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Child Abuse: A Pervasive Problem of the 80s

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CHILD ABUSE: A PERVASIVE PROBLEM OF THE 80s

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I. DEFINING CHILD ABUSE

One of the chief difficulties in coping with the problems of child abuse is the lack of a universally accepted definition of the term "abuse." A pioneering article[1] written over twenty years ago by Dr. Henry Kempe and his associates introduced the term "battered child syndrome" to describe "a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent."[2] Reference to "battered" children and "serious *physical* abuse" denotes a conceptualization of abuse as including only physical trauma with physical manifestations.[3]

In the year following publication of Dr. Kempe's article, Dr.

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1. Kempe, Silverman, Steele, Droegemuller & Silver, *The Battered Child Syndrome,* 181 J. A.M.A. 17 (1962) [hereinafter cited as Kempe].

2. *Id.* at 17.

3. *Id.* at 17-18. Dr. Kempe described the characteristics of a battered child as follows:

> The clinical manifestations of the battered-child syndrome vary widely from those cases in which the trauma is very mild and is often unsuspected and unrecognized, to those who exhibit the most florid evidence of injury to the soft tissues and skeleton. In the former group, the patients' signs and symptoms may be considered to have resulted from failure to thrive from some other cause or to have been produced by a metabolic disorder, an infectious process, or some other disturbance. In these patients specific findings of trauma such as bruises or characteristic roentgenographic changes

Vincent Fontana and his associates published an article in which they maintained that the designation "battered child" was too narrow.[4] According to Fontana, there were additional kinds of harm suffered by children that should be included in a broader clinical category.[5] They labeled this new category "maltreatment syndrome."[6]

Doctors Kempe and Fontana were not the first to realize that child abuse, however defined, existed.[7] They were, however, the first to call popular attention to an insidious phenomenon. Since appearance of their articles in the early 1960s, a virtual flood of medical literature on the subject has appeared.[8] As a result of revelations of the occurrence and incidence of child abuse, legislatures in all fifty states enacted child abuse reporting laws during a four-year period in the mid-1960s.[9]

Most child abuse reporting statutes share certain categorical provisions, such as defining the persons who must report,

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as described below may be misinterpreted and their significance not recognized.

The battered-child syndrome may occur at any age, but, in general, the affected children are younger than 3 years. In some instances the clinical manifestations are limited to those resulting from a single episode of trauma, but more often the child's general health is below par, and he shows evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition. One often obtains a history of previous episodes suggestive of parental neglect or trauma. A marked discrepency between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome. The fact that no new lesions, either of the soft tissue or of the bone, occur while the child is in the hospital or in a protected environment lends added weight to the diagnosis and tends to exclude many diseases of the skeletal or hemopoietic systems in which lesions may occur spontaneously or after minor trauma. Subdural hematoma, with or without fracture of the skull, is, in our experience, an extremely frequent finding even in the absence of fractures of the long bones. In an occasional case the parent or parent-substitute may also have assaulted the child by administering an overdose of a drug or by exposing the child to natural gas or other toxic substances. The characteristic distribution of these multiple fractures and the observation that the lesions are in different stages of healing are of additional value in making the diagnosis.

Id.

4. Fontana, Donovan & Wong, *The "Maltreatment Syndrome" in Children,* 269 NEW ENG. J. MED. 1389 (1963).

5. *Id.* at 1389.

6. *Id.*

7. For an historical chronicle of earlier efforts to diagnose and publicize the phenomenon among professionals, see McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 MINN. L. REV. 1 (1965).

8. *See, e.g.,* M. LYNCH & J. ROBERTS, CONSEQUENCES OF CHILD ABUSE (1982); E. NEWBERGER, CHILD ABUSE (1982); THE BATTERED CHILD (R. Helfer & C. Kempe eds. 3d ed. 1980); V. FONTANA & D. BESHAROV, THE MALTREATED CHILD (1979); THE ABUSED CHILD (H. Martin ed. 1976); V. FONTANA, SOMEWHERE A CHILD IS CRYING (1973); HELPING THE BATTERED CHILD AND HIS FAMILY (C. Kempe & R. Helfer eds. 1972); Kerns, *Child Abuse and Neglect: The Pediatrician's Role,* J. CONTIN. EDUC. PEDIAT., vol. 21, no. 7, at 14 (1979); Kempe, *Sexual Abuse, Another Hidden Pediatric Problem,* 62 PEDIATRICS 382 (1978); Fontana, *The Maltreated Child of Our Times,* 23 VILL. L. REV. 448 (1978); Schmitt & Kempe, *The Pediatrician's Role in Child Abuse and Neglect,* CURRENT PROBS. PEDIAT., vol. 5, no. 5 at 3 (Mar. 1975).

9. Many child abuse reporting statutes are based on model statutes proposed in 1963 by the Children's Bureau and the Children's Division of the American Humane Association. For accounts of these legislative developments, *see* V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE

identifying to whom reports must be made, granting civil immunity to persons reporting in good faith, and waiving the spousal and physician-patient privileges in such cases. The statutes vary considerably in detail, however, particularly in their definitions of what constitutes abuse.

In addition to Dr. Kempe's littany of physical abuse,[10] most modern statutes include an ever-expanding description of other kinds of abuse, giving a new and changing meaning to the definition of abuse from year to year. A number of statutes, for example, now provide that excessive corporal punishment constitutes abuse.[11] Special mention of excessive corporal punishment was prompted in response to claims that what was alleged to be abuse was nothing more than normal discipline.[12] In fact, the most hotly litigated issue in this area centers on the difficulty in determining what constitutes normal discipline, that which parents and others traditionally have been allowed to impose on children,[13] and what constitutes *excessive* discipline amounting to abuse.[14]

Many statutes also include sexual abuse within the general definition of abuse.[15] This is due largely to the fact that unless the act results in physical harm, sexual abuse would not otherwise be covered by the statutes.[16] Another trend is to include sexual exploitation in the definition of abuse. Florida's child abuse statute,

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1970s (rev. ed. 1974); Paulsen, *The Legal Framework for Child Protection,* 66 COLUM. L. REV. 679 (1966); and Paulsen, Parker & Adelmen, *Child Abuse Reporting Laws - Some Legislative History,* 34 GEO. WASH. L. REV. 482 (1966).

10. *See* Kempe, *supra* note 1 and accompanying text. *Cf.* WYO. STAT. § 14-3-202(a) (ii) (B) (1977). Section 14-3-202(a) (ii) (B) provides: " 'Physical injury' means death or any harm to a child including but not limited to disfigurement, impairment of any bodily organ, skin bruising, bleeding, burns, fracture of any bone, subdural hematoma or substantial malnutrition." *Id.*

11. *See, e.g.,* CAL. PENAL CODE § 11165(e), (g) (West 1982); FLA. STAT. ANN. § 415.503(7) (a) (West Supp. 1984); ILL. ANN. STAT. ch. 23, § 2053(e) (Smith-Hurd Supp. 1985); N.Y. FAM. CT. ACT § 1012 (f)(i)(B) (McKinney 1983); WYO. STAT. § 14-3-202(a)(ii) (1977).

12. *See, e.g.,* People v. Jennings, 641 P.2d 276, 278-79 (Colo. 1982); Bowers v. State, 283 Md. 115, 126-27, 389 A.2d 341, 348 (1978) for a codification of common law principles. Adding infliction of excessive corporal punishment to the definition of abuse had the effect of restoring the position held by the common law prior to the adoption of child abuse reporting statutes. The common law held that parents could impose reasonable discipline on their children without civil or criminal liability. If the disciplinary measures taken were excessive or "outrageous," however, parents lost this privilege and could be subjected to civil or criminal liability. Recent legislation seems to have codified these common law principles.

13. *See generally* Ingraham v. Wright, 430 U.S. 651, 660-63 (1977).

14. A number of statutes have been attacked on vagueness grounds, but for the most part have been upheld. *See, e.g.,* People v. Jennings, 641 P.2d 276, 278-79 (Colo. 1982) ("cruelly punished" is not unconstitutionally vague); Bowers v. State, 283 Md. 115, 126-27, 389 A.2d 341, 348 (1978) ("cruel or inhumane treatment" is not unconstitutionally vague). *Contra* State v. Meinert, 225 Kan. 816, 594 P.2d 232, 233 (1979) ("unjustifiable physical pain" is an unconstitutionally vague term).

15. *See, e.g.,* CAL. PENAL CODE § 11165(b), (g) (West Supp. 1985); FLA. STAT. ANN. § 415.503(7)(b) (West Supp. 1984); WYO. STAT. § 14-3-202(a)(ii) (1977).

