessary to scrutinize such media forms.¹²⁵ Ultimately, the courts contribute to this censorship if they fail to closely scrutinize any new forms of media content (i.e. violent video games) that make claims for speech protection.¹²⁶

Nevertheless, it is almost impossible to enact legislation that would be effective for children and, at the same time, not interfere with adults' First Amendment rights.¹²⁷ "Affording some expressive video games constitutional protection still allows for the possibility of a narrowly tailored statute to regulate obscene video games because obscene speech garners a lower level of constitutional protection than non-obscene speech."¹²⁸ Instead of enacting violent video game legislation to remedy the problem, policymakers should "focus on affirmative, productive ways of improving the upbringing of youth and inculcating good values including alternatives to violence."¹²⁹

B. Empirically Guided Causal Connection

The increase of regulatory interest in violent video games follows, in part, from the belief that a causal connection exists between such games and recent high school shootings.¹³⁰ Children often cannot decipher between fantasy and reality in media presentations.¹³¹ Many believe that media violence, including violent video games, desensitizes youth, causing them to become more accepting of real-life violence and more fearful and less trusting of people and their surroundings.¹³²

"Judges are neither well-suited nor qualified to form conclusions on the psychological effects" of video games.¹³³ To prove the causal connection between violent video games and aggressive behavior in minors, legislators need to present convincing, scientifically guided proof. Dr. Craig A. Anderson and Dr. Brad J. Bushman, professors at Iowa State University, conducted the most notable of these studies.¹³⁴ In the *Interactive Digital Software Association* case, St. Louis County cited this study as proof of the causal connection.¹³⁵

Dr. Anderson and Dr. Bushman found that playing video games for ten to fifteen minutes did lead to aggressive behavior.¹³⁶ Violent media increases aggression by teaching observers how to aggress, priming aggressive cognitions, increasing arousal, and creating an aggressive affective state.¹³⁷ They found that pro-social behavior temporarily decreases after exposure to violent video games.¹³⁸ Violent video games may also increase aggression in the short-term by increasing aggressive thoughts, feelings of anger or hostility, and physiological arousal.¹³⁹

Researchers, however, ignored longitudinal testing as to whether repeated exposure to violent video games would increase long-term aggression.¹⁴⁰ In a later study by Dr. Anderson, he admits that there is a glaring empirical gap emerging with respect to violent video game research: the lack of longitudinal studies.¹⁴¹

Anderson states, "[i]t is a mistake to dismiss existing longitudinal studies of media violence effects, because they are highly relevant to understanding and predicting the effects of repeated exposure to violent video games."¹⁴² Furthermore, there are other questions in need of research concerning "the details of how media violence in general and video game violence in particular create the observed short-term and the expected long-term increases in aggression and violence."¹⁴³

C. Potential Health Risks

The amount of time children spend playing video games, even non-violent ones, contributes to the obesity epidemic among American youth.¹⁴⁴ Research indicates that video game use may cause video-induced seizures and "postural, muscular and skeletal disorders, such as tendonitis, nerve compression, and carpal tunnel syndrome."¹⁴⁵

V. Legislative Alternatives

1. Better Parental Education on Video Games and Ratings System

Parents are confused about what to do with video games.¹⁴⁶ On the one hand, the video game industry tells parents to pay closer attention to the ratings.¹⁴⁷ On the other hand, the industry denies that any of these games are harmful.¹⁴⁸ This is especially alarming and troubling with the launch of video games this year aimed at children as young as two.¹⁴⁹ Although it is in the economic best interest of video game manufacturers to allow babies to play these games, this trend raises serious social and health implications for children.¹⁵⁰

A better and more effective way for the government to restrict minors from purchasing and playing violent video games would be to work in collaboration with the Entertainment Software Ratings Board to help increase parental awareness of the content of video games and the ratings system.¹⁵¹ Parents are in the most suitable position to make decisions as to what exposure is appropriate for their children.¹⁵² Clearer, more visible information by the ratings board means better informed parents, which leads to more

sound judgments about their children's access to violent video games.

2. Stricter Enforcement by Retailers

California Governor Arnold Schwarzenegger passed a law in September 2004 providing that:

Every video game retailer shall post a sign providing information to consumers about a video game rating system or notifying consumers that a rating system is available to aid in the selection of a game. The sign shall be posted within the retail establishment in a prominent area...[a] video game retailer shall make available to consumers, upon request, information that explains the video game rating system.¹⁵³

In that same year, the National Institute on Media and the Family conducted a retailer phone survey, which found that only 76% of retailers understood the ratings they are supposed to enforce, which was down from 85% in 2003.¹⁵⁴ Only half of the stores trained their employees in the use of the ratings.¹⁵⁵ Additionally, in many of the stores that reported having training, further inquiry revealed the "training" only amounted to the cash register prompts.¹⁵⁶ The only significant improvement in 2004 was that 89% of the stores surveyed said they now had policies restricting the sale of "M-rated" games to youth under seventeen, which was up from 70% in 2003.¹⁵⁷

Furthermore, in 2004, the Institute carried out a secret shopper survey in which twelve children between the ages of seven and fourteen attempted to purchase "M-rated" games in thirtyfive stores in Wisconsin, Minnesota, Maryland, and Florida.¹⁵⁸ Of thirty-five attempts made, 34% were successful, which was an improvement from 55% in 2003.¹⁵⁹ However, "boys as young as seven were able to buy these games 50% of the time, whereas girls were only able to purchase these games 8% of the time."¹⁶⁰

These surveys and studies clearly suggest that legislators should continue to promote strict enforcement of the ratings system before children purchase or rent violent video games. If retailers and rental stores are properly trained and educated as to the ESRB ratings system, these measures alone would ultimately reduce the amount of violent video game purchases by minors. Moreover, legislation that imposes severe consequences (heavy fines, job termination, etc.) for inadequate procedures and enforcement in places that sell violent video games may cause retailers and their employees to think twice before selling or renting games to minors. This type of regulation will also curb minors' access to violent video games without infringing upon constitutional rights.

3. Clarity in Self-Regulation

Using a random sample of eighty-one "T-rated" video games by the ESRB, study authors Kevin Haninger, a doctoral student at Harvard University, and Dr. Kimberly Thompson, co-founder and director of research at the Center on Media and Child Health at Children's Hospital Boston, characterized game content related to violence, sexual themes, profanity, substance use, and gambling.¹⁶¹

The study compared the content observed in an hour of game play to the ESRB content descriptors provided to consumers.¹⁶² The study found that presence of a content descriptor on the game box provided a good indication of that type of content in the game, but the absence of a content descriptor did not mean the absence of content that might concern parents.¹⁶³ In 48% of games, the researchers observed content involving violence, sexual themes, profanity, substance use, or gambling that was not noted on the game box.¹⁶⁴

According to Haninger and Thompson, there needs to be "greater clarity and transparency in the use of the ESRB content descriptors and in the overall ratings process."¹⁶⁵ The ESRB content descriptors should provide "complete and accurate information" to allow parents to make informed decisions about their child's video game use.¹⁶⁶

4. Retailer Discretion

In 2002, retailers including Wal-Mart and Best Buy decided not to stock the controversial "BMX XXX" due to vulgar language and full motion videos of strippers, even though the game passed the ESRB guidelines with an "M" rating, which is the second highest rating on the ESRB system.¹⁶⁷ In the end, retailers retain the discretion to refrain from placing video games on the shelf if they do not approve of the game's content, which thereby reduces children's outlets to such games.¹⁶⁸

5. Age or Parental Consent Verification

As stated earlier, one of the drawbacks of legislation restricting minors from purchasing violent video games is the failure to address the ineffective systems and methods for age verifycation when purchasing video games, especially over the Internet. A recent study done by the National Institute on Media and the Family, a prominent industry critic, found that retail stores that have an enforcement policy were in compliance 70% of the time.¹⁶⁹ A system to verify either purchasers' ages or parental consent would be relatively easy to institute considering the predominance of large chain retailers, including Wal-Mart and Best Buy, in the video game market.¹⁷⁰

However, for violent video game regulation to truly be effective there needs to be a uniform system for online and retail sellers of violent video games to verify either purchasers' ages or parental consent.¹⁷¹ This process may include multiple proofs of verification by mailing address, driver's license identification, or even parents' and children's social security numbers.

