

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

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Unless disclosure would jeopardize a pending criminal investigation, law enforcement agencies shall disclose information regarding the investigation of a child sexual or physical abuse case to the Division of Family and Youth Services upon request.

In connection with a pending investigation or prosecution of a criminal case involving a child who is alleged to have been sexually or physically abused, the district attorney, upon request, will be allowed access to information contained in the Division of Family and Youth Services file regarding that child or another child in the same family.

Any participating agency having knowledge of exculpatory information concerning a report or investigation of child sexual or physical abuse shall immediately report such exculpatory information to the District Attorney's Office. Exculpatory information is information tending to negate the guilt or mitigate the punishment of a perpetrator of child sexual or physical abuse. Exculpatory information includes, but is not limited to, recanting, accusations of child sexual or physical abuse by third persons, alibi information, and medical evidence that does not corroborate the abuse.

VII.

Limitations

This agreement is intended to establish guidelines for interaction between agencies, and to preserve statutory duties. Nothing in this agreement shall be construed to limit an agency in the performance of its duties; provided, however, that the immediate protection and safety of a child is always paramount. Every reasonable effort to achieve the goals set out in this agreement shall be made.

VIII.

Rights of Victim and Family Members

Children who are victims of child sexual and physical abuse are entitled to receive legal protection. They should be treated sensitively by criminal justice system personnel. Children and their families often face emotional crises after sexual or physical abuse has been disclosed. Family members should be given ongoing support to help them meet these crises. Protection and ongoing support should be provided to all victims of child sexual or physical abuse, regardless of the outcome of any criminal proceedings against an offender. Services should be provided for as long as necessary to enable the child and family members to recover from the trauma created by the abuse. The development of appropriate methods of institutional and community based treatment for offenders should also be encouraged.

In recognition of the goals set forth in this protocol, and to further the realization of those goals, the undersigned participating agencies hereby ratify this protocol in the spirit of cooperation reflected herein.

DATED this 29TH day of MARCH, 1985.

CLOSE ENCOUNTERS

By [Signature]

STATE OF ALASKA
DEPT. OF PUBLIC SAFETY
ALASKA STATE TROOPERS
KETCHIKAN DETACHMENT

By [Signature]

KETCHIKAN GENERAL HOSPITAL

By [Signature]

W. I. S. H.

By [Signature]

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL
SERVICES

KETCHIKAN D. F. Y. S. OFFICE

By [Signature]

JUVENILE PROBATION

By [Signature]

CITY OF KETCHIKAN
KETCHIKAN POLICE DEPT.

By [Signature]

STATE OF ALASKA
DEPARTMENT OF LAW
DISTRICT ATTORNEY'S OFC.

By [Signature]

KETCHIKAN GATEWAY BOROUGH
SCHOOL DISTRICT

By [Signature]

GATEWAY COMMUNITY MENTAL
HEALTH

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FAMILY COUNSELING SERVICES

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VICTIMS OF CHILD ABUSE LAWS

YOICAL NATIONAL OFFICE
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OUR VIEWPOINT

WHO WE ARE

We are a group of individuals who believe we and our families and friends have been victimized by the child abuse laws. We are not guilty people trying to escape judgment; we are innocent people demanding justice.

AIM AND PURPOSE

We wish to see children protected from all forms of abuse, including that which is being inflicted upon them as a result of so-called "child protection" agencies. We want to see due process accorded to all. We wish to see preservation of the family unit made a priority in the handling of suspected child abuse cases.

WHO WE REPRESENT

Our present membership includes individuals from all 50 states (as well as Canada and Australia) who have experienced this nightmare. Our NATIONAL ORGANIZATION recognizes over 150 chapters and contact persons.

SOME OF OUR CONCERNS AND PROBLEM AREAS

PRESENT CHILD ABUSE HYSTERIA

The current child abuse laws are basically good. However, we strongly believe that disregard for the intent behind these laws has put us in our current situations. The present child abuse hysteria has reincarnated the ignorance of the Salem Witch Hunts. The system emotionally abuses and financially drains the alleged child abuser during the fight to prove innocence. If you manage to survive within the system of "justice," as presently constituted, the best you can ever expect is a finding of "unsubstantiated." You are, and always will be a potential child abuser in the eyes of the government. You are not alone! There were over 1,500,000 accusations of child abuse in 1986, and of those, approximately 65% were unfounded.

PRESENT LAWS VAGUE

In addition to the intent of the child abuse laws being lost, many of these laws are written so vaguely that they are easily misinterpreted or are intentionally used to advance the immature philosophies of those implementing the laws.

LACK OF DUE PROCESS

Due to the sensitive and innovative nature of these laws, individual due process rights are not being accorded the importance they are due. As a result, laws that are set up to protect the individual and the family are being used to tear families apart and to sever family bonds.

IMMEDIATE PRESUMPTION OF GUILT

After one has been "hot-lined," regardless of how believable or ludicrous the accusation may seem, there is automatically an immediate presumption of guilt. The only crime more heinous than the intentional abuse of a child, is to be unjustly accused and branded for life as a child abuser. There is no other crime prosecuted with such malicious disregard for the accused and the alleged victim's constitutional and civil rights.

UNETHICAL INVESTIGATIVE TECHNIQUES

In the interest of convicting an accused child abuser, ethical investigative techniques are set aside. Prosecutorial information to corroborate a verbal allegation takes precedence over the gathering of factual information. Child protection workers, investigators, prosecutors and law enforcement officers have convinced themselves to be judge and jury without a trial. Custodial parents and individuals considered "loco parentis" are often instructed to repeatedly interrogate the alleged victim about the alleged incident.

OPINION IN LIEU OF FACT

Child protection officials and county hired *mental health professionals* are presently at liberty to inject into both written and oral reports their "personal opinions" of an event. These "opinions" are then presented and accepted as a basis for fact in legal proceedings.

REMOVAL OF CHILDREN FROM FAMILIES

The abrupt and often unnecessary removal of children is traumatic. It destroys a child's trust in the parents as protectors, and leaves tremendous emotional scars. If a child is truly being abused, the added trauma of being abruptly removed from the home and family can often make matters worse.

EFFECTS ON FAMILIES UNDER INVESTIGATION

The stigma of child abuse allegations creates feelings of fear and shame, and introduces other negative factors into parenting techniques--leading to problems in exhibiting parental affection and problems in discipline.

DEPENDENCY RESULTING FROM COUNTY INTERVENTION

When charges of abuse/neglect are dropped often the county then files charges claiming dependency--a dependency that *its own* intervention created.

POSSIBLE SOLUTIONS

ON-SITE CONTACT WITH FAMILY

The family should be immediately notified of any charge of child abuse. Appointments should be set up for immediate interviewing of all persons involved. No child should be removed before an on-site contact with the family has been made. If a child is doing the reporting, other siblings, if any, should also be questioned as to the reliability of the child making the allegations.

MANDATORY TAPING OF ALL INVESTIGATIVE INTERVIEWS

Investigators must be required by law to conduct each investigation based solely on the facts and must be required to not insert their personal opinion of the accused. To do anything less, seems to invite injustice for the accused and contempt for the law. All interviews should be taped to insure an honest report. Reports must not include statements that suggest expertise in the area of psychology or psychiatry, since child protection workers do not have degrees in these areas. Tapes must be available to defendant's counsel.

EMPHASIS ON REMOVING ACCUSED INSTEAD OF ALLEGED VICTIM

It would be less stressful on the child if the alleged perpetrator were first asked to leave the home during the investigation. Also, a mandatory time schedule for the investigation must be implemented at the outset, so as not to abuse the rights of the accused and the alleged victim by needless separation from the family.

PLACING CHILDREN

No child should be placed in foster care when the parent(s) can offer an alternative placement. If removal is the only solution, supervised family visitation must be mandatory. Siblings removed from the home must be kept together unless countermanded by the Juvenile Court (with written explanation); a recommendation by the Child Protective Services case worker, for separation of siblings, is insufficient cause for separation.

BETTER TRAINING OF SOCIAL WORKERS

If social workers are allowed such unlimited and life-altering powers over us, we believe they should be competent and compassionate enough to handle this responsibility. We demand social workers be required by law to be tested at least once a year on the current child abuse laws, including the policies and procedures of their agency. They must be aware of the long term severe emotional damage inflicted upon innocent children and innocent adults as a result of overzealous intervention. In cases where a child is not in a life threatening situation, and where there is no evidence to substantiate the alleged abuse and/or neglect, the worker must by law allow the family the right to remain together.

REPRESENTATION ON TASK FORCES

Any task force set up by the state to better the child protection system must include a victim of the system-- to insure representation of all viewpoints and to maximize informational input. We must stress that our input is essential and must be heard.

REVIEW BOARD

We believe a review board is imperative for individuals to air their grievances (without repercussion). In our system of democracy there are checks and balances, which attempt to insure that the inherent power of government units does not corrupt their purposes. Child protection units cannot be excepted from these checks and balances.

State of Alaska

House Majority Leader

COMMITTEES

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HOUSE RULES



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The Monitor

American Psychological Association

CHILD ABUSE REPORTING LAWS

Are they a barrier to helping troubled families?

By Laurie Denton
 Monitor Staff

Child abuse reporting laws present potential landmines for psychologists, who must weave a path between the role of child advocate and therapist, between the law that requires them to report suspected abuse, and their ethical code, which demands confidentiality. Because psychologists are often a primary source of help for both abuser and abused, they may be forced to choose between what they believe is best for the client and risking arrest for failing to report abuse.

"It seems like the therapist is getting the short end of the stick because of a problem society has a difficult time dealing with. The law is a reflection of that," said Russ Newman, director of professional affairs at APA. "Therapists tend to be ready targets to deal with the impossible."

Two years ago, a North Carolina psychologist was treating a family who came to him for help, concerned that the time-outs they used to discipline one of their two adopted children had become excessive. Four months into treatment, someone in the community told the Department of Social Services they thought the parents were abusing the children. The department investigated and



found enough evidence to warrant a custody hearing.

The psychologist, Arne Gray, volunteered to testify at that hearing. He told the court the parents had informed him of the time-outs in the basement and that what they were doing was not reportable abuse or neglect. He said the adopted children were not at risk, that the parents were highly motivated and that treatment was going well.

But the next day, the judge issued two warrants for Gray's arrest on two charges of contributing to the delinquency of a minor. Three days later, he issued two more warrants for Gray's arrest on charges of failure to report suspected abuse and neglect.

Today, the two adopted children are each in their third foster home and the older boy is awaiting placement in a state hospital, Gray said.

"There's no good solution for the practicing clinician," said Bryant Welch, associate executive officer of the American Psychological Association's Office of Professional Practice. "They are caught in a 'Catch-22' Kafkaesque environment. It's not clear what standards they are supposed to uphold. And even if it is clear, they are supposed to do something that is counter-therapeutic."

Child abuse reporting laws are



Drawing by Thomas Tilden

thorny for mental health professionals not only for the conflict they create between ethical and legal obligations, many are vaguely worded, yet carry the threat of potential liability.

"Child abuse laws as applied to mental health professionals are wishful thinking," Welch said. "It's natural to want to find some way of knowing when child abuse is going on and intervene, but the cure in this case doesn't work and compounds the disease."

The result, commonly, is that mental health professionals fail to report suspected child abuse. One of the most common rea-

sons, said Sherry Skidmore, a forensic psychologist in California who has worked with battered children for the past 20 years, is "this sometimes naive conception that in spite of the law, they're really protecting their patient/client and even the child and they just don't think the allegation has substance."

Last year, California passed a law requiring licensed psychotherapists to complete at least eight hours of training in child abuse assessment and reporting. Two therapists who have presented those training workshops

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REPORTING LAWS

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have found other reasons for non-reporting.

Writing in *AHP Perspective*, the newspaper of the Association for Humanistic Psychology, Sue Carroll said that indications of abuse or neglect may be submerged by countertransference or over-identification with the parent clients. Therapists also mistrust the system and fear further intrusion into the family. Lennis Lyon, who is a professional in treating child abuse, wrote that once clinicians do resolve to report abuse, they must still decide how to tell their clients they are doing so, and how to keep them in treatment and handle their own discomfort with the situation.

Skidmore said she has seen a few cases where mental health professionals adamantly refuse to divulge information and disrupt the therapeutic relationship, in spite of clear-cut abuse.

In other cases, said Maryland-based forensic psychologist Dennis Harrison, psychologists don't report because they fear reprisals from the family, aren't sure how to assess whether abuse has occurred, or equate reporting with conviction.

Douglas Beharov, of the American Enterprise Institute and first director of the National Center on Child Abuse and Neglect, said the problem is not underreporting, but over-reporting, as a result of "a protect-your-tail syndrome."

Beharov contends that 60 to 65 percent of all reports of abuse



prove to be unfounded. Those are clogging up the system, he said, and detracting resources from children in real danger.

State law, however, requires psychologists to file a report with child protective services if they have a reasonable suspicion that child abuse or neglect has occurred.

"The law supercedes the ethics," said Ruth Ochroch, who teaches an ethics course at New

York University. "It's a real dilemma many mental health professionals feel very caught up in. It's relatively new. We don't have precedents, we don't have enough history to understand how it's being used, but psychologists have no choice. The professional doesn't have a decision to make."

Psychologists disagree on whether therapists should have more discretion.

In Newman's view "To simply bar any decision-making by a qualified therapist is counter-productive."

One way to both protect the child and get the family in treatment, he said, might be to allow psychologists to coordinate intervention efforts. For instance, they might still have to immediately report suspicions of child abuse, but state agencies could delay intervening if the psychologist continued to work with the family. This, Newman suggested, might even strengthen the therapeutic relationship.

Gray said he bases his own decisions to report on whether an investigation by the state would be more abusive than what is already going on in the family. Gray has classified various types of abuse on a scale from one to 10. He rates a well-conducted investigation by the Department of Social Services at level three abuse. Therefore, he will not report abuse he sees on a same level or less severe. And in the case for which he was prosecuted, he would not do anything differently. "Part of my training is to make some judgment and do some screening," he said. "It's the same with suicide and homicide

threats. That's what society pays us to do."

Harrison said, however, that higher standards for mental health professionals would be accompanied by more responsibility and potential culpability. "Why should psychologists be more responsible than anyone else in the state?" he asked.

Psychologists are more likely to wind up in court for failing to report than for reporting abuse. In the latter case, they are on safer ground. Most reporting laws do provide immunity from civil or criminal liability to those who report child abuse or neglect "in good faith."

For instance, said Skidmore, when a California psychologist

out of the home or break up the marriage. On the other hand, if a three-year-old says, "Daddy has been putting snakes in my body," she must be taken seriously, he said.

Harrison said psychologists often lack the education, experience or training to recognize sex abuse.

For instance, he said, one therapist brought a small child into the same room with the abusing parent, expecting the child to be horrified and start to cry. When that was not the reaction, the therapist used that as evidence that the abuse did not occur.

In another instance, several psychologists testified that an

CE for California license

All psychologists licensed to practice in California are now required to complete a mandatory eight-hour course in the recognition, treatment, prevention, and reporting of child abuse, and to provide evidence that they have completed such a course through an California-approved organization when they renew their licenses.

As a service to APA members licensed in California but who do not live or practice there, this required workshop will be offered, in co-sponsorship with the California State Psychological Association, at the 1987 New York convention. The workshop will cover the 28 mandated topics in the area of child abuse; participants who attend the entire course will receive a certificate verifying its completion.

For information about the date, fee, and content of this workshop, contact: APA CE Workshops Office, 1200 17th St. N.W., Washington, DC 20036, or call (202) 955-7719 (8 a.m.-5 p.m. EDT) and request a copy of the Child Abuse Workshop Information.

was sued by a parent for reporting abuse that he became aware of during treatment, he won the case on appeal because the court ruled that he had carried out his responsibility.

"If you're going to be within the law, you have to report," Newman said, "and as long as the reporting is done in good faith, you're never going to be found to have behaved unethically."

But there's another side to the issue, he noted: There will be times when a therapist will believe that reporting the abuse will not help the family, but make their problems worse.

Because a parent has to be reported for even making an appointment for therapy related to abuse, some argue that troubled people won't seek help.

"If therapy can help and the family has taken the initiative to get help," Newman said, "then you're supposed to do the very thing that will destroy that relationship."

Beharov of the American Enterprise Institute contended, "We have to provide immunity for people who decide in good faith not to report."