16. *See, e.g.,* MD. ANN. CODE art. 27, § 35A(b)(7),-(8) (Supp. 1983). Section 35A(b) provides in part:

for example, defines abuse as "harm or threatened harm to a child's physical or mental health or welfare."[17] It further defines "harm" as occurring when a parent or other person responsible for the child's care "[e]xploits a child, or allows a child to be exploited."[18]

Most states also make sexual exploitation of children a criminal offense.[19] New York's criminal statute, which prohibits knowing promotion of a sexual performance by a child under sixteen,[20] was upheld by the United States Supreme Court in *New York v. Ferber*.[21] This decision should provide added impetus to inclusion of sexual exploitation in child abuse statutes.

Finally, a number of states have included emotional or psychological abuse within the general definition of abuse.[22] Wyoming's statute, for example, defines "mental injury" as "injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in his ability to function within a normal range of performance and behavior with due regard to his culture."[23] The same definitional difficulty inherent in the term "excessive corporal punishment"[24] exists here as well.[25]

The expanding definition of abuse is significant in that, as a

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(7) 'Abuse' shall mean any: (A) physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent [or custodian] under circumstances that indicate that the child's health or welfare is harmed or threatened thereby (B) . . . any sexual abuse of a child, *whether physical injuries are sustained or not.*

(8) 'Sexual abuse' shall mean any act or acts involving sexual molestation or exploitation, including but not limited to incest, rape, or sexual offense in any degree, sodomy or unnatural or perverted sexual practices on a child by any parent, adoptive parent or other [custodian].

Id. (emphasis added).

17. FLA. STAT. ANN. § 415.503(3) (West Supp. 1984). Florida, like many other states, also makes sexual exploitation of children a criminal offense. *See id.* § 827.071. *See also infra* note 19.

18. FLA. STAT. ANN. § 415.503(7)(c) (West Supp. 1984).

19. *See id.* § 827.071. *See also* New York v. Ferber, 458 U.S. 747, 749 & n.2 (1982) (the federal government and forty seven states make sexual exploitation of children a criminal offense).

20. N.Y. PENAL LAW § 263.15 (McKinney 1980).

21. 458 U.S. 747 (1982). The opinion in *Ferber* summarizes the concern legislatures and the public have expressed over the growing problem of sexual exploitation of children. New York v. Ferber, 458 U.S. 747, 749 n.1, 750 n.2, 757-58 (1982).

22. *See, e.g.*, FLA. STAT. ANN. § 415.503(7)(a), (8) (West Supp. 1984); WYO. STAT. § 14-3-202(a)(ii)(A) (1977).

23. WYO. STAT. § 14-3-202(a)(ii)(A) (1977).

24. *See supra* notes 13-14 and accompanying text.

25. *See* S. KATZ, WHEN PARENTS FAIL 68 (1971); Areen, *Intervention Between Parents and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 933 (1975). The proposal of the Juvenile Justice Standards Project, a joint effort by the Institute of Judicial Administration and the American Bar Association, was to define emotional abuse symptomatically in terms well understood by mental health professionals. As stated in the proposal, "[c]ourts should be authorized to assume jurisdiction [when] . . . a child is suffering serious emotional damage,

state defines abuse, so it determines the incidence of reported abuse and the desired level of intervention by the state in the lives of families. Assume, for example, that states A and B share identical demographic characteristics in terms of total population, number of families, family size, and the like. Assume further that State A defines abuse only in terms of physical abuse, whereas State B defines abuse as including emotional abuse, sexual abuse, sexual exploitation, and excessive corporal punishment as well. It is readily apparent that State B will have a statistically greater abuse problem than State A, even if the same behavior occurs in both states. The difference will result solely from the difference in how abuse is defined.

By adopting such a broad definition of abuse, State B has made a policy decision favoring increased state intervention in the lives of families as its answer to the countinuing debate over the role a state should play in regulating family behavior. Contrary to those advocating the position adopted by State B are persons desiring to grant families almost total autonomy. This latter group would prefer a basic policy of nonintervention, except in narrowly defined cases where serious injury has occurred or has been threatened.[26] This is the position taken by State A.

These two issues, the preferred level of state intervention and the definition of abuse, are often related. By giving abuse a very broad definition, a state might be expressing its preference for an increased level of state intervention. At the same time, however, the two issues are not necessarily related. A state could, for example, define abuse in its broadest sense but still express a policy favoring less state intervention. This latter approach is taken, for example, in the recently proposed Juvenile Justice Standards Relating to Abuse and Neglect.[27] In either event, how a state defines abuse and what level of intervention it prefers are major factors in determining the statistical incidence of abuse.

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evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her." JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT, Standard 2.1(C) (Tent. Draft 1977 [hereinafter cited as JUVENILE JUSTICE STANDARDS].

26. For a summary of the arguments for and against intervention, see JUVENILE JUSTICE STANDARDS, *supra* note 25, Standards 1.1 and commentary, and 2.1 (A)-(F) and commentary.

27. *See id.* Standard 2.1. Standard 2.1 authorizes intervention in several different sets of endangering circumstances, including those in which children have suffered or are likely to suffer serious physical harm, are suffering severe emotional damage, or have suffered sexual abuse. *Id.* Yet, as a policy matter, the Standards favor family autonomy and discourage state intervention except in egregious cases. *Id.* Standard 1.1 and Commentary.

II. DETERMINING THE INCIDENCE OF ABUSE

While measurement methodology has improved since the first reporting statutes were enacted in the mid-1960s, accurate measurement of the incidence of child abuse continues to pose significant difficulties. A recent summary of the major measurement research over the last twenty years revealed incidence estimates ranging from a few hundred to upwards of two and one-half to four million cases per year.[28] The summary by the National Institute for Juvenile Justice and Delinquency Prevention concluded that, because of the many difficulties in obtaining accurate data of the national incidence of child abuse and neglect, little confidence could be placed in even the most recent studies, which show rates ranging from 40,000 to almost two million cases per year.[29]

Two reports completed since publication of the National Institute's summary have significantly increased knowledge of the incidence of child abuse in this country. The methodologies used to compile the reports differ greatly. The reports' estimates of the national incidence of child abuse, however, are fairly proximate.

The first report is the National Analysis of Official Child Neglect and Abuse Reporting.[30] First issued in 1979 and revised in November 1981, this report is the latest in a series made annually since 1976 by the American Humane Association for the National Center on Child Abuse and Neglect. These reports are based on cases actually reported by official state reporting agencies. The latest report summarizes information submitted by all fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. In addition, thirty-one states and two territories furnished individual case data enabling analysts to report separate figures according to type of report — abuse or neglect — and separate figures according to type of maltreatment.

For reporting purposes, "abuse" is defined as any "intentional, nonaccidental injury, harm, or sexual abuse inflicted on a child."[31] "Neglect" is defined as "the responsible caretaker's

28. NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, A PRELIMINARY NATIONAL ASSESSMENT OF CHILD ABUSE AND NEGLECT AND THE JUVENILE JUSTICE SYSTEM: THE SHADOWS OF DISTRESS 9, Table 1 (April 1980).

29. *Id.* at 13 & Table 1. Perhaps the size of the variance between these "most recent" studies — one based on 1973 data and the other on 1975 data — is itself evidence of the serious difficulty in measurement.

30. THE AMERICAN HUMANE ASSOCIATION, DENVER RESEARCH INSTITUTE, & THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1979 (1981) [hereinafter cited as NATIONAL ANALYSIS].

31. *Id.* at 77. The general reporting category "abuse" is, for analytical purposes, broken down

nonprovision of care essential to a child, such as food, clothing, shelter, medical attention, education, or supervision."[32]

Employing these reporting categories and a methodology based on cases actually reported to official agencies, the report states that the number of incidents of abuse and neglect in all fifty states, the District of Columbia, and the three territories for 1979 was 711,142.[33] Because all reporting states did not furnish individual case data, this total could not be subdivided into separate categories for abuse and neglect. Nor could it be divided according to type of maltreatment.