VI. Conclusion

At the very least, in order to avoid being vague and overbroad, the definitions within the regulation or statute must give a categorical distinction between the forms of violence it intends to cover.¹⁷² Also, when trying to establish a causal connection, it is most effective to provide scientific research conducted on both the longterm and short-term effects of violent video games on minors.¹⁷³ According to *Ginsberg*, persuasive scientific research should be enough to persuade the court and justify the government's decision to regulate video game usage for minors.¹⁷⁴

Unfortunately, the Illinois Violent Video Games Law will be deemed unconstitutional by the Seventh Circuit based on issues of vagueness and a lack of proof concerning a causal connection between violent video game use and increased violent behavior in minors. Douglas Lowenstein, president of the Entertainment Software Association, put it best:

I'm confident the court will affirm our position [with respect to the Illinois Violent Video Games Law]. There is

already a precedent-setting ruling from the Seventh Circuit, which includes Illinois, establishing the unconstitutionality of this type of statute—and the facts, the science, the law, and the U.S. Constitution have not changed since that decision . . . It's unfortunate that taxpayers and parents will see critical funds diverted to defend a bill that courts are almost certain to strike down as patently unconstitutional.¹⁷⁵

Frustration over failed legislative attempts to restrict the sale of violent video games to minors should force society and legislators to redirect their efforts and address serious adolescent youth problems proven to be causes of youth violence such as bullying, social class, lack of parental supervision, and poverty.¹⁷⁶ The best way to further the goals of the government and promote the safety and wellbeing of our children without legislation would be for the government to work in conjunction with the Entertainment Software Ratings Board to help improve parents' awareness and understanding of video game content and the ratings system.¹⁷⁷

Each child has individualized developmental needs; blanket legislation would not be the most effective solution.¹⁷⁸ Parents are the best means of combating video game violence. It is therefore extremely important from a social and legal standpoint for states not to infringe upon the parental role. The Supreme Court has recognized that "parents have a constitutionally protected right to raise their children free from unwarranted interference by the State."¹⁷⁹

Bills restricting sales of violent video games to minors are laws in search of a problem that does not exist.¹⁸⁰ This bill is bad policy because it will substitute the government's judgment for parental supervision and turn retailers into surrogate parents in a misguided effort to help Illinois parents.¹⁸¹ To further this argument, the law would treat computer and video games differently than other constitutionally protected works, such as films, music, and books.¹⁸² As Franklin Harris from The Decatur Daily, states, "Laws like those under construction here [Illinois Violent Video Games Law] and elsewhere are insidious. They seek to transfer the responsibility of parenting to the government, which has a difficult enough time delivering mail, never mind acting as parent to

millions of children ... These laws treat parents like children."¹⁸³

Endnotes

¹720 Ill. Comp. Stat. 5/12-A (West 2006) (originally enacted H.B. 4023, 94th Gen. Assemb., Reg. Sess. (Ill. 2005)). The act will go into effect on January 1, 2006. *Id.* On October 19, 2005, Governor Schwarzenegger signed a similar California bill A.B. 1179, following Michigan and Illinois in enacting a ban on the sale or rental of violent video games to children. Tor Thorsen, Schwarzenegger Signs Game-Restriction Bill: Measure Won't Become California Law Until January, But the ESA is Already Planning a Suit (Oct. 7, 2005), <http:// www.gamespot.com/news/ 6135332.html>.

² Press Release, Ill. Office of the Governor, Gov. Blagojevich Applauds Senate for Passing His Landmark Video Game Legislation (May 19, 2005), <http://www. illinois.gov/PressReleases/PrintPressRelease.cfm?Subject ID=1&RecNum=3977>; Press Release, Ill. Office of the Governor, Gov. Blagojevich Signs Law Making Illinois the Only State in the Nation to Protect Children From Violent and Sexually Explicit Video Games (July 25, 2005), <http://www.illinois.gov/ PressReleases/ShowPressRelease.cfm?SubjectID= 3&RecNum=4170>. "For the same reason we don't allow kids to buy pornography, for the same reason we don't allow kids to buy cigarettes, for the same reason we don't allow kids to buy alcohol, we shouldn't allow them to go to stores and buy violent and sexually explicit video games-games that teach them to do the very things we put people in jail for," said Governor Blagojevich. Id.

³ Press Release, Entm't Software Ass'n, Video Game Industry to File Suit Seeking Relief from Illinois Governor's Unconstitutional Law (July 25, 2005) <http://www.theesa.com/archives/2005/07/video_ game_indu_1.php>.

⁴ Entm't Software Ass'n, et al. v. Rod Blagojevich, et al., 404 F.Supp.2d 1051, 1083 (N.D. Ill. 2005).

⁵ Anthony Ventry, Note and Comment, Application of the First Amendment to Violent and Nonviolent Video Games, 20 GA. ST. U. L. REV. 1129, 1132–33 (2004).

⁶ Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1280 (D. Colo. 2002). Such a task would not only be very complex "but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality." *Id.*

⁷ Scott A. Pyle, Note, Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster, 37 VAL. U. L. REV. 429, 474–75 (2002).

⁸ Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 66–67 (2d Cir. 1997) (applying strict scrutiny to strike down a local law prohibiting the sale to minors of trading cards depicting graphic violence); *see also* Pyle, *supra* note 7, at 475.

⁹ Pyle, *supra* note 7, at 475. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001) (applying strict scrutiny to strike down an Indianapolis ordinance regulating violent video games).

¹⁰ Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992) (applying strict scrutiny to strike down state statute prohibiting rental or sale to minors of video cassettes depicting violence); Pyle, *supra* note 7, at 475.

¹¹ Crawford v. Lungren, 96 F.3d 380, 385 (9th Cir. 1996) (applying strict scrutiny to uphold a local law prohibiting the sale in unattended vending machines of magazines that contain "harmful matter"); Pyle, *supra* note 7, at 475.

¹² M.S. News Co. v. Casado, 721 F.2d 1281, 1291 (10th Cir. 1983) (upholding a city ordinance requiring "blinder racks" be placed over the shelves on which sexually oriented periodicals and publications appealing to a minor's interest are located).

¹³ Am. Booksellers v. Webb, 919 F.2d 1493, 1510 (11th Cir. 1990) (upholding a statute making it a criminal offense to display in a place accessible to minors, any material deemed "harmful to minors" under the statute).

¹⁴ Pyle, *supra* note 7, at 476.

¹⁵ Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (ruling that intermediate scrutiny was the most appropriate level of review for a constitutional challenge to a city's juvenile curfew ordinance); *see also* Pyle, *supra* note 7, at 476.

¹⁶ Ventry, *supra* note 5, at 1130. *Compare* Interactive Digital Software Ass'n, et al. v. St. Louis County, 200 F. Supp. 2d 1126, 1134-35 (E.D. Mo. 2003), rev'd, 329 F.3d 954 (8th Cir. 2003) (finding video games should not be examined on a case by case basis because other forms of protected speech are not examined that way; holding video games are not expressive in a way protected by the First Amendment), and Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1184-85 (W.D. Wash. 2004) (holding that the Washington statute is unconstitutional and violent video games are expressive in nature and deserve full First Amendment protection); See also Rothner v. City of Chicago, 929 F.2d 297, 303 (7th Cir. 1991) (quoting opinion of J. Ripple, "we cannot tell whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline[s] and plot[s] that convey to the user a significant artistic message

protected by the [F]irst [A]mendment. Nor is it clear whether these games may be considered works of art.").

¹⁷ Kurtis A. Kemper, Annotation, *First Amendment Protection Afforded to Commercial and Home Video Games*, 106 A.L.R. 5TH 337 (2004) (discussing the history of video game legislation, the First Amendment, and the commercial or home video game cases afforded constitutional protection).

¹⁹ See infra Part II.

²⁰ See infra Part III.

²¹ See infra Part IV.

²² See infra Part V.

²³ See infra Part VI.