Jenny Boyer, who coordinates a treatment program for legal offenders in Oklahoma, informs clients at their first visit about the limits to their confidentiality and tells them she will report any current incidents of child abuse a client reveals to her.

Consequently, she said, "I'm sure there's child molestation I'm not aware of. If I were trickier, maybe I'd find out about it. But I'm trying to prevent many child molestations through treatment."

Harrison is adamant that psychologists always report, "unless they have good, solid evidence that it is not true." For instance, if a teen-ager who claims her stepfather fondled her actually admits that she was trying to get

alleged abuse was not occurring and advocated that a girl be allowed to continue visiting her father, who then admitted the abuse under oath.

Nor should psychologists fear that the social services/legal system will be unfair to the parent charged with abuse, he said, arguing that any unfairness in the system is toward the child and protective parent.

In addition, he said, most child protective agencies are understaffed and overworked. Rather than sweep in and take over a case, they welcome a relationship with someone in the community.

"My experience has been that it's harder to get them to act than to get them to stop from acting," he said. He added that the child is only taken from the home if the protective parent is not actually protecting the child.

"If you are known as a child advocate, straightforward, unbiased, the abuser who wants help will go to you," Harrison said. "Psychologists shouldn't be afraid of that."

However, many abusive parents must be forced to seek help and to cooperate with therapy. "Maybe the first week or two they feel repentant and scared, but once they realize there's no teeth to the law they don't care."

Harrison said one abusive father told him, "I can outlast you. I will do what I want with that child." The case was an extreme one, Harrison said, "but he was right. He's only on probation for so long. A lot of abuse, sandbag therapy. They come in the door but they won't talk."

Harrison said he is now advocating lawsuits in the names of abused children against "any professional who didn't do what he or she was supposed to do, what the law or the literature said to do."

He has also established the

Emotional abuse hardest to evaluate

By Laurie Denton
Monitor staff

It is the least discussed form of abuse and perhaps the most difficult to define, yet many psychologists believe emotional abuse is at least as devastating as its physical counterpart.

"As surely as one can break a child's bones, one can break a child's spirit," wrote James and Anne C. Garbarino in a pamphlet entitled "Emotional Maltreatment of Children," published by the National Committee for Prevention of Child Abuse.

The committee has begun a national media campaign on emotional abuse in cooperation with the Advertising Council. "Words hit as hard as a fist," one ad reads. "Next time, stop and listen to what you're saying. You might not believe your ears."

Research in the area of psychological maltreatment is sparse in the basic—a definition of the term, identification of preventives and intervention strategies. That makes assessing or reporting such cases even more troublesome.

Forensic psychologist Sherry Skidmore, who has had to assess cases of emotional abuse and psychological maltreatment as a court-appointed examiner, commented, "The means of observing whether such abuse occurred are more flimsy."

She does a full psychological

evaluation and a thorough background history, including talking with as many possible witnesses as she can, including neighbors, family members and teachers.

"To make any conjecture without that comprehensive evaluation would be off base," she said.

Bryant Welch, associate director of the American Psychological Association's Office of Professional Practice, questioned how psychologists could determine something as vague as emotional abuse or neglect.

"A lot of what we deal with are the effects of suboptimal parenting," he said. "At what point do we say it's child abuse? A mother is an alcoholic and emotionally unavailable—is that abuse? Do we report it? How about the father who works 80 hours a week, who's not there—is that abuse? For the therapist who deals with all kinds of gradations in human behavior, at what point is it child abuse is very tricky. And how much is one supposed to be looking for? That is contrary to the therapeutic relationship."

Neither harmful effects nor parental intent alone can be used to define psychological treatment, the Garbarinos contend. "A good definition will include both a value judgment and a scientific

assessment," they wrote.

"They define it as 'acts of omission or commission by a parent or a guardian that are judged by a mixture of community values and professional expertise to be inappropriate and damaging to the development of personality.'"

A child's lack of competence in social relationships and a parent or guardian who treats the child in ways that violate common sense should be strong signals to professionals, they say.

Gary Melton of the University of Nebraska-Lincoln and Howard Davidson of the American Bar Association warn in the February *American Psychologist* that because of the imprecise nature of any definition of psychological maltreatment, caution should be used in assessing whether state intervention is appropriate.

They question whether state intervention would even be beneficial in such cases and recommend a "go-slow" policy. However, they said, the concept could be useful in regulating institutions that care for children.

"People need some rules," commented Douglas Beharov of the American Enterprise Institute. "Just because a parent says in a shopping center, 'I'm going to kill you,' that shouldn't be reported. If you want to add a million cases to the Department of Social Services a year, that's the way to do it."

Children's forensic institute, with Louisiana lawyer Richard Ducote, to provide information on child sexual abuse.

States vary in their reporting requirements, but Alabama is typical, specifying "reasonable cause to suspect that a child is being abused or neglected." Connecticut asks for "reasonable cause to suspect or believe that any child under the age of 18 is in danger of being abused."

California law defines "reasonable suspicion" as meaning "that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse."

Some states, such as Oklahoma, limit the law to physical injury that appears to have been caused by physical abuse or neglect. Others, such as Kansas, specifically include physical, mental or emotional abuse or neglect or sexual abuse.

Penalties for failure to report vary from liability for damages to fines and/or imprisonment. Some laws do not include penalties for failure to report.

That is the case in North Carolina, and for that reason, the charges against Gray of failure to report were dropped on appeal in January. In dropping the charges, the Superior Court judge pointed to "substantial public policy questions that are conflicting" between a law that requires reporting child abuse and one that provides for confidentiality of psychologist-client relationships, according to the *Durham Morning Herald*.

In another recent case, an Alaska psychologist treating a family for child abuse was ordered to turn his records over to a court that was trying the father on child abuse charges. Prosecution lawyers were after confessions that might have come out during treatment. The family had voluntarily sought treatment after the father was reported, and then, at a hearing for probable cause, was ordered to continue therapy.

Alaska's case against psychologist Mitchel Wetherhorn was decided in Wetherhorn's favor on the basis of therapist-client confidentiality. On appeal, the Superior Court judge ruled that court-ordered therapy to help preserve the family should not be considered a court-ordered examination. Further, the judge wrote, since the patient was not warned of possible criminal prosecution nor told that any statements made in therapy could be used against him, release of the psychologist's files would be tantamount to self-incrimination.

The majority opinion made an almost-obvious observation: "The average person facing an eight-year presumptive term for sexual abuse of a minor will not confess to a psychotherapist and seek treatment if he knows that the psychotherapist will testify against him."

In a case still to be decided, Alfred Cavaiani, a limited-license psychologist and marriage counselor in Michigan, has been charged with failure to report a teen-aged girl's allegations that her stepfather had fondled her breasts. Cavaiani had counseled

the family three years earlier after they had been referred to him by the Department of Social Services.

Then in January 1986, the mother called about her daughter's claim, which she believed to be false. The stepfather, who has freely admitted to the prior problem, said it was untrue. Cavaiani had been counseling the daughter individually for about a week and believed that the allegation was greatly exaggerated due to her emotional problems. At that point, the daughter reported the incident to her school counselor, who reported it to Social Services.

Lawyers in that case, People v. Cavaiani are challenging the constitutionality of reporting laws. In final arguments in March, Robe Mueckenheim, Cavaiani's attorney, said, "We are claiming that when a family goes in for therapy, that is an area of privacy protected by the First Amendment."

If that argument is accepted, Mueckenheim said, it would have national implications, because it would mean that therapist/client confidentiality is a right, not a privilege, and therefore cannot be waived. A decision was expected in late May.

Originally, child abuse reporting laws were aimed primarily at emergency room physicians.

Some of those early laws made reporting optional, and were later changed to make it mandatory.

Then the laws were expanded to require reporting by psychologists, social workers and ministers. And the definition of abuse was expanded to include not only physical abuse and neglect, but sexual abuse and emotional neglect and abuse.

Skidmore, disturbed by what she has seen as unprofessional behavior by professionals in child abuse cases, developed guidelines for receiving and making reports, which she presented in testimony before a recent California senate subcommittee hearing.

In most of the cases where professionals have been sued for failing to report or for wrongful arrest and prosecution, Skidmore found, adequate records were not kept, or professionals were practicing outside their boundaries of competence.

She advocates more care, and less zealotry, in processing allegations. She advises colleagues to know the local laws, read the ethical code and educate both the judicial and child care systems about what psychologists actually can and cannot do.

For instance, there are common misconceptions that a psychologist could guarantee that abuse would not occur or state absolutely whether abuse has occurred. Alternatively, people in the judicial and child care systems often do not realize that the psychologist could give valuable information about, for example, how psychologically stable or how leadable the child is. ■

More information on child abuse reporting laws and child abuse can be obtained from Clearinghouse on Child Abuse and Neglect, P.O. Box 1182, Washington, DC 20013, (301) 251-5157; and Children's Forensic Institute, (301) 740-5418 or (504) 525-1399.

October 23, 1987

Testimony given to the House Judiciary Committee by Floyd Richmond, Executive Director of Women In Safe Homes, Ketchikan.

I would like to begin my testimony by making it clear that I recognize the complex nature of child abuse and how difficult it is to deal with as a social problem. I feel we must remember that HB 237 and 229 deals with only one facet, an important facet from our point of view, but only one. It would be my hope that the Judiciary committee would maintain that focus and not let other issues influence their consideration of this legislation.

What I mean by that is such things as "false allegations" which lead to dismissals of cases of alleged child abuse. That's an important matter, but another issue. False allegations have little or nothing to do with this legislation in my view. It's important to clean up our act on reported abuse, investigation of abuse and the system that is charged with that responsibility, but again it's a separate issue from what these bills speak to. For me, the issue boils down to - DO WE FEEL CHILDREN NEED SPECIAL ATTENTION AND PROTECTION? If we do, then we have to change the rules of evidence to convict an offender of repeated child abuse. Our goal should be to protect children who are victims or future victims - not continue to protect an individual who has no control over their behavior and we have very limited ways to help them gain control.

Who are we talking about?

- a) Children and Adults, most often parents, or someone they know.

In 1986, 1,200 child deaths were reported as the result of child abuse. One study found the number to be closer to 5,000. These studies further indicate that many of the children had been victims of repeated abuse. Finally, the average age at death was 2.6 years.

Experts in the field who study sexual offenders never use the word cure, they talk about some offenders gaining control and/or a reduction in offenses committed.

In a study done on non-incarcerated sex offenders, 411 individuals who volunteered information here is what was found.

- a) 44% of incest offenders, offended outside of the home.
- b) 50% had multiple deviances.
- c) 232 molesters were responsible for 17,585 victim assaults.
- d) In a study done at the Oregon State Hospital 53 incarcerated offenders committed 25,757 sexual crimes.

What is the issue?

- a) The commission of a crime against the most vulnerable group of people on this planet, children. Children who trust, trust, trust and trust adults even after they have been victimized.

Who is responsible?

- a) First- the person who after due process is found guilty of the crime.
- b) Second each one of us when we don't say long and hard enough that crimes against children are intolerable and back up such statements with laws that hold adults responsible for their behavior.

Recently, while viewing an F.B.I. video conference on Profiles of Sexual Offenders, one of the panel was asked about society's attitude toward child sexual abuse. Among other things he said it appeared to him that we don't want to deal with it. Although people in the larger community pay lip service to how horrendous such crimes are, until it happens to them personally or very close to home, we don't seem really motivated to solve the problem. This attitude was further reinforced when I read an article recently in Ms. Magazine by a male who was sure a daycare center teacher was innocent of child sexual abuse just because he the writer "knew this to be true." We as a society, and, in my view males in particular, continue to deny that crimes against children are as prevalent as they are and they only happen to the "other person." We think these mostly male adults are "sick" in the case of sexual offenders and parents who have let discipline get out of control when we talk of adults who physically abuse their children.

What can be done?

- a) First we can begin to bring the level of awareness on this issue up to where it belongs by passing legislation that clearly holds adults responsible for their behavior. I am not an advocate of punishment being used as a deterrent. I am an advocate of laws that hold adults responsible for their behavior.
- b) Next, we can provide justice for all victims by recognizing that an adult who repeatedly offends against a child is a different person who has violated a child's rights so severely, sometimes by murder, that their rights as individuals are a secondary issue. Society, children, must be protected from these individuals.

- c) When you are dealing with those offenders who repeat their behavior you have someone that we don't know how to treat very well at all, much less cure. If on the streets in a few months or years they will offend again. Therefore we as a society then, must look at the broader view and that is, what must we do to protect other vulnerable children from these individuals. Until we have more answers, cures or treatment methods, we must keep these individuals off the streets and away from children. There is data available that indicates pedophiles are seeking younger and younger children to molest because they know there is less risk of being caught and convicted due to the age of the child. I think this speaks to the nature of the offender and makes a strong case for what we must do to protect children.

By viewing these offenders as "sick" or adults who let discipline get out of control, we can excuse their behavior and the status quo is maintained. Our system currently recognizes the rights of the offender above the rights of children to a life free of abuse and violence. This has to change. It should be noted that the F.B.I. has never found a sex offender who was legally insane and/or sick; and there is no data that child abusers in general are legally "sick", yet we maintain this attitude.

If we don't break the cycle of abuse, we will have generation after generation of abused children who grow up to be abusing adults. This legislation will help break that cycle, not cure it, but help break it.

Women In Safe Homes
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DEATHS DUE TO MALTREATMENT

Variations in the reporting practices and investigative procedures across the fifty states make it difficult to determine the exact numbers and scope of the problem.

In 1986, at least 1,200 fatalities due to child abuse and neglect were reported. At least one study which reviewed official death certificates and clinical records suggests that the actual number may be as high as 5,000. Many fatalities are mis-diagnosed as "SIDS", homicides, or accidents when the circumstances indicate fatal maltreatment.^{1,3}

Compared to a slow down in the growth rate for child abuse reports, the number of child death due to maltreatment increased dramatically in 1986. Confirmed or suspected deaths rose 29% compared to 1984-1985 comparisons when the number of child deaths declined 2%.³

For many of 1,200 reported cases, death occurred after the child was reported to local child protective services. In some cases the child died in protective custody as a result of abuse or neglect by foster parents.²

Children reported as fatalities are much younger on average than those reported for maltreatment. (7.2%) The average age of death is 2.6 years.¹ Children ages 0-5 are 28% of the general child population, but sustain a disproportionately high, 74% of fatalities. This age group is the most vulnerable due to language skills, intellectual development and dependency needs to request assistance.⁴

In some instances this dramatic increase in fatalities may reflect a more accurate identification system. However, the size and frequency of this increase suggests that maltreatment is on the rise and that this statistic is consistent with current trends noted in infant mortality rates and levels of serious family violence and violent crimes.^{1,2}

Data from American Humane Association states that approximately half of the children die as a result of battering. In some, death is the accumulative result of repeated beatings while in other cases death results from a single violent episode. The other half die as a result of child neglect.¹ Abuse is the second leading cause of death behind SIDS for children 0-5 years old.^{1,5}

Child abuse and neglect may permanently or seriously damage the physical, emotional and mental development of the child. Physical effects may include damage to the brain, vital organs, eyes, ears, arms or legs. These injuries may result in mental retardation, blindness, deafness, loss of limbs and death.⁵

- 1 National Committee for Prevention of Child Abuse.
July/August 1987 NCPA Memorandum.
- 2 First National Symposium on Preventing Child Abuse and
Neglect Fatalities, July 1987.
- 3 Deaths due to Maltreatment Soar: The Results of the 8th
Semi-Annual Fifty State Survey, 1987. NCPA research.
- 4 National Committee for Prevention of Child Abuse and
Neglect Supplement, 1986.
- 5 Committee for Children: Physical Abuse and Neglect
Supplement, 1986.

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SEXUAL ASSAULT CENTER
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CHILD SEXUAL ASSAULT

A pedophile, fixated offender and regressed offender are three typologies that have been assigned to child sexual offenders in recent years.

Specialists who are veterans of treating adult sexual offenders do not use the word "cure" only "control" or "reduction". Because of the problem of chronicity in sexual offenses, these compulsive behaviors are compared often to other addictive, habitual behaviors such as alcohol abuse, drug abuse and gambling. The behaviors are continuous, repetitious and heavily patterned. The strongest predictor of future sexual offenses is past offenses.