Of the total 711,142 cases of abuse and neglect, 296,321 cases, or forty-two percent of the total cases reported, were reported by the group of thirty-one states and two territories furnishing individual case data.[34] Of the total 296,321 cases reported by this group, 62,014 were reported as cases of abuse, 116,484 were reported as cases of neglect, and 43,577 were reported as cases involving both abuse and neglect.[35] The remaining 74,244 cases were reported as "other," which included cases in which data was missing or in which the type of maltreatment was unspecified.[36]

Further differentiation of the 296,321 cases reported by the American Humane Association was made according to type of maltreatment: "major physical injury,"[37] "minor physical injury,"[38] "physical injury unspecified,"[39] "sexual

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further into types of maltreatment. *See infra* note 37 (major physical injury); *infra* note 38 (minor physical injury); *infra* note 39 (unspecified physical injury); *infra* note 40 (sexual maltreatment); *infra* note 42 (emotional maltreatment); *infra* note 43 (other maltreatment).

32. NATIONAL ANALYSIS, *supra* note 30, at 98; *infra* note 41 (deprivation of necessities).

33. NATIONAL ANALYSIS, *supra* note 30, at 5.

34. *Id.* at 22, 49.

35. *Id.*

36. *Id.* at 22. The report further explains that the "other"category primarily represents "at risk" cases. *Id.* at 5. "At risk" is explained as a category "used when maltreatment itself is not reported, but the report indicates that the child is at risk of being maltreated and therefore needs attention because of the potential of abuse or neglect." *Id.* at 79.

The careful reader or the empiricist will note that when the separate figures for abuse, neglect, abuse and neglect, and "other" shown in the text are combined, they total 296,319 rather than 296,321. This discrepancy is inexplicable.

37. *See* NATIONAL ANALYSIS, *supra* note 30, at 95. "Major physical injury" is defined as including "brain damage/skull fracture, subdural hemorrhage or hematoma, bone fracture, dislocation/sprains, internal injuries, poisoning, burns/scalds, severe cuts/lacerations/bruises/welts, or any combination thereof, which constitute a substantial risk to the life and well-being of the child." *Id.*

38. *See id.* at 96. "Minor physical injury" includes "twisting/shaking, minor cuts/bruises/welts or any combination thereof which do not constitute a substantial risk to the life and well-being of the child." *Id.*

39. *See id.* at 97. "Unspecified physical injury" is a category used "when the maltreatment is clearly physical but the specific response cannot be placed accurately into the 'Major Physical' or 'Minor Physical' injury categories." *Id.*

maltreatment,"[40] "deprivation of necessities,"[41] "emotional maltreatment,"[42] and "other maltreatment."[43] The break-down was as follows:

Type	Percent
Major Physical Injury	4.38%
Minor Physical Injury	15.39%
Physical Injury (Unspecified)	2.46%
Sexual Maltreatment	5.76%
Deprivation of Necessities	63.08%
Emotional Maltreatment	14.86%
Other Maltreatment	8.87%[44]

Several conclusions drawn in the report from the above data are self-evident. For example, neglect or, more specifically, deprivation of necessities constitutes by far the major type of reported maltreatment. Minor physical injury follows at some distance. This pattern has antecedents in reports for earlier years.[45] Other conclusions are less obvious on the face of the data. For example, the maltreatment category showing the most rapid growth in reporting in recent years is sexual abuse.[46]

A word of caution is in order. It would be misleading to think of the numbers used in this first report as anything more than approximations, both of the total national incidence of abuse and neglect and of the incidence according to type of maltreatment. This is due to the limitations on accurate measurement mentioned earlier in this article[47] and noted in the report itself.[48] For example,

40. *See id.* "Sexual maltreatment" includes "the involvement of a child in any sexual act or situation, the purpose of which is to provide sexual gratification or financial benefit to the perpetrator; all sexual activity between an adult and a child is considered as sexual maltreatment." *Id.*

41. *See id.* at 98. "Deprivation of necessities" is defined as including "neglecting to provide the following when able to do so: nourishment, clothing, shelter, health care, education, [and] supervision or causing failure to thrive." *Id.*

42. *See id.* at 99. "Emotional maltreatment" includes "behaviour on the part of the caretaker which causes low self-esteem in the child, undue fear or anxiety, or other damage to the child's emotional well-being." *Id.*

43. *See id.* at 100. "Other maltreatment" is defined as including "types of maltreatment other than those mentioned [in *supra* notes 37-42], including abandonment and tying/close confinement." *Id.*

44. *Id.* at 29. More than one type of maltreatment may have been reported for a single child, and thus the total for the figures shown is greater than 100 percent.

45. *Id.* at 50.

46. *Id.* at 50-51.

47. *See supra* note 29.

48. NATIONAL ANALYSIS, *supra* note 30, at 19, 23.

the report observes that since collection of reporting data commenced in 1976, reported cases have increased by seventy-one percent.[49] The report acknowledges that, because of the lack of any universal definition of maltreatment and the variation among state reporting systems, it is impossible to know whether the actual incidence of abuse and neglect has increased at the same rate.[50]

Despite the seventy-one percent increase in reported cases since 1976, the incremental increase each year has decreased.[51] This might lead to the conclusion that there is a closer correlation between estimated and actual incidence of abuse and neglect. The report advises caution here also, adding that the slowing rate of increase most likely signifies that, as state reporting systems have become more sophisticated, they are approaching their optimum capacity for handling reports.[52]

The second report is the findings of the National Study of the Incidence and Severity of Child Abuse and Neglect, also prepared for the National Center on Child Abuse and Neglect in 1981.[53] This study, unlike the first, is based on data collection from sampling and a program definition of child maltreatment. By using such a methodology, members of the study sought to avoid some of the inaccuracies inherent in use of actual reported cases.[54]

An underlying premise of this second study is that cases actually reported to child protective services (CPS) represent only a portion of the actual incidence of abuse and neglect. This is due to the fact that there are cases unknown to CPS, but known to other

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49. *Id.* at 19.

50. *Id.* The same observation can be made of the incidence rates drawn from the individual case data submitted by the 33 states and territories furnishing such data. For example, the total of 296,321 cases reported by this group represented an increase of 55% over the 1978 total of 191,739 cases. *Id.* at 23, 49-50. Rather than signifying an actual increase in the incidence of abuse, the increase was attributed to other factors:

> First, while the total number of states [and territories] that submitted case data remained 33, there was some change in the specific states submitting data. Part of the increase is due to the fact that some of the 'new' states have larger populations — and therefore more reports — than was characteristic of those states that did not continue to provide data for 1979. Another factor is that state reporting systems themselves continue to develop in technical sophistication, which enables them to receive and process more reports and subsequently, to submit them to the National Study.

Id. at 23.

51. *Id.* at 19, 49.

52. *Id.*

53. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILDREN'S BUREAU, ADMINISTRATION FOR CHILDREN YOUTH AND FAMILIES, OFFICE OF HUMAN DEVELOPMENT SERVICES, STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT (1981) [hereinafter cited as STUDY FINDINGS].

54. *Id.* at 3.

investigatory agencies and professionals.[55]

The study developed a program design and methodology calculated to tap the "unofficial" sources of information and, therefore, to produce more realistic estimates of the incidence of child abuse and neglect. Its central features were: (1) use of a probability sample of twenty-six counties across the country, (2) assembly of data from other sources in addition to CPS, and (3) adoption of a program definition of maltreatment through which the data could be screened.[56]

Employing the program definition of abuse and neglect, and the sampling methodology, the report arrived at a national incidence estimate of 651,900 cases of abuse and neglect (or maltreatment) for the one-year study period covering 1979-80.[57] The report estimated that 1,101,500 cases of maltreatment were reported to CPS agencies, but of this number, only 470,500 cases were substantiated by CPS as actually involving maltreatment of children.[58] The latter figure was further reduced to 212,400, representing only those cases fitting the study definition of maltreatment.[59] To those 212,400 cases were added an additional 71,400 cases identified by other investigatory agencies, including police, public health authorities, and the courts. Study agencies including public schools, hospitals, and mental health and social service agencies identified another 368,100 cases, for a total of 651,900 cases.[60]

The report itself concedes that this estimate is conservative for several reasons: (1) it is based on a narrow definition of

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55. *Id.* at 2-3. The report also identified two other levels of abuse and neglect unknown to CPS: cases known to individuals such as the child, the abuser, and friends or neighbors; and cases that are not known or recognized by anyone as abuse. Included in this latter group are cases in which the abusing parent or the child does not recognize the behaviour as abusive. The report described as "very difficult" the task of documenting the incidence of abuse at the latter level, with an "only slightly less difficult" task at the former level. Due to the concern for accuracy and reliability of information gathering at these levels, the decision was made not to attempt verification of such data for inclusion in the report. *Id.* at 3.