²⁴ U.S. CONST. amend. I. The Supreme Court has stressed that the First Amendment protects "[e]ntertainment, as well as political and ideological speech." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981). The Court has also stated that a "particularized message" is not required for speech to be constitutionally protectted. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995). "Expression, to be constitutionally protected, need not constitute the reasoned discussion of the public affairs, but may also be for purposes of entertainment." James v. Meow Media, Inc., 300 F.3d 683, 695 (6th Cir. 2002).

²⁵ Ginsberg v. New York, 390 U.S. 629, 636 (1968). Where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

²⁶ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

²⁷ Nathan Phillips, Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games, 19 BERKELEY TECH. L. J. 585, 587 (2004) (examining the Interactive Digital Software decision and the freedom of speech rights given to minors). In other words, "the regulations are not intended to prevent speech because of its message." Id.

²⁸ *Id.* "To fall within the [protections of] the First Amendment, entertainment content like video games must be designed to communicate or express some idea or some information." Ventry, *supra* note 5, at 1133.

²⁹ Phillips, *supra* note 27, at 587. The Supreme Court has held that courts should evaluate each medium of expression by the standards to which it is best suited. Ventry, *supra* note 5, at 1133.

³⁰ Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994); *see also* Pyle, *supra* note 7, at 439–40.

³¹ Pyle, *supra* note 7, at 450. "[T]he state can even rely on studies that merely purport, but do not explicitly demonstrate, a causal connection between the activity and the resulting harm." *Id.*

¹⁸ Id.

³³ *Renton*, 475 U.S. at 47; *see also* Pyle, *supra* note 7, at 439.

³⁴ See, e.g., Malden Amusement Co., Inc. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983); Am.'s Best Family Showplace Corp. v. City of New York Dept. of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y. 1982); City of Warren v. Walker, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984); City of St. Louis v. Kiely, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983); see also Ventry, supra note 5, at 1133–35.

³⁵ Ventry, *supra* note 5, at 1133.

³⁶ *Id.* at 1133–34.

³⁷ *Rothner*, 929 F.2d at 298.

³⁸ *Id.* at 299; *cf.* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (holding that the distinction between information and entertainment is so miniscule, that both forms of expression are entitled to First Amendment protection). "Entertainment must involve the communication of some idea or information before it will be protected." *Rothner*, 929 F.2d at 299. The court further stated that, "[t]o hold on this record that *all* video games—no matter what their content—are *completely* devoid of artistic value would require us to make an assumption entirely unsupported by the record and *perhaps* totally at odds with reality." *Id.* at 303.

³⁹ Phillips, *supra* note 27, at 587.

⁴⁰ *Rothner*, 929 F.2d at 303.

⁴¹ *Id*.

 42 *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). The regulation must also "leave open ample alternative channels for communication of the information." *Id.* at 303–04. This element was met by the regulation because persons under the age of seventeen were free to play video games on school vacation, holidays, and at any time after school was out. *Id.* at 304.

⁴³ *Id.* at 303.

⁴⁴ *Id.* at 304. "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." Plyler v. Doe, 457 U.S. 202, 221 (1982).

⁴⁵ *Maleng*, 325 F. Supp. 2d at 1184.

⁴⁶ Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

47 Kendrick, 244 F.3d at 572.

⁴⁸ Maleng, 325 F. Supp. 2d at 1191.

⁴⁹ Kendrick, 244 F.3d at 573.

⁵⁰ Id. at 575, 579.

⁵¹ *Id.* at 577.

⁵² Id.

⁵³ See, e.g., H.R. 669, 108th Cong. (2003) (providing that "[w]hoever sells at retail or rents, or attempts to

sell at retail or rent, to a minor any video game that depicts nudity, sexual conduct, or other content harmful to minors, shall be fined"); See also Pyle, supra note 7 at 37 n.183. St. Louis County enacted an ordinance making it "unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors or to permit the free play of graphically violent video games by minors, without a parent or guardian's consent." Interactive Digital Software Ass'n, 329 F.3d at 956. The County sought to restrict access to violent video games because their content purportedly affected the thoughts and behavior of those who played them. Id. at 958. Nonetheless, the court believed that the County failed to meet the burden of proving that the ordinance furthered a compelling state interest and that the ordinance was narrowly tailored to achieve that end. Id. at 959. Government cannot silence protected speech by "wrapping itself in the cloak of parental authority." Id.at 960.

⁵⁴ H.B. 1009, 58th Leg. (Wash. 2003).

⁵⁶ *Maleng*, 325 F. Supp. 2d at 1182.

⁵⁷ *Id.* at 1186. Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

⁵⁸ See Edenfield v. Fane, 507 U.S. 761, 770–71 (1993).

⁵⁹ *Maleng*, 325 F. Supp. 2d at 1185. When used in the context of the First Amendment, the word "obscenity" means material that deals with sex. Miller v. California, 413 U.S. 15, 18 n.2 (1973) (citing United States v. Roth, 354 U.S. 476, 487 (1957)). State statutes designed to regulate obscene materials must be narrowly directed towards "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24.

⁶⁰ Maleng, 325 F. Supp. 2d at 1185. Judge Rosnik also stated that "given the nationwide, on-going dispute [over the constitutionality of violent video games,] it is reasonable to ask whether a state may ever impose a ban on the dissemination of video games to children under eighteen." *Id.* at 1190. "The answer is "probably yes" if the games contain sexually explicit images and "maybe yes" if the games contain violent images, such as torture or bondage, that appeal to the prurient interest of minors." *Id.*

⁶¹ 720 Ill. Comp. Stat. 5/12A – 5(e–f) (West 2006).

- ⁶² § 12A-5(g–h).
- ⁶³ § 12A-5(d).

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⁵⁵ Id.

⁶⁴ § 12A-10(e).

 65 § 12A-15(a). A minor is defined as a person under the age of eighteen. § 12A-10(c). The definition of a person includes, but is not limited to "an individual, corporation, partnership, and association." § 12A-10(d).

⁶⁶ 720 Ill. Comp. Stat. 5/12A-15(b) (West 2006).

⁶⁷§ 12A-15(c).

⁶⁸§ 12A-15(a–c). A retail sales clerk is not liable "unless he or she has complete knowledge that the party to whom he or she sold or rented violent video game was a minor and the clerk sold or rented the video game to the minor with the specific intent to do so." § 12A-15(d). A video game retailer has an affirmative defense under the Act "if the retail sales clerk had complete knowledge that the party to whom he or she sold or rented a violent video game was a minor and the clerk sold or rented the video game to the minor with the specific intent to do so." § 12A-20(3). It is also an affirmative defense if "the video game sold or rented was pre-packaged and rated, EC, E10+, E, or T by the Entertainment Software Ratings Board." § 12A-20(4).

⁶⁹ § 12A-25 (describing labeling requirements; § 12B-30 (describing posting requirements); § 12B-35 (describing brochure requirements).

⁷⁰ § 12A-10(a).

⁷¹ 720 Ill. Comp. Stat. 5/12A-25(a) (West 2006). "The '18' shall have dimensions of no less than 2 inches by 2 inches [and] shall be displayed on the front face of the video game package." *Id.*

⁷² § 12A-25(b). Identical labeling requirements and punishments are imposed with respect to "sexually explicit" video games. § 12B-25 (a–b).

 73 § 12B-30(a). "The sign shall be prominently posted in, or within 5 feet of, the area in which games are displayed for sale or rental, at the information desk if one exists, and at the point of purchase." *Id.* It further requires that the sign be printed in a minimum of 36point type in black ink on a light background, and measure no less than 18 by 24 inches. § 12B-30(b).

⁷⁴ § 12B-35(a).

⁷⁵ § 12B-30(c) (citing penalty for failure to comply with posting requirements); § 12B-35(b) (citing penalty for failure to comply with brochure requirements).

⁷⁶ 720 Ill. Comp. Stat. 5/12A-15(a); § 12A-10(c) (West 2006) (defining "minor"); § 12A-10(e) (defining "violent").

⁷⁷ See § 12A-15(a) (implying that other's rights are restricted).

⁷⁸ See Infra Part V.

 79 See 720 Ill. Comp. Stat. 5/12S - 15(a), 12A - 25(a) (West 2006) (implying that people who sell, rent or permit have the burden).

⁸⁰ § 12A-15(c), 12A-25(b), 12B-30(b), 12B-30(c), 12B-35(b).

