ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7484 SENATE JUDICIARY

38

ALASKA ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS
ALASKA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
ALASKA ASSOCIATION OF SCHOOL ADMINISTRATORS

• ALASKA COUNCIL OF S' JOL ADMINISTRATORS •
326 Fourth St., Suite 406, Juneau, AK 99801-1101 (907) 586-9702 FAX (907) 586-5879

POSITION STATEMENT

HOUSE BILL 27

ENTITLED: DRUG & ALCOHOL USE BY MINORS/SCHOOL ZONES

The Alaska Council of School Administrators supports having a drug free zone located around a school site.

The Alaska Association of Secondary School Principals and the Alaska Association of Elementary School Principals are very aware of detrimental affects drugs can have on our students and society and have long been involved in fighting the menace of drug abuse in Alaska. We are also very aware of the fact that drug pushers have often found a lucrative market among students who cannot say "no" to drugs.

On the national level a recent survey by the Coalition for Drug-Free School Zones shows that 23 states now have drug-free school zones on the books, and legislation is pending in several other states.

Both the Alaska Association of Secondary Principals and the Alaska Association of Elementary School Principals passed resolutions at their annual conference supporting the drug-free school zone legislation.

ASSOCIATION OF ALASKA SCHOOL BOARDS
316 West 11th Street, Juneau, Alaska 99801-1510 • Tel. (907) 586-1083 • Fax (907) 586-2995

Serving Alaskan Education

POSITION PAPER
HB 27

IN SUPPORT OF LEGISLATION CREATING A DRUG-FREE SCHOOL ZONE

The Association of Alaska School Boards endorses and supports legislation, such as HB 27, creating a drug free school zone and urges quick passage of such legislation by the Alaska Legislature. At least 23 other states have enacted such legislation with resulting decreases in drug related activity in and around schools.

The Association of Alaska School Boards has a strong commitment to a drug-free school environment in the State of Alaska. However, current Alaska law does not dictate increased penalties associated with possession of drugs on school grounds, or with delivery of, or possession with intent to deliver on school grounds.

AASB also endorses allowing the extent of the zone to be decided by local schools. A flexible boundary zone, decided upon by local schools or a school district, would grant the necessary latitude for districts to determine an effective drug-free school zone and would recognize the differences between Alaska's very small rural villages and larger communities.

2/1/91

NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

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February 26, 1991

To: **Representatives Carney and Lincoln, Co-Chairs**
Members, House HESS Committee

Re:

HB 27: *"An Act relating to the delivery and possession of controlled substances and imitation controlled substances, to misconduct involving controlled substances, imitation controlled substances, and alcohol by minors, and to the provision of information that includes penalties applicable to misconduct involving controlled substances; and requiring installation of signs in the vicinity of schools declaring the areas to be "drug-free" school zones; and providing for an effective date."*

NEA-Alaska strongly supports and encourages your favorable consideration of HB 27.

Public schools through-out our nation, unfortunately, have become focal points for those who would encourage illegal and inappropriate use of drugs and alcohol. The eventual solution to the myriad of attendant problems will happen only when the collective conscience of society is raised to such a level that alcohol and substance abuse is unacceptable behavior.

HB 27 properly increases penalties and, even more importantly, defines a process for raising an awareness of them. It is appropriate for the board of education to have a greater responsibility in providing students with specific information about controlled substances.

The creation of "drug-free" school zones is a positive step and represents a statement of public policy that it is time for all of us to deal with this problem.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners
Executive Director

Don Oberg
President

cc: **Representative Bettye Davis**

ANCHORAGE
SCHOOL DISTRICT

4600 DeBarr Avenue
P.O. Box 196614
Anchorage, Alaska 99519-6614
AREA CODE [907] 333-9561

February 27, 1991

The Honorable Bettye Davis
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Bettye:

Per your request, the administration reviewed the contents of Sponsor Substitute for House Bill No. 27, and believes that it supports the existing philosophy and practice of the School District relating to the possession of controlled substances and/or imitation controlled substances involving students in our schools. Our current School Board Policy 451.4 - Illegal Drug/ Alcohol (see attached), is but one example of our practice in dealing with this topic.

Because we are an educational institution, we believe we have an obligation to take a strong position on the use, sale, and possession of controlled substances by students in our schools and, where possible, provide appropriate education through regular and optional programs to those students impacted. As an educational organization, we would participate with the intent of drug free school zones.

Sincerely,

Thomas C. O'Rourke
Superintendent

mt

cc Carl LaMarr, Deputy Superintendent

Attachment: School Board Policy 451.4

NATIONAL COALITION FOR DRUG-FREE SCHOOL ZONES
State Legislation
June 1990

One of the goals of the National Coalition for Drug-Free School Zones is the passage of state drug-free school zone legislation. This goal is being achieved. To date 42 states plus the District of Columbia have state legislated Drug-Free School Zones. Five states have proposed or pending legislation (i.e., Nebraska, North Carolina, South Dakota, Texas, and Wyoming). Only three states remain without Drug-Free School Zones laws (i.e., Idaho, Montana, and Tennessee).

As each state has adopted unique DFSZ legislation, this legislation brief has been prepared to bring together all of the variations of DFSZ laws nationwide. It is hoped that this material will prove useful to leaders and legislators as they move to improve their DFSZ laws. The following are excerpts of state legislation for Drug-Free School Zones.

Alabama

Division 4.

Sale on or Near School Campus.

§ 13A-12-250. Additional penalty if unlawful sale on or near school campus.

In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was on the campus or within a three-mile radius of the campus boundaries of any public or private school, college, university or other educational institution in this state. (Acts 1987, No. 87-610, p. 1060; Code 1975, § 20-2-79; Acts 1988, 1st Sp. Sess., No. 88-918, p. 512, § 2; Acts 1989, No. 89-950.)

Alaska

Sec. 11.71.030. Misconduct involving a controlled substance in the third degree.

(3) being 18 years of age or older, possesses any amount of a schedule IA or IIA controlled substance within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school.

(b) It is an affirmative defense to a prosecution under (a)(3) of this section that at the time of the possession the school was closed to any organized activity involving persons under 18 years of age. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

HB
33

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : SCS CSSSHB 33(L&C)

Revision Date:
Title: " An Act relating to penalties for violation of workplace safety laws..."
Sponsor: Representative Koponen, et.al.
Requestor: Senate Judiciary

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Occupational Safety & Health
COMPONENT SERIAL NO. 970

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	15.0	15.0				
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	15.0	15.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:	224.0 GF #1004	172.0 GF #1004	86.0 GF #1004	22.0 GF #1004	6.0 GF #1004	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	15.0	15.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	15.0	15.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached

Prepared by: Richard Arab, Deputy Director Phone : 465-4855
Division: Labor Standards & Safety Date : 3/31/92

Approved by Commissioner: C. W. Mahlen
Agency: Department of Labor Date: 3/31/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/7/91

Fiscal Note Analysis for:

"An Act relating to penalties for violation of workplace safety laws..."

This bill would increase the amount of the penalties charged for the violation of workplace safety laws. Because of the increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. We estimate an additional $15,000 of legal support for the OSH review board would be needed in FY 93 and FY 94. These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore, we would have no additional costs beyond 1994.

Revenues

The department assessed a total of approximately $ 292,000 in penalties in FY 91 with a collection rate of approximately 80%. Since Federal OSHA started to assess higher penalties starting in March, 1991, their average penalty amount has increased by approximately 95%. Assuming that Alaska will have the same experience as OSHA, we estimate that approximately $ 280,000 in additional penalties would be assessed in FY 93. Assuming our 80% collection rate, revenue would increase by approximately $ 224,000.

After the first year, we anticipate revenue would decrease as employers voluntarily correct hazards and fewer violations are detected. Thus, after five year with the new penalties, we project the deterrent affect of the higher rates would bring revenues back to what they currently are.

The reason that federal OSHA penalties have not increased seven fold is that they have adopted a penalty adjustment policy that significantly lowers penalties based on factors such as severity of the violation; good faith of the employer in correcting the violation; the employer's past history of violations; and the size of the employer's work force. If HB 33 is enacted the Department will adopt the same adjustment policy. The following is an explanation of the adjustment method:

* The penalty is adjusted based on the severity of the injury that could occur and the probability of that injury occurring. OSHA has developed a formula that will reduce the $7,000 maximum to a high of $5,000 and a low of $1,500.

* The adjusted penalty based on severity and probability will then be adjusted further based on size of employer, good faith and history. The maximum reduction of 95% can be provided through these factors.

For example, an employer with 50 employees is cited for a serious violation because heavy engine and automotive parts were stored and stacked in an unstable manner. The following penalty adjustment would occur:

* The violation is of medium severity as the injury, a blow to the body or head from a falling part, may result in hospitalization but the injury would result in only a limited period of disability. The probability of the injury is low because only two employees must enter the warehouse where these automotive parts are stored for approximately one hour a day. The $7,000 penalty would be reduced to $2,000 based on the severity/probability determination. The $2,000 would then be reduced by 75% because the employer exhibited good faith and corrected the violation immediately. It would be further reduced by 40 percent because the employer only has 50 employees and it would be reduced by a further 10 percent because the employer had no history of violations with the department. Thus the final assessed penalty would be $ 500.

It should be noted that the states of Washington, Oregon, California, Utah, North Carolina, Maryland, Indiana, Tennessee, and Nevada have passed legislation to increase occupational safety and health penalties to come into compliance with the OSHA higher penalties and the other states with occupational safety and health state jurisdiction have legislation pending to conform with the higher penalty rates.

The Bill would also permit the collection of expenses incurred when employers fail to appear at an OSH Review Board Hearing. The average daily cost for the OSH Review Board to hold hearings is $1,000. If it must cancel five days of hearings because employers do not appear at hearings, the Board could ask for $5,000 in reimbursable expenses from employers. Once employers understand that they may be liable for such costs, the number of cancellations should decrease and therefore, it is expected after the second year, no significant revenue will be raised under this provision.

Alaska State Legislature

Representative Niilo Koponen

House District 21

Pouch V
Juneau, Alaska 99811
(907) 465-4992

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

POSITION PAPER
HB 33

Both Minor and Gross violations of Alaska's Occupational Safety and Health Statutes remained at the same $10,000 or lower level since passage of the original legislation in 1973.

In November of 1990 Congress passed legislation requiring the federal Occupational Safety and Health Administration to increase penalties for OSHA violations. Under the State occupational safety and health plan, Alaska is required to raise their standards to comply with the new federal OSHA penalties. If we fail to do so, Alaska could lose its enforcement power to the Federal Agency.

The amendments provide for a maximum of $70,000 for willful and repeated violations, a minimum of $5,000 for each willful violation, and a maximum of $7,000 for serious, violations. This is a substantial increase from earlier penalties and more than doubled the increase in penalties that I originally wanted to raise in this legislation.

Congress believes that this increased maximum penalty will encourage businesses to conform to workplace safety laws and regulations. As businesses adjust to a tight economic environment, it is important that worker health and safety not be sacrificed. Maintaining a safe workplace is less costly than facing the potential of high penalties and paying the costs of accidents and injuries. HB 33 will bring Alaska into conformity with Federal law.

According to the latest statistics, Alaska occupational safety and health injury and illness incidence rate is 43% higher than that of the nation and is now the second highest in the nation.

It is my sincere hope that this legislation will result in fewer injuries, fewer fines and lower workers' compensation insurance costs. The continually rising number of injuries and fatalities to Alaskan workers testifies to the ineffectiveness of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement in the workplace.

SPONSOR STATEMENT

Alaska State Legislature

Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

February 11, 1992

Dear Colleagues:

Alaska has the second highest occupational injury rate in the nation. In just one year we have jumped from an occupational safety, health injury and illness incidence rate of 31% to 43% higher than that of the national average. This is not a record of which we can be proud.

In November of 1990, Congress passed legislation requiring the Federal Occupational Safety and Health Administration to increase penalties for OSHA violations. Alaska is now required to update its statutes .

Sponsor Substitute for HB 33 will raise our current penalties to Federal OSHA mandated levels.

It is my sincere hope that this legislation will result in both fewer injuries and fewer fines. The rising number of injuries and fatalities to Alaskan workers testifies to the insufficiency of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement.

Workers and the public are entitled to a safe worksite. There is no reason why an employer cannot meet the standards established by federal and state statutes. In fact, a number of Alaskan businesses have safety records much better than those Outside. Others do not, and as a result of their poor safety record, drastically increase Workers Compensation costs for every other business. This bill would encourage greater attention to safety.

I invite your co-sponsorship of this bill. Please let me or Shari Paul of my staff know of your interest.

Niilo Koponen

As in the past, when calculating penalties, OSHA will take into account these factors: the gravity of the violation; the size of the employer as determined by the number of employees; the employer's good faith as principally demonstrated by efforts to implement a sound, effective workplace safety and health program such as given in the voluntary "Safety and Health Management Guidelines" issued by OSHA in January, 1989; and the employer's past history of compliance with the Occupational Safety and Health Act and OSHA regulations.

"The largest monetary penalties will be reserved for those employers who demonstrate the least concern with their workers' safety and health and who expose those workers to the most serious hazards," Scannell said.

This is in line with Congress's aim in establishing larger maximum penalties as a deterrent to employers who might otherwise decide to ignore workplace safety and health requirements.

To ensure that the most flagrant violators are in fact fined at an effective level, a minimum penalty of $5,000 for a willful violation of the OSH Act was adopted by Congress. Specific language in the legislative history of the Budget Reconciliation Act, however, gives OSHA the discretion to adjust this amount during a settlement process.

The new penalty system also will apply to those states with OSHA-approved state occupational safety and health programs, under the Congressional direction that these state plans must be "as least as effective" as the national plan. The participating states are being given a reasonable time to implement the new penalty structure which takes into account the states' legislative calendars.

###

AMENDMENT

TO: Page 2, line 28 HOUSE BILL NO. SCS CSSSHB 33(L&C)

After *Sec. 7. insert

AS 18.60.095(e) is amended to read:

(e) An employer who wilfully or repeatedly violates a provision of AS 18.60.010 - 18.60.105 that is applicable to the employer or a standard or regulation adopted under AS 18.60.010 - 18.60.105, and the violation causes death to an employee, upon conviction is punishable by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both. However, upon a second conviction after a prior conviction for a violation causing death, an employer is punishable by a fine of not more than $20,000, or by imprisonment for not more than one year, or by both. This subsection does not preclude a prosecution brought under AS 11. and renumber accordingly.

WALTER J. HICKEL, GOVERNOR

REPLY TO

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PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS
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1031 WEST 4TH AVENUE, SUITE 318
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DEPARTMENT OF LAW

CRIMINAL DIVISION

May 10, 1991

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: CSSSHB 33 (Violation of workplace safety laws)

Dear Representative Koponen:

As you recall, on May 6, 1991, we wrote a letter to you about the above-referenced bill, "An Act relating to penalties for violation of workplace safety laws." This is to clarify that at that time we understood from your staff that the amendments in sections 3, 7 and 8, changing the necessary culpable mental state to "knowingly" were expected to be deleted. Please be advised that the Department of Law supports this deletion.

If there are any questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

03-C31LH

May 6, 1991

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 33 (Penalties for viol. of workplace safety laws)

Dear Representative Koponen:

This letter is to indicate our support for CS HB33 (Jud), "An Act relating to penalties for violation of workplace safety laws," and particularly for section 7 of the bill, which amends the criminal penalties that may be imposed for wilful or repeated violations that cause an employee's death.

If the defendant is an individual, the bill makes the criminal penalties as great as the civil penalties. This only makes sense; a criminal offense must have consequences at least as serious as a civil violation.

If the defendant is an organization, the bill makes available the criminal penalties already set out for organizations in AS 12.55. AS 12.55.035(c), relating to fines, was amended by the legislature last year to give sentencing judges greater discretion in setting fines for organizations. That amendment can be made effective only if it applies in cases such as these.

Once again, we support this bill and thank you for the opportunity to comment on it. If there are any questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

MOK:mm-046

LETTERS OF SUPPORT

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**ADMITTED IN VIRGINIA, WASHINGTON, D.C. AND ALASKA

ALL OTHERS ADMITTED IN ALASKA

M E M O R A N D U M

TO: Charles Cole
Attorney General

FROM: Jim Clark

DATE: May 9, 1991

RE: House Bill 33

****

Section 3 and Section 7 of House Bill 33 would change the standard for employer civil and criminal conduct respectively from "willful" violations to "knowing" violations. Proponents argue that there is no difference between the words "willful" and "knowing," stating that the latter word is used in the bill because it is defined in Alaska statutes while the former word is not defined.

While it is true that the word "knowingly" is defined in Alaska law and the word "willfully" is not defined, the two words do not connote the same standard. A willful violation requires a higher standard of proof:

> "Knowingly," as used in Section 1001, requires only that the defendant acted "with knowledge." United States v. Mekjian, 5 Cir. 1975, 505 F.2d 1320, 1324; McBride v. United States, 5 Cir. 1324, 225 F.2d 249. "Willfully" means the defendant acted "deliberately and with knowledge." United States v. Mekjian, supra; United States v. Parton, 5 Cir. 1972, 462 F.2d 430, McBride v. United States, supra.

United States v. Smith, 523 F.2d 771, at 773, 774 (5th Cir. 1975).

> "Knowingly" and "willfully" are different concepts of mens rea. In "knowingly," the essential element is one of knowledge; in "willfully," there is the additional requirement of acting with deliberation. United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1974). As a general rule an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. Devitt & Blackmore, supra § 14.06. To establish specific intent, the prosecution must prove the defendant knowingly did an act which law forbids, purposely intending to violate the law.

(emphasis added) Record Revolution No. 6, Inc. v. City of Parma, Ohio, 492 F. Supp. 1157, at 1175 n.10. (N.D. Ohio 1980).

Since "willfully" connotes purpose and intent, the correct substitution for it among those words which are defined in the Alaska criminal code is "intentionally," not "knowingly."

> (1) A person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

AS 11.81.900(a)(1). Substituting the defined word "intentionally" for the undefined word "willfully," instead of substituting the defined word "knowingly" for the undefined word "willfully" (as is done in HB 33) makes sense when one considers how "intentionally" and "knowingly" are used in the law:

> Modern penal codes have consistently followed the lead of the Model Penal Code by utilizing only four culpable mental states and by defining them in a substantially similar way.
>
> > The basic distinction between a person who acts "purposely" ("intentionally") and one who acts "knowingly" is that the former actor desires to engage in a given conduct (which happens to amount to a crime), or desires by his conduct to cause a prohibited harmful result, while the latter actor is merely aware that he is engaging in a given conduct (which happens to amount to a crime), or is aware again and is practically certain that his

> conduct will cause a prohibited, harmful result.