In a unique study drawn from 411 non-incarcerated sex offenders who volunteered for the study under conditions of strict confidentiality:

- 44% of incest offenders offended outside the home.
- 50% had multiple deviances.
- 232 molesters were responsible for 17,585 victims. These molesters produced more than 10 times the number of victims than rapists.
- According to this research, the average adolescent male sex offender may be expected to affect 380 victims during his lifetime.^{1,2}
- At another study at Oregon State Hospital 53 incarcerated offenders reportedly committed 25,757 sexual crimes.²

1 Self-Reported Sex Crimes of Non-Incarcerated Paraphiliacs
Gene Abel, Journal of Interpersonal Violence, Vol.2 No.1,
March 1987.

2 Changing a Lifetime of Sexual Crime, Psychology Today,
March 1986.

Studies to date clearly indicate that child sexual assault is a repetitive, chronic and addictive behavior. Through treatment offenders can learn skills and methods to control their deviant behavior. The statistics do not appear to be available nationally indicating the number of children that have died specifically as a result of sexual abuse. We know there are children that have been victims of continuous and repetitive sexual abuse that have died as a result of this abuse.

Children who are raped and then murdered are listed only as homicides. In most cases, child sexual assault does not physically injure a child to a degree that death results, but it is also a repeated and continued pattern of child abuse that must be considered as dangerous to the child as physical abuse and neglect.

Patty Barnes, M.A. Children's Program Coordinator
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The most notable large scale study done by Diana Russell found that 38% of a sample of 930 San Francisco women reported at least one experience of intrafamilial or extrafamilial sexual abuse before reaching the age of 18.¹ 28% reported one such experience before reaching 14 years of age. 12% had been abused by a relative before the age of 14 and 4.5% had been abused by a father or step-father. Only 4 of these cases were ever reported to the police.

In the survey, 43% of the cases were reported as having occurred once, 31% reported as 2-5 times, 17% 6-20 times, 10% over 20 times. With regard to time period over which multiple abuse occurred, 35% occurred over a period of less than 6 months, 31% over a period of more than six months, but less than 2 years, 28% occurred over a period of more than 2 years, but less than 10 years and 6% over a period of more than 10 years.

Patty Barnes, M.A.
Children's Program Coordinator

1 The Secret Trauma, Incest in the Lives of Girls and Women, Diana E.H. Russell, Basic Books, Inc., 1986.

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 237
Publish Date:

REQUEST: _____

Revision Date: 1-6-88
Title: An act relating to sexual abuse of children

Agency Affected: Alaska Court System
BRU: Trial Courts

Sponsor:
Requestor: Ulmer

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)						
	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
Personal Services
Travel
Contractual
Supplies
Equipment
Land & Structures
Grants & Claims
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL
REVENUE

FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:						
Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: *Jan Strandberg*
 Division: Alaska Court System Phone: 264-8228
 Date: 1-6-88
 Approved by: *Stephanie Cole, for*
 Agency: Arthur H. Snowden, II, Administrative Director Date: 1-6-88
 Alaska Court System

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 Senate Secretary



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Alaska State Legislature

House

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

February 1, 1988

TO: Judiciary Committee
FROM: Representative Fran Ulmer
SUBJECT: Recidivism

I'd like to share with you a statement I received from Patty Barnes, a Children's Counselor at Women in Safe Homes, pertaining to the subject of recidivism.

Attachment

Prepared by Patty Barnes
Children's Counselor
Women In Safe Homes
January 29, 1988

Recidivism

When we combine the data from offender/victim studies, clinical observations, treatment/program evaluations and criminal justice statistics it is apparent that there is a serious short coming in the sex-offender literature given to the study of sex-offender recidivism. Only a few efforts have been made to follow up identified child molesters over a period of time to find out under what conditions they continue to reoffend. With incarcerated offenders investigators routinely use as their criterion of recidivism subsequent offenses that came to the attention of the authorities or in many cases only if a conviction occurred. The serious flaw in these studies is that it only measures the types of offenders most likely to reoffend in the first place. The vast majority of sexual offenders are never reported and never come to the attention of the authorities (Russell study). Because very few offenders ever get caught and sent to prison, those men that do are men who have patterns of repetitive offending. The mean for 10 of these incarceration studies was about 20% recidivism rate.

Two recent studies have been conducted on nonincarcerated individuals, one at Northwest Treatment Associates (1985) and the other by Gene Abel et al (1984). The Northwest Treatment Associates study reported reoffense at 3% for a group of 126 child molesters who had been ordered to treatment and followed up for an average of 24 months. Knowledge of new offenses was not based on a systematic record check, but rather on self-reports or reports from family members. Experts in this field know from the evidence that offenders do not self-report, especially when they are in the criminal justice system. Abel et al. reported a 21% recidivism rate for his group (a mixture of convicted, nonconvicted and publicly undetected offenders) of 24 followed for 12 months after treatment. Abel relied on self-reports, but unlike N.T.A. promised offenders complete confidentiality for their admission. Both of these groups were receiving intensive treatment and up to date therapeutic assistance unlike those offenders who are not caught or who are treated in less sophisticated settings.(Finkelhor, 1986)

Another serious problem with recidivism studies is the short time span which offenders are followed. It is widely accepted in this field today that child molesting is an addictive behavior that is reinforced over long periods of time and cannot be cured, but only controlled by the offender. A child molester may appear reformed while he is under observation, but later will revert to the original pattern. This is supported by one of the longest follow up studies (22) years that found the longer period dramatically increased their rates of recidivism (Soothill and Gibbons, 1978). (Finkelhor, 1986)

In summary, based on the most recent studies of offender behavior and dynamics and on retrospective surveys conducted with adult women and men, recidivism rates are almost impossible to determine. The only two realistic and valid methods to measure recidivism is the offenders decision to self-report an offense and the victims willingness to report the abuse. As offenders rarely self-report on a voluntary basis and victims do not report a large majority of assaults, little reliance can be placed on recidivism rates. As most child sexual assault offenders are never caught, let alone prosecuted, we are left with the national statistics that 25% to 38% of females are victims of sexual abuse by the time they are 18 years old. Either 1 out of every 3 males (and a small minority of females) in this country are sexual assault offenders or a small minority of males are molesting hundreds and hundreds of children during their lifetime.

Exerts From The Experts

1. Faye Knopp, The Rational and Goals of Early Intervention

Offenders begin deviant sexual interests at an early age, through fantasy and reinforcement by orgasm. The deviant themes continue over and over again. This is the key to persistent deviant arousal. When the problem becomes chronic it takes on life of its own. Specialists who are veterans of treating sex offenders never mention "cure" only control and reduction. These compulsive behaviors are compared to addictive, habitual behaviors such as alcohol, gambling and eating.

Offenders learn through observation and direct experience (molestation), cultural influences, socialization process, chaotic, enmeshed or rigid families and sexual trauma as a child. These all contribute to the dynamics that are used to rationalize abusive behaviors.

2. Gene Abel, Judith Becker, Characteristics of Men Who Molest Young Children, 1983 presentation to World Congress of Behavior and Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs, Journal of Interpersonal Violence, March 1987.

Most unique study and data gathered because 561 paraphiliacs were interviewed who were voluntary subjects not under court order to receive evaluations or treatment (nonincarcerated).

Results show that nonincarcerated sex offenders are:

- Well-educated and socioeconomically diverse.
- Report an average number of crimes and victims that is substantially higher than represented in current literature.
- Sexually molest young boys with an incidence that is 5 times greater than the molestation of girls.
- *- 44% of incest fathers admitted to offending outside the home.
- 50% of men had multiple deviations.
- 232 molesters were responsible for a total of 17,585 victims. (Knopp)
- According to a study of adolescent males they may be expected to have contact with 380 victims during lifetime. (Knopp)
- Offender does not outgrow sexually exploitive preferences. Begin deviant fantasies as early as 12 years old. (Knopp)

3. Nicholas Groth, responsible for fixated-regressed typology, author of Men Who Rape and numerous publications on offenders.
 - In study of incarcerated rapists and child molesters, (1982), offenders admitted committing up to 5 times as many sexual offenses for which they were apprehended. Child molesters committed first offense as early as eight years, rapists at nine.
 - A similar population, 1982 study reflects potential for escalation. Of incarcerated sex offenders interviewed, 35% reported progression from compulsive masturbatory activity, repetitive exhibition to the more serious crimes for which they were convicted as an adult.
 - Groth reports in Psychology Today, The Unspeakable Family Secret, 1984 that "sexual abuse is a chronic problem like alcoholism. Offenders shouldn't think of themselves as cured. It's something they have to work on every day of their lives." In evaluating current data on offenders, it appears dangerous to identify intrafamilial offenders as regressed offenders and therefore unlikely to offend outside the home. According to Abel and others almost half of incest fathers admit to pedophilia. Also of interesting note is David Finkelhor's data that reveals girls with a step-father are 6 times more likely to be abused than those without. Pedophiles can enter families with ease.
4. Robert Freeman-Longo, director of Sex Offender Unit, Oregon State Hospital, lecturer, researcher, administrator, therapist, Changing a Lifetime of Sexual Crime, Psychology Today, 1986 and Life Magazine, Special Report, The Offenders, 1984.
 - Sexually deviant behavior is usually deeply engrained and most sex offenders need extensive psychological help to change deviant thought and behavior patterns.
 - No responsible professional in our field would claim that sexual deviancy can now be cured. We can give sex offenders skills and methods for controlling their deviant behavior, but it seldom can be eliminated.
 - Sex offenders may adapt their behavior superficially, but unless they develop noncriminal, even empathetic thinking patterns they are likely to revert to their deviant patterns.
 - There are no cures in this business. We tell these men they will need to work on their problem everyday for the rest of their lives.
 - Estimates of the recidivism rate among untreated sex offenders range between 35 and 80%. These offenders not only commit more sex crimes, but their behavior may help to create a future generation of sex offenders.

- A total of 53 offenders treated at Oregon State Hospital reportedly committed 25,757 sexual crimes.
- 5. Dr. Irwin Dreiblatt, Ph.D, Pacific Psychological Services, WA, Issues in the Evaluation of Sex Offenders, 1982.
- Sexual Assault is often a chronic behavior problem. Even with only 1 victim. We are unable to predict what his future sexual behavior will be or how it will be managed.
- Strongest predictor of future sexual offense is past offenses.
- Sexual deviant behavior must be viewed as a highly, habitual sexual preference, a habit not very dissimilar than alcohol abuse. One must view the offender as vulnerable to his deviant sexual preference indefinitely. He will fall prey to reoffense if he does not respect his vulnerability and cease to manage his life in ways necessary to prevent reoffense. Such a vulnerability model emphasizes that there is no cure, but rather mastery of a serious behavioral problem.
- 6. Stephen Wolf, director, Northwest Treatment Associates, Seattle; editor of Sexual Violence Quarterly, Fall 1985, Evaluation and Treatment: Characteristics of Adult Sexual Offenders.

Sexual offenders act out their deviances at high rates. Behavior does not show the pattern of decline in frequency with age as found in property offenders. It appears they do not outgrow their sexually exploitive preferences. Recidivism rates are high and increase in relation to the number of previous sex offenses and with attraction to male (non-incest child victim). Sexual offenders are motivated to act out their deviances as a sexual preference. In simple terms, they like what they do. They are not in any large numbers psychotic or schizophrenic. Once their sexual preference is established they tend to continue to pursue it. They will most often at the time of discovery have more than one victim and probably more than one deviant sexual focus. In incest cases they molest children outside the home almost half the time.

Offenders tend to return to deviance shortly after they feel safe from criminal justice sanctions. In their histories.

- 7. Diana Russell, researcher and author, The Secret Trauma, in widely utilized study of 930 women in San Francisco survey found that only 2% of intrafamilial abuse and only 6% of extrafamilial abuse was reported. 38% of women admitted to having been sexually abused, 152 abused by family member.

Women In Safe Homes
Ketchikan, Alaska

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PUBLIC DEFENDER AGENCY

APR 13 1987

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April 9, 1987

Jim - pls read

✓ Representative John Ellis
Representative Niilo Koponen
Co-Chairmen
Health, Education & Social Services Committee
P. O. Box V
Juneau, Alaska 99811

Dear Representatives Ellis and Koponen:

I understand that House Bill 237 has been referred to your committee for consideration. Although I certainly understand the concern of its drafters for the safety and welfare of child victims, the proposed changes contained in the bill do not appear to be necessary to vigorous prosecution and effective enforcement of laws preventing assaults on children. Many of the changes in the bill appear to be designed to overrule a variety of appellate decisions unfavorable to the state in cases involving child victims. Since some of the decisions are constitutionally based, the corresponding attempted changes appear unconstitutional. Furthermore, other provisions would substantially increase the presumptive jail term for a first incest conviction, rendering that term much more severe than the sentence required for a violent rape of an adult which results in serious physical injury.

Following is my analysis of the bill.

A. SECOND DEGREE MURDER

Section 1 proposes two changes to the second degree murder statute (AS 11.41.110(a)):

1. Neitzel change. The bill would change AS 11.41.110(a)(2) to define second degree murder as "knowingly engaging in conduct [instead of: intentionally performing an act] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." This change simply brings the language of the statute in accordance with the interpretation of the statute adopted by the Court of Appeals in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982). The change does not present a problem and

could reduce confusion without substantively changing the law. Section 3 proposes a parallel change in the first degree assault statute, AS 11.41.200(a)(3), and is also not a substantive change in the law as it is presently applied.

2. Extreme indifference to the welfare of a child under 16. Proposed AS 11.41.110(a)(4) creates a new subsection of second degree murder, defined as "under circumstances manifesting an extreme indifference to the welfare of a child under 16, the person engages in a pattern or practice of abuse of that child that results in the death of the child." Abuse is defined in section 2 to include bodily impact, restraint, and confinement. "Pattern or practice" is defined in section 8 (proposed AS 11.41.610(2)) to mean "three or more incidents of the prohibited conduct."

It is not clear to me what the purpose of this section is. It appears to be unnecessary since if a person's conduct, even once, displays manifest indifference to the value of a child's life, and the child dies, that is unambiguously included in AS 11.41.110(a)(2). Requiring a "pattern or practice of abuse" might be interpreted to exclude murder prosecutions under AS 11.41.110(a)(2) when the person has only abused the child once or twice.

If the point of the new section is to insure that evidence of any pattern or practice of abuse will always be admissible, the statute is still unnecessary. Existing case law establishes that a history of abuse will ordinarily be admissible. E.g., Garner v. State, 711 P.2d 1191 (Alaska App. 1983); see also Abruska v. State, 705 P.2d 1261, 1264 & n.1 (Alaska App. 1985).

B. FIRST DEGREE ASSAULT

Section 3 creates a new category of first degree assault for any person who engages in a pattern of abuse which results in serious physical injury to a child under 16.

The proposed new assault provision is unnecessary. Given the broad definition of "dangerous instrument" adopted in Wettanen v. State, 656 P.2d 1213 (Alaska App. 1983), many assaults on a child would fit under existing AS 11.41.200(a)(1) (recklessly causes serious injury with a dangerous instrument). Many other assaults, particularly those as part of a pattern of abuse, would fit under AS 11.41.200(a)(3) (the Neitzel-type assault statute). Further, a prosecution under AS 11.41.200(a)(3) would be more likely than a charge under the new offense to open the door to evidence of assaults on other victims; evidence of such other assaults would not be relevant under proposed AS 11.41.200(a)(4) and the current rules of evidence, but such evidence could often be relevant to establish extreme indifference to the value of

life by showing that the defendant knew the likely consequences of his actions.

Further, AS 11.41.200(a)(4) could be read dangerously broadly. A parent who three times "confined" his child to his room for reasonable discipline could be liable under this class A felony if, one time, the child hurt himself seriously while in his room.

C. REPEATED SEXUAL ABUSE OF A MINOR

Sections 5-8 create a new set of offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second, and Third Degree. "Repeated" is given meaning in section 8 as "pattern or practice," defined as three or more incidents. Section 13 provides penalties for RSAM in the First Degree, an unclassified felony, setting a presumptive term for first offenders of 13 years (and 25 and 35 years, respectively, for second and third offenders), with a maximum of 50 years. RSAM in the Second Degree is an A felony, with a presumptive five-year term for a first offender.