⁸¹ § 12B-30(a–b) (citing posting requirements);
§ 12B-35(a) (citing brochure requirements).

⁸² Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

⁸³ 720 Ill. Comp. Stat. 5/12A-10(e) (West 2006).

⁸⁴ Maleng, 325 F. Supp. 2d at 1191.

⁸⁶ *Kendrick*, 244 F.3d at 573.

⁸⁷ *Id.* at 575.

⁸⁸ *Id.* at 579 (noting that the harm to the citizens is speculative and "curtails freedom of expression...without any offsetting justification, 'compelling' or otherwise").

⁸⁹ See Abby L. Schloessman Risner, Violence Minors and the First Amendment: What is Unprotected Speech and What Should Be Done?, 24 ST. LOUIS U. PUB. L. REV. 243, 267 (2005) (citing Majorie Heins, Introduction to Brief Amici Curiae of Thirty-Three Media Scholars in St. Louis Video Games Case, 31 HOFSTRA L. REV. 419, 421 (2002) (arguing that "media violence" is a vague category of expression and its harmful effects are difficult to prove)).

⁹⁰ See Risner, supra note 89, at 243–44 (citing Christopher E. Campbell, Murder-Media: Does Media Incite Violence and Lose First Amendment Protection?, 7 CHI.-KENT L. REV. 637, 665 (2000)).

⁹¹ Gamer Technology Conference, *Emerging Business* and Legal Issues in Video Games, 25 LOY. L.A. ENT. L. REV. 79, 84 (2004) (discussing weak correlations between video games and violence).

⁹² Entertainment Software Association Bulletin, Facts and Research ("Game Player Data"), <http://www. theesa.com/facts/gamer_data.php> (last visited Oct. 31, 2005).

⁹³ Pyle, *supra* note 7, at 443 (quoting Ginsberg v. New York, 390 U.S 629, 649–50 (1968)). "The defendant cannot be faulted for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player, which is virtually impossible." *Sanders*, 188 F. Supp. 2d at 1275.

⁹⁴ Pyle, *supra* note 7, at 443 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

⁹⁵ *Id.* at 450.

⁹⁶ Colleen Carey, *The Blame Game: Analyzing Constitutional Limitations Imposed on Legislation Restricting Violent Video Game Sales to Minors After St. Louis*, PACE L. REV. 127, 141 (2004) (focusing on the *Interactive Digital Software Ass'n* case and the effect it will have on future legislative attempts to restrict the sale of violent video games to minors).

⁹⁷ *Id.* at 130.

⁹⁸ *Id.* at 141. There are deeper issues at stake because video games are played throughout the world, yet the rate of violent crimes, murder, and gun violence in this

⁸⁵ Id.

country exceeds other countries by ten, twenty, thirty times. *Id.*

⁹⁹ Id. at 141–42. Jeffrey Goldstein states that "[most] experiments on the effects of video game violence on the behavior of elementary school children typically fails to distinguish between aggressive play and aggressive behavior." In his testimony, he cites a study that measures both aggressive play and aggressive behavior, showing that violent games only increased aggressive play. See The Impact of Interactive Violence on Children: Hearing Before the Senate Comm. on Commerce Science and Transportation, 106th Cong. (2000) (written testimony of Jeffrey Goldstein, Ph. D.), reprinted in 2000 WL 11069631. Dr. Cheryl Olson, clinical instructor of Psychiatry at the Harvard Medical Schools Center for Mental Health and Media, states that, "[T]here's no indication that violence rose in lockstep with the spread of violent video games." Cheryl Olson, Media Violence Research and Youth Violence Data: Why Do They Conflict?, ACAD. PSYCHIATRY 28:2, 146 (2004).

¹⁰⁰ *Chasing the Dream—Video Gaming,* THE ECONOMIST, Aug. 6, 2005, at 9.

¹⁰¹ *Id.* at 54 (discussing research by Dmitri Williams, a professor at the University of Illinois, who specializes in studying the media's social impact).

 102 *Id*.

¹⁰³ See id. Dr. Olson details the limitations of current studies on the issue of video games and violence, including: vague definitions of aggression; failure to put use of violent media in context with other known contributors to aggression (such as illegal substance abuse and poverty); results which are difficult to generalize to the real world; small, non-random, nonrepresentative samples of individuals tested; and lack of consideration of moderating factors such as the subjects' age or developmental stage. Olson, supra note 99, at 146-47. See also Bruno Baldaro et al., Aggressive and Non-Violent Video Games: Short Term Psychological and Cardiovascular Effects on Habitual Players, 20 STRESS & HEALTH 203, 208 (2004); Joanne Savage, Does Viewing Violent Video Games Cause Criminal Violence? A Methodical Review, 10 AGGRESSION & VIOLENT BEHAV. 99, 128 (2004). See generally WASHINGTON STATE DEPARTMENT OF HEALTH: OFFICE OF EPIDEMIOLOGY, VIDEO GAMES AND REAL-LIFE AGGRESSION: A REVIEW OF THE LITERATURE, (2002); see generally U.S. DEPT. OF HEALTH & HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001).

- ¹⁰⁶ Id.
- ¹⁰⁷ Id.

¹⁰⁸ *Id.* However, it is important to note that the researchers believe more research is still needed to assess the impact of other genres.

¹⁰⁹ Carey, *supra* note 96, at 147.

¹¹⁰ *Id.* at 146.

- ¹¹² *Id.*
- ¹¹³ See Phillips, supra note 27, at 610.

¹¹⁴ ECONOMIST, *supra* note 100, at 53. The average age of American gamers is thirty and has been playing for nine and a half years. Entertainment Software Association, Facts and Research, <http://www.theesa. com/facts/top_10_facts.php> (last visited Oct. 31, 2005). The average game buyer is thirty-seven years old. *Id.* In 2005, 95% of computer game buyers and 84% of console game buyers were over the age of eighteen. *Id.* 87% of all games sold in 2004 were rated "E" or "T." *Id.* Also, 87% of game players under the age of eighteen report that they get their parents' permission when renting or buying games, and 92% say their parents are present when they buy games. *Id.*

¹¹⁵ ECONOMIST, *supra* note 100.

¹¹⁶ Id.

¹¹⁷ Clay Calvert, The First Amendment, The Media, and The Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy, 41 CAL. W. L. REV. 325, 337 (2005).

¹¹⁸ *Id.* at 334–35. The Los Angeles Times stated, "It's always tempting to chisel away at the First Amendment when confronted with offensive material, but [Governor] Blagojevich's proposal, as a legal matter, is a nonstarter. Of course, as a political matter, give Blagojevich points for being a Democrat positioning himself as a defender of family values." *Id.* at 336.

¹¹⁹ Press Release, *supra* note 3, at 1.

¹²⁰ Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

 121 *Id*.

¹²² Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of the First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 160 (2004) (examining the history and confusion of whether video games are protected speech).

¹³³ Phillips, *supra* note 27, at 606.

¹⁰⁴ ECONOMIST, *supra* note 100.

¹⁰⁵ Id.

¹¹¹ Id.

¹²³ *Id*.

 $^{^{124}}$ *Id*.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Risner, *supra* note 89, at 265–66.

¹²⁸ Ventry, *supra* note 5, at 1145.

¹²⁹ Risner, *supra* note 89, at 269.

¹³⁰ See Garry, supra note 122, at 139.

¹³¹ Risner, *supra* note 89, at 263.

¹³² Id.

¹³⁴ See Craig A. Anderson & Brad J. Bushman, Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature, 12 PSYCHOL. SCI. 353, 357 (2001).

¹³⁵ Interactive Digital Software Ass'n, 200 F. Supp. 2d at 1137. An independent investigation by Illinois State Representative Paul Froehlich and the Illinois State Crime Commission found that a fifteen-year-old boy could purchase "Mature-rated" video games (recommended for children seventeen or older) at eleven of fifteen stores visited. Press Release, supra note 3. Another study, completed in 2003 by four experts, including Douglas Gentile from the National Institute on Media and the Family, concluded that adolescents who expose themselves to greater amounts of violent video game use were more hostile, reported getting into arguments with teachers more often, were more likely to be involved in physical fights, and performed more poorly in school. Id. The Institute also found that 87% of pre-teen and teenage boys play games rated "Mature," which are games containing realistic depictions of human injury and death, mutilation of body parts, rape, sex, profanity, and drug consumption. Id.