56. *Id.* The program definition of maltreatment was explained as follows:

> A child maltreatment situation is one where, through purposive acts or marked inattention to the child's basic needs, behaviour of a parent/substitute or other adult caretaker caused forseeable and avoidable injury or impairment to a child or materially contributed to unreasonable prolongation or worsening of an existing injury or impairment.

Id. at 4.

57. *Id.* at 12, 16, 39, 41-42.

58. *Id.* at 16, 41. "Substantiated" indicates that a CPS caseworker followed through on the report by conducting a preliminary investigation, after which the incident was classified as "founded" or "indicated." *Id.* at 11 & n.2, 12.

59. *Id.* at 16, 41. *See supra* note 56.

60. STUDY FINDINGS *supra* note 53, at 16, 41-42.

maltreatment, (2) the non-CPS reporting sources were limited in range, (3) large and central city agencies were underrepresented in the non-CPS information gathering, and participation by some of the "participating" agencies was questionable, and (4) the study estimate excluded all unsubstantiated CPS cases.[61] Taking these factors into account, the report conservatively estimates that the actual incidence of maltreatment is at least 1,000,000 cases per year and quite possibly substantially more than that.[62]

The fact that two studies using different methodologies arrived at comparable estimates of the national incidence of abuse lends some credence to each, particularly when the study furnishing the lower estimate concedes that its total is conservative.[63] With occurrences of maltreatment in these numbers, one might expect an increasing number of maltreatment cases to reach the courts. This in fact has happened. Typically the focus in these cases is on various evidentiary issues including privilege, use of character evidence, and use of expert testimony. This is particularly true in sexual abuse cases, which are on the rise.[64] The remainder of this article is devoted to analysis of these evidentiary issues.

III. EVIDENTIARY PROBLEMS IN CHILD ABUSE CASES

The difficulties inherent in prosecution of child abuse cases are manifold and have been chronicled in greater detail elsewhere.[65] Four particularly troublesome evidentiary problems are deserving of enhanced consideration and will be discussed in detail in the

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61. *Id.* at 17.

62. *Id.* at 42.

63. *See id.* at 11. The second report refers to the "correspondence" between the totals arrived at in the two studies. *Id.*

64. *See supra* text accompanying note 46. If this conclusion was accurate in 1981, it is even more accurate today. This is due in part to media exposure of sexual abuse, particularly in schools and day care programs. *See, e.g.,* NEWSWEEK, May 14, 1984, at 30; *Id.* Aug. 20, 1984, at 44; *Id.* Sept. 10, 1984, at 19.

65. *See, e.g.,* Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions,* 63 GEO. L.J. 257 (1974) [hereinafter cited as Comment, *Evidentiary Problems*]. As the author observed:

> The evidence that is available from eyewitnesses is for the most part useless. Even if the child is alive and mature enough to testify, he may have changed his account of the incident to match the abuser's version. The victim of child abuse is far more susceptible to the influence of the alleged abuser than are most victims of other crimes. While other siblings often are present when the child is abused, they also are easily influenced and intimidated. Further, the husband-wife privilege may prevent the other parent from testifying. The defendant, who alone may know how the injury occurred, usually will maintain that the child was hurt accidentally.
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> Most of the available evidence in child abuse cases is circumstantial. The jury must weigh not only the credibility of the witnesses but also the probabilities of the inferences that the prosecution desires the jury to draw. Therefore, the sufficiency of the evidence frequently becomes an important question.

following section of this Article. These are: (1) the competency and credibility of a child victim as witness, (2) the admissibility of a child's out-of-court statements, (3) the applicability of the husband-wife and physician-patient privileges, and (4) the use of character evidence, either in the form of evidence of prior acts of abuse or in the form of testimony on the "battering parent" profile.

A. COMPETENCY AND CREDIBILITY OF CHILD WITNESSES

The traditional test for determining a child's competency to testify is twofold: whether the child understands the obligation to tell the truth, and whether the child has sufficient capacity to observe, recollect, and relate.[66] Whether a child possesses such understanding and testimonial capacity is a decision within the trial court's discretion, and as with most discretionary decisions, will not be overturned except when abused.[67]

Age is not a controlling factor.[68] Some relatively young children have been found competent to testify, whereas other children have not. For example, in *State v. Skipper*[69] the court upheld a defendant's conviction for cruelty to a juvenile over his claim that two witnesses — seven and five years old — were improperly allowed to testify.[70] As to the seven-year-old, the court observed that

> [he] answered in the affirmative when asked if he understood the difference between telling the truth and not telling the truth, and also when asked if he understood why he was in court. . . . He was able to handle the defense [sic] attorney's questions concerning who had brought him to court, whether anyone had told him what to say, and whether what he told the judge was what he actually saw. . . .[71]

Of the five-year-old victim, the court noted that he "also answered

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Id. at 259-61.

As an example of the inconsistency between accounts by the victim and by the abuser, and of the influence that parents have over their children, see State v. Hunt, 2 Ariz. App. 6, 10-11, 406 P.2d 208, 212-13 (1965).

66. E. CLEARY, MCCORMICK ON EVIDENCE 156 (3d ed. 1984) [hereinafter cited as MCCORMICK].

67. *See, e.g.*, State v. Martin, 189 Conn. 1, 454 A.2d 256, *cert. denied*, 461 U.S. 933 (1983); State v. Skipper, 387 So. 2d 592 (La. 1980).

68. MCCORMICK, *supra* note 66, at 156. A recent survey of child competency statutes and rules, including suggestions for improving the process by which children are allowed to testify, is found in Melton, Bulkley & Wulkan, *Competency of Children as Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW 125 (J. Bulkley ed. 1981) [hereinafter citied as Melton, Bulkley & Wulkan].

69. 387 So. 2d 592 (La. 1980).

70. State v. Skipper, 387 So. 2d 592 (La. 1980).

71. *Id.* at 595.

in the affirmative when asked if he understood why he was in court and if he knew he had to be truthful (although he did not know what a "fib" was). He understood the judge wanted him to tell his story about what happened to him."[72] In *Pace v. State*,[73] however, a defendant's conviction for child molestation was reversed on the ground that the eight-year-old victim was improperly allowed to testify.[74]

Case law indicates that some deficiencies in a child's capacity

72. *Id. See* State v. Martin, 189 Conn. 1, 454 A.2d 256, *cert. denied*, 461 U.S. 933 (1983). In *Martin*, a six-year-old victim was allowed to testify after demonstrating he possessed the capacity for intelligent recollection and could relate what he had experienced. *Id.* at 9-10, 454 A.2d at 260. *See also*, State v. Pettis, ___ R.I. ___, 488 A.2d 704 (1985). In *Pettis* the Rhode Island Supreme Court held that a fourteen-year-old sexual assault victim could testify even though she was mentally retarded and experienced difficulty explaining the difference between a falsehood and the truth. *Id.* at ___, 488 A.2d at 705. The trial judge concluded that, on balance, "I'm satisfied that in her own humble way she appreciates the necessity for telling the truth. . . ." *Id.* at ___, 488 A.2d at 706.

73. 157 Ga. App. 442, 278 S.E.2d 90 (1981).

74. Pace v. State, 157 Ga. App. 442, 443, 278 S.E.2d 90, 92 (1981). The appellate court's use of the actual transcript best illustrates the perceived deficiencies in the child's competency to testify, while raising some question about the propriety of its decision. That testimony is quoted as follows:

By Mr. Sammons [the Assistant District Attorney]:
Q. How old are you, Michelle?
A. Eight.
Q. Do you know when your birthday is?
A. Huh-uh.
Q. Do you go to school?
A. Yeah.
Q. Where?
A. I don't know.
Q. Is it here in Dallas?
A. Yes.
Q. What grade are you in?
A. First.
Q. Who lives with you, Michelle?
A. Mama.
Q. Do you know that when you held up your hand just now with this fellow over here?
A. Yeah.
Q. Do you know what telling a story is?
A. Yeah.
Q. What is that?
A. Not supposed to tell lies.
Q. Is it right or wrong to tell a lie?
A. Wrong.
Q. Do you know where we are today?
A. Yeah.
Q. Where are we?
A. At court.
Q. Do you know that fellow up there?
A. Huh-uh.
Q. Do you know what he is called? You can't remember? Do you know where you are now?
A. At court.
Q. What does court do?
The Court:
Q. What does court do?
[A.] Help people.
Q. Do you know what my job is?
[A.] Huh-uh.
Q. Do you know what Mr. Sammons who is questioning you?
[A.] Yeah.

are perceived as serious enough to disqualify the child from testifying, whereas others are perceived as affecting only the credibility of the child. Thus, the fact that the five-year-old victim