(emphasis added) State v. Pinero, 778 P.2d 704, at 713 n.7 (HA 1989).

In short, if the word "willfully" is to be substituted for a defined word in the Alaska Statutes without changing its essential meaning, then the word "willfully" should be changed to "intentionally"; it should not be changed to "knowingly," which requires a lesser standard of intent and, therefore, a lesser standard of proof.

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700

FAX: (907) 465-2784

April 28, 1992

The Honorable Rick Halford
Chair, Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

Thank you for meeting with the Department's Deputy Commissioner concerning SCS CSSSHB 33(L&C), "An Act relating to penalties for violation of workplace safety laws; and assessing costs for an employer's failure to appear at certain hearings of the OSH Review Board." I am writing to request that you schedule the bill for a hearing before the Senate Judiciary Committee.

The legislation is intended to bring the State of Alaska into compliance with the federal Occupational Safety and Health Act. Passage of SCS CSSSHB 33(L&C) will also result in additional state revenues as reflected in the Department's fiscal note which was submitted March 31, 1992. A copy of the fiscal note is enclosed for your information.

I am also enclosing an amendment which the committee may want to consider. The amendment is not the result of a concern about compliance with federal law. However, reference to Alaska's Criminal Law, in the criminal penalties section of the state's occupational safety and health law, would indicate that the State of Alaska has the ability to prosecute such cases under Title 11 when it is appropriate.

I urge your consideration of my request to schedule SCS CSSSHB 33 (L&C) before the Senate Judiciary Committee. Please do not hesitate to contact my Special Assistant, Arbe Williams, if you would like additional information concerning this legislation. Thank you.

Sincerely,

C. W. Mahlen
Commissioner

Enclosures
CWM:kh

DOL LETTER

bill file

STATE OF ALASKA

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
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FAX: (907) 465-2784

March 25, 1992

The Honorable Rick Halford
Chair, Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

This letter is to affirm the Department of Labor's support for Senate Committee Substitute for Committee Substitute for Sponsor Substitute for House Bill No. 33(L&C), "An Act relating to penalties for violation of workplace safety laws; and assessing costs for an employer's failure to appear at certain hearings of the OSHA Review Board." The bill was considered by the Senate Labor and Commerce Committee and was referred to the Judiciary Committee in February.

The bill's intent is to bring the State of Alaska into compliance with the federal Occupational Safety and Health Act. Noncompliance with OSHA will jeopardize Alaska's Occupational Safety and Health program. As the bill was amended in Senate Labor and Commerce, it must be returned to the House for concurrence. Consequently, it is important that it be heard by the Senate Judiciary Committee at the earliest possible date.

I urge your consideration of my request to schedule SCS CSSSHB 33 (L&C) before the Senate Judiciary Committee. Please do not hesitate to contact my Special Assistant, Arbe Williams, if you would like additional information concerning this legislation. Thank you.

Sincerely,

C. W. Mahlen
Commissioner

CWM:kh

07-G9LH

DOL LETTER OF SUPPORT

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 21149
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FAX: (907) 465-2784

May 8, 1991

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Koponen:

This is to reaffirm the Department of Labor's strong support for CSSS HB 33 (Jud), which increases the penalties for occupational safety and health violations.

As you know, the federal Occupational Safety and Health Administration's civil penalties were increased in late 1990, and Alaska is required to bring its penalties into line with them. Accordingly, passage of the civil penalty provisions in House Bill 33 (Sections 3, 4, 5, 6, and 9) is needed to assure that our state-operated safety and health program is not jeopardized.

Although the criminal penalty provisions in the bill (Sections 2, 7, and 8) are not required to conform to federal law, they, too, are intended to serve as a deterrent to workplace safety and health hazards. Alaska's civil and criminal penalties have not changed since enactment of the occupational safety and health law in 1973.

Section 1 of the bill provides that employers who fail to appear without good cause at an OSH Review Board hearing may be ordered by the Board to pay all reasonable expenses incurred by the Board. Since a hearing before the Board is scheduled at an employer's specific request, it is appropriate for the employer to appear at the hearing.

I urge your continued effort to secure passage of House Bill 33 this year.

Thank you.

Sincerely,

Nancy Bear Usera
Commissioner

07-G9LH

DEPARTMENT OF LABOR
RESPONSE TO QUESTIONS RELATED TO
SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 33
HOUSE LABOR AND COMMERCE COMMITTEE

1. What are the funding sources for the Alaska Occupational Safety and Health Program?

The Alaska Occupational Safety and Health program is funded by three sources of monies: a federal grant that provides 50 percent matching funds for enforcement and training activities; a federal contract that provides 90 percent matching funds for private consultation activities; and state general fund monies for a portion of enforcement and consultation activities and for worker certification programs.

In Fiscal year 1991, the Alaska Occupational Safety and Health budget is as follows:

Federal 23(g) grant: $1,138,500 which requires $1,138,500 in state matching monies. Federal 7(c)(1) contract: $308,100 which requires $32,900 in state matching monies. State General fund monies:$705,800. Total: Federal funds $1,446,600 and state monies $1,877,200. Total budget: $3,323,800.

In Fiscal Year 1992, the Alaska Occupational Safety and Health budget is requesting the following:

Federal 23(g) grant: $ 1,159,300; federal 7(c)(1), $336,600; (total federal monies $1,495,900) and state matching and general funds $1,910,500. Total request: $ 3,406,400.

2. What would be the social impact of transferring the state's occupational safety and health jurisdiction back to the federal Occupational Safety and Health Administration?

The major social impact will be less protection for Alaska workers from occupational safety and health hazards. The State has a staff of 16 enforcement compliance officers and nine safety and health consultants. Federal OSHA's staffing benchmark for Alaska is for 9 enforcement compliance officers. Federal OSHA does not offer any consultative and training services and therefore, the consultative and training services currently available to employers would be greatly diminished. Also Federal OSHA does not have jurisdiction over State and local government employment and therefore, approximately 50,000 Alaskan workers (almost 20 percent of the Alaskan workforce) would be without any occupational safety and health protection.

There will also be less sensitivity to occupational safety and health issues that are unique to Alaska's work sites. For example, the Alaska Occupational Safety and Health agency has worked closely with the logging industry to develop safety and health standards that address the hazards of working in the rugged terrain of Southeast Alaska and is providing safety training programs specifically geared to the needs of the Alaskan

logging industry. A program run from Washington D.C. would be unlikely to provide such assistance as they must cover industry on a nationwide basis and would not fit their programs to meet the different needs of each State.

3. What type of adminstrative procedures will be used by the Alaska Occupational Safety and Health Program to adjust penalties?

The Department of Labor uses an administrative procedure to adjust penalties of violations so that there is a sliding scale depending on the gravity of the violation, the size of the employer's business, the good faith of the employer in correcting violations, and the history of the employer's previous violations.

If SSHB 33 is enacted, the Department would use the same or similar procedures that federal OSHA uses to adjust penalties. The following are examples of how the penalties would be adjusted:

Example # 1: An employer with five employees is cited for a serious violation for allowing employees to be exposed to an unguarded chain and sprocket. As this violation would be considered to result in a low probability of death or broken bones, the agency would start by cutting the maximum $7,000 penalty by 50%. This would result in an unadjusted penalty of $3,500. The agency would then adjust this penalty further by providing a reduction of 60 percent for the size of the employer; a reduction of 25 percent for good faith if the employer corrects the hazard immediately; and a reduction of 10 percent if the employer has not been previously cited for a serious, willful or repeated violation. The "unadjusted" penalty of $3,500 would, therefore, be lowered by 95% to a final penalty of $175.

Example # 2: Employees are working in a 10 feet deep trench, laying a sewer line. The trench is unshored and there is no sloping. As this hazard will result in a high probability of death due to suffocation, asphyxiation, or broken bones should a cave-in occur, the Department would not provide any reduction for the gravity of the violation and would start with a $7,000 unadjusted penalty. The employer employs 50 employees. The Department would provide a 40 percent reduction for size of the employer but would not provide any reduction for good faith or for history because the employer had been cited for several other violations on an inspection six months prior to this inspection. The "unadjusted" penalty of $7,000 would, therefore, be lowered by 40% to a final penalty of $4,200.

The above are two examples of the penalty calculation procedures that would be used for "serious" violations. If the department found a willful violation that caused the death of one or more employees, no penalty reduction would be provided and a penalty of $70,000 would be assessed.

U.S. Department of Labor

Occupational Safety & Health Administration
1111 Third Avenue - Suite 715
Seattle, Washington 98101-3212
Telephone: (206) 553-5930
Fax: (206) 553-6499

Refer to: FSO/SND
AK STP 2-1.163

April 30, 1992

The Honorable Charles W. Mahlen
Commissioner, Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Mahlen:

This is in reference to Alaska House Bill (HB) 33 addressing proposed penalty legislation for the State 18(b) program. Regional and OSHA National Office review of the HB has been ongoing for the past several weeks. I have attached a copy of the memorandum from our National Office dated April 21, 1992, about HB 33 for your review and appropriate action.

Essentially, review of HB 33 has resulted in the following issues for your consideration:

- AKOSH criminal provisions at AS 18.60.095(f) should provide maximum monetary penalties equivalent to those available under federal OSHA as found in section 17(g) of the OSH Act; and

- the penalty and prison term levels should be stated in the text.

Although, all other sections of HB 33 are acceptable, it could be concluded that modifying Alaska's current provisions under AS 18.60.095(f) may jeopardize Alaska's at least as effective status regarding penalties. Please be aware, however, it is imperative Alaska enact into law the seven-fold civil penalty provisions of HB 33 during the current Alaska legislative session.

If there are questions, or you would like to discuss this matter in more detail, please contact me.

Sincerely,

James W. Lake
Regional Administrator

Enclosure

cc: Randy Carr, Acting Director, w/enclosure
Richard Arab, Deputy Director, w/enclosure
Barry Noll, Area D

U.S. DOL LETTER

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

APR 21 1992

MEMORANDUM FOR: JAMES W. LAKE
Regional Administrator - X

THROUGH: LEO CAREY, Director
Office of Field Programs

FROM: BRUCE HILLENBRAND, Director
Federal-State Operations

SUBJECT: Alaska's Proposed Penalty Legislation

This office and the Office of the Solicitor have reviewed Alaska's proposed penalty legislation, HB 33. As you know, it contains several differences from the Federal. Two sections of the bill are more stringent: section 1 unilaterally increases the penalty for unauthorized advance notice of inspection from $1,000 to $7,000, and section 2 allows the Review Board to order an employer to pay all expenses for a hearing at which he failed to appear. Two other sections also contain differences. Section 3 states that Alaska "shall assess a minimum penalty of $5,000"... "except when a settlement is negotiated." Since this added phrase simply reflects OSHA's actual procedures, it does not pose a problem. Proposed penalties, even minimum $5,000 penalties, can be revised downward as a result of informal settlements. The Directorate of Compliance Programming agrees with this assessment.

Alaska's proposed unilateral change to its currently identical criminal penalties in AS 18.60.095(f), however, (section 7 of the bill) does make that section less effective than section 17(g) of the OSH Act. A person who knowingly makes a false statement, etc., "is guilty of unsworn falsification". This is a Class A misdemeanor under Alaska criminal law for which a person may receive a penalty of not more than $5,000 and/or not more than one year in prison (section 11.56.210, Alaska Criminal Law, and sections 12.55.035 and 12.55.135, Alaska Code of Criminal Procedure). The Federal numbers are not more than $10,000 and/or six months in prison. Moreover, under the Federal Sentencing Reform Act (18 USC 3571), criminal monetary penalties are available in cases under the OSH Act in amounts larger than those set for the Act. For example, an individual convicted under section 17(g) of the OSH Act is subject to a maximum criminal penalty of $100,000 under the Sentencing Reform Act. Higher penalties are available for organizations.

Although Alaska allows a one year prison term instead of a maximum six month term, it also allows a maximum penalty of only $5,000, which is half the penalty level allowed under the OSH Act, and only a fraction of that allowed under the Sentencing Reform Act. Although the matter has not yet been definitively resolved by OSHA, it is the view of this office that State OSHA criminal provisions should provide maximum monetary penalties equivalent to those available under Federal OSHA. At a minimum, until this matter is resolved, Alaska's monetary penalties should reflect the amounts in the OSH Act. We should also point out that, in actual practice, monetary fines rather than prison sentences are imposed in the vast majority of criminal cases. For this reason, the possibility of a prison sentence cannot be substituted for penalty maximums comparable to the Federal.

Our other concern with this "unsworn falsification" section is that the penalty and prison term levels are not stated in the text; not even a reference is given. This gives inadequate notice of what the sanctions are.

Therefore, we conclude that modifying the State's current provisions at AS 18.60.095(f) would jeopardize Alaska's ALAE status regarding its penalties. All other sections of HB 33 are acceptable to OSHA. If you concur with this analysis, please inform Alaska of our comments.

We are aware that Alaska's legislative session ends in May, and that HB 33 has already passed the House. It is essential that Alaska enact into law the seven-fold civil penalty provisions of this bill during this legislative session.

Crosstabulation: **AREA**

YEAR-> Count / AREA	84	85	86	87	Row Total
10 Aleutians	247	337	382	410	1376 3.2
20 Anchorage	4917	5020	3932	3606	17475 40.9
50 Bethel	118	86	92	90	386 .9
60 Bristol Bay	46	62	63	58	229 .5
70 Dillingham	119	119	112	104	454 1.1
90 Fairbanks	1162	1173	932	900	4167 9.7
100 Haines	28	20	15	23	86 .2
110 Juneau	417	419	282	335	1453 3.4
122 Kenai	590	721	623	682	2616 6.1
130 Ketchikan	401	385	406	462	1654 3.9
140 Northwest Arctic	44	33	28	32	137 .3
150 Kodiak	245	223	263	342	1073 2.5
170 Mat-Su	516	464	357	294	1631 3.8
180 Nome	87	85	75	70	317 .7
185 North Slope	1231	1247	872	631	3981 9.3
201 Pr of Wales	192	229	249	319	989 2.3
Colu.... Total	11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

(Continued)

STATS

Crosstabulation: AREA

YEAR-> AREA	Count	84	85	86	87	Row Total
220 Sitka		180	188	232	231	831 1.9
231 Skagway		131	206	269	319	925 2.2
240 S E Fairbanks		60	45	62	32	199 .5
261 Valdez-Cordova		204	199	203	269	875 2.0
270 Wade Hampton		39	33	30	41	143 .3
280 Wrang-Ptrsbrg		164	270	300	253	987 2.3
290 Yukon-Koyuk		168	145	121	119	553 1.3
996 Milti-Area			6	4	2	12 .0
998 Out of State			29	38	25	92 .2
999 Unknown		92	3	3	12	110 .3
	Column Total	11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

Number of Missing Observations = 0

Crosstabulation: NATURE2

YEAR-> Count / NATURE2	84	85	86	87	Row Total
10 Amputation / Enu	44	31	28	35	138 .3
11 Asphyxia, Strang	7	3	4	5	19 .0
12 Burn (Heat)	214	248	192	191	845 2.0
13 Burn (Chemical)	60	79	47	66	252 .6
14 Concussion	49	78	98	121	346 .8
15 Infective / Para	11	20	17	11	59 .1
16 Contusion, Crush	1303	1513	1145	1024	4985 11.7
17 Cut, Laceration,	1137	1142	909	1041	4229 9.9
18 Dermatitis	41	42	47	42	172 .4
19 Dislocation	170	188	241	196	795 1.9
20 Electric Shock	7	15	8	8	38 .1
21 Fracture	1014	1053	847	792	3706 8.7
22 Exposure to Low	33	25	17	13	88 .2
23 Hearing Loss / I	3	7	4	11	25 .1
24 Environmental He		2	2	1	5 .0
25 Hernia, Rupture	173	164	130	132	599 1.4
Column Total	11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

(Continued)

Crosstabulation: NATURE2

YEAR-> Count / NATURE2	84	85	86	87	Row Total
26 Inflammation	169	108	136	187	600 1.4
27 Poisoning	109	114	107	78	408 1.0
28 Pneumoconiosis	2	2	3		7 .0
29 Radiation Effect	37	34	23	16	110 .3
30 Scratches, Abras	359	318	306	322	1305 3.1
31 Sprains, Strains	5507	5725	4970	4859	21061 49.3
32 Hemorrhoids	11	10	3	2	26 .1
33 Hepatitis	4	6	1	5	16 .0
40 Multiple Injurie	541	503	223	118	1385 3.2
50 Changes in Atmos	7	2	4	1	14 .0
51 Cerebrovascular	5	7	12	10	34 .1
52 Complications -	1		1	1	3 .0
53 Eye Diseases	37	20	22	12	91 .2
54 Mental Disorders	17	17	36	30	100 .2
55 Neoplasm			2	3	5 .0
56 Nervous System	55	87	105	93	340 .8
Column Total	11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

(Continued)

Crosstabulation: NATURE2

YEAR-> Count	84	85	86	87	Row Total
NATURE2					
57 Respiratory Syst	14	23	23	25	85 .2
58 Symptoms & Ill-D	21	20	29	19	89 .2
90 No Injury or Ill	1	1	1	1	4 .0
95 Damage to Prosth	3	1	4	2	10 .0
99 Other Dis/Inj Ne	232	139	198	188	757 1.8
Column Total	11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

Number of Missing Observations = 0

News
United States Department of Labor
Office of Information
Washington, D.C. 20210

Occupational Safety and Health Administration

USDL: 91-28

CONTACT: Frank Kane
OFFICE: (202) 523-8151
AFTER HOURS: (703) 360-7080

FOR RELEASE: 1:00 PM EST
Thursday, Jan. 24, 1991

OSHA ANNOUNCES PROCEDURES FOR IMPLEMENTING NEW SYSTEM OF CIVIL PENALTIES

Procedures for implementing its new system of civil monetary penalties for violations of occupational safety and health law and regulations were announced today by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor.

Congress enacted a seven-fold increase in the maximum limits for such penalties in the Omnibus Budget Reconcilation Act of 1990. The maximum allowable civil penalty now is $70,000 for each willful or repeated violation; and $7,000 for each serious or other-than-serious violation as well as $7,000 for each violation of the posting requirements and $7,000 for each day beyond a stated abatement date for failure to correct a violation.

Assistant Secretary of Labor Gerard F. Scannell, who heads OSHA, said, "I want to emphasize that these amounts are ceilings---not floors. We will not automatically assess penalties that are seven times what they were previously, although there will be some increases."

He added that OSHA's basic approach will remain the same---striving for voluntary compliance by America's employers with occupational safety and health requirements.

The new civil penalty policy will be applicable to citations issued as the result of inspections initiated after March 1, 1991, for violations occurring after Nov. 5, 1990---the effective date of the Budget Reconciliation Act.