¹³⁶ Interactive Digital Software Ass'n, 200 F. Supp. 2d at 1137; see Anderson & Bushman, supra note 134, at 358.

¹³⁷ Anderson & Bushman, *supra* note 134, at 354. Fourth-grade girls (59%) and boys (74%) reported that the majority of their favorite video games were violent ones. *Id.* Teens in eighth through twelfth grade reported that 90% of their parents never checked the ratings of video games before allowing their purchase, and only 1% of the teens' parents had ever prevented a purchase based on ratings. *Id.* Also, 89% reported that their parents never limited time spent playing video games. *Id.*

¹³⁸ Interactive Digital Software Ass'n, 200 F. Supp. 2d at 1137; see Anderson & Bushman, supra note 134, at 357.

¹³⁹ *Id.* at 358.

¹⁴⁰ *Id.* at 358–59.

¹⁴¹ Craig A. Anderson, An Update on the Effects of Playing Violent Video Games, 27 J. ADOLESCENCE 113, 121 (2004).

¹⁴³ Anderson & Bushman, *supra* note 134, at 359.

¹⁴⁴ David Walsh, et al., *Mediawise Video Game Report Card*, 9 NAT'L INST. ON MEDIA & FAM. 1, 2 (2004).

¹⁵¹ See Carey, supra note 96, at 147. To dodge a constitutional bullet, the Interactive Digital Software Association created the Entertainment Software Ratings Board in 1994 as a means of video game selfregulation. Phillips, supra note 27, at 593-94. The Entertainment Software Ratings Board categorizes each game into: "EC" for Early Childhood; "E" for Everyone; "T" for Teen; "M" for Mature; "AO" for Adult Only; and "NR" for Not Rated. Id. at 594. The Entertainment Software Ratings Board also provides content descriptors for video games, such as "Blood and Gore" (meaning that the game contains depictions of blood or the mutilation of body parts); "Strong Language" (referring to profanity and graphic references to sexuality, violence, alcohol, or drug use); and "Use of Drugs" (indicating consumption or use of illegal drugs). Id. The Entertainment Software Ratings Board rates virtually every video game for use on console systems (e.g. Sony Playstation, Nintendo GameCube, and Microsoft Xbox), as well as personal computers. Id.

¹⁵² See Carey, supra note 96, at 148. The Federal Trade Commission found that there have been improvements in the areas of media self-regulation and that over time the self-regulatory systems are becoming more effective. Risner, supra note 89, at 266. States, as another option, may require the inclusion of media literacy courses in the school curriculum to help educate children about violence in the media, including video games. Id.; see also John P. Murray, Children and Television Violence, 4 KAN. J. L. & PUB. POL'Y 7, 12 (1995).

¹⁵³ CAL. BUS. & PROF. CODE § 20650 (West 2004) (codifying Assembly Bill 1793); *see* Calvert, *supra* note 117, at 339–40.

¹⁵⁴ Walsh, *supra* note 144, at 4. In a 2002 telephone survey of forty video game rental and retail stores in large and small cities in twelve states, conducted by the National Institute on Media and the Family, 47% of the stores said they educated the public about the ESRB ratings system (a 5% increase from 2001). David A. Walsh, Mediawise Video Game Report Card, 7 NAT'L INST. ON MEDIA & FAM. 1, 3 (2002). In these stores, ratings education was typically conveyed by signs or posters in the stores, listings on the aisles, or displays offering pamphlets. Id. Unfortunately, the percentage of employees surveyed who personally understood the ratings system had fallen from 88% in 2001 to 77% in 2002. Id. at 3-4. Store training for their employees on ratings also decreased from 51% in 2001 to 32% in 2002. Id.

¹⁵⁵ Walsh, *supra* note 144, at 4.

¹⁴² Id.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ Id.

¹⁴⁸ Id.

 ¹⁴⁹ Walsh 2004, *supra* note 144, at 2.
 ¹⁵⁰*Id.*.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ *Id.* Only about 70% of stores have a policy preventing children younger than seventeen from renting or buying violent video games. Walsh, *supra* note 154, at 3–4. In a "sting" operation by the Institute in 2002 where children ages seven to fourteen made twenty-six attempts to purchase "M-rated" games, only 54% of the stores enforced their ratings policies. *Id.* A 2003 Federal Trade Commission survey showed that 69% of teenage shoppers, thirteen to sixteen, were able to buy "M-rated" video games. Federal Trade Commission, Results of Nationwide Undercover Survey Released, <http://www.ftc.gov/opa/2003/10/shopper.htm> (last visited Oct. 31, 2005).

¹⁵⁹ Walsh, *supra* note 144, at 4–5.

¹⁶⁰ *Id.* at 5.

¹⁶¹ Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 J. AM. MED. ASS'N 856, 857 (2004) (assessing children's exposure to violence, blood, sexual themes, profanity, substances, and gambling in the media).

¹⁶² *Id.* at 856.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ *Id.* at 865.

¹⁶⁶ Haninger & Thompson, *supra* note 161, at 863.

¹⁶⁷ Ventry, *supra* note 5, at 1146.

¹⁶⁸ Id.

¹⁶⁹ Gamer Technology Conference, *supra* note 91, at 87.

¹⁷⁰ Phillips, *supra* note 27, at 610.

¹⁷¹ Id.

¹⁷² Pyle, *supra* note 7, at 478–79.

¹⁷³ *Id.* at 479.

¹⁷⁴ Id.

¹⁷⁵ Press Release, *supra* note 3, at 1 (referring to *Kendrick*, 244 F.3d at 576).

¹⁷⁶ Carey, *supra* note 96, at 145–46; *see* U.S. DEPT. OF HEALTH & HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, <http://www. surgeong eneral.gov/library/youthviolence/chapter4/ appendix4bsec3.html> (last visited Oct. 31, 2005).

¹⁷⁷ Carey, *supra* note 96, at 141.

¹⁷⁸ *Id.* at 148.

¹⁷⁹ Risner, *supra* note 89, at 268. *See* Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972).

¹⁸⁰ Franklin Harris, *Campaign Against Video Games is Political Grandstanding*, DECATUR DAILY (TN), March 24, 2005, *available at* <http://www.decaturdaily.com/ decaturdaily/columnists/franklinharris/050324.shtml> (last visited Oct. 31, 2005).

¹⁸¹ Press Release, *supra* note 3, at 1.

¹⁸² Id.

¹⁸³ Harris, *supra* note 180, at 1.

Children's Legal Rights Journal

Spotlight On: LaPorte County Dorothy S. Crowley Juvenile Services Center

by Erika Stallworth

Established in 1992 to address concerns about housing youthful offenders in the same facilities as adult offenders, the LaPorte County Dorothy S. Crowley Juvenile Services Center (JSC) serves approximately 500 youth annually, with many of these youth being repeat offenders. The JSC, located in LaPorte, Indiana (about seventy miles southeast of Chicago), was named after former Chief Juvenile Probation Officer Dorothy Crowley.

Prior to the opening of the Juvenile Services Center, LaPorte County children who broke the law were sent to a family crisis center that was based out of a large home. However, residents deemed inappropriate for placement in the home were sent to the county jail, the same facility that housed adult offenders. Although these minors were separated from the adult population, concerns grew about placing juveniles in the same environment as adult offenders. After recent court rulings about the constitutionality of housing juvenile offenders in adult facilities, LaPorte County Commissioners voted to build a new facility that would be larger and more accommodating to the juvenile population.

The Juvenile Services Center is unique in that it serves as both a detention center and a residential shelter for youth ages six to eighteen. The Secure Unit operates according to standards established by the Indiana Department of Corrections (DOC) and runs under the direction and supervision of Circuit Court Judge Robert W. Gilmore, Jr., and the Residential Unit operates under standards established by the Indiana Department of Child Services.