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Q. Do you know what his job is? Let me ask you this: You said you knew what it meant to tell the truth. What happens when you tell an untruth?
By Mr. Sammons:
Q. Is it bad to tell a story, Michelle?
A. Yes.
By Mr. Farless [Defense Counsel]:
. . .
Q. Do you know what would happen to you if you don't tell the truth when someone asks you a question? Do you?
A. No.
Q. Do you go to church, Michelle?
A. Yeah. But I used to.
Q. How long has it been since you have been to church?
A. I don't know.
Q. Have you heard the expression, I swear to God?
A. Yeah.
Q. What does that mean to you? Michelle, where do you go to church when you go?
A. I don't know.
Q. Do you know how long it has been since you have been to church?
A. I don't know how long. I don't know.
Q. Does your mother ever read from the Bible to you?
A. Huh-uh.
Q. Does your grandmother ever read to you from the Bible?
A. Huh-uh.
Q. Does anyone ever talk to you about the Bible?
A. Yeah.
Q. Who?
A. The preacher.
Q. Do you know this preacher's name?
A. Huh-uh.
Q. Have you seen him in quite a while? How long has it been since you have seen him?
A. I don't know.
Q. Do you know what the Bible is supposed to be?
A. I don't know.
Q. Have you ever told fibs, made up stories?
A. Huh-uh.
Q. You never have had imaginary playmates, make up games to play?
A. Huh-uh.
. . .
Q. . . . Michelle, when you play, you never make up games to play?
A. Huh-uh.
Q. Do you ever talk to your dolls?
A. Yeah.
Q. Sometimes you pretend they talk back to you? They don't really, do they?
A. Huh-uh.
. . .
Q. Have you ever been given a spanking for telling a story?
A. Huh-uh.
Q. When I say, tell a story, do you know what I mean?
A. Huh-uh.
Q. If I told you I could fly without an airplane, would you believe me?
A. Yeah.

Id. at 442-43, 278 S.E.2d at 91-92.

Examination focusing on church and Sunday School attendance has been questioned as having "little probative value today in view of changing norms regarding religion" and as having little likelihood "to shed light on the child's ability to apply moral principles." Melton, Bulkley & Wulkan, *supra* note 68, at 128.

in *State v. Skipper* "did not know what a 'fib' was"[75] did not operate to disqualify him as a witness. Nor did the fact that a six-year-old victim's memory was vague and limited as to some details operate to disqualify him as a witness in *State v. Martin*.[76] In *Martin* the Connecticut Supreme Court noted that "[s]uch shortcomings . . . are not ususual in the testimony of victims of a traumatic experience and are properly considered as going to the weight of the testimony rather than its admissibility."[77]

Two observations can be made regarding the foregoing. First, courts perceive testimony of victims following trauma — such as abuse — as presenting a unique problem in that the trauma itself can affect the victim's memory and ability to relate what happened. In *State v. Middleton*,[78] for example, the Oregon Supreme Court affirmed a rape conviction, holding that expert testimony on familial child sexual abuse was properly admitted to explain inconsistencies in the fourteen-year-old victim's statements of what had happened to her.[79] The Oregon court, as did the Connecticut court in *Martin*, viewed the problem as one affecting weight rather than admissibility of the evidence.[80]

The second observation concerns the argument by some that a child's testimony should be allowed into evidence for whatever credence the jury, in light of all the circumstances, may be inclined to give it.[81] While the Connecticut and Oregon courts purport to follow the traditional test, they may also be perceived as supporting the more liberal view favoring admissibility. This is at least true where the deficiencies in the child's understanding or memory are not excessive.

The problem is one of significant proportions. Prosecutors frequently are compelled to forego putting the child-victim on the stand because the child — for reasons of age, embarrassment,

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75. 387 So. 2d at 595. *See supra* note 72 and accompanying text.

76. 189 Conn. 1, 454 A.2d 256, *cert. denied*, 461 U.S. 933 (1983). *See supra* note 72.

77. State v. Martin, 189 Conn. 1, 10, 454 A.2d 256, 260, *cert. denied*, 461 U.S. 933 (1983).

78. 294 Or. 427, 657 P.2d 1215 (1983).

79. State v. Middleton, 294 Or. 427, ____, 657 P.2d 1215, 1221 (1983). *See also* State v. Myers, 359 N.W.2d 604 (Minn. 1984). In *Myers* the Minnesota Supreme Court held that an expert was properly allowed to testify as to traits typically exhibited by a child sexual abuse victim. 359 N.W.2d at 609. The court also held it proper to permit the expert to assist the jury in evaluating the credibility of the victim by testifying that she believed the child was telling the truth, where the defense raised the credibility issue in its cross-examination of the child. *Id.*

The general use of such expert testimony is discussed in Berliner, Canfield-Blick & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 166 (J. Bulkley ed. 1981).

80. *Middleton*, 294 Or. at ____, 657 P.2d at 1221.

81. *See, e.g.*, MCCORMICK, *supra* note 66, at 156. The Federal Rules of Evidence adopt this approach of allowing the jury to give credence to a child's testimony by doing away with all disqualifications. *See* FED. R. EVID. 601. A recent report declares that 13 states have adopted the

trauma, awe, or shyness — will not pass the scrutiny required for testimonial competence.[82] In cases already noted for their paucity of evidence, the loss of a child's testimony has been devastating.[83] The problem admits of only two solutions.

First, the prosecutor can seek to use the child's extrajudicial statements under existing or specially formulated exceptions to the hearsay rule as discussed below. Second, steps can be taken to reduce the trauma faced by the child-victim, permitting the child's testimony to be received in evidence. Both kinds of reforms have been suggested recently. One commentator has suggested the use of youth examiners who would examine the child and present the child's statements in court, in camera examination of the child, use of a "child's courtroom" with the defendant "present" behind a one-way mirror, use of videotaped depositions, and closure of the courtroom to all persons whose presence is not necessary during the taking of the child's testimony.[84] The writer expresses serious doubt, however, whether any of these measures will pass constitutional muster in terms of the defendant's right to confrontation and the right of the public and press to attend the proceedings.[85]

Another commentator has proposed a Model Act to facilitate the use of a child's statement.[86] The Act would provide for appointment of a specially trained attorney as Child Hearings Officer (CHO) who would examine the child, videotaping of the initial interview for admission at trial, in-court questioning by the judge or CHO rather than defense counsel if necessary to protect the child's psychological health, giving of testimony in a special,

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approach of the Federal Rules by statute or by rule. Melton, Bulkley & Wulkan, *supra* note 68, at 127 & n.20.

82. *See, e.g.*, Goldade v. State, 674 P.2d 721 (Wyo.), *cert. denied*, 104 S.Ct. 3539 (1984). In *Goldade* the prosecutor was forced to seek admission of the child's extrajudicial statements when the child, a four-and-one-half-year-old, was declared incompetent to testify as a witness. *Id.* at 723-24. The psychological problems experienced by child victims of sexual offenses and the evidentiary problems associated with use of their statements are chronicled in Parker, *The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?* 17 NEW ENG. L. REV. 643, 648-53 (1982) [hereinafter cited as Parker].

The victim may even experience a change of heart about testifying. As an example of perhaps a court's overreaction to this dilemma, see State v. DeLong, 456 A.2d 877, 880-82 (Me. 1983) (affirming the contempt conviction of a fifteen-year-old sexual abuse victim for refusing to testify against her father).

83. For a discussion of cases concerning the effects of missing child-victim testimony, see Comment, *Evidentiary Problems, supra* note 65, at 259-61; Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745-46 (1983) [hereinafter cited as Note, *Child Hearsay*].

84. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW 184, 185-93 (J. Bulkley ed. 1981).

85. *Id.*

86. Parker, *supra* note 82, at 664-73.

smaller room in the company of a parent or other friendly adult, and use of depositions in the event a smaller courtroom is unavailable.[87] Unlike the first writer, after thorough analysis the second commentator foresees no constitutional infirmities with use of these procedures in terms of the defendant's rights to confrontation,[88] compulsory process,[89] due process,[90] or public trial.[91] Some of these issues will be discussed in the following section.