Effectively, the proposed offense of RSAM in the first degree declares that all family sexual abuse cases will be treated far more harshly than violent rape of a stranger. As the Court of Appeals has noted, virtually all family sexual abuse cases involve repeated abuse. State v. Andrews, 707 P.2d 900, 908-09 (Alaska App. 1985), aff'd, 723 P.2d 85 (Alaska 1986); see Benboe v. State, 698 P.2d 1230, 1232 (Alaska App. 1985) (single incident of abuse may make crime among least serious in its class). To penalize the family offender more harshly than the bike-path rapist is an illogical and unfair result. The typical defendant charged under RSAM will be a middle-aged man who has abused his step-daughter on a number of occasions. He will have no criminal record of any sort and will be an upstanding member of the community in all other respects than his sexual offense. Yet, he will face a presumptive term of 13 years. If he had a prior felony conviction as a young adult, perhaps for a property crime such as theft, he would face a presumptive term of 25 years.

By contrast, the bike-path rapist, who is convicted of one sexual assault and has a misdemeanor record, a serious alcohol problem, or a sociopathic personality which makes him predictably dangerous, faces a presumptive term of only 8 years for his first offense and 15 years for his second violent rape.

RSAM in the second degree parallels the first degree offense and covers any pattern of sexual contact with a child under 16 or of sexual penetration with a child aged 13-15 who is at least 3 years younger than the defendant. This is made a class A felony, in contrast to the present statute, which treats basically the same conduct as a class B felony. See AS 11.41.436. The father

who fondles his 12-year-old on a few occasions would now face a presumptive term of 8 years in prison; the bike-path assailant who grabs and fondles a child once would face no presumptive term.

Increasing the presumptive terms for sexual offenses will undoubtedly increase the number of cases going to trial. While the present 8-year presumptive term for first degree sexual abuse of a minor is certainly long, more defendants will plead guilty to an 8-year term than a 13-year term. Similarly, although the present sanctions for sexual contact with a minor are stiff (0-10 years), there is no presumptive term applicable to first offenders. Clearly more people will plead guilty to class B charges than to the new class A charge. Any increase in the number of trials will mean increased costs for the prosecutors, court system, and Public Defender Agency. Every time the number of trials increases, appeals increase, too, with corresponding extra burdens on the appellate courts, Office of Special Prosecutions & Appeals and the Public Defender appellate case load.

The proposed new statutes are not necessary. If the state can prove three incidents of sexual abuse, the state is presently free to file three charges of sexual abuse of a minor in the first degree. Although the convicted defendant would face a presumptive term of 8 years, rather than 13, Andrews v. State establishes that consecutive terms can be imposed, and the possible maximum term would be 90 years. Thus, the defendant whose pattern of abuse deserves more serious punishment than 8 years can be sentenced more severely by imposition of consecutive terms.

The problems with the proposed RSAM crimes are compounded when considered in the light of other provisions in the bill. All of the repeated sexual abuse of a minor crimes described above include as an element that the defendant "hav[e] authority over a child under the age of 16." "Having authority over a child" is defined in section 8, proposed AS 11.41.610(1), to mean:

- (a) the child is entrusted to the defendant's care by authority of law [e.g., foster parents];
- (b) the child is the defendant's son or daughter, including adopted children and step-children;
- (c) the child resides as a member of a social unit in the same household as the child; or

(d) the child has been temporarily entrusted to the defendant's care [e.g., babysitter, older sibling, day care worker].

These definitions, particularly (c) and (d), are so broad that virtually every sexual abuse of a minor case would involve a person having authority over a child. The definition of "having authority over a child" is so far reaching that a 16-year-old boy who, on several occasions has consensual sexual foreplay involving digital penetration with his new step-sister just prior to her 13th birthday, would be exposed to the 13-year presumptive term should he be waived into adult court. An 18-year-old involved with a 15-year-old step-sister under similar circumstances could be prosecuted for RSAM in the second degree with a presumptive 8-year term on the first offense.

D. PRIOR INCONSISTENT STATEMENTS AS SOLE EVIDENCE AT TRIAL

Section 11, proposed AS 12.845.025, is an attempt to overrule Brower v. State, 728 P.2d 645 (Alaska App. 1986). This proposal states that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

The question whether an uncorroborated prior inconsistent statement is sufficient to support a conviction is a uniquely judicial determination, not one susceptible to legislative fiat. The federal constitution prohibits conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358. A court's holding on a question of the sufficiency of certain evidence is an interpretation of the constitutional requirement of proof beyond a reasonable doubt. Thus, the Court of Appeals' decision in Brower took no radical or novel position; the Brower holding is consistent with all other courts which have considered this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action. Section 11 is, therefore, unconstitutional.

E. NONUNANIMOUS JURY VERDICTS

Section 8, proposed AS 11.41.600, provides that in the statutes requiring a "pattern or practice," each juror must be convinced beyond a reasonable doubt that at least three incidents of the prohibited conduct occurred, but the jury need not be unanimous as to any particular incident. This provision is an attempt to overrule Covington v. State, 703 P.2d 436, opin. on reh., 711 P.2d 1183 (Alaska App. 1985).

Covington requires that, where a defendant is charged with one count of criminal conduct, in order to convict the defendant,

jurors must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. The Covington holding is based upon the defendant's constitutional right to a unanimous verdict. Johnson v. Louisiana, 406 U.S. 356, 362 (1972). No state has reached a contrary result. The legislature cannot overrule Covington. Proposed AS 11.41.600(2) is unconstitutional.

F. CHANGES TO EVIDENCE RULE 404

Section 14 proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

This is arguably not constitutional. In a very long line of cases, the Alaska appellate courts have held that evidence of prior bad acts by a defendant are not admissible to prove the defendant's propensity to commit crimes. E.g., Eubanks v. State, 516 P.2d 726 (Alaska 1973); Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980); Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd, 726 P.2d 546 (Alaska 1986). The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. U.S. Const., amend. VI; Alaska Const., art. I, § 7. When evidence of a defendant's character, as shown through prior bad acts, is admitted to show his propensity to commit a crime, there is a grave likelihood that the jury will convict the defendant because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

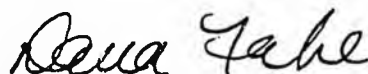
Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, trials could take two to three times as long, as witnesses are called by both sides to establish and refute incidents entirely collateral to the real issues at trial. Longer trials also mean longer transcripts; increasing the cost of appeals means more defendants would need public defenders.

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly open the doors to evidence of prior bad acts when such evidence is probative of something other than criminal disposition. E.g., Coleman v. State, 621 P.2d 869 (Alaska 1980); Adkinson v. State, 611 P.2d 528 (Alaska 1980); Oswald v. State, 715 P.2d 276 (Alaska App. 1976). Further, the Alaska courts

already recognize and have recently expanded an exception to Evidence Rule 404(b) for cases where the defendant is charged with sexual misconduct and the state wishes to offer evidence of prior misconduct with the same victim or another victim having highly relevant common characteristics (e.g., another child in the same family), particularly where the evidence of misconduct with the other[s] approaches being evidence of a habit. Burke v. State, 624 P.2d 1240 (Alaska 1980); Soper v. State, Op. No. 675 (Alaska App., Jan. 23, 1987), pet. hearing denied (April 3, 1987). Thus, the state is currently able to introduce evidence of prior bad acts in child sexual assault cases when it is probative.

Please let me know if I can provide you with any further information on this or any other proposed legislation. I appreciate this opportunity for input.

Very truly yours,



Dana Fabe
Public Defender

DF:rjb

STATE OF ALASKA THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

April 1, 1987

SUBJECT: Abuse of children/admissibility of certain
criminal evidence (Work Order No. 5-0809)

TO: Representative Fran Ulmer
Chair, State Affairs Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have requested a sectional analysis of Work Order 5-0809, relating to abuse of children and the admissibility of certain evidence in criminal prosecutions. As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 makes two changes to the offense of murder in the second degree. First, under existing law, one way a person may be guilty of murder in the second degree is if the person "intentionally performs an act" resulting in death under certain circumstances. Section 1 lowers the level of intent required by substituting the language "knowingly engages in conduct" (AS 11.41.110(a)(2)). Section 1 also adds a new provision under which a person may be guilty of murder in the second degree: if "under circumstances manifesting an extreme indifference to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse of the child that results in the death of the child" (AS 11.41.110(a)(4)). The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)).

Section 2 defines the term "abuse", as used in the second degree murder statute, to include bodily impact, restraint, or confinement (AS 11.41.110(c)).

Section 3 makes changes to the offense of assault in the first degree similar to those changes discussed in sec. 1. First, under current law, a person may be guilty of assault in the first degree if that person "intentionally performs an act" that results in serious physical injury under certain circumstances. Section 2 lowers the required level of intent by substituting the words "knowingly engages in conduct" (AS 11.41.200(a)(3)). Section 2 also adds a new provision under which a person may be guilty of assault in the first degree: if "the person engages in a pattern or practice of abuse of a child under the age of 16 that results in serious physical injury to the child" (AS 11.41.200(a)(4)). The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)).

Section 4 defines the term "abuse", as used in the first degree assault statute, to include bodily impact, restraint, or confinement (AS 11.41.200(c)).

Sections 5 and 6 create three new offenses: repeated sexual abuse of a minor in the first degree (AS 11.41.441), in the second degree (AS 11.41.442), and in the third degree (AS 11.41.444). Each of these offenses is committed if a person over a certain age having authority over a child under 16 years of age (1) engages in a pattern or practice of sexual penetration or sexual contact with the child, or (2) aids, induces, causes, or encourages the child to engage in a pattern or practice of sexual penetration or sexual contact with another person. The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)). The phrase "having authority over a child" is defined in sec. 8 of the bill to mean (1) the child is entrusted to the person's care by authority of law, (2) the child is the person's son, daughter, illegitimate or adopted child or step child, (3) the person resides as a member of a social unit in the same household as the child, or (4) the child has been temporarily entrusted to the person's care (AS 11.41.610(1)).

The degree of the offense of repeated sexual abuse of a minor depends upon the age of the defendant, the age of the victim, and the nature of the sexual conduct. Repeated sexual abuse of a minor in the first degree is an unclassified felony punishable as provided in AS 12.55.125(j) under sec. 13 of the bill. Repeated sexual abuse of a minor in the second

degree is a class A felony and repeated sexual abuse of a minor in the third degree is a class B felony.

Section 7 amends existing law to make two affirmative defenses applicable to the offenses of repeated sexual abuse of a minor in the first, second, and third degree. The first defense is that, at the time of the alleged offense, the victim was the legal spouse of the defendant and the defendant had the consent of the victim (AS 11.41.445(a)). The second defense is that, if the offense required that the victim be under a certain age, the defendant reasonably believed the victim to be that age or older. However, this defense does not apply if the victim is under the age of 13 (AS 11.41.445(b)).

Section 8 adds two new general provisions. AS 11.41.600 applies to the offenses, discussed above, that require a "pattern or practice" of conduct as an element of the offense. First, it provides that a prosecution for an offense requiring a "pattern or practice" of conduct does not preclude a prosecution on charges of separate incidents of the conduct. Second, this section provides that the jury must find that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to the specific incidents. Third, if a person is found innocent of a specific incident, that incident may not be used to establish the pattern or practice. Finally, as many as two of the three incidents used to establish a pattern or practice may have occurred before the effective date of the act.

AS 11.41.610 contains the definitions of "pattern or practice" and "having authority over a child" discussed above.

Sections 9 and 10 make technical amendments to existing provisions indicating that repeated sexual abuse of a minor in the first degree is an unclassified felony and is among the most serious of offenses (AS 11.81.250).

Section 11 provides that in a criminal prosecution, evidence of a prior inconsistent statement of a witness is, by itself, sufficient to support a conviction if believed by the trier of fact (AS 12.45.025).

Section 12 amends existing law to provide that a defendant convicted of sexual abuse of a minor in the first degree or repeated sexual abuse of a minor in the first degree may be sentenced to pay a fine of up to \$75,000 (AS 12.55.035(b)).

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Section 13 sets out the punishments a defendant convicted of repeated sexual abuse of a minor is subject to. The maximum term is 50 years with presumptive terms of 13 years for a first felony conviction, 15 years for a first felony conviction if the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 years for a second felony conviction, and 35 years for a third felony conviction (AS 12.55.125(j)).

Section 14 amends Rule 404 of the Alaska Rules of Evidence by adding a new subsection to provide that in any prosecution for physical assault upon or sexual misconduct with a child under the age of 16, evidence of prior acts of the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

Section 15 makes the provisions of sec. 14 retroactive and applicable to offenses and evidence of acts committed before the effective date of the bill.

Section 16 provides for an immediate effective date.

KBL:mkr
m10/082

STEVE COWPER, GOVERNOR

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DEPARTMENT OF LAW

CRIMINAL DIVISION/FOURTH JUDICIAL DISTRICT
OFFICE OF THE DISTRICT ATTORNEY

December 29, 1987

Representative Fran Ulmer
P.O. Box V
Juneau, Alaska 99811

Re: HB 237

Dear Representative Ulmer:

As District Attorney Harry Davis is consumed in the trial of State v. Mckay, I was asked to comment for him on HB 237. I circulated the packet of materials provided with your letter of November 13, 1987 as well as these comments among those attorneys in the Fairbanks District Attorney's Office who have specialized in sexual abuse and assault cases, and have incorporated their input. Our comments are as follows:

1. Amendment of A.S. 11.41.110(a)(2) and 11.41.200(a)(3).

This amendment changing the mental element of "reckless murder" and certain serious assaults appears to be really a housekeeping amendment. It merely reflects the current interpretation of the statute.

2. The Additional Theory of Murder II and Assault I:

It should be first noted that the proposed statute only protects children under the age of 16. In 1980 for Title 47 proceedings the legislature redefined "child" as a person under the age of 18 rather than under 16. It would seem that even older children should be protected by the criminal statutes. Note the crimes of sexual abuse of a minor (hereinafter SAM) I as well as SAM II protect those children under age 18 who have a special relationship to the abuser.

The definition of abuse or gross neglect in sections 2 and 4 fails to include failure to provide necessary medical treatment, sexual abuse, or subjecting a child to a risk of injury due to frostbite. I would suggest the following definition (written in legislative style):

In this section, "abuse" [OR GROSS NEGLECT] includes intentional bodily impact, restraint, confinement, sexual contact or penetration, or administration of lethal chemicals or drugs that create a substantial and unjustifiable risk that the child will suffer serious physical injury, or knowingly exposing the child to conditions which create a substantial and unjustifiable risk that the child will suffer serious physical injury due to burns, frostbite, hypothermia, or suffocation, or knowingly or unjustifiably failing to provide medical treatment to a child.

It is troubling to call the behavior abuse or gross neglect and then require a pattern or practice. Neglect is rarely a single incident, but a pattern or practice consisting of a failure to provide for the child in various ways, usually a combination of physical, emotional or mental deprivation and abuse. For example, leaving a child with an abusive babysitter once would not necessarily be neglect. However, to do so frequently and knowingly could be neglect. A review of the Title 47 definitions of abuse, child and neglect may assist in the definitions for the proposed statute.

Proposed A.S. 11.41.110 and 200 do not define the phrase "pattern or practice." However, I suspect there would be a tendency to adopt the definition in proposed A.S. 11.41.510 which speaks of "three or more incidents of prohibited conduct." It appears this definition was drafted with the Repeated Sexual Abuse of a Minor (hereinafter RSAM) offenses in mind. In applying that definition to the proposed assault and murder statutes confusion may arise with the phrase "prohibited conduct." Surely we do not want to say the child must be burned, restrained, confined, etc. three or more times.

3. The Offense of Repeated Sexual Abuse of a Minor

Is a repeat sex offender statute really necessary? It appears the purpose of the proposed statutes is to punish more severely those persons who repeatedly abuse children; to provide greater protection for children who are abused by those persons with whom they have a special relationship; to punish those persons who abuse within those relationships more severely; and, to circumvent the perceived problems associated with Covington v. State, 703 P.2d 436 (Alaska App. 1985).

I would respectfully suggest a new set of offenses entitled RSAM I-III are not really necessary to accomplish these goals. A few minor amendments to the present SAM statutes and the sentencing provisions of A.S. 12.55.155 could accomplish the same

purposes without raising some of the constitutional issues the repeat offender statutes may.