The procedures for implementing the new penalty policy are contained in a new chapter for OSHA's Field Operations Manual which is being distributed to all the agency's regional and area offices.

-more-

U.S. Department of Labor
Program Highlights

Fact Sheet No. OSHA 91-36

NEW OSHA CIVIL PENALTIES POLICY

A seven-fold increase in the maximum limits for OSHA civil monetary penalties was stipulated in the Budget Reconciliation Act passed by the 101st Congress.

The maximum allowable penalty is now $70,000 for each willful or repeated violation; and $7,000 for each serious or other-than-serious violation as well as $7,000 for each violation of the posting requirements and $7,000 for each day beyond a stated abatement date for failure to correct a violation.

The amounts are ceilings—not floors. However, in order to ensure that the most flagrant violators are in fact fined at an effective level, a minimum penalty of $5,000 for a willful violation of the OSH Act was adopted.

The new penalty policy will be applicable to all citations issued as a result of inspections initiated after March 1, 1991, for violations occurring after Nov.5, 1990--the effective date of the Budget Reconciliation Act.

The new policy also applies to those states with OSHA-approved state occupational safety and health programs, under the congressional direction that these State plans must be "as least as effective" as the national plan. The participating states are being given a reasonable period to implement the new penalty structure which takes into account the states' legislative calendars.

The basic penalty process will not change—it still follows the criteria set forth in the Occupational Safety and Health Act, which is to determine penalties based on the gravity of the violation and the size, good faith and history of the employer. Gravity determines the base amount; the other factors determine appropriate reductions.

As in the past, all penalty amounts are proposed penalties issued with the citation. The employer may contest the penalty amount as well as the citation within the statutory 15-day contest period. Thereafter, the penalty may be adjudicated by the independent Occupational Safety and Health Review Commission, or OSHA may negotiate with the employer to settle for a reduced penalty amount if this will lead to speedy abatement of the hazard.

Here is how the new system for proposing penalties will operate.

ADJUSTMENT FACTORS:

The size adjustment factor is as follows: For an employer with only one to 25 workers, the penalty will be reduced 60 percent; 26 to 100 workers, the reduction will be 40 percent; 101 to 250 workers, a 20 percent reduction; and more than 250 workers, there will be no reduction in the penalty.

There may up to an additional 25 percent reduction for evidence that the employer is making a good faith effort to provide good workplace safety and health, and an additional 10 percent reduction if the employer has not been cited by OSHA for any serious, willful or repeat violations in the past three years.

In order to qualify for the full 25 percent "good faith" reduction, an employer must have a written and implemented safety and health program such as given in OSHA's voluntary "Safety and Health Management Guidelines" (Federal Register, Vol. 54, No. 16, Jan. 26, 1989, pp. 3904-3916) and that includes programs required under the OSHA standards, such as Hazard Communication, Lockout/Tagout or safety and health programs for construction required in 1926.20.

SERIOUS VIOLATIONS:

The typical range of proposed penalties for serious violations, before adjustment factors are applied, will be $1,500 to $5,000, although the Regional Administrator may propose up to $7,000 for a serious violation when warranted.

A serious violation is defined as one in which there is substantial probability that death or serious physical harm could result, and the employer knew or should have known of the hazard.

Serious violations will be categorized in terms of severity—high, medium or low—and the probability of an injury or illness occurring—greater or lesser.

Base penalties for serious violations will be assessed as follows:

Severity	Probability	Penalty
High	Greater	$5,000
Medium	Greater	$3,500
Low	Greater	$2,500
High	Lesser	$2,500
Medium	Lesser	$2,000
Low	Lesser	$1,500

Penalties for serious violations that are classified as high in both severity and greater in probability will only be adjusted for size and history.

OTHER-THAN-SERIOUS VIOLATIONS:

If an employer is cited for an other-than-serious violation which has a low probability of resulting in an injury or illness, there will be no proposed penalty. However, the violation must still be corrected. If the other-than-serious violation has a greater probability of resulting in an injury or illness, then a base penalty of $1,000 will be used, to which appropriate adjustment factors will be applied.

The OSHA Regional Administrator may use a base penalty of up to $7,000 if circumstances warrant.

REGULATORY VIOLATIONS:

Regulatory violations involve violations of posting, injury and illness reporting and recordkeeping requirements, and not telling employees about advance notice of an inspection. OSHA will be applying adjustments only for the size and history of the establishment.

Here are the base penalties, before adjustments, to be proposed for posting requirement violations: OSHA notice, $1,000; annual summary, $1,000; and failure to post citations, $3,000.

Base reporting and recordkeeping penalties are as follows: Failure to maintain OSHA 200 and OSHA 101 forms, $1,000; failure to report a fatality or catastrophe within 48 hours, $5,000 (with a provision that the OSHA Regional Administrator could adjust that up to $7,000, in exceptional circumstances); denying access to records, $1,000; and not telling employees about advance notice of an inspection, $2,000.

WILLFUL VIOLATIONS:

In the case of willful serious violations, the initial proposed penalty has to be between $5,000 and $70,000. OSHA calculates the penalty for the underlying serious violation, adjusts it for size and history and multiplies it by 7. The multiplier of 7 can be adjusted upward or down at the OSHA Regional Administrator's discretion, if circumstances warrant. The minimum willful serious penalty is $5,000.

Willful violations are those committed with an intentional disregard of, or plain indifference to, the requirements of the OSH Act and regulations.

REPEAT VIOLATIONS:

A repeat violation is a violation of any standard, regulation, rule or order where, upon reinspection, a substantially similar violation is found.

Repeat violations will only be adjusted for size, and the adjusted penalties will then be multiplied by 2, 5, or 10. The multiplier for small employers—250 employees or fewer—is 2 for the first instance of a repeat violation, and 5 for the second repeat. However, the OSHA Regional Administrator has the authority to use a multiplication factor of up to 10 on a case involving a repeat violation by a small employer to achieve the necessary deterrent effect.

The multiplier for large employers—250 or more employees—is 5 for the first instance of a repeat violation, and 10 for the second repeat.

If the initial violation was other-than-serious, without a penalty being assessed, then the penalty will be $200 for the first repetition of that violation, $500 for the second repeat, and $1,000 for the third repeat.

FAILURE TO ABATE:

Failure to correct a prior violation within the prescribed abatement period could result in a penalty for each day the violation continues beyond the abatement date.

In these failure to abate cases the daily penalty will be equal to the amount of the initial penalty (up to $7,000) with an adjustment for size only.

This failure to abate penalty may be assessed for a maximum of 30 days by the OSHA Area office. In cases of partial abatement of the violation, the OSHA Regional Administrator has authority to reduce the penalty by 25 percent to 75 percent.

If the failure to abate is more than 30 days, it may be referred to the OSHA national office in Washington where a determination may be made to assess a daily penalty beyond the initial 30 days.

###

HB

44

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

Bill Number: H 44
Abbreviated Title: Domestic Violence

Sponsor: Ulmer Original Received: May 3, 1991
Written Request to Schedule Rcv'd: _____ From: _____
Sponser's Statement Rcv'd: _____ From: _____
Sectional Analysis Rqst'd: _____ From: _____
Sectional Analysis Received: _____
Fiscal Note (Original)
Rqst'd Of: _____ Rcv'd From: Pub Saf O Date: With File
Rqst'd Of: _____ Rcv'd From: PD O Date: With File
Rqst'd Of: _____ Rcv'd From: Admin O Date: With File
Court O
Fiscal Note (C.S.)
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Five Day Notice Given: _____ Notice of Hearings Given: _____
Committees of Referral: First: _____ Second: _____ Third: _____
LAA Contact: _____ To Senate Secretary: _____

COMMITTEE ACTION

DATE:
5-15-91 Moved Sen CS w Ind Rec. all Sen in Favor
5-15-91 Turned in the Sen Sec.

PERSONS TO BE NOTIFIED OF HEARING

1. Sponsor Ulmer
2. Agency
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 44

Revision Date:
Title: An Act relating to domestic violence
Sponsor: Ulmer, Parnell, B. Davis
Requestor: Ulmer

Department Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
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						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/04/91

Approved by: Arthur H. Snowden, II, Administrative Director Stephanie Cole, for
Agency: Alaska Court System
Date: 02/04/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 44

Revision Date: _____ Department Affected: Department of Administration

Title: "An Act relating to domestic violence." BRU: Public Defender Agency

Component: _____

Sponsor: Rep. Ulmer, Parnell, B.Davis

Requestor: HESS COMPONENT SERIAL NO. 4 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Barbara K. Bink for

Prepared By: John Salemi, Public Defender Phone: 279-7541

Division: Public Defender Agency Date: 2/6/91

Approved by Commissioner: Millett Keller

Agency: Department of Administration Date: 2/11/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 44

Revision Date: _____ Department Affected: Administration

Title: "An Act relating to domestic violence." BRU: Office of Public Advocacy

Component: Office of Public Advocacy

Sponsor: Ulmer, Parnell, B.Davis

Requestor: House Judiciary COMPONENT SERIAL NO. 4 3

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.) See Attached

Prepared By: Brant McGee, Public Advocate Phone: 274-1684

Division: Office of Public Advocacy Date: 2/5/91

Approved by Commissioner: Millett Keller

Agency: Department of Administration Date: 2/8/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 44

It is unlikely that the number of new cases generated under the provisions of this bill will have a significant impact on the Office of Public Advocacy civil and criminal caseload.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 44

Revision Date:
Title: An act relating to domestic violence
Sponsor: Rep. Ulmer
Requestor: H. HESS

Department Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments

COMPONENT SERIAL NO. | | 7 | 9 | 9 |

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not Included)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: Gayle A. Horetski
Phone: 465-4322
Division: Commissioner's Office
Date: 2/6/91

Approved by Commissioner: Gayle A. Horetski for Richard L. Burton
Agency: Department of Public Safety
Date: 2/6/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. H.B. 44

Revision Date: _____ Department Affected: Corrections

Title: "An Act relating to domestic violence." BRU: _____

Component: _____

Sponsor: Rep. Fran Ulmer

Requestor: _____ COMPONENT SERIAL NO. | | | | |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Tom Sutton, Director Phone: 465-3376

Division: Administrative Services Date: 02-05-91

Approved by Commissioner: _____

Agency: Department of Corrections Date: 02-05-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM
May 14, 1991

To: Senator Rick Halford, Chair
Senate Judiciary Committee

From: Representative Fran Ulmer

Subject: HB 44

There are several statutes which, depending upon the circumstances, would be applicable if a person supplies false information in petitioning for a domestic violence restraining order. They are:

1. The petition for a domestic violence restraining order is made under oath, which means that a person falsely applying could be charged with perjury for completing the written petition, as well as for presenting the evidence . Perjury is a Class B Felon under 11.56.200.

2. Unsworn Falsification under 11.56.210 is a Class A misdemeanor.

3. Making a False Report to a Peace Officer is 11.56.800.

Thanks for your assistence with HB 44.

Attachment

District 4B — Juneau
P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947

Alaska State Legislature

REPRESENTATIVE FRAN ULMER

MEMORANDUM

MAY 2, 1991

TO: Senator Rick Halford, Chair
Senate Judiciary Committee

FROM: Representative Fran Ulmer

SUBJECT: Senate CS for CS for House Bill No. 44 (State Affairs)

This is to request that you schedule HB 44 for hearing at the earliest possible time. Domestic violence is epidemic nationally. In Alaska, more than 19,000 women are victims of domestic violence annually. HB 44 is an important bill which revises existing laws to improve protection of the victims of domestic violence.

Provisions:

1. Under current law regarding harassment, the crime of harassment is committed if a person, with intent to harass or annoy, violates the conditions of a domestic violence restraining order by communicating with the petitioner. HB 44 moves that provision to a new section, entitled Violating a Domestic Violence Restraining Order, and sets out the circumstances when the crime is committed. It establishes the offense as a Class A misdemeanor. It removes the necessity for a law enforcement officer or prosecutor to prove that one intended to harass another, by stating that the crime is committed if a person knowingly violates a provision of a domestic violence restraining order.

2. Currently, the law provides that a court, in determining the conditions of a domestic violence restraining order, shall consider, among other things, ordering the defendant to participate in personal or family counseling. HB 44 provides that if the court directs personal counseling, the counseling must propose alternatives to aggression if that type of counseling is available. It also provides that a court shall not direct family counseling, unless it makes a finding that the family counseling will not result in further domestic violence. This is an important provision, as it has been reported many times that family counseling sessions are often followed by episodes of violence.

District 4B — Juneau
P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947

3. Current law does not include persons involved in a courtship, engagement or dating relationship in the list of parties eligible to obtain domestic violence restraining orders. This leaves some victims, specifically teenagers who still live with their parents, without recourse. HB 44 adds courtship, engagement and dating relationships to the list.

4. HB 44 establishes that a sentencing court may mitigate a presumptive term in assault, attempted assault, homicide or attempted homicide cases when the defendant was acting in response to domestic violence against the defendant.

5. This bill clarifies the circumstances under which the court may issue a domestic violence restraining order which restrains both the petitioner and the respondent from communicating. The court must make a finding of mutual violence or find that there is other good cause based on extraordinary circumstances of the case.

Thank you for prompt scheduling of this bill.

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM
April 8, 1991

To: Senator Rick Halford, Chair
Senate Judiciary Committee

From: Representative Fran Ulmer

Subject: Senate CS for CS for House Bill No. 44 (State Affairs) "An Act relating to domestic violence."

HB 44 is pending scheduling for a hearing before the Senate Judiciary Committee. I believe that this bill needs to become law as quickly as possible, as there are growing numbers of victims in need of the protections it provides. There is not much time remaining in the session, and I ask your assistance through immediate scheduling of HB 44 for a hearing.

If I can provide further information or back-up, please let me know. Thank you in advance for your attention to this matter.

Thanks!

District 4B — Juneau
P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947

BILL NO: HB 44

DATE: February 6, 1991

TITLE: An Act relating to domestic violence.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence
and Sexual Assault

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The Council on Domestic Violence and Sexual Assault supports HB 44. This legislation contains numerous sections that will promote the protection of victims of domestic violence. As more is learned about the dynamics of domestic violence, it becomes apparent that revisions must be made to existing laws. This legislation addresses many of the changes in legislation the Council has identified as important.

Alaska continues to maintain high rates of domestic violence. According to a study conducted by the University of Alaska, 26% of the women in Alaska have been victims of domestic violence in their lives. Recently in Anchorage, an apparent domestic violence murder-suicide was committed. Tragedies such as this point out how important it is that changes in legislation to further protect victims are identified and made.

Andy Klamser

Andy Klamser, Chair
Council on Domestic Violence
and Sexual Assault

Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT
415 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA
99901

Chambers of
THOMAS E. SCHULZ, Presiding Judge

April 25, 1991

Senator Rick Halford
Room 103, Capitol
P.O. Box V
Juneau, Alaska 99811

Re: House Bill No. 44

Dear Senator Halford:

A copy of House Bill No. 44 was given to me by Gigi Pilcher of the WISH organization here in Ketchikan. When I initially reviewed the Bill I did not have anything in the way of comments for Gigi, but I have reviewed the Bill further, and I do have a couple of comments that I wanted to pass on to you. My first comment relates to Section 4 which provides for a minimum term of imprisonment of 20 days, and then goes on to provide that the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours. That is contradictory language, and gives judges a lot of trouble. I am generally opposed to mandatory minimum sentences in misdemeanor cases because our limited jail capacity is already taxed to the maximum. However, I think we should be able to expect mandatory minimum sentences that are consistent if we're going to have them at all. I do not wish to express any opinion as to whether 72 consecutive hours is an appropriate minimum sentence as opposed to a minimum of 20 days, but I would respectfully ask that the legislature pick one or the other.

At a First District Magistrates Training Conference in Sitka I was told that this Bill had been amended to include provisions prohibiting reciprocal restraining orders in Domestic Violence cases. One of the justifications for that position was that the National Council of Juvenile and Family Court Judges supports it. The other justification that I was

given for it was that a number of crisis intervention centers in the State of Alaska and women's groups supported that position. Well, I cannot speak for the women's groups and crisis centers such as WISH in Ketchikan, I can say that I have been a member of the National Council of Juvenile and Family Court Judges for over 20 years, and that is not the first mistake that that organization has made. The function of a Domestic Violence hearing is not to assess fault; the function of the hearing is the get the violence to stop. One of the quickest ways to do that, and one of the most effective ways to do that is to prohibit both parties from contacting the other at least until that ten day hearing. I would like to emphasize that judicial time, police officer time and counselor time in places like WISH is not unlimited, and while I think it is entirely appropriate for the State to intervene in these situations and get the violence stopped, I do not feel it is appropriate at all to take away a very effective tool, particularly when the only complaint about the use of that tool is the depravation of someone's rights for a relatively limited period of time.

I have been using reciprocal no contact orders almost from the time the Domestic Violence Act was first enacted. It became apparent very early one that one of the primary causes of hearings in that first ten days was that the "victim" contacted the respondent and did not like what he or she heard and filed a violation with the court. That ten day period between the petition and the initial hearing is an excellent cooling off period, and we loose a substantial advantage if this Bill is enacted to take that away from us. Finally, I have never had a complaint about the use of the reciprocal no contact provisions. All most all of the people who have applied for these orders at the Ketchikan Trial Courts, with whom I have dealt, have expressed satisfaction with the reciprocal no contact order, and no one has disagreed with it.

Thank you very much for considering these remarks.

Very Truly Yours,

Thomas E. Schulz
Superior Court Judge

TES/dhr

cc: Representative Fran Ulmer
Gigi Pilcher

Superior Court
State of Alaska
FIRST JUDICIAL DISTRICT
415 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA
99901

Chambers of
THOMAS E. SCHULZ, Presiding Judge

May 3, 1991

Ms. Gigi Piltcher
Women In Safe Homes
P.O. Box 6552
Ketchikan, Alaska 99901

Re: CS For House Bill 44 (Judiciary)

Dear Ms. Piltcher:

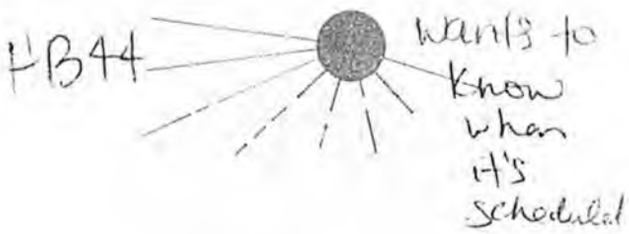
Thank you very much for your note of May 2nd. I will get to the articles you enclosed as soon as I can. Regarding House Bill No. 44, I had the unfortunate experience of meeting a couple of the citizens who are pushing this Bill in Sitka. I say unfortunate, because they were totally unwilling to discuss the provision regarding no contact orders on petitioners in domestic violence cases. I have been told by Mr. Snowden that the amendments done in the Senate are about as far as we will be able to go, but I am convinced that the legislation is a piece of dumb legislation particularly regarding sections 10 and 11. One of the quickest ways to restore peace in these domestic violence situations is to restrain both parties from contacting the other, at least until the initial hearing when both are present. I remain totally mystified as to why the legislature is so committed to taking this valuable tool away from us, but apparently that is what's going to happen. I frankly get a little tired from time to time of trying to preserve everybody's rights and counting black eyes all at the same time.