B. EVIDENCE OF CHILD'S EXTRAJUDICIAL STATEMENTS

With the problems attending use of a child-victim's in-court testimony,[92] a number of courts have allowed evidence of the child's out-of-court statements to be used under various exceptions to the hearsay rule. Commonly used exceptions include the spontaneous exclamation exception,[93] the statement of physical condition exception,[94] a specially formulated "tender years" exception,[95] and the residual exception[96] often allowed under hearsay rules.[97] An example is the Wyoming case of *Goldade v. State*.[98] In *Goldade* the prosecutor was forced to seek admission of the four-and-a-half-year-old victim's extrajudicial statements under an exception to the hearsay rule because the trial court ruled that she was incompetent to testify as a witness.[99] The trial court allowed a

87. *Id.* at 653, 665-70.
88. *Id.* at 686-702.
89. *Id.* at 703-08.
90. *Id.* at 708-12.
91. *Id.* at 712-16. The conclusion that no constitutional infirmities exist was drawn before the United States Supreme Court's decision in Globe Newspaper v. Superior Court, 457 U.S. 596 (1982). In *Globe Newspaper* the Court held unconstitutional a Massachusetts statute requiring mandatory closure of the courtroom during testimony of a child-victim in a sexual offense trail. According to the Court, the Massachusetts statute was violative of the first amendment right of the public and press to free access to criminal trials. *Id.* at 610-11. Of course, *Globe Newspaper* does not address the issue of closure of noncriminal trials such as child abuse proceedings in juvenile court. Moreover, even in criminal trials, *Globe Newspaper* does not prohibit closure per se, but only mandatory closure in a certain class of cases. The Court recognized that closure might be appropriate in some cases, to be decided on a case-by-case basis. 457 U.S. at 607-09.
92. *See supra* notes 79, 82, and accompanying text.
93. A discussion of the cases as well as a criticism of the spontaneous exclamation exception in child-victim cases is found in Note, *Child Hearsay, supra* note 83, at 1753-59.
94. *See, e.g.*, Goldade v. State, 674 P.2d 721 (Wyo.), *cert. denied*, 104 S.Ct. 3539 (1984).
95. Note, *Child Hearsay, supra* note 83, at 1759-61.
96. *Id.* at 1761-63. A recent case rejecting admissibility of a child's extrajudicial statements under the excited utterance and physical condition exceptions, and refusing to judicially create a residual exception in light of the legislature's explicit rejection of such an exception, is W.C.L. v. People, 685 P.2d 176 (Colo. 1984).
97. The Federal Rules of Evidence, after enumerating specific exceptions to the hearsay rule, also create a residual exception under which statements not covered within the enumerated exceptions but having the same guarantees of reliability can be admitted into evidence. FED. R. EVID. 803(24), 804(b)(5).
98. 674 P.2d 721 (Wyo.), *cert. denied*, 104 S.Ct. 3539 (1984).
99. Goldade v. State, 674 P.2d 721, 723 (Wyo.), *cert. denied*, 104 S.Ct. 3539 (1984).

pediatrician and a nurse to testify that the child had told them her mother had injured her, over the defendant's objection that their testimony constituted hearsay.[100] On appeal the defendant's conviction for child abuse was affirmed, the Wyoming Supreme Court holding that the testimony was properly admitted under the hearsay exception covering statements made to a physician for purposes of diagnosis and treatment.[101] The court recognized that ordinarily statements of fault are not admissible under this exception because they do not relate to diagnosis or treatment. Here, however, the physician's testimony clearly revealed that he was not simply treating bruises on the child's face but was attempting to diagnose the injuries as a case of child abuse, a diagnosis to which identity of the person causing the injuries was a pertinent fact.[102]

The Wyoming Supreme Court has been sensitive to the special evidentiary needs in child abuse cases and has adopted a liberal view of admissibility.[103] In fact, the court in *Goldade* acknowledged that it

> has pursued a policy in child homocide cases of developing rules which ultimately will assist in protecting the innocent victims of child abuse. . . . [N]o apology is necessary for this policy. Because of the manifest need to protect the most helpless members of our society from violence on the part of others, the policy is both necessary and proper.[104]

Such a liberal view is not always shared, however. For example, in *W.C.L. v. People*[105] the Colorado Supreme Court held that statements of a four-year-old victim of sexual assault were improperly admitted because they did not fall within any of the enumerated exceptions to the hearsay rule, nor could their admission be justified under a "residual exception" that does not exist in Colorado.[106] While the court was sympathetic with the

100. *Id.* at 723-24.

101. *Id.* at 725-27.

102. *Id.* at 725-26. The court also gave considerable weight to its function in this case, which it perceived as pursuing "the transcendant goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse." *Id.* at 725.

103. *See, e.g.*, Grabill v. State, 621 P.2d 802, 811 (Wyo. 1980) (evidence of prior acts of abuse admissible to prove identity and intent or reckless disregard of consequences).

104. Goldade v. State, 674 P.2d at 727 (citations omitted).

105. 685 P.2d 176 (Colo. 1984).

106. W.C.L. v. People, 685 P.2d 176, 181-83 (Colo. 1984). As in *Goldade*, the four-year-old child in *W.C.L.* was declared incompetent as a witness when called to testify because she did not

argument presented for admissibility under the residual exception, it was unwilling to give judicial recognition to such an exception when the legislature had considered but rejected a proposed residual exception in adopting the rules of evidence.[107]

The contrast in result between these two cases is symptomatic of a problem that has caused some to criticize the judicial practice of analyzing admissibility of children's extrajudicial statements in accordance with traditional hearsay exception dogma.[108] Routine, rigid adherence to traditional requirements is said to force a harsh result in most instances because it fails to take into account significant perceptual differences between children and adults. In many cases, especially those in which sexual abuse is alleged, these differences render statements of children more reliable than those of adults. The result is loss of a substantial proportion of probative evidence that should be admitted.[109]

Perhaps in response to such concerns, some states have recently enacted new exceptions to the hearsay rule applicable in criminal prosecutions for sexual abuse of children.[110] Washington's statute, for example, provides that statements made by a child describing any act of sexual conduct with or on the child are admissible in criminal proceedings.[111] The court must find that the statement is sufficiently reliable before invoking the exception, and the child must either testify at the proceeding or be unavailable.[112]

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know what "to tell the truth" meant. *Id.* at 178 & n.1. A statement to the child's aunt identifying the child's uncle as the perpetrator did not, in the court's judgment, fit within the excited utterance exception. *Id.* at 179-83. Nor did a similar statement made to a physician fit within the medical diagnosis exception. *Id.* at 181-83.

107. *Id.*

108. *See, e.g.*, Note, *Child Hearsay, supra* note 83, at 1755-58, 1761, 1763.

109. *Id.*

110. *See, e.g.*, KAN. STAT. ANN § 60-460 (dd) (1983); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1985).

111. *See, e.g.*, KAN. STAT. ANN. § 60-460(dd) (1983); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1985). The Washington statute provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings . . . if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opporunity to prepare to meet the statement.

Id. (emphasis original).

112. *Id.*

This new Washington statute has been hailed as a positive innovation that allows courts greater discretion to consider alternative indicia of trustworthiness as opposed to limiting consideration to spontaneity. This allows courts to consider the special characteristics of children that require differential treatment, as well as the special need for this type of evidence in sexual abuse cases.[113] Moreover, the new statute relieves courts from the often farcical task of distorting traditional hearsay analyses to bring children's statements within the confines of existing hearsay exceptions.[114] The claim is also made that the statute accomplishes these worthy objectives without infringing on the defendant's constitutional rights.[115]

In fact, both the Washington and Kansas statutes have been upheld against the claim that they violate the defendant's constitutional right to confront witnesses against him.[116] Both courts upheld the statutes under the test announced in *Ohio v. Roberts*.[117] Under *Roberts* the confrontation clause is not violated if the declarant is either present or shown to be unavailable, and the out-of-court statement is shown to be reliable.[118]

Although the Kansas statute is not so limited, Washington's new hearsay exception is applicable only to sexual abuse cases. This means that in other kinds of abuse cases, admissibility of a child's out-of-court statements still depend on application of traditional hearsay analysis under recognized exceptions or a residual exception. Nevertheless, because sexual abuse cases constitute the bulk of those in which problems with a child's in-court testimony are likely to arise,[119] the new statute is a welcome legislative response to a problem confronted by courts alone, sometimes with

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113. Note, *Child Hearsay, supra* note 83, at 1764-65; Comment, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 819-20 (1983) [hereinafter cited as Comment, *Washington's New Hearsay Exception*].