For example A.S. 11.41.434(a)(2) (SAM I) and A.S. 11.41.436(a)(3) (SAM II) already contain the language "entrusted to the offender's care by authority of law." I suggest changing that phrase to simply "authority over," and then include in A.S. 11.41.470 a definition of the phrase. I would suggest the following (in legislative style):

11.41.434 SEXUAL ABUSE OF A MINOR IN THE FIRST DEGREE. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older the offender engages in sexual penetration with a person who is under 18 years of age with whom the person had authority over. [WITH A PERSON WHO IS UNDER 18 YEARS OF AGE AND WHO]

[(A) IS ENTRUSTED TO THE OFFENDER'S CARE BY AUTHORITY OF LAW, OR

(B) IS THE OFFENDER'S SON OR DAUGHTER, INCLUDING AN ILLEGITIMATE OR ADOPTED CHILD, OR A STEPCHILD].

b) Sexual abuse of a minor in the first degree is an unclassified felony and punishable as provided in A.S. 12.55.

11.41.470. DEFINITIONS. For purposes of A.S. 11.41.410-11.41.470, unless the context requires otherwise.

(1) "having authority over a child" means

(A) the child is entrusted to the person's care by authority of law; or

(B) the child is the person's son or daughter, including an illegitimate or adopted child or stepchild; or

(C) the person resides as a member of the same household as the child; or

(D) the child has been temporarily entrusted to the person's care

(The definitions of incapacitated, victim and without consent would remain as defined and would be simply renumbered).

In conjunction with the above suggestions A.S. 12.55.155(c)(18), which is the aggravator for offenses perpetrated against persons of the same social unit, could be amended to include those defendants who abuse persons they have authority over. For example:

12.55.155(c)(18)

The offense was a crime specified in A.S. 11.41 and was committed against a spouse, former spouse, [OR] a member of the social unit comprised of those living together in the same dwelling as the defendant[.], or a person over whom the defendant had authority.

While the original bill punished repeated sexual abusers more severely than SAM did, the committee substitute (with the exception of the lesser degrees) does not. However, another way to accomplish that goal with minimal tinkering within the present statutory scheme is to make evidence of repeated sexual abuse an aggravating factor. For example:

() The defendant is convicted of an offense specified in A.S. 11.41.434-440 and the defendant's conduct indicated the defendant engaged in a pattern or practice of sexual abuse.

However, if the legislature is desirous of enacting a separate repeat sex offender statute, I have the following comments on the proposal:

I would first note that this statute requires the offender to be over the age of 16 and the victim to be under the age of 13. Contrast that to the analogous sections in SAM I and SAM II, which simply require the defendant be over age 18 and the victim under 18. The ages should be the same whether the charge is violation of A.S. 11.41.434(a)(2) (SAM I) or proposed A.S. 11.41.441(a) (RSAM I). If we are protecting children who have a special relationship with the adult, the age of 18 is more appropriate.

Second, why is RSAM limited to those persons who "have authority over a child"? The definition of authority is good for it includes persons like babysitters, but it does not include those who have no specific authority or relationship to the child or who live in the same social unit but nonetheless may abuse a child repeatedly. The neighbor, boy/girl friend, family friend, relative or other person who has frequent contact with the child should be included in the repeat offender statute.

Perhaps the statute could be drafted like the current SAM I and SAM II statutes. Children under the age of 18 are protected from repeated abuse by someone with authority over them, while children under 16 are protected from repeated abuse outside that relationship.

Finally, I would note the offense of RSAM II is a class "A" felony while SAM II is a "B" felony and RSAM III is a "B" felony while SAM III is a "C" felony. The scheme made sense under the original draft of the bill when the offense of RSAM I carried a presumptive jail term of 13 years. However, as the committee substitute reduced the presumptive term for RSAM I to 3 years it would seem appropriate to reduce the sentences for RSAM II and III accordingly.

4. Evidence Rule 404(b) and (c)

This amendment certainly clears up a somewhat confusing morass in the law regarding the admission of prior bad acts. The amendment will be of assistance to prosecutors. However, people should not be convicted on rumor, reputation or speculation. Perhaps something akin to the rape shield statute could be devised which would allow the state to use those acts after a showing of relevance at a hearing outside the jury's presence.

Proposed Evidence Rule 404(c) contains some potentially confusing language. I would suggest it be written as follows:

(c) Notwithstanding (b) of this rule, in a prosecution for a crime involving a physical assault upon a child or for the sexual abuse of a minor in any degree, evidence of prior acts of the defendant toward the same or another child victim is admissible to show the defendant's disposition to commit the offense.

This does not substantially change the proposed rule; it makes application of the rule more explicit.

In considering this amendment, Section 15 of Article IV of the Alaska Constitution should be noted. That section empowers the Alaska Supreme Court to promulgate rules of procedure. Any changes of those rules require a super-majority of two-thirds of the legislature. Further the desirability of making such a change must be evident and the bill must specifically state that the legislature intends to alter the rule. Leege v. Martin, 379 P.2d 447 (Alaska 1963).

Thank you for considering these comments. Please let me know if I can provide further input or if any of the suggestions herein require amplification.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

HARRY L. DAVIS
DISTRICT ATTORNEY

By: *Gayle L. Garrigues*
Gayle L. Garrigues
Assistant District Attorney

GLG/tmh

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION/FIRST JUDICIAL DISTRICT

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February 11, 1987

Barbara Walker
326 Fourth Street, Suite B
Juneau, Alaska 99801

Re: Impact of FY 88 budget on sexual abuse cases

Dear Barbara:

As a result of your request on Friday, February 6, 1987, I am providing you with information regarding the impact of the proposed FY 88 budget on the prosecution of both physical and sexual abuse of children.

In FY 84 there were 309 cases referred to the district attorney offices across the state which dealt with sexual abuse of children. During that year, the district attorneys declined 37% of the cases submitted for prosecution. There was a dramatic increase in the number of cases in FY 85 with 462 cases being submitted for prosecution and 40% of those cases being declined. In FY 86, 356 cases were submitted for prosecution with 43% of the cases being declined. This figure compares with a 30% rate of decline of all felony cases being submitted to the Criminal Division of the Department of Law.

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It is my belief that the higher percentage of declination in sexual assault cases is a direct result of the availability of staff to deal with these cases. Child sexual assault cases are very labor intensive. In FY 84 we had the resources to spend time with children to prepare them for the impact of the criminal justice system on their lives after they had already been victimized. For example, in FY 84 one attorney in the Juneau District Attorney's Office was assigned responsibility for all child sexual abuse cases; I was the assigned attorney to deal with child sexual abuse cases and had sufficient time to be involved in the initial interview with the child. Because of the impact of declining oil revenues on this office, it is impossible to maintain this specialized skill. In the court building here in Juneau we had established a child interview room where the police or social worker's initial interview with the child was conducted with me being present. This limited the number of times the child had to be interviewed regarding the sexual assault. This is no longer the case. As a result of the decline in resources, it became necessary to do away with the child interview room and to no longer be involved in the initial interview with the child. This is a result of both the declining resources in the district attorney's office and with the police officers investigating these cases.

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What I attempted to do, after I could no longer become involved in the initial interview, was to conduct two meetings with the child. The first meeting was simply an introductory meeting where I would talk with the child and we would not discuss the elements of the sexual assault. During the next couple of days a grand jury would be set up and before the grand jury was to hear the case, I would spend another hour talking with the child, going over what was going to happen during the grand jury, a view of the grand jury room and going over what the child's testimony would be. Unfortunately, with the decline in resources, the time available to even do this two-step meeting process has been for the most part eliminated.

To illustrate the effect of the FY 88 budget on the Criminal Division, I should first point to the amount of proposed funding for this division. In the governor's budget for FY 88 there is 7.7 million dollars allocated to the Criminal Division of the Department of Law. This compares to 9.35 million dollars which is presently allocated for the Office of Public Advocacy and the Public Defender Agency. In other words, CPA and Public Defender have approximately 20% more money for the defense of criminal cases than the state has for the prosecution of those cases. This obviously does not include any private money spent

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for the defense of criminal cases. Two years ago, approximately 50% of all child sexual abuse cases were handled by private attorneys. This is probably the first time in history that the defense can far outspend the prosecution in bringing a case to trial. It must not be forgotten that the state has the burden of proving beyond a reasonable doubt that an offense occurred and this generally means that the majority of the cost of the trial will be borne by the state. On an average, my estimate would be five witnesses are called by the state for every two or three called by the defense in a child sexual abuse case. The defense can rely upon any perceived weakness in the state's case and choose to call no witnesses at all. Obviously the increased funding for counsel at public expense and the ability of people who can afford attorneys to defend cases will negatively impact the ability of the state to prosecute all felony cases, including child physical and sexual abuse cases.

As I indicated above, the Criminal Division's proposed budget for FY 88 is 7.7 million dollars. This compares to the FY 87 budget when the state was funded at 11.7 million dollars and the FY 86 budget where the Criminal Division received even more. Sixty-six positions are being eliminated from the Criminal Division. The Criminal Division has operated with 20 of these

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positions unfilled for several months, so there will be a lay-off, come the first of July, of 46 Department of Law employees. This will include the elimination of almost all victim-witness aid that we now provide. The paralegals who will be left with the department will have to spend all of their time on litigation support and will not be able to deal with lessening the impact of the criminal justice system on victims and witnesses. Although it is a policy of the Criminal Division not to divert any sex offenders, the Pretrial Diversion Program is totally eliminated. The prosecution of child abuse cases in Valdez, Sitka, Dillingham and Barrow will obviously be impacted by the closing of offices in those locations.

Child sexual abuse cases have been on the increase in Juneau with 20 cases being referred in FY 84, 28 in FY 85 and 31 in FY 86. Because of the closure of the Sitka District Attorney's Office, it is necessary to use an attorney from the Juneau DA's Office to cover that community. With the legislature creating a superior court judgeship in Wrangell and Petersburg, it is necessary for the Juneau District Attorney's Office to have an attorney cover those communities as well. Because this obviously decreases the amount of time a Juneau attorney can spend on Juneau cases, this negatively impacts all criminal cases

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in Juneau, especially child abuse cases, which are especially labor intensive.

Another cause for the increased time involved in child sexual abuse cases and the increasing rate of district attorney offices declining these cases is a result of procedural changes in the law made by the court of appeals. The first major setback dealt to the state by the court of appeals in the prosecution of child sexual assault cases came in Covington v. State, 503 P.2d 436 (Alaska App. 1985). The facts in Covington are set out by the court of appeals as follows:

Covington's victim was his natural daughter, D.C.O.

She testified at trial that Covington began sexually abusing her when she was 9 or 10 years old. D.C.O. was 18 years old at the time of trial. D.C.O. testified that Covington slept with her, touched her breasts and penetrated her vagina with his finger. After D.C.O.'s death in November 1977 when D.C.O. was 13-years-old, Covington told her that she reminded him of her mother and had D.C.O. sleep with him in bed.

Shortly before D.C.O.'s sixteenth birthday, Covington began having sexual intercourse with her. D.C.O. testified that she had sexual intercourse with Covington "practically every night," until she moved out in March 1983. Covington allegedly told her that he did not want her to "grow up naive like [her] mother." C.C., D.C.O.'s brother, the 13-year-old son of the defendant, also corroborated D.C.O. testifying that on Mother's Day 1982 he saw an empty condom package on the night table next to the bed in which

Covington and D.C.O. were sleeping but that he could not see if they had clothes on, nor could he remember if the door of the bedroom had been shut. He also testified that throughout 1982 his father and sister were sleeping in the same bed. Covington testified in his own defense, he conceded that he had slept in the same bed with D.C.O. from August or September 1979 until D.C.O. moved out in March 1983 but contended he had never fondled or penetrated her with his finger or penis. He stated that the bedroom door was always open and that D.C.O. had slept with him at her own request and not because of anything he said or did. He also denied the truth of earlier out-of-court tape recorded statements in which he admitted having had sexual intercourse with D.C.O. after her sixteenth birthday. Covington's testimony also suggested that D.C.O. was motivated to lie in order to obtain custody of her younger sister and prevent Covington from moving out-of-state with her.

In this case the court of appeals reversed Covington's conviction because D.C.O. could not be specific with the jury as to any particular instance and hence it was possible that some members of the jury were thinking of one instance of sexual intercourse and convicting Mr. Covington for that offense, while others were thinking of a different instance of sexual assault and convicting Covington for that instance. In effect, Covington because of the frequency and number of occasions that he penetrated his daughter, was able to convince the court of appeals that a jury could not be unanimous as to any specific act he engaged in and therefore should have his conviction reversed. In Covington the victim was, at the time of trial, over 13 years of age and the

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state may well have been able to focus in on one of the sexual assaults sufficient to convince all twelve people on a jury of that one event. However, this case all but eliminates the prosecution of multiple sexual assaults on young children who cannot as readily distinguish between events occurring on consecutive nights when they are four or five years of age. The Covington decision rewards the multiple sex offender who offends against younger children. If an offender were to sexually abuse a child on only one occasion, the child could be specific to that event; however, if multiple sexual assaults have occurred, as they do in the majority of cases, young children are unable to distinguish between multiple events.

This was aptly demonstrated only a week ago in Ketchikan when during the middle of a trial the state was forced to dismiss the sexual abuse case against a child who, although testified consistently as to sexual abuses by his father, on cross-examination gave different dates than the state elicited in its direct examination. Children up through third grade often have difficulty in time sequencing and specificity as to dates. A statute similar to AS 11.46.110, Consolidation of Theft Offenses: Pleading and Proof, which allows for a jury to convict

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a person guilty of a crime of theft on multiple theories may solve the Covington problem.

In a case arising out of Juneau, Moor v. State, 709 P.2d 498 (Alaska App. 1985), the court of appeals rejected the long-held belief that incidents of sexual abuse involving other child victims are admissible in sexual assault cases to show "lewd disposition." The Alaska Supreme Court in Burke v. State, 624 P.2d 1240 (Alaska 1980), seemed to agree with the state's position but the court of appeals distinguished Burke in saying that the prior sexual misconduct needed to be with the same victim.

Another blow was dealt to the prosecution of child sexual assault cases by the court of appeals in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The facts in Bolden as recited by the court of appeals are:

Robert Bolden was convicted after a jury trial of three counts of Lewd and Lascivious Acts Towards Children, former AS 11.15.135(a) and of one count of Rape, former AS 11.15.120(a). The victims were Bolden's daughters, R., then aged 13 or 14, and M., then aged 11 or 12. The incidents occurred in December 1973 and through 1979.

Concerning the incident charged in Count I of the indictment, R. testified that Bolden had offered to pay her \$50 to "give him head." R. testified that Bolden forced her to touch his penis after she refused. In addition to this incident, R. testified that Bolden frequently fondled her breasts and that Bolden had touched her vagina on numerous occasions.

R. also testified to other incidents involving Bolden, herself, her sisters, and friends. R. testified that she had seen Bolden fondle her sister K.'s vaginal area. She also testified that Bolden supplied herself and one of her friends with liquor, and that Bolden attempted to molest her friend. R. additionally testified that Bolden had once attempted penile intercourse with her and that he had attempted to bribe her to have sex with him. The state charged Bolden with one incident only with respect to R. - that being the incident when he offered R. the \$50.

Of course, under Covington the state was precluded from charging multiple counts and had to be very specific as to one incident. Returning to the court's description of the case, the court said:

The other three counts of the indictment charged Bolden with incidents involving M. M. testified that Bolden had inserted his fingers into her vagina on four or five occasions. M. also testified that Bolden touched her breasts and forced her to touch his penis.

In addition to the incidents involving her personally, M. testified that she saw Bolden with his hand under the bed covers near R.'s vaginal area. M. also related an incident when she heard a friend, who was spending the night, tell Bolden to "stop it." M. similarly described an incident involving another friend who was also spending the night. In this incident, M.'s friend apparently became intoxicated on liquor that Bolden had supplied and had intercourse with Bolden. The victim was also a minor.

In addition to Bolden's two daughters' testimony, the state presented several other witnesses who testified about uncharged sexual acts. A third daughter, K., reluctantly testified for the state. She testified that Bolden had touched her breasts and vagina. She also indicated that she had seen Bolden touch her sisters and corroborated M.'s account of the incident where Bolden had supplied liquor and had sexual intercourse with M.'s friend. Bolden's daughters' mother (Bolden's ex-wife) testified that she had seen one incident in which Bolden was fondling K.

The state called several other minor victims. One testified that Bolden had laid on top of her, without her consent, and tried to force her legs apart, and that Bolden had bought her liquor. Another testified that Bolden pulled her close to him on the couch and then asked her to take off her robe. Yet another testified that Bolden kissed her without her permission. Finally, the state called a minor who related two separate incidents involving Bolden. First, she testified that Bolden, M., and herself were all in Bolden's bedroom naked. She testified that Bolden performed cunnilingus upon her, digital penetration on her, and forced her to perform fellatio upon him. Second, she testified that Bolden bought her, R., M., and another friend liquor and ordered them to take their underwear off. She testified that Bolden then had intercourse with the other friend while she and Bolden's daughter watched. All of the described incidents occurred when the witnesses were spending the night at Bolden's home when Bolden's wife was away and appeared to have occurred within a three year period.