The unit in which a child is placed is determined by several factors, including the child's age and the child's charge. Some children are placed in the Residential Unit under a Child in Need of Services (CHINS) status while they await foster care placement or respite care. The Secure Unit houses youth between the ages of ten and eighteen. (In Indiana, a minor who turns eighteen while residing at the Juvenile Center may continue to reside at the Center until he or she is adjudicated, has finished placement under the terms of the court order, or has his or her case dismissed.) The Probation Department places children on the Secure Unit for non-status offenses such as theft, robbery, criminal mischief, and murder. Both the Probation Department and the Department of Child Services place children on the Residential Unit. Children on the Residential Unit include those charged with status offenses such as truancy and running away, as well as some non-status offenders. Status offenders are not kept on the Secure Unit, however, because it is a restrictive environment designed for more serious offenders.

While the official capacity of the Juvenile Services Center is thirty-six beds (twenty-four in Residential and twelve in Secure), the Center often makes room to hold more children as necessary. The 2005 average daily population for the Secure Unit was fifteen residents, and the average daily population in the Residential Unit was seventeen residents. The average length of stay for Secure Unit residents was thirteen days, and the average length of stay for Residential Unit residents was eight days. Some residents placed on the Residential Unit, however, may only stay for twenty-four to forty-eight hours. Residents on the Secure Unit usually stay until a detention hearing and often an initial hearing. The Juvenile Services Center 2005 Annual Report cites that out of the 339 residents placed on Secure (116 of them repeat admissions), there were 534 offenses represented with some juveniles charged for multiple offenses at one time. Similarly, out of the 669 residents who were placed on Residential (266 of them repeat admissions), there were 677 offenses represented.

The Residential Unit is divided into two separate wings, one housing males and the other females. The Residential Unit appears more home-based with unlocked doors, moveable furniture, televisions in the units, and bedrooms that resemble a dormitory room. On the other hand, the Secure Unit resembles a jail. Bars cover the windows and the bedroom furniture is mounted to the walls and floor. Male and female offenders on the Secure Unit sleep in individual locked cells.

Although the Residential and Secure programs run differently, both maintain the same mission to provide services to troubled youth "by intervening in the least restrictive manner different than and separately from adults." While at the Juvenile Services Center, youth participate in recreation, education, and counseling. The Center employs fifty-six full-time and twenty parttime staff consisting of youth specialist workers, kitchen personnel, maintenance, administrators, and transportation officers. In addition, there are four licensed teachers, four masters level counselors, and a registered nurse. Residents on the Secure Unit are not allowed to leave the Center except to go to doctors' appointments. With court approval, however, residents on the Residential Unit are allowed to go on community outings, family visits, and to their regular schools. They may also be allowed to go to a job or participate in community service. Children who are not allowed to leave the facility or attend their regular school receive assignments from their regular schools and complete it at the Center with the assistance of the Center teachers.

The Juvenile Center also houses day and night reporting programs in a mobile classroom located on Center property. In addition, Juvenile Center staff operate and supervise electronic monitoring and home detention programs; staff in these programs visit the homes and schools of children on electronic monitoring or home detention, monitor these children's progress, and make reports to the court.

All children at the Juvenile Services Center receive counseling from one of the in-house counselors and participate in individual, group, and/or family counseling. Residents receive education on topics such as substance abuse, pregnancy and sexually transmitted disease prevention, proper hygiene, communication skills, life skills, career readiness, depression, and selfesteem. Children at the Juvenile Center present a myriad of symptoms and often have a mental health diagnosis. Counselors, therefore, utilize a variety of therapeutic approaches and modalities when counseling residents. Juvenile Center staff work to enhance residents' self-confidence, educate residents on issues and lifestyles that have negative consequences, promote new patterns of communication, and foster change by helping

residents develop skills that will be useful after the child leaves the facility.

Because children come into the Center with many different issues, Juvenile Center staff are trained in CPR and first aid, therapeutic crisis intervention, suicide awareness and prevention, gang awareness, learning and emotional disabilities, and other areas. Juvenile Center staff members evaluate each child who comes into the Center for medical, suicide, violence and other risks.

Once children leave the Juvenile Center, the court may send them back to their home environments, commit them to the Department of Corrections, or send them to another placement. If children are sent back to their home environments, often a JSC counselor will continue contact with the resident and his or her family and serve as a continued resource. In March 2006, the Juvenile Services Center began a new program designed to continue aftercare with residents returning from a commitment to the Department of Corrections. The Community Transition Program (CTP) will provide services to juveniles before they are sent to the Department of Corrections, during commitment, and after they return to their communities. This program will foster family involvement in the child's program during the DOC placement, which will better prepare the child for his or her return home. Furthermore, CTP will ensure that children returning from DOC will have continued support and resources as they adjust to being back in their communities.

Over its thirteen-year span, the LaPorte County Juvenile Services Center has had more than 10,805 admissions. Workers at the Juvenile Center continue the mission of the facility by providing services to troubled youth. Speaking about her work with Juvenile Center youth, Doris Howell, a youth specialist worker, who has worked in the field for eighteen years and has been employed at the Juvenile Services Center since it was operating out of the family crisis center, states, "While you don't help all of them, some kids look to us as their parents because we give them something that they don't get at home. We give them structure, shelter, and a sense of belonging." The LaPorte County Dorothy S. Crowley Juvenile Services Center operates 24 hours a day, 365 days a year. Information about the Juvenile Services Center may be found at <www. laportecounty.org/departments/juvenile_services> or by calling (219)324-5130, ext. 238.

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Interview with: Zenaida Alonzo, Equal Justice Works Fellow, Mobile Legal Outreach for Unaccompanied Homeless Youth in Lakeview

by Melissa Schmidt

Zenaida Alonzo started a mobile legal services clinic for unaccompanied homeless youth in Chicago. A majority of her outreach occurs in the Lakeview neighborhood because of the large number of unaccompanied homeless youth in the area and the array of social services already available. Zenaida defines homeless youth as "individuals between the ages of fourteen and twenty-one who lack parental, foster or institutional care, who lack a fixed, regular, and stable nighttime abode," and includes youth "not in the physical custody of a parent or guardian." A study done by the University of Illinois and funded by the Illinois Department of Human Services found that in 2004, nearly 9,000 unaccompanied homeless youth lived in Chicago and almost 25,000 lived in the state of Illinois. The National Coalition for the Homeless estimates that twenty-five percent of the urban homeless population are unaccompanied homeless youth.

Zenaida experienced homelessness during her senior year of high school as a direct result of domestic violence in her own home. She lived in cars, hotels, shelters, and eventually a transitional housing program. While homeless, she continued to attend school and felt that school was the only stable aspect of her life. Throughout this time, she had great teachers and mentors who encouraged her and helped her through the difficult situation. These teachers encouraged her to apply for college scholarships, and despite the challenges of homelessness, Zenaida went on to attend the University of Notre Dame. In undergraduate school, she knew she wanted to be involved in public interest work. She saw the law as an obstacle that stood in the way of achieving many of the things she hoped to achieve. As a result, she decided to attend law school; she wanted to understand legal concepts in order to be able to change and work with the law.

Zenaida remained at Notre Dame and earned a law degree from Notre Dame Law School. During the summer after her second year of law school, she interned at the Chicago Coalition for the Homeless, where she began her mobile outreach in the Lakeview area. The mission of her mobile legal services clinic is to "help homeless youth succeed by connecting them with an education." Her education, as well as the teachers who assisted her in her difficult situation, were instrumental in her ability to cope with her own experience of homelessness. She started the mobile clinic to enable other homeless youth to achieve their educational pursuits because she knows education was essential to her own success. Although she began the clinic at the beginning of the summer, it took time for the youth she served to trust her-so she did not really begin to form trusting relationships with her clients until the end of the summer when her internship was nearly over.

When her summer internship ended, she knew she wanted to continue her outreach; she was passionate about the work she was doing. The youth were beginning to trust her and came to her with their legal issues. She and her supervisor at the Chicago Coalition for the Homeless came up with a proposal to submit for an Equal Justice Works Fellowship. Equal Justice Works awarded her a fellowship that allowed her to continue doing her legal outreach to the unaccompanied minors in Chicago.