Very Truly Yours,

Thomas E. Schulz

Thomas E. Schulz
Superior Court Judge

TES/dhr
cc: Arthur H. Snowden, II
Representative Fran Ulmer
Senator Rick Halford


HB44
wants to
know
when
it's
scheduled

ALASKA FAMILY
SUPPORT GROUP

4-29-91

SENATOR RICK HALFORD
PRES., JUDICIARY COMMITTEE
PO BOX V
JUNEAU, AK 99811

RE: HB 44

DEAR RICK,
AS YOU CAN SEE IN THESE ATTACHMENTS, TEXAS AND NEW YORK ARE DEALING W/ FALSE DOMESTIC VIOLENCE/CHILD ABUSE CHARGES.
IT'S TIME THE ALASKA LEGISLATURE DEALT WITH THE ISSUE ALSO.
PLEASE AMEND HOUSE BILL 44 TO INCLUDE PENALTIES FOR MAKING FALSE ALLEGATIONS. REP. ULMER INCLUDED CHILDREN IN HOUSE BILL 44.

FATHERS (AND MOTHERS) ARE BEING RIPPED AWAY FROM THEIR HOMES AND THEIR CHILDREN BY FALSE ALLEGATIONS DURING DIVORCE PROCEEDINGS, THIS IS A NATIONAL DISGRACE.

SINCERELY,
Steven P. Stumbo

PLEASE DISTRIBUTE TO THE COMMITTEE MEMBERS.

P.O. Box 521155 Big Lake, Alaska 99652 Phone/Fax (907) 892-7760

CHILD ABUSE ALLEGATIONS ARISING IN THE CONTEXT OF ADVERSARIAL DIVORCE

M. Guyer, Ph.D., J.D., P. Ash, M.D., Child and Adolescent Psychiatry, University of Michigan Medical Center, Ann Arbor, Michigan 48109-0706

SUMMARY:

A considerable body of literature addresses the psychological effects of divorce upon children. Some studies indicate that highly adversarial divorces, with prolonged custody disputes are especially harmful to children. Our own experience and research in conducting court ordered custody evaluations over the last five years (n =400) indicates a relatively new phenomenon in such cases which heightens the risk to children and makes the custody evaluation process considerably more difficult - this phenomenon is the allegation of sexual abuse or misconduct made by one parent against the other. During the last year, the frequency of allegations of sexual abuse in custody/visitation cases referred to our Program has risen to approximately 33%. This is in contrast to much lower frequencies in our previous years' referrals. Our research on cases involving such allegations draws attention to the problems of distinguishing true from false allegations in contested custody cases. Because such allegations often trigger the involvement of child protection and law enforcement agencies the custody evaluation becomes quite complex, with difficult "evidentiary" concerns as well as clinical problems in making accurate assessments due to the multiple agency/multiple assessment of the child(ren) in these cases. Our paper will discuss the legal and clinical problems created by these new "allegation" cases including the unique stresses which they create for children and parents. We will also present our paradigm for managing such evaluations in a way which minimizes risk to the child and reduces the need for multiple evaluations of the child by various child protections agencies. Our paradigm is based upon our clinical/forensic experience in conducting such court-ordered evaluations over the course of six years.

CHILD ABUSE AND NEGLECT DEFINED FOR THE FIRST TIME EVER IN TEXAS LAW

§ 34.012. Definitions.

In this chapter:

(1) "Abuse" includes the following acts or omissions by a person responsible for a child's care, custody, or welfare:

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

(D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

(E) sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a foreign object, incest, sexual assault, or sodomy inflicted on, shown to, or intentionally practiced in the presence of a child if the child is present only to arouse or gratify the sexual desires of any person;

(F) failure to make a reasonable effort to prevent sexual contact, sexual intercourse, or sexual conduct, as those terms are defined by Section 43.01, Penal Code, sexual penetration with a foreign object, incest, sexual assault, or sodomy being inflicted on or shown to a child by another person, or intentionally practiced in the presence of a child by another person if the child is present only to arouse or gratify the sexual desires of any person;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code; or

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene (as defined by the Penal Code) or pornographic.

(2) "Neglect" includes:

(A) the leaving of a child in a situation where the child would be exposed to a substantial risk of harm, without arranging for necessary care for the child, and a demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child; or

(B) the following acts or omissions by a person responsible for a child's care, custody, or welfare:

(i) placing the child in or failing to remove the child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

(ii) the failure to seek, obtain, or follow through with medical care for the child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child; or

(iii) the failure to provide the child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused.

(3) "Person responsible for a child's care, custody, or welfare" means a person who traditionally is responsible for a child's care, custody, or welfare, including:

(A) a parent, guardian, managing or possessory conservator, or foster parent of the child;

(B) a member of the child's family or household as defined by Section 71.01 of this code;

(C) a person with whom the child's parent cohabits;

(D) school personnel or volunteers at the child's school; or

(E) personnel or volunteers at a public or private child-care facility that provides services for the child or at a public or private residential institution or facility where the child resides.

FALSE REPORT OF CHILD ABUSE MADE A CRIMINAL OFFENSE

§ 34.031. False Report.

(a) A person commits an offense if the person knowingly or intentionally makes a report under this chapter that the person knows lacks factual foundation. An offense under this subsection is a Class B misdemeanor.

(b) If, in connection with a pending suit affecting the parent-child relationship, one parent of a child makes a report alleging child abuse by the other parent that the parent making the report knows lacks factual foundation, the report shall be deemed a knowingly false report. Evidence of a false report shall be admissible in any suit between the parents involving terms of conservatorship.

STATE OF NEW YORK

2050--A

1989-1990 Regular Sessions

IN ASSEMBLY

January 25, 1989

Introduced by M. of A. HOYT, VANN, HARENBERG -- Multi-Sponsored by -- M. of A. DIAZ, HINCHEY, LOPEZ, MARSHALL, McPHILLIPS -- read once and referred to the Committee on Children and Families -- reference changed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the social services law and the penal law, in relation to false reporting of child abuse or maltreatment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 8 through 12 of section 424 of the social services law are renumbered subdivisions 9 through 13 and a new subdivision 8 is added to read as follows:

8. refer suspected cases of falsely reporting child abuse and maltreatment in violation of subdivision three of section 240.55 of the penal law to the appropriate law enforcement agency or district attorney;

§ 2. Section 240.55 of the penal law, as added by chapter 276 of the laws of 1973, subdivisions 1 and 2 as amended by chapter 146 of the laws of 1979, is amended to read as follows:

§ 240.55 Falsely reporting an incident in the second degree.

A person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire or an explosion under circumstances in which it is not unlikely that public alarm or inconvenience will result; [or]

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05918-04-9

SUNDAY
TIMES UNION
October 14, 1990

Abusing the system is child abuse, too

By Richard Wexler

The tragic death of 3½-month-old Michael Lewellen in Schenectady, allegedly at the hands of his mother, will set in motion events that are entirely predictable, and almost certain to result in more such tragedies in the future.

Here's what's likely to happen:

(1.) Politicians will swoop down on this case like vultures. They will seek out scapegoats. They will pledge to "crack down on child abuse" by urging more people to report the slightest suspicion of maltreatment to authorities. They will suggest legislation to make it even easier than it already is to remove children from their parents.

This is sure to make everything worse. Though there are more than two million "reports" alleging maltreatment of children every year, the kind of severe beatings that come to mind when we think of "child abuse" represent at most 3 percent of those reports, and sexual abuse represents another 6 percent.

In contrast, nationwide, at least 60 percent of all "reports" turn out to be false. In New York the percentage is even higher. Defenders of the status quo will tell you that in some cases labeled "unfounded" there really was abuse. But, a federal study found that for every such case there are at least two cases in which parents are wrongly labeled abusive by child protective workers.

Richard Wexler is a Times Union staff writer. His book, "Wounded Innocents: The Real Victims of the War Against Child Abuse," was published this month by Prometheus Books.

So, the 60 percent figure actually underestimates the problem of false reports. Of the remaining reports, more than half are cases of "deprivation of necessities." Often that means sweeping laws allowed a child protective worker to confuse "neglect" with poverty and remove children from their parents because of poor housing conditions, for example.

The deluge of false reports leaves child protective workers with insufficient time to deal with cases in which children truly are endangered. In New York City, for example, allegations of abuse sometimes have piled up in boxes because no one had time to investigate them.

Overwhelming caseloads are given to workers with minimal qualifications — In New York, a bachelor's degree in anything — and little training — is enough. That's why the system errs in both directions. Children who should be left at home are taken from their parents, and children who should be taken from their parents are left at home. Encouraging more reporting and broader laws will only make that worse.

(2.) There will be a foster care panic. Protective workers in Schenectady will be running scared. Every time they go out on a case, they will wonder if it might turn out to be the next Michael Lewellen — and if they will be blamed. So, workers will be much more likely to remove children from their homes for little or no reason. Some will convince themselves that's good because it supposedly keeps more children safe. But, what could be more traumatic to a small child who has suffered no harm from

See **ABUSE** / B-8

THE TIMES UNION
Tuesday
October 23, 199(

Group offers support

To the Editor:

Congratulations to staff writer Richard Wexler on his Oct. 14 article on "Abusing the system is child abuse, too" and his recently published book on "Wounded Innocents: The Real Victims of the War Against Child Abuse."

The formation of VOCAL NEW YORK and the rapid growth of Victims of Child Abuse Laws in the Capital District and throughout the state of New York bears testimony to the epidemic and widespread abuse of our legal system through false reports of child abuse which have victimized (1) non-abused children subjected to repeated interrogation and instructional messages, (2) innocent parents wrongfully deprived of access to their children as the result of false reports of child abuse, (3) innocent teachers, day-care workers, and clergymen who have been falsely accused, (4) under-educated over-worked child protective service workers who are incapable of distinguishing true allegations from false allegations and who systematically abuse our children in the name of protecting them, (5) gullible family court judges who routinely presume innocent adults to be guilty until proven innocent, and (6) the legal system itself when used intentionally and maliciously to falsely accuse innocent adults of child abuse.

The purpose of VOCAL NEW YORK is to provide emotional support and education to children, innocent adults, and families that have been victimized by false reports of child abuse; to promote and support just and reasonable child abuse laws; to protect children and innocent adults from false reports of child abuse; and to work toward changes in the legal system so that innocent adults shall be presumed innocent until proven guilty.

In short, our goal is to protect our children and their families from all forms of abuse. Our member's kit containing much needed valuable and practical information can be obtained by calling us at 371-7239. Our national hotline number is 1-800-848-6225.

PETER G. SOKARIS
Albany

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF NEW YORK

2050--A

1989-1990 Regular Sessions

IN ASSEMBLY

January 25, 1989

Introduced by M. of A. HOYT, VANN, HARENBERG -- Multi-Sponsored by -- M. of A. DIAZ, HINCHEY, LOPEZ, MARSHALL, McPHILLIPS -- read once and referred to the Committee on Children and Families -- reference changed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the social services law and the penal law, in relation to false reporting of child abuse or maltreatment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 8 through 12 of section 424 of the social services law are renumbered subdivisions 9 through 13 and a new subdivision 8 is added to read as follows:

8. refer suspected cases of falsely reporting child abuse and maltreatment in violation of subdivision three of section 240.55 of the penal law to the appropriate law enforcement agency or district attorney;

§ 2. Section 240.55 of the penal law, as added by chapter 276 of the laws of 1973, subdivisions 1 and 2 as amended by chapter 146 of the laws of 1979, is amended to read as follows:

§ 240.55 Falsely reporting an incident in the second degree.

A person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire or an explosion under circumstances in which it is not unlikely that public alarm or inconvenience will result; [or]

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05918-04-9

2. Reports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire or an explosion which did not in fact occur or does not in fact exist; or

3. Reports, by word or action, to the statewide central register of child abuse and maltreatment, as defined in title six of article six of the social services law, an alleged occurrence or condition of child abuse or maltreatment which did not in fact occur or exist.

Falsely reporting an incident in the second degree is a class A misdemeanor.

§ 3. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

SUNDAY
TIMES UNION
October 14, 1990

Abusing the system is child abuse, too

By Richard Wexler

The tragic death of 3½-month-old Michael Lewellen in Schenectady, allegedly at the hands of his mother, will set in motion events that are entirely predictable, and almost certain to result in more such tragedies in the future.

Here's what's likely to happen:

(1.) Politicians will swoop down on this case like vultures. They will seek out scapegoats. They will pledge to "crack down on child abuse" by urging more people to report the slightest suspicion of maltreatment to authorities. They will suggest legislation to make it even easier than it already is to remove children from their parents.

This is sure to make everything worse. Though there are more than two million "reports" alleging maltreatment of children every year, the kind of severe beatings that come to mind when we think of "child abuse" represent at most 3 percent of those reports, and sexual abuse represents another 6 percent.

In contrast, nationwide, at least 60 percent of all "reports" turn out to be false. In New York the percentage is even higher. Defenders of the status quo will tell you that in some cases labeled "unfounded" there really was abuse. But, a federal study found that for every such case there are at least two cases in which parents are wrongly labeled abusive by child protective workers.

Richard Wexler is a Times Union staff writer. His book, "Wounded Innocents: The Real Victims of the War Against Child Abuse," was published this month by Prometheus Books.

So, the 60 percent figure actually underestimates the problem of false reports. Of the remaining reports, more than half are cases of "deprivation of necessities." Often that means sweeping laws allowed a child protective worker to confuse "neglect" with poverty and remove children from their parents because of poor housing conditions, for example.

The deluge of false reports leaves child protective workers with insufficient time to deal with cases in which children truly are endangered. In New York City, for example, allegations of abuse sometimes have piled up in boxes because no one had time to investigate them.

Overwhelming caseloads are given to workers with minimal qualifications — In New York, a bachelor's degree in anything — and little training — is enough. That's why the system errs in both directions. Children who should be left at home are taken from their parents, and children who should be taken from their parents are left at home. Encouraging more reporting and broader laws will only make that worse.

(2.) There will be a foster care panic. Protective workers in Schenectady will be running scared. Every time they go out on a case, they will wonder if it might turn out to be the next Michael Lewellen — and if they will be blamed. So, workers will be much more likely to remove children from their homes for little or no reason. Some will convince themselves that's good because it supposedly keeps more children safe. But, what could be more traumatic to a small child who has suffered no harm from

See **ABUSE** / B-8

THE TIMES UNION
Tuesday
October 23, 199(

Group offers support

To the Editor:

Congratulations to staff writer Richard Wexler on his Oct. 14 article on "Abusing the system is child abuse, too" and his recently published book on "Wounded Innocents: The Real Victims of the War Against Child Abuse."

The formation of VOCAL NEW YORK and the rapid growth of Victims of Child Abuse Laws in the Capital District and throughout the state of New York bears testimony to the epidemic and widespread abuse of our legal system through false reports of child abuse which have victimized (1) non-abused children subjected to repeated interrogation and instructional messages, (2) innocent parents wrongfully deprived of access to their children as the result of false reports of child abuse, (3) innocent teachers, day-care workers, and clergymen who have been falsely accused, (4) under-educated over-worked child protective service workers who are incapable of distinguishing true allegations from false allegations and who systematically abuse our children in the name of protecting them, (5) gullible family court judges who routinely presume innocent adults to be guilty until proven innocent, and (6) the legal system itself when used intentionally and maliciously to falsely accuse innocent adults of child abuse.

The purpose of VOCAL NEW YORK is to provide emotional support and education to children, innocent adults, and families that have been victimized by false reports of child abuse; to promote and support just and reasonable child abuse laws; to protect children and innocent adults from false reports of child abuse; and to work toward changes in the legal system so that innocent adults shall be presumed innocent until proven guilty.

In short, our goal is to protect our children and their families from all forms of abuse. Our member's kit containing much needed valuable and practical information can be obtained by calling us at 371-7239. Our national hotline number is 1-800-848-6225.

PETER G. SOKARIS
Albany

THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

ABUSE

Continued from B-1

his parents from whom he was taken from them and suddenly dropped into the laps of strangers — with no idea if he ever will see his parents again.

That's about the least amount of harm foster care can do. Often, children are bounced from home to home, emerging unable to love or trust anyone again. And foster care is no guarantee of safety.

Corey Greer of Treasure Island, Fla., was about the same age as Michael Lewellen when he died in his crib of dehydration in a filthy, overcrowded foster home. A witness at the foster mother's trial said the white foster mother had to teach black children and described Corey as a big baby.

A study of case records in Baltimore found there was abuse in one of every four foster homes studied, and in Maryland, 35 percent of foster children are placed in four or more homes. Abuse in foster homes is so rampant in Los Angeles County that the state of California is considering taking over operation of the county's child welfare agency.

(3.) Bureaucrats ducking for cover will find some way to blame Michael's death on efforts to keep families together. They will say "the law" requires them to keep children in, or return them to, dangerous situations.

There is no such law. There is a federal law requiring "reasonable efforts" be made to keep families together — reasonable, not ridiculous, efforts — and that law is regularly ignored with impunity anyway. Nor is there a conflict between child protection and family preservation. Programs all over the country are keeping children at home with a record of safety far better than the foster care system can claim — and at lower cost.

Such successes get little attention because, like a plane that doesn't crash, a child kept safely at home is not news. But, experts estimate at least half the children now in foster care could safely be home if adequate services were provided.

If the system is ever to do better, family preservation must become its centerpiece. In addition, definitions of neglect — that often are confused with poverty — must be narrowed, and a screening mechanism must be put in place to reduce the number of false and trivial reports investigated.

Yes, such screening would mean some maltreatment will be missed, but we miss more such cases now by overwhelming the system. Letting reports pile up in boxes is screening, too.

1-21-91

ALASKA FAMILY
SUPPORT GROUP

SENATOR RICK HALFORD, CHAIR
SENATE JUDICIARY COMMITTEE
P.O. BOX V
JUNEAU, AK 99811
RE: HB 44
DEAR RICK,

THE PURPOSE OF THIS LETTER IS TO ASK YOU TO HOLD HB 44 IN COMMITTEE FOR TWO WEEKS TO GIVE US A CHANCE TO PREPARE AN AMENDMENT TO THE BILL THAT WOULD RE-INSTATE THE PERJURY SANCTION ON ALL COMPLAINT FORMS, AND TO PROVIDE PENALTIES FOR FILING FALSE DOMESTIC VIOLENCE/CHILD ABUSE CHARGES.