114. Comment, *Washington's New Hearsay Exception, supra* note 113, at 817-19.

115. Note, *Child Hearsay, supra* note 83, at 1765-66; Comment, *Washington's New Hearsay Exception, supra* note 113, at 825-29. The latter commentary concludes that under some circumstances the new statute could be applied in such a way that the defendant's rights would be compromised. Comment, *Washington's New Hearsay Exception, supra* note 113, at 825-27. Courts are therefore urged to examine specific applications of the exception on a case-by-case basis to determine whether the right to confrontation has been violated. *Id.*

116. State v. Ryan, 103 Wash.2d 165, 691 P.2d 197 (1984); State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985). *See* State v. Slider, 38 Wash. App. 689, 688 P.2d 538 (1984) (the legislature did not overstep its authority or violate the confrontation clause by enacting a statute that permitted admission of statements from a two-and-one-half-year-old child); State v. Pendelton, 10 Kan. App. 2d 26, 690 P.2d 959 (1984) (statutory exception to hearsay rule did not violate the confrontation clause because the judge must first determine that the child is unavailable by way of disqualification and that the statements sought to be admitted are reliable).

117. 448 U.S. 56 (1980).

118. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

119. *See supra* note 82 and accompanying text.

unsatisfactory results, for a number of years.

C. WAIVER OF PRIVILEGES

1. Spousal Privilege

Difficulty in obtaining the testimony of one parent against the other has been a recurring problem in child abuse cases.[120] Two types of husband-wife privilege — one a true privilege and the other a competence rule — occasionally have been invoked to preclude admissibility of an otherwise valuable source of probative evidence. The first type of privilege is not a "privilege" at all, but rather is a remnant of the common law rule that declared both spouses incompetent to testify for or against the other. Eventually spouses were permitted to testify for the other as the disqualification for interest gave way to a rule that allowed interest to be considered on the issue of credibility. The rule that kept disqualified spouses from testifying against each other remained, however, at least in criminal cases, in the form of a testimonial "privilege" of the spouse against whom the testimony was offered to prevent the other from testifying. Many of these testimonial privilege rules have been altered today to declare the witness-spouse the holder of the privilege, thus allowing a willing spouse to testify against the other.[121]

Even at common law certain exceptions were recognized. For example, where one spouse was charged with a crime committed against the other, or against the child of either or both, the privilege could not be invoked.[122] Today the practical effect of the latter exception is that in either a civil or criminal case alleging parental abuse of a child, the other spouse is free to give adverse testimony.[123] This is not to say, however, that application of the testimonial privilege has always been even. The exception is sometimes allowed in both civil and criminal cases,[124] but at other times is allowed only in criminal cases alleging child abuse.[125] Moreover, at times the exception has been construed so narrowly that it is applicable only where one spouse is charged with abuse *of*

120. *See generally* Comment, *Evidentiary Problems, supra* note 65, at 260.
121. MCCORMICK, *supra* note 66, at 161-62. *See generally* Trammel v. United States, 445 U.S. 40 (1980).
122. MCCORMICK, *supra* note 66, at 162 & n. 11.
123. *See, e.g.*, TEX. CODE CRIM. PROC. art. 38.11 (1979).
124. *See, e.g.*, CAL. EVID. CODE § 972(d), (e)(1) (1966).
125. *See, e.g.*, MINN. STAT. § 595.022(b) (1984).

the other spouse. Under such a construction, spousal testimony is effectively precluded in cases alleging parental abuse of a child.[126] In any event, regardless of how the statute creating the privilege might be worded, any question over its scope may be alleviated if the child abuse reporting statute provides for waiver of any privilege that otherwise might be applicable.[127]

The second type of spousal privilege is the marital communications privilege. Unlike the first type, it does not seek to disqualify a spouse from testifying at all, but rather to preserve the confidentiality of communications between spouses. Thus, while one spouse is competent to testify against the other, he or she is not free to testify as to any confidential communications made by the other spouse. The holder of the privilege is the communicating spouse.[128]

With this true privilege, also, an exception is sometimes provided to permit testimony even as to confidential communications in child abuse cases.[129] Additionally, as with the testimonial privilege, if the child abuse reporting statute contains a waiver provision, it operates as a waiver of the marital communications privilege.[130]

Two recent cases indicate how these privileges are being applied in child abuse cases today. In *Daniels v. State*[131] the trial court's order holding a wife in contempt for failure to testify against her husband on a child abuse charge presented to the grand jury was affirmed.[132] The wife's refusal to testify was based on her claim of spousal privilege.[133] Alaska recognizes both types of privilege discussed above — the testimonial privilege, which is granted to the spouse against whom the testimony is offered,[134] and the marital communications privilege.[135] With respect to both, however, the rule creating the privileges provides that neither is applicable to a case in which one spouse is charged with "[a] crime against the person or the property of the other spouse or of a child of either."[136] In addition, the Alaska child abuse statutes also

126. *See, e.g.*, State v. McGonigal, 89 Idaho 177, 403 P.2d 745 (1965); State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961). The Idaho statutes were later amended to extend the exception to child abuse cases. *See* IDAHO CODE §§ 9-203(1), 19-3002(2) (Supp. 1984).

127. *See infra* notes 137, 147 and accompanying text.

128. For the distinction between the two husband-wife privileges and their origins, see MCCORMICK, *supra*, note 66, at 188-91.

129. *See, e.g.*, FLA. STAT. ANN. § 90.504(3)(b) (West 1979).

130. *See infra* notes 137, 147 and accompanying text.

131. 681 P.2d 341 (Alaska App. 1984).

132. Daniels v. State, 681 P.2d 341, 342 (Alaska App. 1984).

133. *Id.* Rule 505(b)(1).

134. ALASKA R. EVID. 505(a)(1).

135. *Id.*

136. *Id.* 505(a)(2)(D)(i), (b)(2)(A).

provide for waiver of the husband-wife privilege in child abuse proceedings.[137]

The only issue in *Daniels* centered on construction of the word "child" in the part of the rule creating the exception. Specifically the *Daniels* court discussed whether the exception extends to a case in which the child is a foster child. Two reasons supported the court's decision that it did. First, current research supports the view that spousal privileges should be construed narrowly, since they prevent disclosure of probative evidence.[138] Secondly, the court determined that the privilege must yield in any event to the policy of prevention of child abuse.[139]

In the other case, *People v. Corbett*,[140] the Colorado Supreme Court reversed the trial court's dismissal of charges against the defendant husband.[141] At his preliminary hearing, the defendant was able to prevent his wife from testifying against him on a charge of sexual assault on a child by claiming the husband-wife privilege. Colorado's testimonial privilege, like Alaska's, is held by the spouse against whom the testimony is offered.[142] An exception is allowed under the privilege statute itself, but only "[in] a criminal action or proceeding for a crime committed by one [spouse] against the other."[143] The court observed that it was a moot point whether any crime committed by one spouse should be broadly construed as a crime "against the other," because the child abuse statutes provide that the husband-wife privilege cannot be claimed in a child abuse proceeding.[144]

These cases are significant in that they indicate the tendency of courts to look to the child abuse statutes themselves, as well as the statutes or rules creating the privileges, when questions arise concerning the possible application of spousal privilege to child abuse cases. The cases also indicate the further tendency to give a somewhat narrower scope to spousal privilege than has traditionally been given. The same is not necessarily true with respect to waiver of the physician-patient privilege in such cases.

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137. ALASKA STAT. § 47.17.060 (1984).

138. *Daniels*, 681 P.2d at 343-45 (citing Trammel v. United States, 445 U.S. 40, 50 (1980)). *Cf.* State v. R.H., 683 P.2d 269 (Alaska App. 1984) (a contrary result with respect to the physician-patient privilege). *See also infra* notes 146-55 and accompanying text.

139. *Daniels*, 681 P.2d at 345.

140. 656 P.2d 687 (Colo. 1983).

141. People v. Corbett, 656 P.2d 687, 689 (Colo. 1983).

142. COLO. REV. STAT. § 13-90-107(1)(a) (Supp. 1984).

143. *Id.*

144. *Corbett*, 656 P.2d at 688-89. The pertinent provision of the child abuse statute is COLO. REV. STAT. § 19-10-112 (1978). *Cf.* State v. R.H., 683 P.2d 269, 280 (Alaska App. 1984) (a similar

2. Physician-Patient Privilege

In addition to spousal privilege, a number of states have eliminated the physician-patient privilege in child abuse proceedings.[145] In two recent cases, however, such statutes were read very narrowly, casting some doubt on the scope to be accorded the physician-patient privilege in future cases, as well as the breadth of application of any waiver of the privilege.