The trial court admitted the evidence of the acts of sexual misconduct which were not specifically set out in the indictment under Evidence Rule 404(b) which says:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to

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show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Boiden appealed his conviction claiming that the trial court was wrong in allowing in the evidence of his sexual activity except for the very specific incidents charged in the indictment. The state contended that the acts were admissible under Evidence Rule 404(b) to show a common scheme or plan. This is the accepted rule in California. People v. Thomas, 20 Cal. 3rd 457, 143 Cal. Rptr. 215, 573 P.2d 433 (Calif. 1978). The Alaska Court of Appeals found that admissions of the defendant's previous similar sexual acts, with another victim, constituted inadmissible propensity evidence and therefore reversed his conviction.

By far the most troubling case is Brower v. State, ____ P.2d ____, Ct. App. Op. No. 656 (November 28, 1986), because this case changes the rules of evidence as they relate to sexual abuse of minor cases but to no other offense. The court of appeals appears to be holding the state to a different standard, and a higher standard in sexual abuse cases than in any other type of criminal prosecution. The facts as set out by the court of appeals in Brower are:

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John Brower was charged with several counts involving sexual misconduct. The convictions from which Brower appeals involves J.L.

J.L. testified to the grand jury that she was 16 years old at the time of the incidents. J.L. lived with Brower in Barrow.

J.L. testified before the grand jury about several incidents involving Brower. J.L. testified about an incident which occurred when he was watching TV in the living room of Brower's home. J.L. testified that Brower entered the room, approached J.L., and began to rub J.L. on the back and legs. J.L. allegedly told Brower to stop, but Brower continued, unbuckling J.L.'s belt. J.L. became scared and began wrestling with Brower. Brower then purported threw J.L. on the floor. J.L. picked up a metal coffee cup and threatened Brower, who then discontinued his advances. J.L. stated that he received a bruise from the fall. J.L. moved out of Brower's house for three days, then returned. The incident gave rise to Count IX, charging attempted first degree sexual assault, for which the jury convicted Brower of the lesser included offense of attempted second degree sexual assault.

J.L. also testified that Brower approached J.L. on one night as J.L. was going to sleep. Brower allegedly began to rub J.L.'s penis. No further testimony was presented. This incident gave rise to Count XI (second degree sexual assault).

At trial, J.L. testified regarding another incident describing Brower's actions: "he tried to hump on me so I told him no." However, J.L. totally recanted his description of the incident which had given rise to the sexual assault charge. The state successfully impeached J.L. with his grand jury testimony.

It is a longstanding rule in the prosecution of all forms of criminal activity that a witness, including the victim, may be impeached by his or her prior inconsistent evidence. The

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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impeachment evidence is to be considered by the jury as substantive evidence in the trial. The court of appeals recognized this rule in Van Hatten v. State, 666 P.2d 1047, 1050-51 (Alaska App. 1983), but decided in Brower that a new rule should prevail for sexual abuse cases. In Brower the court found that J.L.'s uncorroborated prior sworn testimony before the grand jury was an inconsistent statement with his testimony at trial and hence insufficient to convict Brower. The court reached this conclusion despite the evidence of witness tampering by Brower in sending J.L. a note prior to trial attempting to influence J.L.'s testimony.

The combination of budgetary cuts and changes in the procedural law by the court of appeals over the last three years has resulted in a decline in the number of child sexual abuse cases accepted for prosecution by the district attorney's offices across the state and it can be expected that the reduced budget

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of the Criminal Division of the Department of Law will substantially impair the state's ability to bring child abusers to justice.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____

Richard Svobodny
District Attorney



STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS

DEPARTMENT Health and Social Services	DIVISION Family and Youth Services	BILL NUMBER HB 237	SPONSOR Ulmer, et al.
DEPARTMENT POSITION Support concept			
PREPARED BY Yvonne M. Chase, Director <i>JMC</i>	DATE 4/22/87	COMMISSIONER'S SIGNATURE <i>Walter H. Munson</i>	DATE 4/22/87

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Department of Law	CONSTITUENT GROUP(S) AFFECTED BY BILL Victims of child abuse Offenders
ORGANIZATIONAL SUPPORT FOR BILL	ORGANIZATIONAL OPPOSITION TO BILL

FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

This bill is intended to return the interpretation of affected sections to what it was before recent appeals cases resulted in more narrow applications of those sections.

ANALYSIS OF BILL/PROGRAM EFFECTS

In general, this bill would make successful criminal prosecution in certain child abuse cases easier to achieve. This would be accomplished by: 1) changing the mental state required for conviction in certain cases of second degree murder and first degree assault to "knowingly" rather than "intentionally" causing the person's death or serious injury under circumstances of "extreme indifference" to human life, 2) by including within the definition of assault in the first degree a "pattern of practice" of abuse of a child under age 16 which causes serious physical injury to the child; 3) by establishing the crime of repeated sexual abuse of a minor in the first, second and third degrees based on a "pattern or practice" of sexual abuse; 4) by allowing conviction for repeated sexual abuse of a minor or assault in the first degree based on a unanimous agreement among jurors that three or more incidents of a prohibited abusive act occurred, but not requiring unanimous agreement on the three incidents which establish the pattern or practice; and 4) by allowing conviction based on a prior statement by a witness which may be inconsistent with present statements (allowing statements, such as those of child victims, later recanted under pressure to serve as the basis for conviction). This bill would address problems encountered as a result of recent criminal appeals decisions and would not have direct programmatic impact on the Department.

AMENDMENTS PROPOSED

(1) Proposed change: Sections 1 (a)(4) and (3)(a)(4) from "age 16" to age 18.

Rationale: The age in this section should be consistent with the age of majority in the children's statutes rather than with the age of consent for sexual activity because physical abuse does not involve the concept of consent.

Amendments Proposed continued:

(2) Proposed change: Section (1)(a)(4) and (3)(a)(4) from "pattern or practice of abuse" to pattern or practice of abuse or neglect.

Rationale: More children die of neglect than abuse. Situations of neglect which manifest extreme indifference for the welfare of a child and are habitual are just as lethal for the child as abusive behavior and affect more children.

(3) Proposed change: Sections 2 and 4 from "bodily impact, restraint, or confinement" to bodily impact, restraint, confinement, administration of lethal chemicals or drugs, exposure to conditions which could result in death or injury due to hypothermia, severe burns or suffocation.

Rationale: The current definition is too narrow and possibly would exclude many common forms of abuse that lead to serious injury and death.

STATE OF ALASKA



REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

April 27, 1987

Mr. Jeffrey Feldman
Gilmore & Feldman
Attorneys at Law
310 K Street, Suite 308
Anchorage, AK 99501-2095

Dear Mr. Feldman:

Thank you for your letter expressing your opinion on House Bill 237.

You raised several objections to the bill: that the present criminal code adequately protects children from physical and sexual abuse; that the bill emphasizes punishment rather than rehabilitation of persons who engage in a pattern or practice of child abuse or child sexual abuse; that it raises the possibility of prosecutors unfairly charging offenders with multiple offenses; and that criminal convictions should not be allowed based on prior inconsistent statements.

After conversations with police officers, troopers, social workers, guardians ad litem, prosecutors, and parents, I am convinced that the current law does not provide adequate means of prosecuting persons who abuse children. The difficulty children often have in remembering specific dates and times in the past makes it hard to prove abuse that has occurred many times over a long period of time. A recent opinion of the Alaska Court of Appeals, Covington v. State, 703 P.2d 436, opin. on reh. 711 P.2d 1183 (Alaska App. 1985), is an example of this difficulty. The court in Covington required that the jury unanimously agree on specific incidents before returning a verdict of guilty, which makes it more difficult to convict an individual who has engaged in multiple abuse of the victim. Under the Court of Appeals' interpretation of the unanimous jury requirement, the younger the victim and the more frequently the victim is abused, the

more difficult it is to obtain a conviction. Although the conviction of the defendant was ultimately upheld in the opinion on rehearing, similar cases of frequent sexual abuse may not result in convictions in the future. By making it an offense to engage in a pattern or practice of abuse, it would not be necessary for the young witness to recall the exact time and date of each individual assault or to distinguish among individual incidents in a long pattern of abuse. The jury can still decide unanimously that the defendant engaged in the unlawful conduct, the pattern of abuse.

The bill does provide stiff penalties for persons convicted of a pattern or practice of abuse, and for good reason. Persons who repeatedly abuse children physically or sexually are especially culpable because they are often in a position of special trust -- either a family member or good friend. Not only does the victim suffer the injury and pain from the assaults, but also must endure the fear, betrayal, and guilt so often connected with these cases. Further, I cannot agree that many of these offenders should be treated rather than penalized. Experts in the area of treatment tell me that child sexual abusers are extremely difficult to treat, and that they resist treatment unless ordered to do so by a court as a result of prosecution and conviction. I certainly agree that other steps must be taken to break the cycle of child victimization. However, the conviction of offenders is an important part of the process; their punishment and treatment are important for everyone: for the offenders, for their victims, and also for society as a whole.

In regard to your fear of unfair, multiple charges brought against offenders, it is true that Section 8 allows a person to be charged both with a pattern or practice of conduct and with separate incidents during the time of the alleged pattern or practice. This is a part of the bill which may need refinement, and I welcome your constructive suggestions. But, as you know, prosecution for criminal acts is often based on multiple counts and alternate theories; sentencing is based on one of the theories if there are convictions on more than one.

Finally, you state that convictions should not be based on unsworn, uncorroborated statements. I believe that only rarely would a case go to trial where the only evidence of child sexual abuse or assault is an unsworn, uncorroborated statement. However, in the rare case where that evidence is sufficiently persuasive, it ought to be left to the trier of fact to decide if proof beyond a reasonable doubt has been

Mr. Jeffrey Feldman

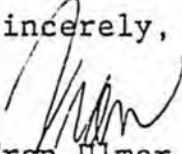
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presented. Prior inconsistent statements are admissible now; the question raised by Brower v. State is whether they can be sufficient to convict. That sufficiency should be determined by the jury or trial judge in each individual case, not by the Court of Appeals as a matter of general law.

The tragedy of child abuse is of great concern to me and to other Alaskans. House Bill 237 was introduced to help stop the cycle of abuse. I am not persuaded by your letter that it is either "unnecessary" or "unfair", and I hope that, upon reflection, you may be willing to support this legislation.

Sincerely,



Fran Ulmer
Representative

TESTIMONY OF DR. SMITH
LANGDON CLINIC
JUDICIARY COMMITTEE
JANUARY 26, 1988

I testified last week just with some facts and figures with respect to sexual offenders and what you can expect in terms of past sexual offenses when there was a certificate of total confidentiality. And then I had to leave the proceedings and I understand that there has been a question with respect to the issue of treatment and how treatment might be affected by something like consecutive sentencing. So I wanted to be available to this committee for that, also to any questions you might have in more depth or detail with respect to the nature of the sexual offender.

So I think that maybe to provide a stimulus for that, if I could just speak to the issue of how the sexual offender presents themselves. It's always a question of whether it's a difference between someone who would be "a common criminal" in the criminal justice system, and a sexual offender. In some cases, obviously, none at all, in terms of appearance or method of operation, but in some other cases there are very, very wide differences. We've seen that overall in the facility at Highland Mountain where our predominant treatment program, that is the largest number of offenders is located in the state. The complexion of that institution has changed in the five years that we moved from a treatment base of 20 to a treatment base of 90, because of the fact that the predominant sexual offender in the system is sexual assault of a minor charge, a pedophile by diagnosis, as opposed to rapists. Rapists get longer sentences and are either in more maximum security institutions here in Alaska or else in the FBP, Federal Bureau of Prisons.

But, in addition to that, the method of operation, the method of presentation of someone who has been generally convicted of a child sexual assault is such that they will seem very much like you and me, from the perspective that they will hold the same values in terms of the Protestant work ethic. They will work very hard in the institution; they work very hard, in fact, out of the institution. They don't have an itinerant history, either in relationships or in vocational, in terms of their job history, as you often find with a criminal background where they move geographically every one or two years, they engage in short-term relationships, they are unable to hold down a job. The sexual abuser that we see is someone who establishes himself in a job, establishes himself in the community, establishes himself, often, in a family; who, in fact, uses his ability to work his way into those situations, those groupings, for their own reasons. So, in a way, he has the same value structure as you or I, but it's for the wrong reasons. His reasons have to do with gaining access, first of all gaining trust, gaining the trust of his family or of the neighborhood or

of the community and, second of all, using that trust for his own purposes which have to do with an underlying deviant sexual arousal. I don't have to but allude to the kind of cases that get a lot of notice in certain geographic areas in the state, the man of the year, in a particular state. We have physicians, we have psychologists, we have ministers, we have police officers. They cut across a wide swath of vocational and job strata or social strata, in terms of who it is who is charged and ultimately convicted and comes through the program. That's one major difference that we do see is that on the surface you can't necessarily tell.

Certainly the other point I was trying to make was that in terms of personality profiles, you also can't necessarily tell. What is uncontrovertable evidence for any sexual abuser is their past history of sexual abuse and behavior. That, and really nothing else.

The only other thing I might add with respect to sexual abuse is the difference in the impact of the crime. If someone enters your home and steals from your property, takes property from you, we all feel a sense of intrusion when that has happened. There's a sense of a personal investment in our objects and so there's a sense of intrusion in having someone come into our castle, so to speak, in your home. But that is external to us physically. We can get over that by replacing those articles, by buying into a sophisticated security system or just changing the locks. When your body's invaded, as occurs in a sexual abuse case, you can't change the body that you live in. The impact on the victim is so much different that that's where the crime really does become something that is qualitatively quite different on the impact on those that are the victims of it.

I think at that point, I'll stop, with respect to that, and ask if there's any questions the committee might have about the characteristics of the sexual offender.

Ulmer: Thank you, Dr. Smith. Are there any questions? Representative Barnes.

Barnes: Thank you, Madam Chairman. I'm not sure that I heard you correctly so I'd like to have you repeat it, if you would, please. The population that you have at Highland Mountain, would you state again exactly what that's made up of? Did I understand you to say that those that have committed sexual abuse are more likely to be in a more long-term prison than the ones that are at Highland Mountain, and those that have gotten lesser sentences are the ones that have abused children?

Smith: Thank you. That needs clarification. What I was saying there was that generally with an offense that involves rape, that there's the use of a weapon and/or use of enough force

where the sentencing reflects that. The longer the sentence, the higher the security level within the Department of Corrections, and therefore, the higher the security level, the more that they're going to be incarcerated in a maximum security setting. Highland Mountain is a minimum to moderate security institution; therefore, the prisoners that we get are prisoners that are the end of their sentences who are a much lower risk on that matrix.

The other part of that is that the complexion of the sexual offender in the state is that we have more sexual abusers of children than we do rapists, in terms of relative numbers, even though, statistically, we're in the top five in the country for both rape and sexual abuse of minors.

So it's two-fold. It's the complexion issue in terms of who is, in fact, in the system, and then it's also, to a lesser extent, the fact that a man is not going to be long-term, is not going to be housed, if he has an extremely long sentence. But, with the presumptive eight year sentence, we certainly have a majority, at this point I think, of the offenders in the system have the presumptive eight.

Ulmer: Any other questions for Dr. Smith? Thank you very much for joining us. We appreciate it. Representative Taylor.

Taylor: Dr. Smith, do you have any figures that would give us some idea of recidivism rates, rehabilitative effects of the program that you're running?

Smith: Yes, I do. They're preliminary. First of all, you need to have about five years worth of treatment program in order to have recidivism statistics that are valid, for the very fact that again, there's a difference between rapists and child molesters in that rapists will generally re-offend, if he's going to, in the first year post-incarceration; whereas, a child molester will re-offend up to five years, post-incarceration. So he's much slower in his method of operation. So you need to have that kind of data. In addition, you simply need to have people that have cycled out of the system. So having said that, we have the three-and-one-half-year recidivism rate, to date, which shows that for the people that complete the program, not one of them has re-offended to date. I'm quoting only sexual re-offenses, actually, for the people that have concluded the program. Out of that total number that have gone through our program since September 1983, we've had 231 people. Out of that 231, 23 have successfully completed the incarcerated component, meaning they have gone through the complete two years and they are now in the follow-up after-care setting. That comprises 10%. In addition to that, there's also another 76 who have been released who were still in the program, so we consider them to be a group that was continuing to work. So, in other words, 43% of the men who have come to the program continue with us in after-care follow-up, and 57% of the men who come to the program drop out. They fail or

they're asked to leave, for one reason or another, which may sound high but across the nation, it's relatively low compared to other programs of equal rigor or intensity. So you have to break it down into three categories to answer that question of recidivism.