WE REQUEST THIS TIME PERIOD TO COLLECT DATA FROM OTHER STATES WHERE DOMESTIC VIOLENCE LAWS ARE ALSO TERRIBLY ABUSED.

DOMESTIC VIOLENCE IS A FAMILY ISSUE. THIS BILL WOULD MAKE IT AN ISSUE TO BE DEALT WITH BY COUNCELING MALES ONLY. THIS BILL PUTS CHILD ABUSE INTO THE SAME REALM AS DOMESTIC VIOLENCE. PLEASE NOTE ATTACHED DOCUMENTS THAT SHOW BOTH ALASKA AND TEXAS ARE EXPERIENCING MORE DOMESTIC VIOLENCE/CHILD ABUSE BY WOMEN THAN MEN.

WE BELIEVE THIS BILL IS THE VEHICLE TO USE TO SEND THE MESSAGE TO THE PUBLIC AND THE COURTS THAT FALSE DOMESTIC VIOLENCE/CHILD ABUSE CHARGES ARE NOT TO BE USED TO REMOVE A SPOUSE (MOM OR DAD) FROM THE MARITAL RESIDENCE, DEPRIVE HIM OR HER OF PROPERTY AND CHILDREN IN A PENDING DIVORCE ACTION.

DOMESTIC VIOLENCE IS DEPLORABLE, AND IS A NATIONAL DISGRACE, BUT HB 44 IS NOT THE WAY, AS WRITEN, TO DEAL WITH THE PROBLEM.

SINCERELY,
STEVE STRUBE

C.C.: SENATORS RODEY, ADAMS, COLLINS, FRANK, FISCHER

P.O. Box 521155 Big Lake, Alaska 99652 Phone/Fax (907) 892-7760

Texas Dept. Human Resources

Characteristics of Alleged Perpetrators in Confirmed Reports of Abuse/Neglect

	Total Number of Cases			Percentage of Total			Average For Three Year Period
	Year			Year			
	1987	1988	1989	1987	1988	1989	
Age Group							
Under 19	1,687	1,303	1,640	3.7	3.7	4.2	3.9
18-25	10,505	8,387	8,729	23.3	23.7	22.4	23.1
26-35	19,604	15,500	17,101	43.4	43.9	43.9	43.7
36-45	9,456	7,146	8,057	20.9	20.2	20.7	20.6
Over 45	3,924	3,009	3,427	8.7	8.5	8.8	8.7
Sex							
Male	21,004	16,402	18,200	46.5	46.4	46.7	46.5
Female	24,172	18,943	20,754	53.5	53.6	53.3	53.5
Ethnic Group							
Anglo	24,036	17,539	18,971	53.2	49.6	48.7	50.5
Black	8,441	7,544	8,585	18.7	21.3	22.0	20.7
Hispanic	12,095	946	10,897	26.8	2.7	28.0	19.1
Other	604	516	501	1.3	1.5	1.3	1.4
Marital Status							
Married	23,598	17,882	18,879	52.2	50.6	48.5	50.4
Widowed	779	599	574	1.7	1.7	1.5	1.6
Seperated	3,717	2,874	3,227	8.2	8.1	8.3	8.2
Divorced	6,292	4,728	5,120	13.9	13.4	13.1	13.5
Single	6,617	5,600	6,473	14.6	15.8	16.6	15.7
Unknown	3,084	2,767	3,471	6.8	7.8	8.9	7.9
Under 18	1,089	895	1,111	2.4	2.5	2.9	2.6
Not Applicable							
Relationship to Oldest Victim							
Mother	20,977	16,532	18,400	46.4	47.1	47.2	46.9
Father	11,137	8,820	9,447	24.7	25.0	24.3	24.6
Stepparent	4,244	3,209	3,510	9.4	9.1	9.0	9.2
Parent's Paramour	2,199	1,995	2,231	4.9	5.6	5.7	5.4
Grandparent	1,476	1,136	1,315	3.3	3.2	3.4	3.3
Aunt/Uncle	1,535	1,144	1,393	3.4	3.2	3.6	3.4
Sibling/Other Relative	1,746	1,269	1,629	3.9	3.6	4.2	3.9
Other Caregiver*	1,862	1,140	1,038	4.1	3.2	2.7	3.3
Total Alleged Perpetrators	45,176	35,345	38,954				

* Includes Daycare, School and Institutional Personnel, Pre-consummated Adopted

Alaska Dept. Health & Social Services

CHARACTERISTICS OF ALLEGED PERPETRATORS OF CHILD ABUSE/NEGLECT

	Total Number of Perpetrators Year						Percentage of Total Year					
	1985	1986	1987	1988	1989	1990	1985	1986	1987	1988	1989	1990
Age Group												
00--17	67	94	94	60	75	64	2%	3%	2%	2%	2%	2%
18-25	490	365	429	409	407	398	17%	10%	10%	11%	12%	13%
26-35	1417	1206	1255	1068	901	904	51%	34%	31%	28%	27%	29%
36-45	544	1585	2011	2105	1831	1626	19%	44%	49%	54%	54%	52%
Over 45	286	321	309	230	186	161	10%	9%	8%	6%	5%	5%
TOTAL	2804	3571	4098	3872	3400	3153						
Gender												
Male	1242	1569	1728	1623	1442	1339	44%	44%	42%	42%	42%	42%
Female	1565	1999	2374	2252	1961	1821	56%	56%	58%	58%	58%	58%
TOTAL	2807	3568	4102	3875	3403	3160						
Ethnic Group												
Ak. Native	797	904	939	857	751	602	28%	25%	23%	22%	22%	19%
Non-Ak. Native	12	8	11	16	15	18	0%	0%	0%	0%	0%	1%
Black	150	153	137	155	224	234	5%	4%	3%	4%	7%	7%
Asian	16	27	29	31	39	38	1%	1%	1%	1%	1%	1%
Mexican	23	22	11	33	33	39	1%	1%	0%	1%	1%	1%
Caucasian	1727	1717	1515	1469	1304	1393	62%	48%	37%	38%	38%	44%
Other	55	67	43	26	43	27	2%	2%	1%	1%	1%	1%
Unknown	20	665	1405	1271	987	803	1%	19%	34%	33%	29%	25%
TOTAL	2800	3563	4090	3858	3396	3154						

The Truth About Domestic Violence: A Falsely Framed Issue

R. L. McNeely
Gloria Robinson-Simpson

Domestic violence has received increasing attention during the past decade; attention that has framed the violence as essentially a masculine form of assaultive behavior. This article presents the results of empirical studies that contradict the popular conception. The authors suggest that the popular view has contributed to men's increasing legal and social defenselessness. The appropriateness of psychotherapeutic approaches to the problem is discussed briefly.

AS McNEELY AND JONES noted in 1974, the prevalence of physical abuse of women by their male intimates has resulted in the classification of woman-battering as a severe social problem. Feminists have made efforts to heighten public awareness of violence against women and have successfully escalated media coverage of the subject and introduced numerous federal and state bills to provide women with increased legal protection from abusive men. Pizzey's seminal book raised urgent questions, such as "Who are these men?" and "Why do these men do it?"[1]

Asking these questions frames an important social problem in a context that may inaccurately depict the phenomenon. The questions are based on the assumption that men, exclusively or nearly exclusively, perpetrate domestic assaults. Thus, the public, legislators, change agents, and other activists are acting on underlying assumptions that may be false or, at best, not fully reflective of domestic violence. Policies, then, are being built on an erroneous vision of physical abuse. Accounts of domestic violence reinforce the dominant view by excluding virtually any reference to the pervasiveness of violence in American families and, almost invariably, by ignoring male victimization. Steinmetz notes that "Husband abuse is not uncommon, although many tend to ignore it, dismiss it or treat it with 'selective inattention.' "[2]

This article surveys domestic violence investigations, compares those revealing high abuse for both sexes with contradicting investigations that yield findings more consistent with the popular view of domestic violence, and considers briefly some of the implications of the inaccurate view of the problem. The authors examine whether psychotherapeutic treatment of male assailants is a sound response to the social problem of domestic violence and whether recent legal actions designed to protect the rights of women contribute to men's social and legal defenselessness.

INVESTIGATIONS OF SPOUSE ABUSE

In 1977, Steinmetz studied conflict tactics used in 57 families selected by a public opinion polling firm. The study group included families from a broad range of socioeconomic status categories and age groups. She found that 93 percent of the families used verbal aggression, and 60 percent had used physical aggression at least once to resolve marital conflicts. Thirty-nine percent of husbands and 37 percent of wives had thrown things, 20 percent of both husbands and wives had struck their spouses with their hands, and 10 percent of both husbands and wives had hit their spouses with a hard object. Steinmetz observed that there were few differences between husbands and wives in the type and frequency of physical aggression and that many families experienced reciprocal aggression. Steinmetz also noted that women were as likely as men to select and initiate physical violence to resolve marital conflicts and that men and women had similar intentions when using physical violence, although men were somewhat more likely to cause greater injury, perhaps because of their superior physical strength. Pointing out that an equal number of wives and husbands kill their spouses—a pattern that has been stable over time—Steinmetz observed that when weapons neutralize differences in physical strength, about as many men as women are victims of homicide. In supporting her assertion that women are equally likely to engage in violence, Steinmetz noted that women are more likely than men to physically abuse children, and that throughout history women have been the primary perpetrators of infanticide.[3] In fact, Steinmetz found that mothers abused children 62 percent more often than fathers, and that male children were more than twice as likely to suffer physical injury.[4] Men were underrepresented in the Steinmetz study because a greater percentage of husbands than wives chose not to participate in the oral interview (as opposed to the structured questionnaire) portion of the study. Apparently, men were less likely to discuss their victimization if required to do so in face-to-face interaction.

Nisonoff and Bitman conducted a telephone survey in which subjects were asked to report on incidents of violence with current and former spouses and former intimates.[5] Because divorced and separated individuals would be surveyed, the researchers presumed that the investigation would reveal high marital violence rates.

Whereas 15.5 percent of the men and 11.3 percent of the women reported having hit a spouse, 18.6 percent of the men and only 12.7 percent of the women reported having been struck by a spouse. Thus, although a higher percentage of men than women

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ported having hit a spouse, a higher percentage of men reported having been hit by a spouse. The investigators found no differences between the sexes in the frequency or severity of spousal violence. The investigators concluded that "As predicted, wives reported hitting their husbands almost as frequently as husbands reported hitting wives, and a higher proportion of men reported having been hit by their wives than vice versa...men often are the victims of spousal violence."[6]

Time Periods Compared

Gelles's 1974 study was the first to examine a group of families who had no known history of abuse, and thus it provided some data on the incidence of family violence in the general population.[7] He found that 2.5 percent of the wives had been victimized between two and five times during the course of marriage, and 12.5 percent of the husbands had been so victimized. Five percent of both husbands and wives had been victimized as often as once every two months, and 7.5 percent of the wives and 2.5 percent of the husbands were victimized at least once per month; some were assaulted daily. Gelles concluded that "Although the wives were less violent than their husbands, they were far from passive."[8]

In 1986 Straus and Gelles published the findings of a nationally representative survey that replicated Straus's earlier study. A primary research objective was to compare domestic violence rates for two time periods.[9] The study revealed that the incidence of violence against females decreased between 1975 and 1985. About 12.1 percent of all women reported at least one violent incident in 1975, whereas 11.3 percent reported being victimized in 1985. Reports of severe violence dropped from 3.8 percent in 1975 to 3.0 percent in 1985. The investigators note that this represents a 26.6-percent decrease in the rate of severe violence men committed against women.[10] Violence against men, however, increased: 11.6 percent reported victimizations in 1975, compared with 12.1 percent in 1985. The rate of severely violent incidents men reported dropped slightly from 4.6 percent to 4.4 percent.

Straus and Gelles's data demonstrate that women are as violent, if not more violent than men.[11] Women also appear to use weapons far more often than men, which the authors suggest is explained by the greater average size and strength of men. In 1975, 2.2 percent of the respondents reported men using objects to strike women, and 1.7 percent reported it in 1985. No change was reported for women: 3.0 percent used objects in both 1975 and 1985. Also, unlike 1975 when males were more likely actually to use a gun or a knife, no differences were observed in 1985, when 2.0 percent of both men and women used at least one of these weapons against their intimates. No changes were observed in the percentage of those threatening to use a gun or a knife: 4.0 percent of men made these threats in 1975 and 1985 and 6.0 percent of women threatened use of a gun or knife in 1975 and 1985.

Discussing the decrease in violence against women and the increase in violence against men, Straus and Gelles commented:

> Violence by wives has not been an object of public concern. There has been no publicity, and no funds have been invested in ameliorating this problem because it has not been defined as a problem. In fact, our 1975 study was criticized for presenting statistics on violence by wives. Our 1985 finding of little change in the rate of assaults by women on their male partners is consistent with the absence of ameliorative programs.[12]

Degrees of Violence

Straus conducted the first study of domestic violence using a demographically representative national sample.[13] Noting that "wife beating" is a political rather than a scientific term, Straus developed an ascending continuum (the Conflict Tactics Scale) of violent acts that included (1) throwing things at spouse; (2) pushing, shoving, or grabbing; (3) slapping; (4) kicking, biting, or hitting with the fist; (5) hitting or trying to hit with something; (6) beating up; (7) threatening with a knife or gun; and (8) using a knife or a gun. Items 1 through 8 were termed a "Violence Index," and items 4 through 8 constituted a "Severe Violence Index." Data were obtained to reflect the yearly incidence of violence perpetrated by men and women.

Findings indicated that in a given year men perpetrated a median of 2.5 assaults (items 1–8) a year and women perpetrated a median of 3.0 assaults (items 1–8) a year. Using means rather than medians to assess central tendencies reveals that men engaged in an average of 8.8 assaults a year and women engaged in 10.1 assaults a year. Because means are more sensitive than medians to extreme scores (scores of those who engaged in many violent acts per year), the latter figures reflect more accurately the total amount of violence occurring, and the medians reflect more accurately the normative rates of violence.

Women also engaged more often than men in severe violence as measured by items 4–8. Men perpetrated a median of 2.4 acts of severe violence per year, whereas women committed a median of 3.0 acts of severe violence against male intimates. The mean severe violence rate for men was 8.0 acts per year; however, women committed 8.9 acts of severe violence. Men and women also engaged in different types of severe violence: women more frequently kicked, bit, or hit male intimates with their fists, they more often hit or tried to hit men with objects, and more women than men threatened to use knives or guns. However, men were slightly more likely actually to use a gun or a knife, and men beat up women more often than women beat up men. Men were found to beat up women an average (median) of 1.7 times a year, whereas women beat up men an average (median) of 1.4 times a year. When all severely violent acts were examined, the data indicated that women as a group were more violent to their male partners, and more men than women were victimized. Applying the results of the study to the total U.S. population, Straus posits that about 1.8 million females are victims of severe violence each year and about 2.1 million males are victimized. Although the data do not indicate what proportion of the violent acts by women were in response to violent acts by men, the fact that women had higher mean and median rates for severe violence suggests that female aggression is not merely a response to male aggression.

In fact, the study probably underestimates the true extent of domestic violence because divorced and separated couples, who are likely to have experienced violence, were not represented. Straus noted that women are no more likely than men to reject physical force on moral grounds and stated that "The old cartoons of the wife chasing the husband with a rolling pin or throwing pots and pans are closer to reality than most—and especially those with feminist sympathies—realize."[14]

National Crime Survey

The National Crime Survey (NCS)[15] defines spouse abuse as "Assault without theft in which the offender was the victim's spouse or ex-spouse."[16] Consequently, cohabiting couples and incidents involving theft are excluded. NCS does not focus specifically on domestic violence, and no interviewing techniques sensitive to the difficulties of obtaining domestic violence data are used. In fact, spouses of victims may be present when NCS interviews are conducted. The result is estimates of domestic violence that are significantly lower than those found in other studies, and the

Bureau of Census notes that assaults by relatives are the most underreported of all types of victimization NCS investigates.[17]

According to NCS data, annualized for the years 1973, 1974, and 1975, Gaquin reports that fewer than 1 percent of both women (3.9 per 1,000 persons) and men (0.3 per 1,000 persons) are victimized by spouses or ex-spouses.

McLeod examined 6,200 cases of domestic assault that were reported to law enforcement authorities or to NCS interviewers to determine whether or not females sustained greater injuries than males when victimized.[18] Men comprised 6 percent of all self-reported spousal assault victims in her study, a figure that is considerably higher than that reported by Gaquin, who also used NCS data in her analysis of domestic violence.[19] McLeod's survey, unlike those of Steinmetz, Straus, and Nisonoff and Bitman, disproportionately sampled black people, who, when aggregated, were decidedly below the national average for income. Seventy-seven percent of all male victims in McLeod's study were black men, which introduces further questions about the extent to which her findings can be applied to the general population.[20]

Whereas a weapon was used in about 25 percent of all cases in which women were victims, 82 percent of all victimizations of men involved weapons. McLeod suggests that the data underrepresent weaponless assaults, because victims are less likely to report these incidents to the police. Although 25 percent of all offenses against women were classified as aggravated assaults, about 80 percent of all offenses against men were classified as aggravated assaults, and the vast majority of the latter cases involved the use of weapons. In fact, none of the men reported a serious victimization in which no weapon was present.[21] In noting that 73 percent of male victims known to the police and 77 percent of those reported to the NCS sustained injuries, McLeod estimates that corresponding figures for female victims are between 52 percent and 57 percent.[22]

McLeod concluded that

> Clearly, violence against men is much more destructive than violence against women....Male victims are injured more often and more seriously than are female victims....The data do provide rather strong support for the view that violence against men and violence against women are independent events. Overall differences in weapon use, weapon choice, offense severity, and injury are evident.[23]

RESEARCH FLAWS AND COMMON MISCONCEPTIONS

Data from the studies reviewed here present a view of domestic violence at odds with common assumptions about the nature of the problem. Surveys that show higher rates of men as aggressors invariably are based on NCS data or official law enforcement records, but the researchers point out that these studies are flawed methodologically because the samples are not representative and because men are less likely to lodge official victimization reports. Nonetheless, two of the three studies reviewed that used data from NCS and other official sources found that victimized men are abused more often, are more severely injured, or both.

Another problem with much of the domestic violence literature is that it is based on clinical populations, specifically battered women receiving shelter services or therapy.[24] Data collected and conclusions drawn from those who seek shelter or therapy cannot be generalized to the broader population. Victims who seek services may differ significantly from the broader population, so the value of these studies lies primarily in spawning clinical prescriptions for treatment, not in describing or explaining domestic violence in general.