Zenaida served about 100 clients through outreach last year. At the mobile legal clinic, she assists unaccompanied youth with a variety of legal issues, ranging from assisting homeless youth in getting their state identification cards, to guardianship, public assistance, and employment issues. The youth come to her office hours, which she holds in Lakeview social service agencies like the Broadway Youth Center and the Night Ministries. Sometimes the youth have specific legal issues and ask for her help. Other times, they come to talk giving Zenaida the chance to identify potential legal issues of which they were unaware. Her ultimate goal is to help the youth with the legal problems they are experiencing in order to enable them to return to school. Often these youth do not attend school for a variety of reasons. When a youth has to worry about where he or she will spend the next night, school understandably becomes less of a priority. Moreover, homeless youth face problems obtaining documents such as birth certificates and identification cards. Often they do no realize that they have a right to an education despite their homelessness. The barriers in enrollment faced by homeless youth often result in another legal issue-truancy-that needs to be worked out. Zenaida helps the youth solve as many of the legal issues as she can to make it easier for the youth to return to school. If, despite her efforts, a young person is unable to return to school for some reason, she connects the youth with a GED program that suits his or her needs or an alternative educational program.

Although her main goal is connecting homeless youth with an education, as the youth came to her with their stories, a common thread among the stories began to emerge: experiences of police harassment. The police in the Lakeview area harassed them everyday, and the youth were scared. Zenaida sees kids fearing the cops as a huge problem because when the youth have real problems, they will not go to the police for help.

Some police in the Lakeview area were targeting homeless youth to harass. Many had the same story: while they waited at a bus or train stop, officers would ask them for identification, something homeless youth often do not have. When they could not produce identification, the often police would handcuff, harass, and detain them before letting them go. Often police conducted searches without probable cause. If they found an identification card, certain police would break it in half and throw it on the ground. If the youth were carrying medication, some officers dumped it on the ground. Such actions are particularly harmful to homeless youth. Identification cards are costly, and these youth often have little to no access to money. It also takes time and resources to get the actual identification card, including the time and money to get to a place that provides identification cards. If a homeless young person loses his or her prescription medication, generally he or she does not have the money to replace it. Nor will he or she likely be able to go to a doctor to get a replacement prescription. Often homeless youth are on medication for mental health reasons. If the youth is forced to go without his or her mental health medication, the consequences for the youth's health, stability, and ability to deal with their living situation are serious.

To stop these daily violations of the rights of homeless youth, Zenaida took a grassroots approach. Zenaida recognized that many did not know about homeless young people and even fewer knew that they were experiencing police harassment. She and other area service providers partnered with the Lakeview Action Coalition to develop a creative means for solving the problem.

The group organized an action that called for the establishment of a task force. The action took place on July 24, 2005, and resulted in the creation of the Homeless Youth and Police Relations Task Force consisting of Zenaida, service providers, and the police commanders of the police wards where the incidents occurred. The task force meets monthly with the goals of addressing the misconduct and creating officer accountability. Zenaida gathers information and records complaints the youth raise about the officers. She then brings the specific complaints to the meetings and asks the commanders to address them and reprimand officers responsible for violating the rights of the homeless youth.

Although the formal procedure for filing complaints against officers is through the Office of Professional Standards (OPS), the homeless youth have expressed their disbelief in the effectiveness of OPS. As a result of their lack of faith in the OPS process, youth simply do not report the abuse. A long-term goal of the task force is holding OPS accountable and making their procedure for reporting easier so that the youth actually report the abuse. But, because the procedure in place is ineffective, the Police Relations Task Force is an alternative means to achieving the result intended by OPS.

The task force is also working on developing a system for training sergeants on how to interact appropriately with unaccompanied homeless youth. The training will include enforcement of proper procedures, which require police to fill out a conduct card when searching the youth and to address the youth in an appropriate manner using appropriate language. The training will also include information about the causes of youth homelessness, the specific needs of these young people, as well as information about how to approach them, and the broader picture of resources available to homeless youth.

The results of Zenaida's work have been mixed. On the one hand, young people still report police harassment. On the other hand, the number of complaints seems to have decreased. Regardless of the number of complaints, the movement has been successful in bringing together a variety of different groups and organizers—including the police commanders—to educate them on the needs of homeless youth. She has helped to educate many about the issues surrounding unaccompanied homeless youth, which is a success in and of itself.

Zenaida's Equal Justice Works fellowship is a two-year program. She began her mobile legal outreach clinic in August 2004. Although the fellowship ends in August 2006, the Chicago Coalition for the Homeless is extending her position for at least another year.

Sources:

Email zenaida@chicagohomeless.org for more information on her outreach or to find out how you can contribute to her cause. For general information on the Chicago Coalition for the Homeless or to learn more about the Law Project, visit www.chicagohomeless.org.

Spotlight On: American Domestic Violence Crisis Line (ADVCL)

by Kristina O'Young

Emotional, physical and sexual abuse is a reality that women and their children confront on a daily basis. Stopping the cycle of violence in the face of social and financial barriers is difficult. The situation becomes increasingly challenging for a person who lives in a foreign country where no or few services are available. This problem may be further compounded if a victim lives in a country or culture where domestic violence is accepted or even expected. Moreover, because the Hague Convention compels the return of 'abducted' children, a victim of domestic violence living in a foreign country may face unique legal challenges if she leaves a country with her children to escape abuse.

The American Domestic Violence Crisis Line (ADVCL) is a non-profit organization that addresses the complexities of international domestic violence. Founder and Executive Director Paula Lucas experienced twelve years of escalating abuse when she moved to the Middle East with her then new husband and three young sons. Despite her repeated efforts to acquire domestic violence resources and assistance abroad, she was unable to get any real help, not even at the U.S. Embassy. After enduring many years of abuse, Ms. Lucas escaped to the United States with her children and later created ADVCL to address the unique and urgent needs of U.S. citizens who experience domestic violence outside of the country. ADVCL works to help women and their children to establish violence-free lives if and when they decide to return to the United States.

Cases of international domestic violence are uniquely challenging and become complex when children are involved because of the Hague Convention. The Convention declares that children's interests are of utmost importance in custody matters and provides for the prompt return of missing children to the state of their residence. Although the habitual Hague Convention works to protect abducted children by imposing their timely return, the Convention fails to consider instances when a battered woman may take her children to escape from domestic violence. This creates significant problems for the victims who must cross international borders to find safety.

Article 13(b) of the Hague Convention seems to provide an exception to a child's return to his or her habitual residence. If there is a "grave risk" that a child's return would expose him or her to "physical or psychological harm or otherwise place the child in an intolerable situation," a court has the power to exercise the exception and not compel the child's return. However, the U.S. Court of Appeals, Second Circuit is the only court to hold that a child's exposure to domestic violence rose to the level of a "grave risk" as protected under the Convention. In contrast, a majority of courts have not interpreted Article 13(b) to apply in situations of domestic violence. Critics of applying Article 13(b) in these circumstances explain that: (1) the concept of "grave risk" applies only in situations of internal strife within a person's country of residence, not to one party's behavior; (2) "grave risk" applies only where courts of the habitual residence country cannot or will not protect the child and his or her family; and (3) if courts interpreted "psychological harm" so broadly as to include circumstances of exposure to domestic violence, such holdings may render the Convention ineffective and its language meaningless.

The Convention provides no relief and few other resources exist to assist battered victims who flee across international boarders—even so, women and children must still leave their lives of abuse. Although the American Domestic Violence Crisis Line cannot circumvent nor change the law, the agency continually supports clients in their escape from violence.

Based in Portland Oregon, the ADVCL serves a diverse client group through the only international toll free domestic violence crisis line in the world. This hotline serves abused U.S. citizens and their children who reside overseas in both civilian and military settings. The agency also assists those victims who cannot call the crisis line through crisis email. ADVCL works with about 200 clients each year.

ADVCL provides advocacy as well as more comprehensive assistance, including relocation, safety planning, and/or emergency financial support. ADVCL also assists clients as they build their legal cases, often before a victim actually leaves the abuser. In addition, given that courts often return children to the abuser under the Hague Convention, ADVCL provides retainer fees so victims can secure legal representation in the United States. Currently, the agency is assembling a network of attorneys to work with clients who cross international borders and face legal custody battles.

Whether the agency helps a victim devise a safety plan, provides funds for initial legal representation, or counsels a client in building cases to meet the challenges of the Hague Convention, the American Domestic Violence Crisis Line is working to fulfill a worldwide need.