In the first category, Group A, which is the people that completed, we have had two re-offenses which were alcohol-related probation violations, but no sexual re-offenses. So that's a statistic of either zero or nine percent of the total, depending on whether you include the two alcohol related offenses or not. Out of that group of 57% that have dropped out, they have an overall recidivism rate of 25%. In relative terms, we're talking about, at this point, 9% versus 25%. But, again, out of that Group C, of the 132 that dropped out so far, only 64 have actually been released. So you see you have 68 men still in jail who we can't necessarily say anything about. Because they're still incarcerated, we don't have any idea what their overall recidivism is going to be. So it's a preliminary kind of recidivism statistic. All we can say is that at this point for the men that complete the program, none of them are re-offending. So that's a very heartening statistic and one that we hope will continue. But it will take another year-and-one-half before we'll have the kind of statistic where I sit and answer that question completely.

Ulmer: Thank you very much. Any other questions? Thank you for joining us.

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October 20, 1987

Representative Fran Ulmer
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Re: House Bill 237

Dear Representative Ulmer,

Thank you for giving me the opportunity to meet with you last Wednesday on House Bill 237. Following is the specific information which I offered to provide to assist you in your work on the bill. I have also noted some of the suggested drafting changes in the first few sections of the bill. I will provide a copy of these to the House Judiciary Committee so that they are aware of modifications in my position on these provisions.

A. Second Degree Murder -- Extreme indifference to the welfare of a child under 16.

As we discussed, my concerns over this section would be alleviated by some drafting changes. I understand the desire for a statute which involves a "pattern or practice of abuse," particularly since it solves perceived evidentiary problems regarding past abuse of that child victim. First, I suggest changing the circumstances to those manifesting an "extreme indifference to the health and physical welfare" of a child under 16, in order to narrow the focus to physical rather than psychological or mental abuse.

Second, actions exhibiting this extreme indifference must directly cause the death to avoid covering accidental deaths. The phrase "results in" should be deleted and replaced by "directly causes."

Finally, my concerns regarding the broad application of this section would be quelled by a much more narrow and specific definition of abuse in Sections 2 and 4. Abuse is currently defined in the proposed legislation as "bodily impact, restraint or confinement." This broad definition could include many normal disciplinary actions taken by parents, including spanking and

"time-out" in the child's bedroom. I suggest the following definition for abuse:

- (c) In this section, "abuse is defined as:
- (1) striking a child with a body part or instrument in a manner likely to cause serious physical injury to the child; or
 - (2) confining a child in a small enclosed area or container for a prolonged period of time without food or water in a manner likely to cause serious physical injury to the child; or
 - (3) restraining a child by use of physical restraints in a manner which significantly limits the child's freedom of movement in a manner likely to cause serious physical injury to the child.

These changes to Sections 1 and 2 should eliminate the overbroad application of a second degree murder statute to those persons using reasonable disciplinary techniques which result in the accidental death of a child.

B. Assault in the First Degree -- Extreme indifference to the welfare of a child.

The sections regarding Assault in the First Degree closely track the second degree murder sections, discussed above. Similar changes should be made in these sections. Thus, Section (a)(4) of AS 11.41.200 should provide "the person engages in a pattern or practice of abuse of a child under the age 16 that directly causes serious physical injury to the child." Section 4 should define abuse in a manner identical to my suggested revisions in Section 2.

C. Repeated Sexual Abuse of a Minor (RSAM)

I understand your purpose for suggesting a repeated sexual abuse of a minor statute, particularly in that evidentiary issues regarding prior bad acts of a perpetrator against the victim would automatically come in to prove "pattern and practice." If such a statute is adopted for these evidentiary reasons, I have

three major areas of concern:

1. Exhanced Presumptive Sentence (Removed by HESS)

First, the presumptive term for this offense should not exceed the already severe presumptive for those convicted under the current child sexual assault statutes. Virtually all family sexual abuse cases involve repeated abuse and prosecutors would have unbridled power to determine a higher sentence simply by selecting this charge. As we discussed the other day, although there may be some offenders who deserve lengthy periods of incarceration, others who willingly admit their conduct, seek treatment and exhibit remorse and a wish to avoid putting the victim through legal proceedings, may not require a lengthy presumptive term, particularly on a first offense. The HESS committee's removal of an increased presumptive term allays my concern in this area.

2. Unanimous Jury Verdict

My second concern with this portion of the bill relates to unanimous jury verdicts. Your bill would remove the requirement for a unanimous jury verdicts in that the jury need not be unanimous as to any particular incident of sexual abuse. Unanimous jury verdicts are constitutionally required. In State v. James, 698 P.2d 1161, 1165 (Alaska 1985), the Alaska Supreme Court interpreted the unanimity requirement to require unanimity as to the single criminal incident involved. James was applied in Bell v. State, 716 P.2d 1004 (Alaska App. 1986). Evidence at trial showed Bell had assaulted his wife on May 2nd and May 6th. The state was allowed to argue that believing the evidence as to either incident would support the verdict. The jurors were not told that they had to agree unanimously on which assault Bell committed. The Court of Appeals reversed, finding a violation of the unanimous jury requirement.

The fact that a pattern and practice of abuse forms the basis of the crime does not allow circumvention of the constitutional requirement of unanimity. In the federal RICO (racketeering) cases which involve "pattern and practice" language, there is an implicit assumption that all the jurors must agree on the individual acts establishing the criminal pattern. For example, United States v. Brown, 583 F.2d 659, 669 (3rd Cir. 1978); United States v. Peacock, 654 F.2d 339, 348 (5th Cir. 1981); and United States v. Boffa, 688 F.2d 919, 933-34 (3rd Cir. 1982), all refer to "the jury" collectively having found the defendant guilty of the particular acts which established the alleged criminal pattern. Further, in Boffa, the trial court apparently had the jurors specifically indicate which particular acts they agreed upon. 688 F.2d at 924.

United States v. Morse, 785 F.2d 771 (9th Cir. 1986), which you mentioned in your letter last spring, although not directly on point for the present dispute, supports a requirement of unanimity. Morse holds explicitly that jury unanimity is required, citing United States v. Echeverry, another 9th Circuit decision, which interprets unanimity as referring to agreement on the "particular set of facts."

Finally, as we discussed in our meeting last week, nothing in Covington requires a child to name a specific date of a sexual assault. A victim can testify that step-dad assaulted her many times, including in particular one time in the living room, one time in the bedroom and one time in the bathroom. Often children will state that one assault happened before Christmas while the other occurred at Easter time. I am not aware of a single acquittal based upon the victim's inability to describe separate specific incidents. Furthermore, despite the literally dozens of sex abuse cases which have been appealed since Covington, only one has been reversed due to a problem with jury unanimity. This was not a case where a victim could not specify separate incidents of assault. Instead at trial, there was testimony describing several separate assaults, but the jurors received no instruction requiring them to agree unanimously that at least one of the specific alleged acts was proved. Streni v. State, 722 P.2d 226, 229 (Alaska App. 1986).

3. Definition of "Authority Over Child"

The last troublesome portion of the Repeated Sexual Abuse of a Minor provision involves the definition of "having authority over a child." This language is broad and potentially problematic, particularly with respect to a romantic relationship between a young teenager and an exchange student or step-sibling who is three years older and living in the family unit.

As I mentioned, I worked a bit with Maureen Weeks of Senator Halford's office in an attempt to resolve a similar problem in SB 231. The resolution was to require the child to be under the authority of the member of the social unit. AS 11.41.434(a):

[(C) at the time of the offense, is
residing as a member of a social unit
in the same household with the offender
and is under the authority of the offender.]

D. Prior Inconsistent Statements (Deleted by HESS)

This section, which was drafted to combat perceived problems caused by Brower v. State, was deleted by the HESS committee.

Brower held that if the only evidence at trial is a victim's prior inconsistent statement, some corroboration of that out-of-court statement is necessary. As I mentioned the other day, the Court of Appeals recently clarified the type of corroborating evidence it had in mind. In Bodine v. State, ___ P.2d ___, Op. No. 708 (Alaska App., May 29, 1987), the court stated that the specificity with which a young child was able to describe the perpetrator's acts in and of itself provided "intrinsic assurance of the reliability of her statement..." Slip Op. at 8-9. Other types of corroborating evidence were permitted to substantiate a prior inconsistent statement which formulated the only direct evidence of the charge. They involved the mother's lack of cooperation with the authorities when told that her husband would have to go to jail and psychological opinions that the victim was an abused child despite lack of any details as to the type of abuse or by whom she had been abused. There need not be other witnesses to or physical evidence of the abuse to satisfy the corroboration requirement. Thus, the Court of Appeals' adoption of a flexible standard of corroboration to support a prior inconsistent statement should remove many concerns regarding the impact of the Brower decision.

E. Rule 404 Alaska Rules of Evidence

As we discussed the other day, the Alaska Supreme Court and Court of Appeals have in many instances allowed evidence of a defendant's prior abusive conduct to come in at trial, including abuse of the named victim, abuse of other victims in the family and abuse of victims outside of the family who are similarly situated to the named victim. Following are brief summaries of the cases in this area of the law.

1. Evidence of Other Abuse on Named Victim is Ordinarily Admissible.

In Burke v. State, 624 P.2d 1240 (Alaska 1980), the Alaska Supreme Court established the rule that evidence of earlier assaults on the same victim is admissible. The Supreme Court held that it was proper for a victim to testify to the whole history of assault by her step-father, the defendant.

A recent Court of Appeals decision, Patterson v. State, 732 P.2d 1102, 1103 (Alaska App. 1987), explained the justification for the well-established Burke rule: "First, to establish an ongoing relationship between the victim and the accused; and, second, to place an offense in context and to show the background of the offense." In Patterson, the court approved admitting evidence of a prior sexual assault on the named victim even though that assault occurred nearly two years earlier.

The "same victim" rule is also followed in cases charging physical assaults on children. The Court of Appeals in Garrer v. State, 711 P.2d 1191, 1193 (Alaska App. 1986), held that it was proper to admit evidence indicating prior physical abuse by the defendant covering a four month period before the child's death.

2. Evidence of Abuse of Other Victims in the Same Family is Ordinarily Admissible.

In Soper v. State, 731 P.2d 587 (Alaska App. 1987), the Court of Appeals expanded Burke to cover testimony of abuse on other family members. The court in Soper said:

The limited exception for lewd disposition recognized in Burke should be extended to cover the testimony of the complaining witnesses' sisters who were allegedly seduced under similar circumstances at roughly the same age as the complaining witness.

3. Evidence of Abuse Outside the Family Can Be Admissible

Evidence of abuse of other victims not in the same family but in the same class is admissible if the defendant's plan or pattern of sexual misconduct is relevant. Soper appears to authorize admission of evidence concerning sexual assaults of non-family victims so long as the victims are members of a "limited class [having] highly relevant common characteristics." 731 P.2d at 590. For example, in recent trials where the defendant was charged with sexual abuse of a child in a daycare situation, the state successfully argued that Soper authorized admission of evidence concerning sexual abuse on other children in the daycare.

Other cases upholding admission of evidence concerning abuse on non-family victims include Oswald v. State, 715 P.2d 276 (Alaska App. 1986); Moor v. State, 709 P.2d 498 (Alaska App. 1985).

4. Bolden v. State -- Similar in concept to the Rape Shield Law

The only time a prior bad act is not admissible in this context is when there is no nexus or connection between the prior act and the charged conduct.

Bolden v. State, 720 P.2d 957 (Alaska App. 1986), illustrates the rule that evidence of sexual abuse of uncharged victims not part of the same class as the victim is ordinarily inadmissible. Bolden was charged with sexually abusing two of his daughters. At trial the state presented testimony by other girls that they

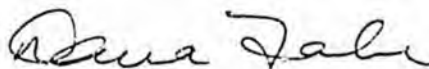
had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

The Bolden rule, which disallows evidence of other sexual assaults where the only purpose for such testimony is to show the defendant's propensity to commit such acts, is comparable to the rape shield law protection for victims. That is, the fact that a victim may have engaged in a certain type of sexual practice on one occasion with one partner is not admissible to prove the victim consented to such practice on another occasion with the defendant.

In summary, in all situations in which prior bad acts by the defendant are relevant and probative of the issues at hand, the Court of Appeals and Supreme Court have upheld their admissibility. This body of case law, when combined with the new evidentiary freedom in your proposals of pattern and practice offenses for murder in the second degree, assault in the first degree, and repeated sexual abuse of a minor, will hopefully alleviate your concerns that the jury is not hearing all evidence which is relevant to the charge.

Again, I appreciate your willingness to discuss various provisions of this bill with me, and I hope that this letter provides you with additional information which may be helpful to you. I will provide a copy to House Judiciary so that they are aware of my modified position on the first sections of your bill. I look forward to working with you in the future.

Very truly yours,



Dana Fabe
Public Defender

DF:cs

cc: ✓ Representative John Sund
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The Propensity to Misunderstand the Character of Specific Acts Evidence

Richard B. Kuhns*

Proof that a criminal defendant has committed specific bad acts other than those included in a current charge may be relevant to prove the defendant's guilt. For example, if the factfinder knows that an assault defendant has committed numerous assaults in the past, the factfinder could reasonably conclude that it is more likely that the defendant behaved violently on the occasion in question than it would be if nothing were known about the defendant's past behavior.¹

There are, however, important factors that militate against the use of such evidence. First, in at least some cases, the probative value of the inference from conduct on other occasions to conduct on the occasion in question may be relatively weak. Evidence that a defendant has been violent once or twice in the past, for example, shows that the defendant has the capacity for violence, but such evidence is not very probative of the issue whether the defendant was in fact violent on a particular occasion.² Second, particularly if there is a dispute about whether the defendant committed the other acts, introduction of evidence concerning those acts could be time-consuming and distract the factfinder from the central issues in the case. Finally, and most importantly, other acts evidence may have a prejudicial impact on the factfinder. For example, if the

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The author wishes to express appreciation to his colleague, Ronald J. Allen, for helpful comments on earlier drafts of this Article and particularly for insightful observations about the nature of the inferential process of proof, discussed in part I *infra*. The author is also grateful for research assistance provided by Arthur Zulick, a former law student at Cleveland State University and now a member of the Pennsylvania Bar; Robert Wilson, a third year law student at the University of Iowa; and Jeffrey Borns, a second year law student at the University of Iowa. Although the extent of their work is not directly reflected in this Article, their thoughtful case analyses provided the author with invaluable background information.

1. See FED. R. EVID. 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

2. This assertion, like most statements about the probative value of any particular item of evidence, is primarily intuitive. The question whether evidence is relevant or probative of the fact it is offered to prove must be answered, in the absence of empirical data, on the basis of one's common experience and judgment about the relationship among various phenomena in the real world. See C. MCCORMICK, LAW OF EVIDENCE § 185, at 498 (2d ed. E. Cleary 1972).

prosecution were permitted to prove that an assault defendant had committed violent acts in the past, the factfinder might view the defendant as deserving of punishment and be willing to convict even if there were a reasonable doubt about the defendant's guilt.³ Because of these concerns,⁴ courts uniformly prohibit the use of specific acts to prove a person's character for the purpose of showing action in conformity with character.⁵

3. Prejudice can operate in a positive as well as a negative manner. For example, if a criminal defendant were permitted to prove that he had engaged in a number of humanitarian acts, the factfinder might be inclined to acquit him despite overwhelming evidence of guilt. As a practical matter, however, the problem of prejudice with respect to specific acts evidence most often arises in the context of an offer by the prosecutor to prove bad acts committed by a defendant. Thus, the discussion of prejudice in this Article is couched in terms of prejudice against a criminal defendant.

Whether or to what extent an item of evidence may be prejudicial, like the question whether or to what extent an item of evidence is probative of a particular proposition, see note 2 *supra*, is one that must be answered intuitively on the basis of one's common sense and judgment.