An unquestioned belief about human behavior is that men are more aggressive than women. Yet when Frodi, Ropert-Thome, and Macauley surveyed the empirical literature on aggression, they found that 61 percent of all studies reviewed did not show men to be more aggressive than women, and that "...women [did not show] consistently lower tendencies than men to be physically aggressive."[25] In fact, Frodi and her colleagues reviewed studies examining nondomestic aggression, a sphere in which women are assumed commonly to be even more timid than in family, cohabitation, or dating relationships.

There are other common misconceptions. Most people accept the assumption that wives, particularly low-income wives, cannot escape abusive relationships because of financial dependence. Their entrapment is used to explain the desperation of those who resort to spouse killings. However, examinations of female spouse abuse victims reveal that low-income women are more likely than affluent women to leave domestic arrangements involving spouse abuse.[26] Also, Steinmetz's study of battered males showed that men stay in violent homes for some of the same reasons women remain in abusive situations. In particular, men often become the targets of abuse when they step in to protect children being abused, and because women usually become the custodial parent upon divorce, many men are afraid to leave for fear of further violence directed at their children. Steinmetz adds:

> It is always assumed that the husband's greater economic resources could allow him to more easily leave a disruptive marital situation. Not only do men tend to have jobs which provide them with an adequate income, but they have greater access to credit and are not tied to the home because of children. This perspective rests on erroneous sexist assumptions. Although males, as a group, have considerably more economic security, if the husband leaves the family, he is still responsible for a certain amount of economic support of the family in addition to the cost of a separate residence for himself. Thus, the loss in standard of living is certainly a consideration for any husband who is contemplating a separation.... Interviews with abused men suggest that leaving the family home means leaving....the comfortable and familiar, that which is not likely to be reconstructed in a small apartment.[27]

Another common misconception is that black men treat women more violently than do white men. Even Straus, Gelles, and Steinmetz, whose survey is the most comprehensive and methodologically sound of all domestic violence investigations, contributed to this misconception. Reporting in 1980 that wife abuse was 400 percent greater among black couples than white couples, they failed, as have the investigators of nearly every other domestic violence survey, to take into account that social class differences between the races, rather than race itself, may explain discrepant rates.[28] However, in the one study published thus far that was designed specifically to examine the convergence of race and class in explaining domestic violence rates, Lockhart found virtually no difference between the races.[29] Although a higher percentage of black women reported at least one victimization event, the median rate of violent episodes experienced by middle-class white women was somewhat higher than that experienced by middle-class black women.

CONSEQUENCES OF MISCONCEPTIONS

The danger of these misconceptions is that social policy, legislation, and the attitudes of officials and the public are being shaped by erroneous information.[30] For example, the

assistant district attorney of Milwaukee County's Sensitive Crime Unit stated that "Ninety-eight percent of all victims are women. Often, the woman is passive and allows it to happen."[31] Milwaukee County's Domestic Abuse Specialist indicated her conviction that 94 percent of all abuse involves male assailants and female victims, and that all of the men are disturbed emotionally and characteristically have low self-esteem.[32] John McNally, a prominent Milwaukee attorney, pointed out another consequence of misconceptions:

> In Milwaukee County, the complexion of a jury often determines the outcome of a case. Out of 12 jurors, seven or eight will be women, and five of the women will be white. The majority will be over 50 years of age. If you are a black male charged with domestic assault, rape or sexual assault of children, what do you think your chances are? Black males start out with a foot in the bucket to begin with. And juries in Milwaukee County are more racially mixed than most juries elsewhere.[33]

Men increasingly are defenseless when allegations of domestic violence are made. Women increasingly are successfully using charges of past abuse as a justification for assaulting, killing, or planning to kill husbands. Women also increasingly escape first-degree homicide convictions when they claim past spouse abuse.[34] The effectiveness of past abuse as a defense results from the popular view of domestic violence as perpetrated solely by emotionally disturbed men against women who are physically weak, defenseless, predisposed to passivity, and philosophically nonviolent.[35] Rittenmeyer notes that this view is supported by women's rights activists and a growing body of academic literature, and that women who kill their husbands increasingly explain their actions in the context of a history of abuse.[36] These facts are particularly interesting given the fact that approximately equal numbers of men and women are killed each year by spouses.[37] Rittenmeyer states that

> ...the [battered woman] defense, by exploiting the traditional stereotypes regarding women's weaknesses and vulnerability, licenses the quick use of deadly force by a specialized group and stands as an ironic contradiction both to the social equality sought by women and to the basic aim of the criminal law. And, finally, the defense, if accepted by the courts, is an unconstitutional, invidious, sex-based classification of the due process and equal protection rights of male homicide defendants and victims...bestowing upon the abused wife the unique right to destroy her tormentor at her own discretion.[38]

The politically charged atmosphere that pervades the broad array of gender-sensitive crimes such as marital rape, sexual abuse of children, and child abuse increasingly provides the means by which women are able to victimize men socially merely by alleging their occurrence. For example, growing numbers of wives are falsely accusing their husbands in divorce disputes of having sexually assaulted their children.[39] Wives reportedly are motivated to make the false accusations to improve their negotiating posture in property settlements, to improve their chances of being awarded sole custody of children, or simply to be vindictive toward divorcing husbands.[40] Attorney McNally states that the popular view of these accusations has spawned a host of publicly financed support services that serve inadvertently in some cases to "...throw gasoline onto the fire."[41] Typically staffed by social workers, the services provide assistance to legitimate victims, but also can prolong court proceedings and increase legal fees for men implicated in marginal or deceitful cases. Wives who allege assault, child abuse, sexual abuse of children, or marital rape also have the benefit of free representation by county prosecutors or district attorneys. Data indicate that 60 percent of the nation's alleged abuse cases that involve children turn out to be false, only 1 percent of all allegations involve the serious assaultive behavior the public generally regards as truly abusive, and disgruntled neighbors as well as spouses increasingly use false abuse allegations vindictively.[42]

SUGGESTED APPROACHES

The authors do not intend to diminish the seriousness of domestic violence. Yet attempts to address the problem will not be effective unless the full scope of the phenomenon is acknowledged. Although, as Steinmetz notes, "...it is not likely that feminist researchers and counselors will publicly acknowledge that males might also be victims," society must recognize this fact or we will be addressing only a part of the phenomenon.[43] Nearly every investigation includes the caveat that the prevalence of violence was likely to be underestimated. Most estimates of the true magnitude of the problem are that 60 percent of all American families experience spouse abuse. When child abuse is considered also, forecasts have envisioned family violence as a nearly universal phenomenon.[44]

Given the magnitude of the problem, it is unlikely that psychotherapeutic approaches can successfully address it, or that psychological disturbance is the root of family violence in most instances. It is more likely that the causes are located in society's reverence for violence, as evidenced in movies, advertisements, popular music, and in the high rate of firearm ownership.[45] Thus, laws must clearly state that spouse abuse cannot be tolerated; it is not just a "family affair." Progress has been made: more jurisdictions have instituted procedures requiring police officers to document cases of suspected abuse.[46] Additionally, some evidence suggests that recidivist abuse is reduced when assailants are jailed, and more jurisdictions are mandating the incarceration of abusers.[47]

A large percentage of homicides involve spouses or other intimates. Considering the fact that more than one-half of all American households own guns, most of which are handguns, Straus recommends the enactment of stringent gun control legislation.[48] Additionally, efforts should be made to mitigate the scope of violence portrayed in the mass media, even in the absence of convincing empirical evidence of a relationship between media violence and household violence.

Given the strong relationship between childhood victimization and subsequent participation in violence during adulthood, harsh discipline must be defined as physical abuse and merit official intervention.[49] A number of studies have shown that violence becomes more likely when families are isolated from extended kin; thus, some suggest that governmental policies that encourage geographical mobility at the cost of reduced ties to members of extended families be reshaped.[50]

Other strategies will be required as well. Some writers have argued that violent behavior is a natural reaction to inegalitarian structures in society that inhibit personal growth, and the extent to which socially structured racial, gender, and class inequalities frustrate human needs largely predicts the amount of domestic violence in society.[51] Consequently, efforts must be made to achieve a more egalitarian society. But concerted efforts in all of these areas are unlikely to be effective unless society realizes that domestic violence is a two-way street.

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THE CHILDREN'S ADVOCATE

Newsletter of The New Jersey Council for Children's Rights

April, 1991 Vol. IV No. 2 Box 615, Wayne, NJ 07474 / (201) 694-9323

N.J.C.C.R. HELPS STOP D.V. BILL

A-2408 Sent Back To Assembly For Revision!

The New Jersey Council for Children's Rights and the National Rifle Association successfully defeated the Assembly version of the Domestic Violence Bill which deleted a provision calling for perjury sanctions to be stated on all complaint forms. This provision was lobbied for by the N.J.C.C.R. because it is being evidenced by lawyers, prosecutors, judges and others in the legal system that the current domestic violence laws are terribly abused. In the January 1991 edition of the New Jersey Family Lawyer--a newsletter distributed to family court lawyers--that domestic violence is used as a "first strike" weapon in a pending divorce that effectively "blindsides" a spouse, usually the husband, by throwing him out of the marital residence and depriving him of his property and most importantly his children.

As previously reported in *The Children's Advocate*, the Middlesex County prosecutor's office knows that women use domestic violence to gain the upper hand in divorce actions to win property and custody. All of this done without due process and usually without the other side being given immediate notice and an opportunity to be heard.

Reports from the NJ State Police and the Administrative Office of the Courts Report on Domestic Violence state that 82% of all D.V. complaints are filed by women, not 95% that you always see in the media. According to these reports approximately 50% of these cases are dismissed, withdrawn, don't rise to the standard of evidence, or are false. Probably this figure is more in the 70%-80% range because repeated complaints are filed in the same cases for harassment purposes, and end up inflating the statistics.

Because the defendant's property interests, family and children are implicated and the government's interest to protect those truly abused is important, it is no small constitutional matter. A judge must define the injury and state why it is irreparable, when giving out an order without notice. The decisive matter then is the risk of erroneous deprivation. The law provides no protection from risk of error or false allegations and because no showing of imminent danger is required to be stated on the pre-printed D.V. complaints, the statute is fatally defective because it is not narrowly drawn, but is now open to abuse. Federal Rules of Civil Procedure 65 (c) grants security (property, money, etc.) if a TRO is falsely or erroneously given.

Even though some argue women would be reluctant to file a complaint if the perjury provision is on the form, that argument fails because in most complaint situations police officers responding to the scene have the power to make an arrest or file complaints on behalf of the complainants if they deem necessary.

We have also argued for a commission to be set up to investigate the rising number of false allegations. This is not forthcoming and should be addressed by each and every member to the press and to their legislators.

The N.R.A. argued against the pending legislation also. The police would have been granted broad new powers to confiscate weapons that were not used in the alleged assault. The judge conducting a summary hearing could revoke the firearms credentials of the owners, and they would then have to petition the court to get them back.

N.J.C.C.R.'S STORMIN' NORMAN ATTACKS

Stormin' Norman Wright, our Monmouth/Ocean County chapter coordinator, along with member and non-member parents from his area, kept a vigil on the status of D.V. Bill A-2408/S-2230 as it was hurriedly rammed through the Assembly. After alerting the N.J.C.C.R. of the impending act, we were able to organize a letter and phone campaign to our Legislators that was instrumental in stopping this back-door approach by Assemblywoman Marlene Lynch-Ford of Ocean County and the Commission on Sex Discrimination in the Statutes. Norman and others passed out literature to every individual they came into contact with in Trenton. Legislators, lobbiests, special interest groups, aides, and the media were besieged with literature concerning this bad legislation. This organization sends a special note of gratitude to Norman and his forces for their effort to protect the rights of children to two parents.

Continued on Page 3

GUEST SPEAKER

APRIL 15TH 1991
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Nick Appicelli

Open Forum. Come meet the lawyer who is offering the Legal Insurance plan to our members. He will answer questions on the

TESTIMONIAL STATEMENT

Prepared For:

THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
CONGRESS OF THE UNITED STATES

Regarding:

House Concurrent Resolution 172

Prepared By:

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Professor of Social Welfare
School of Social Welfare
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15 May 1990

TESTIMONIAL SUMMARY

Proponents of H. Concurrent Resolution 172 might wish to consider the following: (1) The Resolution, as presently worded, permits a tremendous amount of discretionary latitude in what might be considered as abuse, suggesting that it may be too ambiguous; (2) custody rights may be denied to both parents in families with a pattern of reciprocal abuse; (3) custody rights may be denied to a large number of women; and (4) the absence of specified criteria to determine the veracity of spousal abuse evidence may be problematic.

Chairman Frank and honorable members of the subcommittee, I would like to thank you for holding this hearing, and I would like to thank you for inviting me to participate today. I wish to start by indicating that although I do have a concern about Concurrent Resolution 172, I do not view myself as having a partisan role in these proceedings. I am here merely to provide information that may be useful in your deliberations. In addition, I wish it to be clear that I am not here as an apologist for violence. My comments should not be construed as motivated by an intent to diminish the seriousness of domestic violence. Acts of domestic violence are deplorable. They should be punished and, wherever possible, all prudent deterrents should be employed.

Having made these points I would like to begin my remarks by noting that there are two images of domestic violence. One image has been projected by the popular media and by academicians who have examined victims of domestic violence housed within shelters for abused women. The image that emerges from this view of domestic violence is that men, exclusively, or nearly exclusively, are the perpetrators of physical violence in domestic assaults. This image often has guided lawmakers, domestic violence change agents, and other activists.

A conflicting image of the phenomenon emerges from research that has been conducted on the general population in which people at large are asked to disclose their participation in domestic violence. The view of violence that emerges from this research is that violence is a nearly universal phenomenon in American families, with both sexes being perpetrators and victims of violence. If, for example, one uses as one's yardstick of abuse the resort to physical punishment in disciplining children, nearly all American families can be said to be abusive at some time or other. In addition, estimates are that at least 60% of all families will experience at least one episode of physical aggression occurring between spouses during the course of a marriage. And some studies have found that 95% of both husbands and wives employ verbal aggression against each other, such as yelling, screaming, insulting each other, and stomping out of rooms. Perhaps it is important to note that such actions often precipitate physical violence; in fact they are often precursors to domestic homicide.

One implication of these findings is that violence against spouses and children is more the norm than it is the exception in American family life. If it is the norm, one might wish to consider whether or not a spouse who has on one or two occasions resorted to the use of physical punishment in disciplining children should be barred from having custodial rights. I suspect that most people would argue against the barring of custodial rights unless it can be shown that there has been a pattern in which the person repeatedly engages in routine acts of physical punishment.

Similarly, the pattern as well as the nature of spousal abuse should be taken into account in any proceedings in which a parent's custody rights are at stake. Yet as the Resolution is worded presently, I can see no distinction between those families that have experienced battering exclusively in the form of verbal abuse and those that have experienced physical abuse. Nor can I see a distinction drawn between those families that have experienced only one episode of physical spousal violence, and those that routinely experience a pattern of physical abuse. And what about families in which there is a pattern of reciprocal violence? Finally, I am unable to discern any distinction between a situation in which spouses have resorted to the use of a push or a shove, versus those, for example, that have resorted to the use of fists or objects in striking spouses.

Given this, it seems to me that the Resolution, as presently worded, permits a tremendous amount of discretionary latitude in what might be considered as abuse. Forecasting future courtroom situations suggests that the Resolution may be too ambiguous and subject to legal challenge.

Another point I would like to make is that it is conceivable that custody rights will be denied to more women than presently imagined if the Resolution is enacted into law. Most people are surprised to find out that the best scientific estimates indicate that whereas 1.6 million wives are "beaten" by their husbands each year, 2.4 million husbands are "beaten" annually by their wives. By "beaten" is meant having been kicked, bitten, or hit with a fist or object, actually being beaten up, or having been victimized by the threat or actual use of a gun or knife.

One reason why people tend to react with such disbelief to these figures is because they fly in the face of the popular image of violence promoted by the media and by academicians who examine female victims housed in shelters. They also fly in the face of official crime reports that indicate much greater male involvement in physical abuse. And such data do not correspond to the image most people have of women as being philosophically nonviolent and predisposed to passivity.

Yet rigorous studies have shown that men tend to contact formal authorities only in the most serious cases of female perpetrated abuse, thereby skewing the official crime report statistics by underreporting female perpetrated spousal violence. Rigorous studies also have found that women are as likely as men to select and initiate physical violence, that men and women are equal in their intentions when using physical violence, and that whereas husbands are the aggressors in some families, wives are the aggressors in other families, and that many families experience reciprocal violence. Another finding that tends to surprise people is the fact that battered men often stay

in abusive situations because they fear that their absence will result in continued violence being visited upon their children. As one researcher found, these men often became targets for abuse when they step in to protect children from being abused. I might add that studies also have found that women are somewhat more likely than men to engage in the most serious forms of violence, perhaps because of the greater average size and strength of men.

Given these findings I think it is important for those who support Resolution 172 to consider that one possibly unintended consequence of the Resolution might be that a large number of women will be denied custody rights to their children. I also wonder what the courts will do in cases wherein domestic violence is reciprocal. Will both parents be denied custody?

Finally, the Resolution does not appear to set out criteria relating to the veracity of evidence to be considered in court. It merely indicates that spousal abuse evidence should be considered. It seems to me that guidelines should be established that can determine the veracity of the evidence. This is especially so when one considers that some seminar leaders apparently are recommending to divorce-prone seminar participants that false records of abuse are expeditious means to remove husbands from the marital residence prior to the commencement of actual divorce proceedings. They can be used also as tools to achieve better bargaining positions in property settlements, or to improve chances of being awarded sole custody of children. According to one author who attended a number of seminars, the means recommended to seminar participants to achieve these objectives is by the filing of false domestic violence claims prior to filing for divorce.