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Statistically Speaking: Is the Illinois Abandoned Newborn Infant Protection Act Working?

by Shawn Bosak

In response to the recent widespread media attention given to unsafe infant abandonment, the majority of states, including Illinois, have enacted some form of a "safe haven" law that makes it legal for a parent to abandon an infant in a safe location designated by the law. Illinois enacted Abandoned the Illinois Newborn Infant Protection Act in 2001, and although statistics provide some insight into the Act's impact, it remains unclear whether the Act adequately addresses the problem of unsafe infant abandonment.

The media drew public attention to the problem of infant abandonment in the 1990s. One of the most publicized cases of unsafe abandonment occurred in 1997, when a New Jersey woman gave birth in the bathroom during her high school prom, strangled her newborn, and threw him into a trash can. Legislators quickly responded to public dismay about such stories of unsafe infant abandonment by enacting safe haven laws.

Some argue that because legislators acted with haste when they enacted safe haven laws, they failed to consider the causes of abandonment and therefore did not respond in a way that effectively addresses the problem of unsafe infant abandonment. Legislators acted without statistics about the problem; neither the federal nor state governments have systematically tracked the number of infants abandoned in public places. Critics of safe haven laws also argue that legislators did not consider which mothers may be more likely to abandon their children, alternatives to safe haven laws, or how safe haven laws impact existing adoption and criminal abandonment laws.

Regardless of the questionable efficacy of safe haven laws, Illinois and many other states have enacted such laws. Texas enacted the first statewide safe haven legislation to address the problem of child abandonment in 1999, and as of December 2005, forty-seven states passed safe haven laws. In 2001, Illinois passed its safe haven law, The Illinois Abandoned Newborn Protect Act.

To understand better whether a mother who would otherwise unsafely abandon, would instead safely abandon her child, one must analyze the ways these laws benefit and protect such mothers. Much like the safe haven laws in other states, Illinois' law includes a presumption that the person relinquishing the newborn is the baby's biological parent who consents to the termination of parental rights. The Illinois statute designates hospitals, fire stations, and police stations as "safe" places to abandon infants who are seventytwo hours or younger; the law makes the facility responsible for providing all necessary emergency services and care to the infant. The law also requires the facility to inform a parent of the location of his or her infant if the parent returns to the facility to reclaim the baby within seventytwo hours. Illinois' safe haven law provides immunity from liability to both the relinquishing party, as long as other signs of abuse or neglect do not exist, and to the facility where the infant is left, as long as the facility proceeds in good faith in accordance with the Act.

The Illinois law allows for complete anonymity of the relinquishing party and provides the abandoning parent with a packet of information, including an optional questionnaire on medical history and information on how the parent's rights will be terminated. After a baby has been abandoned, the statute requires the facility to report the infant for transfer to a child placement agency, investigate whether the child has been reported missing, and search the Illinois Putative Birth Father Registry before initiating proceedings to terminate parental rights. The parent of the abandoned infant can petition for the return of custody of the baby anytime before his or her parental rights have been terminated. These provisions seem to give the abandoning mother a safe and easy alternative to leaving her baby in a dumpster or toilet, but are the laws being utilized by the intended mothers?

Since legislators passed the Illinois Abandoned Newborn Infant Protection Act in 2001, the number of infants unsafely abandoned as well as those abandoned safely in accord with the law have increased. According to the Save Abandoned Babies Foundation, since the law's enactment, approximately eighteen newborns have been safely relinquished in accord with the Illinois law and thirty-seven newborns have been illegally abandoned, twenty of whom were found dead. In 2001, the year legislators passed the Act, five infants were illegally abandoned and zero were relinquished in accordance with the Act. In 2002, the number of infants illegally abandoned rose to seven, and only two babies were safely relinquished in accordance with the law. In 2005, ten babies were illegally abandoned and eight were safely abandoned in accordance with the law.

Is this progress? Supporters of the Illinois Abandoned Newborn Infant Protection Act argue that the law is working because eighteen newborns have been safely relinquished. On the other hand, critics believe that since the number of infants unsafely and illegally abandoned has also risen, the women who would have abandoned their babies illegally did so without regard to the law, while others who might have given their babies to relatives or put the babies up for adoption used this law as an "easy way out."

Given illegal abandonment is still increasing in number, measuring the success of this law may depend on the mothers who are using its protection. Research suggests a commonality among mothers who abandon their children is that they often conceal their pregnancies. Since these women want to ensure that no one finds out about their pregnancy, they want to "get rid" of the baby as soon as possible after the child's birth. Some argue that safe haven legislation allows parents to break existing laws without "addressing the deeper issue of why women choose to abandon their babies, whether it be a lack of prenatal services or social and economic problems." It is also suggested that these mothers who abandon their babies are distraught and would not know or care about penalties and exemptions in a state's criminal code nor would they be thinking clearly about a safe plan to abandon their baby. So, if this is the case, and these mothers are too distraught to take safe haven laws into consideration and are illegally abandoning their babies anyway, then the laws are not reaching their target and are possibly counterproductive.

Although it remains unclear whether the Illinois Abandoned Newborn Infant Protection Act successfully reaches the intended target of abandoning mothers, or whether it influences mothers who would have otherwise gone through the traditional channels of adoption, the Act was made permanent on January 1, 2006. Whether this has to do with its success in saving at least a few babies, or is merely a result of political pressure, the need for extensive research on the causes of infant abandonment is clear. Such information will help test the true efficacy of the Act, help legislators tailor safe haven laws, and provide insight into alternate ways to address the problem of unsafe infant abandonment.

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Legislative Update: Illinois House Bill 4186

by Erin Marshall

Last year's landmark Baby Tamia reform law (House Bill 3628) gave sweeping protections for families involved in the adoption process in Illinois. It prohibited for-profit adoption agencies from operating in Illinois, and gave the Department of Children and Family Services (DCFS) broader oversight of adoption agencies. The bill was named after "Baby Tamia," a six-month-old Chicago girl who was nearly adopted by alleged drug users in Utah after her birth mother, who was suffering from post-partum depression, gave the baby to a for-profit agency doing business in Illinois through newspaper ads. A legal challenge by the baby's grandmother resulted in a court order returning the infant to Illinois in April 2005.

House Bill 4186 takes adoption reform in Illinois a step further. This bill, introduced by State Representatives Sara Feigenholtz, Paul D. Froehlich, and Barbara Flynn Currie on November 3, 2005, amends The Children and Family Services Act, the Foster Parent Law, the Child Care Act of 1969, the Abused and Neglected Child Reporting Act, and the Mental Health and Developmental Disabilities Confidentiality Act. It requires adoption agencies to provide social and behavioral history to prospective foster and adoptive parents, in addition to caretakers of children in foster homes, group homes, child care institutions, or relative homes. It states that the agency shall provide to the caretaker: [a]vailable detailed information concerning the child's educational and health history, copies of immunization records (including insurance and medical card information), a history of the child's previous placements, if any, and reasons for placement changes, excluding any information that identifies or reveals the location of any previous caretaker.

The bill defines the "juvenile authorities" to whom DCFS may disclose information as individuals and agencies having custody of a child pursuant to placement of the child by the Department. Additionally, the Bill states that nothing in the Child Care Act of 1969 prevents the disclosure of information or records by a licensed child welfare agency as required by this Act.

House Bill 4186 requires agencies to report any known social and behavioral history "necessary to care for and safeguard the child." Examples of such history include criminal background, fire setting, perpetration of sexual abuse, destructive behavior and substance abuse. The Bill not only permits a prospective adoptive parent or foster parent to have access to records concerning reports of child abuse and neglect, but also makes it one of a foster parent's rights to be given this information. The Bill also empowers DCFS to refuse to renew or revoke an adoption agency's license for failure to comply with these disclosure requirements.

According to Sara Feigenholtz, the bill's sponsor and chairperson of the Special Committee on Adoption Reform, if signed into law, the bill will ensure "adopted children and their families are treated with the utmost respect, help adoptive families understand the often complex social and behavioral history of the children they are bringing into their homes, and ultimately ensure successful placement and a happier family life."

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- Endnote or footnote citations in manuscripts should conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005).

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