For excellent theoretical discussions of the concept of prejudice, see R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 147-53 (1977); Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977).

4. There are at least three additional concerns: a fear that the party against whom the evidence is offered will be surprised by the evidence and unprepared to rebut it; a sense that proof of prior acts which resulted in convictions would be inconsistent with the notion that the defendant had "paid his debt to society," see R. LEMPERT & S. SALTZBURG, *supra* note 3, at 213; and a fear that the jury may overestimate the probative value of the evidence, see Lempert, *Modeling Relevance*, MICH. L. REV. 1021, 1027-28 (1977). See also P. LEMPERT & S. SALTZBURG, *supra* note 3, at 211-12.

The surprise problem can be dealt with simply by granting a continuance, see Advisory Committee's Note, FED. R. EVID. 403, 56 F.R.D. 183, 218 (1972), and the notion that a convicted defendant has paid his debt to society, even if it were generally accepted as the basis for an exclusionary rule, has no bearing on the propriety of using specific acts that have not resulted in convictions. Thus, neither of these concerns is addressed in this Article.

The fear that the factfinder may overestimate the probative value of specific acts evidence is also not addressed for two reasons. First, it is at best speculative and at worst incongruous to assume that the judge, as a reasonable person, would find an item of evidence to have only a certain degree of probative value and, at the same time, to assume that jurors, as supposedly reasonable people, would not reach roughly the same conclusion. Second, even if one concedes that a judge, by virtue of his training and experience, may in some instances have a more accurate sense of probative value than the jury, the potential overestimation problem with respect to specific acts evidence is not likely to exist independently of the concerns noted in the text of this Article. The problem is likely to seem most acute when the judge perceives the evidence to be of low probative value. Moreover, admitting the evidence and permitting the opposing party, in closing argument or perhaps by introduction of evidence, to expose the low probative value could be time-consuming and distract the jury from the central issues of the case. Finally, although the concepts of overestimation and prejudice are theoretically distinct, there may be a direct relationship between them with respect to specific acts evidence. For example, specific bad acts offered against a criminal defendant are prejudicial because they show he is a bad person; and because the defendant is viewed as a bad person, the jury may overestimate the probability that he in fact committed the crime with which he is charged.

5. See C. MCCORMICK, *supra* note 2, § 188, at 444-45. See generally Stone, *The Rule*

Although the various formulations of the specific acts prohibition do not attempt to define the term "character," it appears to have two commonly understood attributes. First, "character" probably includes only those qualities of personality that have some moral overtone, which connotes something good or bad about a person. The term frequently has this meaning as a matter of common usage,⁶ and ascribing such a meaning to it for the purposes of the specific acts prohibition is consistent with the concern over the potentially prejudicial impact of specific acts evidence.⁷ Pursuant to this understanding of character, morally neutral acts could never fall within the specific acts prohibition because they would not be relevant to prove character.

The second attribute of character is suggested by the fact that the prohibition against specific acts evidence to prove character is limited to showing action in conformity with character.⁸ This limitation implies a belief that character has an impact on how one behaves.⁹ Or, to put it

of Exclusion of Similar Fact Evidence: America, 51 HARV. L. REV. 988 (1938).

This prohibition applies only to the use of specific acts to prove facts that are relevant to the substantive issues in the case. Many jurisdictions permit inquiry on cross-examination about specific acts relevant to a witness' character for trustworthiness for the purpose of impeaching the credibility of the witness. See FED. R. EVID. 608(b); C. MCCORMICK, *supra* note 2, § 42, at 82-84; cf. FED. R. EVID. 609 (use of prior convictions to impeach credibility of a witness). This Article does not deal with the use of specific acts evidence for impeachment purposes.

6. See C. MCCORMICK, *supra* note 2, § 195, at 462 ("character is a generalized description . . . of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness"); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 225 (College ed. 1969) (defining character, *inter alia*, as a "moral or ethical quality" and as "qualities of honesty, courage, or the like").

7. The notion that character connotes a moral quality is buttressed by the fact that evidentiary rules traditionally make a distinction between inadmissible specific acts evidence offered to prove "character" and potentially admissible specific acts evidence offered to prove "habit." See C. MCCORMICK, *supra* note 2, § 195, at 462-64. Compare FED. R. EVID. 404(b) (precluding specific acts to prove character to show action in conformity with character) with FED. R. EVID. 406 (acknowledging absence of specific limitations on use of habit evidence to show action in conformity with habit). The feature most commonly attributed to habit for the purpose of distinguishing character and habit is that a habit is a relatively more routine, regularized response to a particular situation. See C. MCCORMICK, *supra* note 2, § 195, at 462. Therefore, habit evidence is more probative than character evidence. A second feature that tends to distinguish habit evidence from character evidence, however, is the often morally neutral and, therefore, nonprejudicial nature of the former. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 242; C. MCCORMICK, *supra* note 2, § 195, at 462-63.

8. The prohibition against specific acts evidence to prove character is not applicable when the person's character is itself an essential element of a claim or defense. See FED. R. EVID. 405(b); C. MCCORMICK, *supra* note 2, § 187, at 443-44. On the question whether specific acts can be used to prove character when character is not an essential element and when the character evidence is used for some purpose other than showing action in conformity with character, see Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces*, 48 U. CIN. L. REV. 1, 6-11 (1979).

9. The notion that character has an impact on how one behaves is further manifested in the rules regulating the use of opinion or reputation evidence to prove

somewhat differently, proof of a person's character trait is proof that a person has a propensity to behave in a particular manner. Indeed, the terms "character" and "propensity" are often used interchangeably, and the prohibition against specific acts evidence is frequently described as a prohibition against the use of specific acts for propensity purposes.¹⁰

Apparently content with this general notion of what constitutes character, courts and commentators have been primarily concerned with articulating how the prohibition against specific acts evidence should be implemented.¹¹ Some jurisdictions follow the so-called "exclusionary rule," which prohibits the proof of specific acts unless they are relevant for some specifically designated noncharacter purpose, such as to prove motive, identity, or intent.¹² If a court in an exclusionary rule jurisdiction is persuaded that the evidence is relevant for one or more of the permissible purposes, it may admit the evidence without giving careful consideration to the questions of probative value and prejudice.¹³

Other jurisdictions follow the "inclusionary rule," which permits the use of specific acts evidence for all purposes *except* to prove character to show action in conformity with character.¹⁴ This latter formulation of the rule, it is argued, is preferable for two reasons. First, it precisely states the underlying basis for excluding some specific acts evidence.¹⁵ Second, the absence of a limited list of permissible purposes should contribute to a more rational analysis of specific acts evidence. Rather than ruling on questions of admissibility in a mechanical, pigeonholing fashion, courts are likely to deal directly with the problems of probative value and prejudice in those instances in which the narrow rule of absolute exclusion is not applicable.¹⁶

character for the purpose of showing action in conformity with character. See *Michelson v. United States*, 335 U.S. 469, 475 (1948); FED. R. EVID. 404(a), 405(a). See generally Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

10. See, e.g., *United States v. Beechum*, 582 F.2d 898, 909 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); R. LEMPERS & S. SALTZBURG, *supra* note 3, at 210, 220, 226; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1004 (1938).

It is well recognized that specific acts evidence offered to prove a "habit" to show action in conformity with the habit does not fall within the "propensity evidence" prohibition, even though the use of such evidence concededly requires the factfinder to make a propensity inference. See R. LEMPERS & S. SALTZBURG, *supra* note 3, at 241-43; C. MCCORMICK, *supra* note 2, § 195, at 462-64.

11. See, e.g., *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974); C. MCCORMICK, *supra* note 2, § 190, at 452-54; Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 403-05 (1952). See generally Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

12. See, e.g., *State v. O'Connell*, 275 N.W.2d 157, 202 (Iowa 1979).

13. See C. MCCORMICK, *supra* note 2, § 190, at 453-54.

14. See, e.g., FED. R. EVID. 404(b).

15. See Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 405 (1952).

16. See G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 130 (1978); C.

character trait is proof that a particular manner. Indeed, the two are used interchangeably, and character is frequently described as a propensity for purposes.¹⁰

The notion of what constitutes specific acts evidence should be primarily concerned with the so-called "exclusionary rule" unless they are relevant for purpose, such as to prove an exclusionary rule jurisdiction for one or more of the purposes without giving careful value and prejudice.¹⁵

ary rule," which permits the exception to prove character to This latter formulation of reasons. First, it precisely the specific acts evidence.¹⁵ possible purposes should constitute specific acts evidence. Rather than mechanical, pigeonholing the problems of probative which the narrow rule of

ty with character. See Michelson ID. 404(a), 405(a). See generally 24 IOWA L. REV. 498 (1939). 8, 909 (5th Cir. 1978) (en banc), ALTZBURG, *supra* note 3, at 210, Evidence: America, 51 HARV. L.

red to prove a "habit" to show e "propensity evidence" prohibi- requires the factfinder to make a C. *supra* note 3, at 241-43; C.

27, 134 (4th Cir. 1973), cert. 2, § 190, at 452-54; Trautman, ND. L. REV. 385, 403-05 (1952). Evidence: America, 51 HARV.

02 (Iowa 1979). 54.

Conflict of Theory, 5 VAND. L.

OF EVIDENCE 130 (1978); C.

Federal Rule of Evidence 404(b) is a codification of the inclusionary rule, and judicial opinions applying the rule tend to support the claimed benefits of this approach to specific acts evidence. In increasing numbers, federal courts are careful to articulate the precise purpose for which specific acts evidence is relevant and, more importantly, to follow this articulation with an analysis of whether the potentially prejudicial impact of the evidence should nonetheless result in its exclusion.¹⁷

There are, however, some fundamental problems with both traditional approaches to specific acts evidence that transcend the question whether the exclusionary rule or the inclusionary rule is preferable. The thesis of this Article is that neither the concept of propensity nor the concept of character is helpful to an understanding of how courts have ruled or should rule on the admissibility of specific acts evidence. To support this thesis, part I of this Article will demonstrate that no useful purpose can be served by attempting to distinguish admissible from inadmissible specific acts evidence on the ground that the latter involves a "propensity inference."¹⁸ Part II will show that any independent content that might be given to the concept of "character" for the purpose of the specific acts prohibition does not adequately address the concerns that justify the exclusion of some specific acts evidence.

Part III deals with the Federal Rules of Evidence provisions regulating the admissibility of specific acts evidence. The analysis will point out that the drafters of the Federal Rules, by failing to come to grips with the problems discussed in parts I and II of this Article, created a rule that is inconsistent with the basic approach of the Federal Rules to questions of admissibility. More importantly, the analysis will suggest that the Federal Rules of Evidence may have inadvertently expanded the extent to which specific acts evidence is admissible in federal courts. Finally, part IV will offer several alternative ways to restructure the rules dealing with the admissibility of specific acts evidence.

I. PROPENSITY EVIDENCE

To substantiate the proposition that the concept of "propensity inference" does not provide a viable basis for distinguishing between admissible and inadmissible specific acts evidence, the analysis in this part will examine the nature of the inferential process of proof involved

MCCORMICK, *supra* note 2, § 190, at 453; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1006-07 (1938); Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 403-05 (1952).

17. See, e.g., *United States v. Beechum*, 582 F.2d 898, 910-11, 913-18 & nn.18-23 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States v. O'Connor*, 580 F.2d 38, 40-43 (2d Cir. 1978); *United States v. Ring*, 513 F.2d 1001, 1003-09 (6th Cir. 1975).

18. For an articulation of this proposition in a manner that is similar to but more limited than the method of analysis in this Article, see Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 220-36 (1954).

in the use of specific acts evidence. To facilitate this examination, the inferential process is divided into five categories:¹⁹ (1) traditionally prohibited propensity inferences; (2) permissible individualized propensity inferences from a defendant's bad conduct; (3) permissible generalized propensity inferences from a defendant's bad conduct; (4) permissible generalized propensity inferences from a defendant's neutral conduct; and (5) permissible generalized inferences from the conduct of third persons.²⁰ The analysis will show that the inferential process is identical in the first two categories and that the remaining categories present only minor variations of the same basic inferential process.²¹

A. Traditionally Prohibited Propensity Inferences

An initial difficulty in comparing the inferential process involved in the supposedly prohibited use of specific acts for propensity purposes with the inferential processes involved in the legitimate uses of specific acts evidence is that there are relatively few examples of impermissible "propensity evidence." The question whether specific acts evidence is admissible arises most frequently in the context of a prosecutor's offer to prove that a criminal defendant has committed various bad acts. A published opinion addressing the question of admissibility is likely to exist only if the defendant is convicted and appeals on the ground that the evidence was improperly admitted. An appellate court, however, may simply state that the admission of the evidence, if improper, was harmless error.²² Moreover, even an opinion holding that the specific acts should not have been admitted can avoid the question whether the evidence required an impermissible propensity inference. The court may simply explain that regardless of whether the evidence should have been excluded on that ground, the trial judge abused his discretion in admitting marginally probative, extremely prejudicial evidence.²³

Nonetheless, there would probably be a general consensus that the following example illustrates an impermissible propensity inference: The defendant is charged with murdering his wife by stabbing. He admits being present at the time of the fatal incident, but claims that a third

19. The categories have been devised solely to facilitate the analysis. In terms of the nature of the inferential process of proof, each category is substantially similar to the others. See note 21 *infra* and accompanying text.

20. A sixth category, permissible individualized propensity inferences from a defendant's neutral conduct, is discussed briefly in note 32 *infra*.

21. Because each category is so similar to the others, there may be disagreement over whether a particular illustrative example has been properly classified. Such a disagreement, however, would support rather than detract from the central point of the analysis: The nature of the inferential process involved in the use of specific acts evidence is so similar in all cases that it cannot be used as a device to distinguish between admissible and inadmissible specific acts evidence.

22. See *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980).

23. See *United States v. Shavers*, 615 F.2d 266, 270-71 (5th Cir. 1980).

person stabbed his wife. To show that the defendant was the assailant, the prosecutor offers to prove that on several previous occasions the defendant had become involved in fistfights with neighbors.²⁴

The relevance of the fistfight evidence is clearly dependent upon a propensity inference: The fact that the defendant has been violent on previous occasions shows that he—at least in comparison to people who have not been violent—has a propensity for violence, and from this propensity the factfinder is asked to infer that the defendant was violent on the occasion in question. Moreover, all of the factors that justify excluding some specific acts evidence are present.²⁵ If the defendant disputes his involvement in the fistfights, there may be time-consuming and distracting litigation of collateral issues. The factfinder may be more willing to return a guilty verdict after hearing the evidence simply because the defendant appears to be a bad person. Finally, the probative value of several fistfights with neighbors to prove a deadly assault with a knife against one's spouse is not great.²⁶

For the purpose of comparing the fistfight hypothetical with other uses of specific acts evidence, it is important to note three aspects of the inferential process of proof involved in linking the prior assaults to assault on the occasion in question. First, the factfinder is asked to make an "individualized" propensity inference in the sense that the defendant's propensity for violence is not a propensity shared by the populace at large. Rather, it is the defendant's prior violent behavior which shows that he, unlike most other people, tends to be violent.

Second, the relevance of this individualized propensity inference, like the relevance of any other inference from evidentiary facts to proof of ultimate facts at issue in litigation, depends on an assumption about the relationship among various phenomena or events in the real world. Consider, for example, a murder prosecution in which the homicide occurred at 10:00 p.m. in Fresno, California, and the defendant shows that at 8:00 p.m. Pacific Standard Time on the same day he was in Bangor, Maine. The defendant's evidence is relevant to prove that he did not commit the crime because of the assumption, based on common experience, that a person cannot travel from Bangor to Fresno in only two hours. Similarly, if a witness testifies that he saw the defendant stab her husband, that evidentiary fact is relevant to prove the ultimate fact that the defendant indeed did stab her husband because of the assumption that it is more likely that on any given occasion a person is speaking truthfully rather than falsely.²⁷ This assumption about truth-telling is

24. Cf. E. KIMBALL, PROGRAMMED MATERIALS ON PROBLEMS IN EVIDENCE 46-47 (1978) (improper to admit evidence of threats directed against third persons to prove aggressiveness or hottheadness to show improper aggression on occasion in question).

25. See text accompanying notes 2-3 *supra*. See also note 4 *supra*.

26. See note 2 *supra*.

27. People, of course, are not always truthful, careful with their words, or accurate in their perceptions and memories. Indeed, the hearsay rule with its various exceptions, see