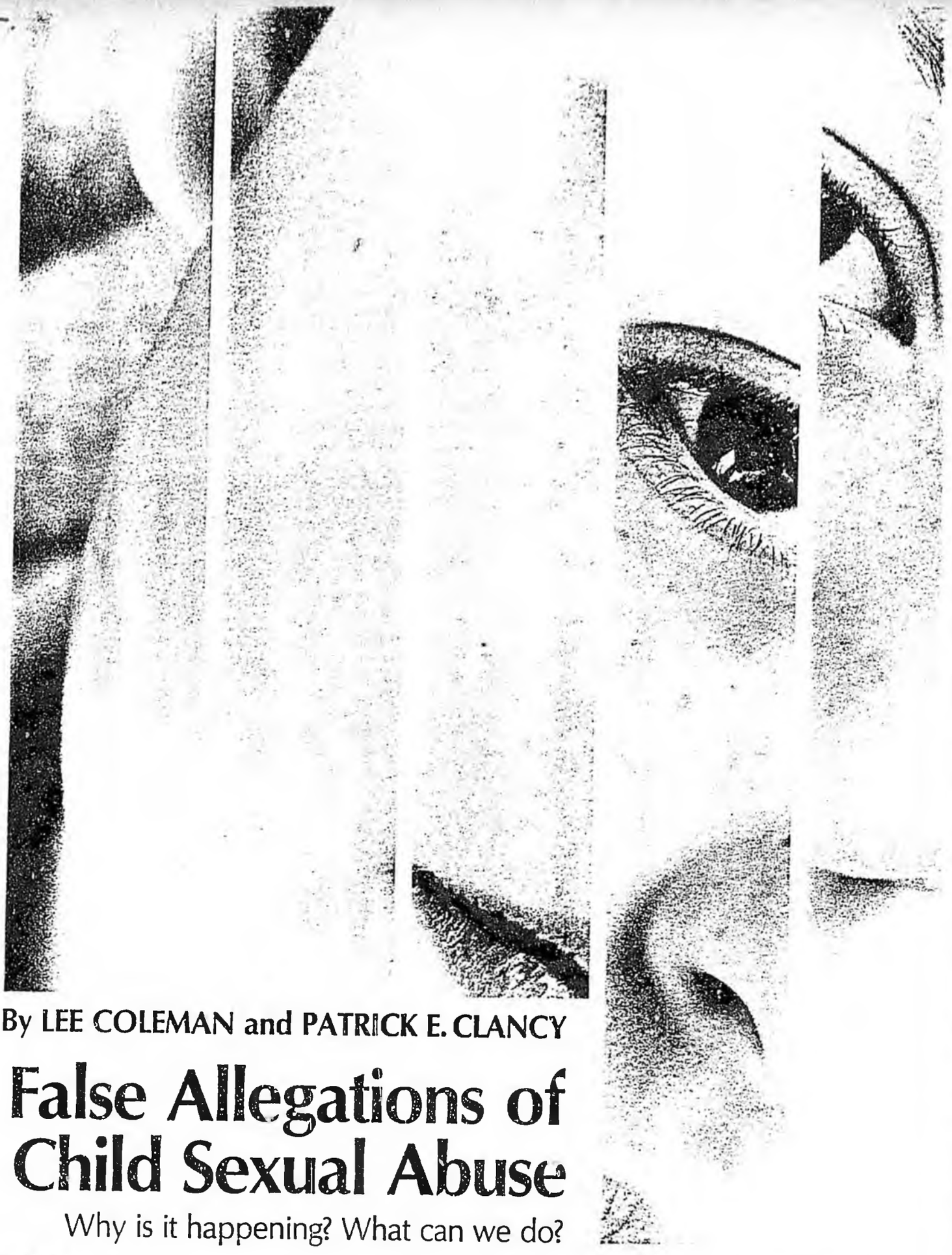
I might add that false claims of spousal violence is but one strategy. More and more false sexual abuse allegations are being heard each year. One researcher has estimated that more than 500,000 families are put through investigations of unfounded reports of sexual abuse each year. And, in the most serious of situations, those involving domestic homicides, another researcher found that fewer than 10% of cases involving female perpetrators examined in her study of five major American cities actually warranted justifiable pleas of self-defense. This was despite the fact that nearly 60% of the women claimed self-defense as the homicide motive. Indeed, in cases involving male homicide victims who were asleep, infirm, intoxicated, or helpless, 73.3% of the female assailants claimed self-defense. Yet 30% of the women had prior violent arrest records involving individuals other than their spouses.

In conclusion, it would appear to be most advantageous for attention to be directed to the issue of credible evidence. The Resolution merely specifies that evidence of spousal abuse should create a statutory presumption. The absence of focus on credible evidence seems to me to be a serious flaw.

THANK YOU

Biographical Sketch

R.L. McNeely is a professor of social welfare at the University of Wisconsin-Milwaukee. He is a graduate of Eastern Michigan University, the University of Michigan, and Brandeis University. He is the author of more than 50 articles published in scientific journals, and he has published two books, including, Race, Crime and Criminal Justice (with C. Pope). He is a Research Fellow of the Gerontological Society of America, and was selected recently as an American Council On Education Fellow, where he served in the Office of the Chancellor, University of New Orleans. He appeared on CBS Morning News, and on NBC's Showcase Series, to discuss the issue of domestic violence, and has spoken before numerous groups and organizations on the topic.



By LEE COLEMAN and PATRICK E. CLANCY

False Allegations of Child Sexual Abuse

Why is it happening? What can we do?

Just a few short years ago, neither of the authors could have anticipated that his professional life would become so heavily involved in cases of alleged child molestation. One of us, a public defender, found that only 1 or 2 percent of his clients were truly innocent of any wrongdoing. Many defendants had been overcharged, but were actually guilty of lesser crimes; many defendants were guilty, but the prosecution didn't have the proof necessary to convict. The truly innocent defendant was rare. The other author, a practicing psychiatrist and a critic of courtroom reliance on psychiatric examinations, testified regularly on behalf of the prosecution, rebutting defense experts' claims that psychiatric tools were helpful to a jury deciding *mens rea* questions.

Now something new and unprecedented has emerged, something that is having a devastating impact on the lives of thousands of persons and threatens many of the due process protections of all of us. We are speaking of the widespread occurrence of false accusations of child sexual abuse. And while informed persons may disagree on how often false accusations are made, there is no real doubt that it is happening far more often than our society can afford.

Some researchers claim that only 8 percent of cases studied are fictitious. (David P.H. Jones and J. Melbourne McCraw, *Reliable and Fictitious Accounts of Sexual Abuse of Children*, 2 J Interpersonal Violence (March 1987).) Others stress that nationwide, only about 40 percent of all reports are substantiated. (Douglas J. Besharov, *Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decisionmaking*, Report to American Bar Association and American Public Welfare Association, Oct 8, 1987.)

We are unimpressed by studies done in laboratories, claiming that children are not susceptible to leading questions. Such studies fail to duplicate the reality of investigative interviews in actual cases. However, it clearly would be unethical to attempt to see if a child could be trained to believe falsely that sexual abuse had taken place.

Even if the true incidence of false allegations of sexual abuse is unknown, it seems beyond question that the problem is a serious one, deserving of a careful reevaluation of current theory and practice.

To begin to understand the developments that ultimately led to innocent persons being charged with child molestation and to prosecutors relying so heavily on those whom they traditionally disdained—the mental health professionals—we may take as a starting point Senator Walter Mondale's 1973 hearings on child abuse and neglect. Those hearings led to the passage of the Child Abuse Prevention and Treatment Act of 1974, 42

USC §§ 5101-5106. Gradually, all the states were required to develop programs aimed at faster recognition and treatment of child abuse. We see no reason to doubt that thousands of children benefited, but at the same time, a disturbing trend was set in motion.

While physical abuse will leave behind physical evidence, sexual abuse may not. As a result, investigators from law enforcement and child protection agencies had the difficult job of interviewing young children who might be afraid to say what had happened to them. As they have done so often, public agencies turned to "experts" from the mental health professions, this time for lessons in how to talk to children.

It is our contention that false allegations of child sexual abuse are on the increase as a direct result of this alliance between law enforcement and mental health professionals. We want to explain this development and suggest a better way to protect children while protecting the innocent.

Investigators and therapists: two different worlds

Neutrality is the *sine qua non* of the criminal investigator. He or she advocates neither for individuals nor for political and social causes. Wherever the truth leads, the responsible investigator follows.

We believe that the root cause of the current problem of false allegations of child sexual abuse is the incompatibility between the neutrality required of investigators and a series of biases imported into the investigative process from the mental health professions.

Unlike investigators, therapists are *not* neutral. They are advocates who seek to promote the welfare of their patients. The patient (sometimes including the family) becomes the major source of information, and the therapist monitors progress by relying heavily on the reported *feelings* of the patient.

What would happen if therapists became investigators in legal cases involving their patients? Conversely, what would happen if investigators were trained to think and act like therapists, seeing themselves as *advocates* for one or more persons being investigated? This is what happened in the late 1970s and early 1980s, and while the results are all around us, little has been written to explain this history and its aftermath.

Both camps, the sexual abuse "specialists" from mental health fields and the criminal and child protection investigators, came to believe sincerely that their major task was to "believe the child" and to convince others to do the same. This was certainly not an attempt to hide the truth. It was, rather, the result of their belief that when it comes to sexual abuse, the child's statements *are* the truth.

Society had for so long ignored incest victims, some of whom never told anyone about their victimization out of fear of their abusers or out of family loyalty, that the new mental health specialists conceived the problem solely as one of helping molestation victims to disclose their abuse. The exclusive focus was on the molested child who hid the fact; they failed to recognize that under certain conditions, a child might make a false allegation. They failed to understand that their own questioning of the child, if it was based on a prior assumption that abuse had occurred, might be the very thing that could cause such an undesired result.

To illustrate the "believe the child" approach, consider the recommendations of psychiatrist Roland Summit, a major figure in the developments outlined above. In 1983, in an article describing what he termed the "child sexual abuse accommodation syndrome," Summit wrote:

- Acceptance and validation are crucial to the psychological survival of the victim. . . .
- [Summit invited] more active, more effective clinical advocacy . . . within the systems of child protection and criminal justice.
- . . . [T]he validation of the child's perception of reality, acceptance by adult caretakers and even the emotional survival of the child may all depend on the knowledge and skill of the clinical advocate. Every clinician must be capable of understanding and articulating the position of the child in the prevailing adult imbalance of credibility.
- Clinical experience and expert testimony can provide advocacy for the child. . . . [Children] need an adult clinical advocate to translate the child's world into an adult-acceptable language.
- As an advocate for the child both in therapy and in court . . . the more illogical and incredible the initiation scene might seem to adults, the more likely it is that the child's plaintive description is valid.
- The specialist must help mobilize skeptical caretakers into a position of belief, acceptance, support and protection of the child.

(Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983).)

Summit justified such a one-sided approach with a claim which is still echoed by many child abuse professionals: *"It has become a maxim among child sexual abuse intervention counselors and investigators that children never fabricate the kinds of explicit sexual manipulations they divulge in complaints or*

Lee Coleman *practices psychiatry in Berkeley, California. His concerns about the influence of psychiatry in legal proceedings have been reflected in several dozen articles as well as in his book,* The Reign of Error: Psychiatry, Authority, and Law *(Beacon Press 1984).* **Patrick E. Clancy** *is a certified criminal law specialist in the State of California. Clancy's law firm in Sacramento deals exclusively with child molestation, representing both juvenile accusers and the accused.*

interrogations." [Emphasis added.]

Such ideas had a profound impact on front-line workers from law enforcement, social work, and mental health. Workshops on sexual abuse promoted the feeling that a competent, sensitive, and up-to-date professional would believe molestation had occurred, while one who raised doubts was incompetent, insensitive, and not fit to handle such cases. Under such pressures, investigators could easily come to feel that every case labeled "substantiated" or "founded" was a sign of competence and concern for children.

The myth that children never fabricate stories about sexual abuse brought a glorious simplicity to the difficult task of investigating possible sexual abuse of a child. If molested children may be hesitant to admit what happened (something we do not dispute) and non-molested children (quoting Summit) "never fabricate explicit sexual manipulations," then *interrogators would have everything to gain and nothing to lose by using a questioning technique aimed at "encouraging" the child to disclose abuse.* Leading questions suggesting that abuse had occurred, and positive reinforcement for statements about abuse, would "help" the molested child tell the secret, while non-molested children would be resistant to such techniques.

We now know, of course, that these ideas are wrong. There is no group of human beings that is immune to suggestibility—and the idea that children are immune is especially unlikely, given their intellectual and emotional immaturity and their dependence on adults. There is considerable irony in the fact that it was the "experts" from the mental health professions who so effectively convinced police and social work investigators of these false ideas.

Thousands of children have been subjected to interviews based on these ideas. Those who have had a chance to study audio- or videotapes of these interviews do not need expert credentials to under-

stand what can happen. Here is an example from the well-publicized "Country Walk" case in Miami, which in 1985 resulted in the conviction of a couple who ran a babysitting service in their home. (*People v. Francisco Fuster*, Dade Cty, Fla, No 84-19728 A (1984); *People v. Illiana Fuster*, Dade Cty, Fla, No 84-19728 B (1984).)

Creating "memories"

"Sue," close to her fifth birthday, was interviewed at the request of prosecutors by a social worker who had a special interest in sexual abuse. Asked what happened at the babysitters', Sue replied, "They did nothing bad to me." Asked if she saw anything bad done to others, she said, "No."

After Sue said she had learned from her mother that the babysitters were bad and were in jail, she was then told by the social worker that other children claimed naked games were played. (In truth, such statements came only after highly leading and suggestive interviewing.) Sue said she didn't think this had happened, so the social worker asked her to pretend what *might* have happened. After undressing the "anatomically correct" dolls, Sue was asked what kind of games they played. "Duck, Duck, Goose," she responded.

When Sue failed to play a sexual game with the dolls, she was told that *if* the children were touched in private places, then that was wrong. Sue again repeated that "they didn't do anything bad to me," to which she was told that if she *did* have a secret to tell, "everybody would be very proud of you for telling."

Now Sue asked if bad things happened, and she was told, "some of the children said so, and I believe the children, because I don't think children make up stories like that." (Sue, of course, could not know that none of the other children talked about any sexual activities until they were subjected to techniques similar to what she was experiencing.)

When Sue next was told that even "bigger" children had said such things, she was finally convinced. "Now I found out that it was true because other children said it," she said. She was also told that "all of the parents . . . are real proud of their children if they don't keep a secret. . . ."

Despite the fact that Sue had consistently denied seeing such things and had clearly said she had now "found out" what had happened, she was next asked to demonstrate with the dolls. She complied, touching the penis of the male doll with her finger. As the session drew to a close, she was encouraged to try to "remember" even more after she went home and to try to tell her parents.

Five months later she was again interviewed, and now her "memory" was definitely improved. She talked about knives held to necks, "cut your head off" games, and now "Duck, Duck, Goose" included taking clothes off. She now "remembered" that each of her babysitters pulled on her vagina at the same time.

Encouraged by Sue's new "memories," her interviewer asked if she had seen any boys have their penises bitten, whether the children played a "pee-pee" game, whether they played with urine and feces, and whether the children had been given anything to eat or drink that made them sleepy. These were all things the social worker said the other children had claimed, but Sue said she hadn't seen any of this.

Once again, she was encouraged to try to remember more and tell her parents, because, as her interviewer said, "I kind of have a feeling that maybe there might be something else. . . ."

Eight months after this session, and over a year since the first interview, Sue was the first child witness called by the prosecution. She promised to tell the truth, which satisfied the judge that she was competent to testify, and then went on to describe the "cut your head off" game, and also said that any children who asked for a cupcake had a knife held to their throats. Everyone was naked, she said, and her private parts were pulled. She was even able to draw a picture of what happened. Sue said she didn't see anything done to other children, but later said she knew it happened to them.

Not lying and not telling the truth

The "believe the child" approach thus turns out to be more truly a "disbelieve denials but believe disclosure" approach. Children may "lie" when they deny abuse, out of fear or loyalty toward the abuser, but they never "lie" about abuse. As the preceding example shows, however, by the time Sue testified against her babysitters, she was hardly "lying." She now believed what she was saying, and was too young to understand that her beliefs came not from memories of her own experiences but from what she had *learned*.

Thus, the frequently heard debate about whether children may "lie" about sexual abuse misses the point in most cases. The real question is not whether the child believes what he or she is saying, but whether the statements are based on memories of real events or on a mental image created by suggestive questioning.

In our experience, which adds up to hundreds of allegations and about fifteen hundred hours of audio- or videotaped interviews with children being investigated for possible molestation, children quite regularly make allegations that can be factually proven not to be true. When this happens, it is rare for the child to be the true initiator of the false statements. In most cases, the child's false statements are the product of an interviewing style that leads the child gradually to construct a mental picture of abuse. This picture becomes the child's "memory." The result can be disastrous, not only for the justice process but also for the child's emotional well-being.

Separating real memories from indoctrination

Given that real molestation most certainly does occur, the courts are left to separate the wheat from the chaff. When is a child's testimony trustworthy, and when is it the product of interviews that have contaminated the child's ability to know the truth?

It seems to us that a clear record of all interviews with the child, via audio- or videotape recording, is the best way for a judge or jury to determine responsibly whether the child's testimony is coming from memory or from prior suggestive interviews. We find that in many cases, none of the interviews are taped; in many other cases interviews are taped only after many sessions have already taken place and the child is now ready to "disclose."

We think it is significant that those who like to call themselves "advocates for the child," such as police, child protective services, district attorneys, and abuse therapists, are the very ones who have resisted the use of tape recording as a standard investigative tool. In other words, those who are talking to the child in the crucial early stages of an investigation seem to be the most uncomfortable about documenting everything that is happening.

Therapists as investigators

This problem of undocumented interrogations of children, which leaves the trier of fact with inadequate evidence to evaluate the quality of the questioning process, is most severe when child therapists become part of the investigative process. It is common practice for police or child protection investigators to refer a child for therapy at the very outset of an investigation. The stated purpose is either to help the child disclose information about abuse or to help the child with the trauma secondary to abuse.

If the child is a true molestation victim, both of these purposes may be fulfilled with no harm done to the truth-seeking process. But if the child has not been abused, such therapy can have a profoundly contaminating impact. Week after week, the child is questioned about abuse and encouraged to "tell the secret." In our experience, children may "learn" in such sessions that they are in danger and may develop major fears and anxieties. They may learn to believe they were abused and gradually construct the details. They may come to believe in these inventions with all the sincerity that real events would call forth. They may, tragically, learn to hate a parent who has never harmed them.

The therapists chosen by the investigators are often handpicked from among a small group of "specialists" in child sexual abuse. These abuse specialists, trained as they are to be "advocates for the child," have no doubt that a child brought to them as a molestation victim is a true victim. In case after case we have studied, such therapists grudgingly acknowledge that false allegations do occur, but they are nonetheless sure that the case in question is a valid case.

The interviews that these therapists conduct are called "therapy" and are therefore protected, in nearly all states, by the patient-therapist privilege. But such sessions are also *investigative*, because the child is regularly asked to describe what supposedly happened. They are therefore crucial to the court's efforts to determine the truth. Nonetheless, in many jurisdictions, accused persons are unable to gain access to information that might shed light on what type of questioning is taking place. In this way, *therapists become investigators who work in secret*, depriving the judge or jury of crucial information.

Not surprisingly, therapists working for months or even years to help children deal with the aftermath of assumed abuse are not likely to change their opinions about whether abuse actually took place, regardless of evidence to the contrary. Faulty conclusions therefore go unrecognized, and we see no lessening of the use of leading questions in interviews.

Kelley-Frye rule of reliability

Despite such problems, our courts have traditionally allowed mental health professionals to offer expert opinions rather freely. In California prior to 1984, psychologists, psychiatrists, and Child Protective Services personnel testified at will that in their opinion, a certain child was the victim of molestation. Such testimony then began to be challenged under the *Kelley-Frye* rule of reliability (*Frye v. U.S.*, 293 F 1013 (1923); *People v. Kelley*, 17 Cal 3d 24 (1976)), according to which scientific evidence must be shown to be accepted as reliable by the relevant scientific community.

In 1984, in *People v. Bledsoe*, 36 Cal 3d 236, the California Supreme Court ruled that the rape trauma syndrome was not accepted as a scientific tool to determine whether a particular woman had been raped. It was then quickly recognized that if behavioral syndromes that might result from rape were not *specific* to rape, and therefore could not reliably be used as evidence of rape in a trial, the same held true for the various behaviors said to be typical of child victims of molestation. As a result, psychological opinion testimony that a child was a victim of molestation fell into disuse.

Prosecutors immediately found a way around *Bledsoe*. The same evidence was introduced to rebut what were said to be common myths about child molestation victims: that they would actively resist their abusers, would report immediately, and could during the first interview tell everything that happened. (*People v. Roscoe*, 168 Cal 3d 1093 (1985); *People v. Gray*, 187 Cal 3d 213 (1986); *People v. Sanchez*, 208 Cal 3d 721 (1989); and

People v. Stark, 213 Cal 3d 107 (1989).) The result of dispelling numerous "myths" was to create a profile of a child molestation victim that was tailored to fit the child involved in the case at hand. The appellate courts realized this subterfuge and moved to block it. (*People v. Baucher*, 203 Cal 3d 385 (1988).)

Expert opinions that rely on attempts to evaluate the accused rather than the child are also being excluded under *Kelley-Frye*. Penile plethysmographs were held to be unreliable, as were profiles of pedophiles. (*People v. John W.*, 185 Cal 3d 801 (1986).) Opinions based on children's play with sexually explicit dolls were held to be unreliable. (*U.S. v. Gillespie*, 852 F2d 475 (1988); *In re Amber B.*, 191 Cal 3d 682 (1987); *In re Christine C.*, 191 Cal 3d 676 (1987).) In response, prosecutors attempted to introduce such doll play and let the court form its own opinion. This was also barred on the grounds that a judge's opinion, if based on an unreliable method, is not a proper substitute for an expert opinion based on the same method. (*In re Christine D.*, 206 Cal 3d 469 (1988).)

The juvenile court took a short detour. In 1984, *Cheryl H.*, 153 Cal 3d 1098, held that the juvenile court worked under different rules and continued to allow opinion testimony that a child had been molested. That detour was short-lived when it was held that the *Kelley-Frye* test applied to juvenile court as much as to adult court. (*In re Sara M.*, 194 Cal 3d 585 (1987).)

The last chapter in the battle over admissibility of expert opinion is not over. The California Supreme Court recently issued its opinion in *People v. Stoll*, 49 Cal 3d 1136 (1989), holding admissible as character evidence psychological opinion testimony based upon interviews and personality tests (MMPI and MMCI) said to show that the defendant displayed no signs of "sexual deviance" or "abnormality." The court held that such opinion was *medical* opinion and not the type of scientific opinion that *Kelley-Frye* monitors.

Clearly, then, both prosecution and defense interests have been able at times to convince the courts that experts from mental health fields are able, based on examinations of the child or the accused, to assist the finders of fact. We think such reliance hinders rather than advances quality investigations and fair trials, but it is in the next area of improper investigation where vigorous application of *Kelley-Frye* is most needed.

Faulty medicine

Recognizing that true victims of molestation might be too frightened to tell about it or too young to describe their abuse, it is easy to see why investigators would be eager for clear physical indicators that molestation has occurred. In the late 1970s, when a handful of doctors claimed they knew how to interpret "subtle clues" that most doctors would miss, the law enforcement and child protection communities eagerly adopted these doctors as their own. Before looking at how such unsupported claims came to be considered reliable evidence of sexual abuse, a few clarifications are in order.

Doctors who are told of a suspicion of abuse and write this down in their reports as "history of sexual abuse" have not made a finding, but have merely repeated the allegations. Likewise, a normal examination does not help to establish that molestation occurred. Nonetheless, it is extremely common for doctors examining a child to report: 1) "history of sexual abuse," and 2) "physical examination consistent with sexual abuse." The result? An examination with no positive findings might be understood by investigators to prove molestation, with devastating impact on the subsequent handling of the case.

If investigators are misled by this improper use of language when the child's examination is normal, the problem is magnified when these same doctors interpret normal variations of anal or genital anatomy as subtle signs of prior trauma. To understand this problem, we need a bit of history.

Medical examinations for sexual abuse of children performed long after the alleged fact are a new phenomenon. All but a handful of the articles on this subject were written only within the past decade. (Lee Coleman, *Medical Examination for Sexual Abuse: Have We Been Misled?* Champion (Nov 1989).)

An early but influential article was, significantly, a collaboration of Ventura, California, family physician Bruce Woodling and local district attorney Peter Kossoris. (Bruce Woodling and Peter Kossoris, *Sexual Misuse: Rape, Molestation and Incest*, Pediatric Clinics of North America (May 1981).) They listed a number of findings as being indicative of prior sexual abuse—findings which in truth were either nonspecific or open to subjective interpretation, including erythema (redness), tightness (too much or too little) of pubic or anal muscles, anal fissures, and hymenal variations said to be "transections," or old scars.

What support did Woodling and Kossoris offer for these new interpretations? Only Woodling's "experience." Even beginning students of scientific methodology know that experience, unaccompanied by corrective feedback, is hardly a guarantee of reliable conclusions; the developing movement in child protection was too eager for validation to notice this lack.

A still small but growing number of physicians and nurses took a special interest in forensic ano-genital examinations of suspected child abuse victims, usually because these professionals were members of new "sex abuse teams." They attended workshops and readily absorbed the kind of unsupported claims that a handful of physicians like Woodling promoted.

Sodomy, they were told, could be determined by seeing if the anus

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privilege nor the psychiatrist-patient privilege should be used to shield psychiatrist-patient communications when the defendant's mental state is in issue (Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va L Rev 597 (1980)); and

8. A defense-retained psychiatrist is much more than an attorney's "interpreter"; the psychiatrist's observations and conclusions—apart from the defendant's communications—constitute material knowledge relevant to the case, and such knowledge "should be treated just like the knowledge of any other witness and should be discoverable from the [psychiatrist] himself" (Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan L Rev 455, 463-64 (1962).)

Therefore, given the arguments on both sides, the lack of any Supreme Court precedent, the split on the circuits, and the risks of disclosure of a defense-retained psychiatrist's "privileged" communications, as a federal litigant you should assume nothing about psychiatric confidences in the context of insanity or other diminished-capacity defenses. And you should be prepared to argue it all—and to lose it all. **CJ**

Sentence Reduction

(Continued from page 7)

ically has shown remarkable restraint when reviewing prosecutorial decision making generally. (See Bennett Gershman, *Prosecutorial Misconduct* § 4.1 (Clark Boardman 1985).) Even so, as a practical matter, reviewing prosecutorial discretion under a subjective bad-faith test is meaningless. Cases that apply a bad-faith standard to prosecutorial behavior have rarely found against the prosecutor. (See B. Gershman, supra; *United States v. Smitherman*, 889 F2d 189, 191 (8th Cir 1989): threatening to intervene if prosecutor arbitrarily and in bad faith refuses to file a 5K1.1 motion.)

Rexach is a prime example of arguably bad-faith conduct by the prosecutor. Although Rexach provided information leading to the drug arrests of three persons, the Second Circuit sustained the prosecutor's claim that the assistance was not substantial enough. Finally, the Second Circuit's confidence that institutional incentives guarantee prosecutorial good faith may be fanciful. After *Rexach*, it is probably more likely that cooperating defendants will be reluctant to enter into cooperation agreements with prosecutors without much more meaningful assurances than simple reliance on the prosecutor's good faith. **CJ**

Sexual Abuse

(Continued from page 20)

failed to contract when the skin nearby was stroked. If the anus relaxed instead, this was said to be a sign that the child had learned to anticipate penetration. Another example: Hymenal edges that were not lacy and thin were said to have been traumatized.

As these trainees went back to their communities and in turn became the trainers in more workshops, these uncorroborated "signs" became conventional wisdom. Community pediatricians usually refused to get involved, deferring to those few who claimed to be "specialists." Law enforcement and child protection workers learned to refer possible victims to the "sex abuse teams."

By now, thousands of criminal, civil, and juvenile trials have prominently featured expert testimony from these examiners, usually with devastating impact on triers of fact. A doctor's opinion that physical examination findings show clear evidence of sexual molestation is likely to convince almost anyone who is not familiar with the true state of the art. And few doctors are willing to testify in defense of alleged child molesters, even when they are aware of the scientific shortcomings of such claims.

In search of research

Clearly, there is a need to get beyond these naked claims and into the world of research findings. It is remarkable, considering the attention paid in recent years to the sexual abuse of children and the devastating consequences to all parties of good and bad investigations, how little research has been done to validate the claims so readily offered in court by the doctors who examine the children.

Only in the last three or four years has *any* research been done, and the trend is clear: The conventional wisdom is wrong. Normal children frequently show the very things said to be unmistakeable signs of molestation. Reflecting this development, the journal *Child Abuse and Neglect* recently devoted an entire issue to medical examinations for sexual abuse (v 13, no 2 (1989)). Significantly, the editor titled his introduction "The More We Learn, The Less We Know With Reasonable Medical Certainty" and acknowledged that previously held ideas about physical signs of prior molestation had been hastily drawn

and were unsupported.

Given such admissions, it is obvious that defense lawyers have been remiss in not mounting a *Kelley-Frye* challenge to a good deal of the medical testimony being offered in child molestation trials.

Confusion in the laboratory

Overinterpretation of data has not been confined to the physical examination of children. Well-intentioned but hasty efforts at child protection have also infected the laboratory. We now know, for example, that gonorrhea, especially of the throat, is sometimes misdiagnosed because of inadequate laboratory techniques.

The federal government's Center for Disease Control recently reported that of 40 specimens sent from various hospitals for confirmation of gonorrhea, 14 (35%) turned out to be something else. (See E.R. Alexander, *Misidentification of Sexually Transmitted Organisms in Children: Medicolegal Implications*, 7 Pediatric Infectious Disease Journal (Jan 1988); W.L. Whittington, et al, *Incorrect Identification of Neisseria Gonorrhoea from Infants and Children*, 7 Pediatric Infectious Disease Journal (Jan 1989).) The report also noted that ". . . these instances represent the tip of a large iceberg. . . . Many probably go unnoticed."

We can add one of our own, for in the "Country Walk" case described earlier (where Sue—like the other children—learned from her interviewer about the things she later testified were her memories), the jury also heard unrebutted testimony that the son of the babysitters had gonorrhea of the throat. What the jury didn't learn was that Miami's Jackson Memorial Hospital failed to perform (or to preserve specimens so others could perform) the very tests which the Center for Disease Control has shown are absolutely necessary to confirm gonorrhea.

Other false medical claims being offered to courts include unreliable screening tests for chlamydia, and the unsupported conclusion that genital warts are always sexually transmitted.

Learning from the *McMartin* case

After more than six years, a jury finally reached a verdict in the *McMartin* case. (*People v. Peggy McMartin Buckey and Ray Buckey*, No A750900 (Los Angeles Cty Super Ct, 1990).) And while it was unique as the longest and most costly criminal trial in U.S. history, in many important respects the case had features common to countless other cases of alleged sexual abuse. It therefore has much to teach us.

The most frequent question is: If the allegations were not true, why would the children say not only that they were sexually abused, but also that they were exposed to rituals involving animal slaughter and even murder? The answer is both simple and terrible. They were trained. Trained first by the experts whom law enforcement agencies trustingly allowed to evaluate the children, and then by handpicked therapists hired to treat them for the molestation that everyone was so sure had taken place.

What makes the *McMartin* case so instructive is that the medical and mental health professionals who set the tone of the case were not unknown but were some of the very professionals who were most influential in developing the thinking and style of the new child sexual abuse movement. In studying the *McMartin* case, we have an opportunity to see the best and the brightest in action. If they come up short in our estimation, we may be sure that their proteges, spread across the nation, are using similar methods.

Let us begin by going back to February 1986. Virtually everyone still believed the McMartin pack was guilty. Nonetheless, questions were starting to arise. Perhaps most common was the issue of how the children from the McMartin preschool had been interviewed. The videotaped interviews had been seen by only a handful of persons, but word was leaking out after the preliminary hearing. The charge was that the children had been prodded and pressured into claiming abuse.

However, the law enforcement/mental health team that handled the case had at that time far more defenders than detractors. Most influential among them was psychiatrist Roland Summit, whom we have already heard from. Summit wrote in a *Los Angeles Times* editorial that social worker Kee MacFarlane of the Children's Institute International used proper, up-to-the-minute techniques to interview the children.

"There was both reason and precedent for the methods used . . .," he wrote. The interviews represented the "state of the art . . . highly evolved, intensely specific, and largely unknown outside the fledgling specialty of child abuse diagnosis." This form of interviewing, Summit continued, was "an amalgam of several roles . . . the knowledge of a child development specialist to understand and translate toddler language, a therapist to guide and interpret interactive play, a police interrogator to develop evidentiary confirmation, and a child abuse specialist to recognize the distinctive and pathetic patterns of sexual victimization." Such techniques were needed because "specialist understanding is both unexpected and counterintuitive." (*No one invented McMartin "secret,"* L.A. Times, Feb. 5, 1990 part II, 1-2.)

Study of just how the McMartin preschool children were interviewed offers us, then, more than an opportunity to study one case. It offers us a chance to study thousands of cases, because Dr. Summit has helped train thousands of front-line investigators, and Kee MacFarlane, lead interviewer of the McMartin children, has for years been considered a model for those entering the field of child sexual abuse investigations.

We wish we could reproduce here the transcripts of all the interviews done with the *McMartin* chil-

dren. One of us (L.C.) has viewed 56 hours of videotaped interviews and can assure readers that the following excerpt is in no way exceptional.

As we come in, MacFarlane is interviewing an eight-year-old boy who had attended the McMartin preschool four years before. He has a Pac-Man puppet on his hand.

> **MacFarlane:** Here's a hard question I don't know if you know the answer to. We'll see how smart you are, Pac-Man. Did you ever see anything come from Mr. Ray's wiener? Do you remember that?
> **Child:** (no response)
> **MacFarlane:** Can you remember back that far? We'll see how . . . how good your brain is working today, Pac-Man.
> (Child moves puppet around.)
> **MacFarlane:** Is that a yes?
> **Child:** (Child nods puppet yes.)
> **MacFarlane:** Well, you're smart. Now let's see if we can figure out what it was. I wonder if you can point to something of what color it was.
> (Child tries to pick up the pointer with the puppet's mouth.)
> **MacFarlane:** Let me get your pen here. (Puts a pointer in puppet's mouth.)
> **Child:** It was . . .
> **MacFarlane:** Let's see, what color is that?
> (Child uses the Pac-Man's hand to point to the Pac-Man puppet.)
> **MacFarlane:** Oh, you're pointing to yourself. That must be yellow.
> (Child nods puppet yes.)
> **MacFarlane:** You're smart to point to yourself. What did it feel like? Was it like water? Or something else?
> **Child:** Um, what?
> **MacFarlane:** The stuff that came out. Let me try. I'll try a different question on you. We'll try to figure out what that stuff tastes like. We're going to try and figure out if it tastes good.
> **Child:** He never did that to [me], I don't think.
> **MacFarlane:** Oh, well, Pac-Man, would you know what it tastes like? Would you think it tastes like candy, sort of trying. . . .
> **Child:** I think it would taste like yucky ants.
> **MacFarlane:** Yucky ants. Whoa. That would be kind of yucky. I don't think it would taste like . . you don't think it would taste like strawberries or anything good?
> **Child:** No.
> **MacFarlane:** Oh, think it would sort . . . do you think that it would be sticky, like sticky, yucky ants?
> **Child:** A little.

Such, then, is the "state of the art" advocated by Summit and many of his associates and being taught to front-line investigators throughout the country. This is what is happening in the little as well as the big cases, except that most often there is no tape recorder running to preserve the evidence.

Having seen similar examples over and over in the *McMartin* tapes, only one conclusion is reasonable: MacFarlane and her trainees had decided *before the first interview* that children were molested at the McMartin preschool. However they may now try to rationalize their interviewing techniques, their behavior with the children looks like an attempt to squeeze from them evidence of what the interviewers were convinced must have taken place.

After these interviews, parents were told that their children had disclosed abuse, and none of the parents demanded to watch the entire videotape. Instead, they heeded the advice to take their children to therapists who specialized in "sexual abuse trauma." As months stretched into years, and the children not only did their best to please their therapists but also exchanged information with each other at school and were repeatedly questioned by parents and investigators, the stories grew and grew. It is hardly surprising that some of the children who initially said over and over that they saw nothing happen, now insist that they were victimized.

Los Angeles County District Attorney Ira Reiner has summed it up as well as anyone. Interviewed for the "60 Minutes" television program, he said:

> The entire case was turned over by the district attorney . . . to a group of social workers. . . . Now, these people are absolutely unqualified to handle a criminal investigation. . . . They start from a premise . . . that no child is capable of fabricating stories about sexual molestation. To do so would require them to talk of a thing of which they have no understanding or knowledge, and so we can always rely upon a child talking about being sexually molested. . . . But what we had here were these social workers questioning the children, asking very leading and very suggestive questions. . . .

With the children's statements so badly contaminated, the prosecution had no choice but to lean heavily on the alleged medical evidence. Once again, however, this turned out to be a false alarm. On child after child, medical reports done by doctors specifically selected by the police concluded with: 1) "history of sexual abuse," and 2) "physical examination consistent with sexual abuse." We have already examined the linguistic trickery of such phrases. In the few examples where alleged abnormalities were described, rebuttal testimony explained that the alleged signs of "trauma" were now known to be variations of normal anatomy.

The question naturally arises: Why was the case prosecuted if the investigation was so badly botched? Reiner admitted that when the case was taken to a grand jury for indictment, the prosecutors had not bothered to view any of the videotapes of the children! Only later did prosecutors realize how the children had been bludgeoned into making accusations, and by then the political stakes were so high that the case couldn't be dropped. Charges were dismissed against five of the seven defendants one week after the close of California's longest preliminary hearing (which took