In the first case, *State v. R.H.*,[146] a clinical psychologist was subpoenaed to appear and bring certain of his records before a grand jury investigating charges of sexual abuse brought against one of his patients. He sought and obtained an order quashing the subpoena on the ground that disclosure would violate the psychotherapist-patient privilege recognized under the rules of evidence.[147] In the State's interlocutory appeal, the Alaska Supreme Court affirmed the trial court's decision.[148]

The pertinent provision of Alaska's child abuse reporting statutes provides that the physician-patient privilege is not applicable to a child abuse proceeding "related to a report made under this chapter."[149] This language is very similar to that found in other such statutes.[150] The court held that the provision eliminating the physician-patient privilege applies only in civil child protective proceedings brought under the child abuse reporting statutes, and is not applicable to criminal proceedings alleging child abuse. The court based this decision on policy considerations and its reading of legislative intent.[151]

The Alaska court's decision in this case is puzzling in view of its earlier decision in *Daniels v. State*[152] involving a similar refusal to testify, but based on spousal rather than physician-patient privilege. In *Daniels* the same statute that eliminates both privileges

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provision eliminating the physician-patient privilege held inapplicable to criminal prosecutions for child abuse). *See infra* notes 146-64 and accompanying text.

145. *See, e.g.*, ALASKA STAT. § 47.17.060 (1984); COLO. REV. STAT. § 19-10-112 (1978); OR. REV. STAT. § 418.775(1) (1983); VA. CODE § 63.1-248.11 (1980).

146. 683 P.2d 269 (Alaska App. 1984).

147. State v. R.H., 683 P.2d 269, 271 (Alaska App. 1984). *See* ALASKA R. EVID. 504(b) (recognizing the physician-patient privilege).

148. State v. R. H., 683 P.2d at 272.

149. ALASKA STAT. § 47.17.060 (1984).

150. *See* statutes cited in *supra* note 145. Virginia's statute provides, "[*i*]*n any legal proceeding resulting from the filing of any report or complaint pursuant to this chapter*, the physician-patient and husband-wife privileges shall not apply." VA. CODE § 63.1-248.11 (1980) (emphasis added). Similarly, the Oregon statute provides, "[i]n the case of abuse of a child . . . the physician-patient privilege . . . shall not be ground for excluding evidence regarding a child's abuse, or the cause thereof, *in any judicial proceeding resulting from a report made pursuant to [the reporting statute]*." OR. REV. STAT. § 418.775(1) (1983) (emphasis added).

151. State v. R.H., 683 P.2d at 280.

152. *Daniels*, 681 P.2d 341 (Alaska App. 1984). *See supra* notes 131-39 and accompanying text.

in proceedings "related to a report made under this chapter,"[153] was held applicable to a criminal prosecution for child abuse. Thus, the trial court's decision holding the wife in contempt for failure to give testimony against her husband before the grand jury was affirmed,[154] in part because the spousal privilege must yield to the policy of prevention of child abuse.[155] Other courts confronted with the same issue likewise have concluded that elimination of the spousal privilege is applicable in criminal prosecutions for child abuse.[156]

In *State v. Andring,*[157] the second case narrowly construing statutory elimination of the physician-patient privilege in child abuse proceedings, the defendant was charged with criminal sexual abuse. The state sought discovery of his medical records and statements made by him to personnel in a psychotheraphy program in which he voluntarily participated. The trial court denied the state's motion to discover statements made by the defendant in one-on-one sessions with psychotheraptists, but granted discovery of statements he had made in group therapy sessions. The issue of the scope of the physician-patient privilege was certified to the appellate court for interlocutory review.[158]

The applicable state statute provides that, notwithstanding the physician-patient privilege,[159] "[n]o evidence regarding the child's injuries shall be excluded in any proceeding arising out of the neglect or physical or sexual abuse."[160] The purpose of the latter provision, according to the court, is to encourage full, unfettered reporting of child abuse. The court found this to be consistent with the purpose of the reporting statutes themselves — to protect children rather than to punish the wrongdoer. Thus, prior to the reporting of abuse, the policy underlying the medical privilege must yield to the policy of protecting children. Once abuse is discovered through required reporting, however, the purpose of child protection has been served, and full disclosure of confidential physician-patient communications is no longer required. Therefore, the court construed the statute as a limitation on, but

153. ALASKA STAT. § 47.17.060 (1984).

154. *Daniels*, 681 P.2d 341, 345 (Alaska App. 1984). *See supra* note 132 and accompanying text.

155. *Daniels*, 681 P.2d at 345. *See supra* note 139 and accompanying text.

156. *See, e.g.*, People v. Corbett, 656 P.2d 687 (Colo. 1983); State v. Suttles, 287 Or. 15, 597 P.2d 786 (1979). In these states the statutes eliminating the spousal and physician-patient privilege contain language similar to that in the Alaska statute, indicating that the abrogation applies to "any judicial proceeding resulting from a report made pursuant to [the child abuse reporting statute]." OR. REV. STAT. § 418.775(1) (1983). *See also* COLO. REV. STAT. § 19-10-112 (1978).

157. 342 N.W.2d 128 (Minn. 1984).

158. State v. Andring, 342 N.W.2d 128, 130 (Minn. 1984).

159. *See* MINN. STAT. § 595.021(d) (1984) (the physician-patient privilege).

160. *Id.* § 626.556.

not a complete abrogation of the privilege. Only evidence required to be reported under the child abuse reporting statute — the "identity of the child, the parent, guardian, or other person responsible for . . . [the child's] . . . care, the nature and extent of the child's injuries, and the name and address of the reporter" — may be admitted.[161]

Such a construction by the court gives a very broad scope to the physician-patient privilege itself, which is contrary to the trend in recent years to narrow the scope of the privilege.[162] Perhaps this decision and the Alaska court's decision in *State v. R.H.* are explained largely by the fact that both involved confidential communications between psychotherapists and their patients. The psychotheraist-patient relationship, with its greater need for encouragement of communication, has become the last strong haven for a privilege that in recent years has struggled for survival.[163] Still, one might question whether the policy underlying the physician-patient privilege should be accorded greater weight than the policy underlying spousal privilege.[164]

D. USE OF CHARACTER EVIDENCE

An axiom of evidence law is that evidence of a person's character is inadmissible to show his propensity to act in accordance with that character.[165] Several exceptions to the general rule of exclusion have been recognized. Thus, under well-defined circumstances, character evidence may properly be used to prove that a person acted in conformity with his character on a particular occasion.[166] Moreover, evidence may be admitted for purposes other than propensity to act in a certain way. For example,

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161. *Andring*, 342 N.W.2d at 132-33. The child abuse reporting statute, from which the quotation is taken, is MINN. STAT. § 626.556(7) (1984). The current language is slightly different from the statute in effect at the time of the court's decision.

162. Not all states recognize a general physician-patient privilege. MCCORMICK, *supra* note 66, at 184, 244 & n.5. In those that do, the privilege is noted for the kinds of cases to which it does not apply, and the ease with which it can be waived. *Id.* at 254-58. Moreover, the traditional underlying rationale of the privilege — that it is necessary to encourage communication by patients to their physicians — has been questioned. *Id.* at 244. The latter concern led to rejection of a general physician-patient privilege when the Federal Rules of Evidence were proposed. *See* PROPOSED FED. R. EVID. 504 advisory committee note, 56 F.R.D. 183, 241-42.

163. MCCORMICK, *supra* note 66, at 244-45. Some jurisdictions do not recognize a general physician-patient privilege but do recognize a psychotherapist-patient privilege. *Id.* at 245 & nn. 9 & 10.

164. All states recognize some form of spousal privilege, whereas most, but not all states recognize a physician-patient privilege. *Id.* at 183-84. *See supra* note 162.

165. MCCORMICK, *supra* note 66, at 554. *See also* FED. R. EVID. 404(a). Rule 404(a) states the general rule: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . ." *Id.*

166. FED. R. EVID. 404(b). The accused in a criminal case may offer evidence of his good

character evidence is admissible to prove identity, intent, motive, knowledge, absence of mistake or accident, and the like.[167]

Recent cases indicate that the use of character evidence in child abuse proceedings is a recurrent issue. The cases are generally of two types. In the first type of case, character evidence is used for permissible purposes such as evidence of intent, identity, and absence of mistake or accident. The second type of case includes those in which expert testimony on the "battering parent syndrome" is received, along with evidence that the defendant fits the profile, as evidence of the defendant's guilt. Each kind of case will be discussed in turn.

Both Alaska and Wyoming have adopted rules of evidence modeled after the Federal Rules. Thus, each state excludes evidence of character if offered to show propensity,[168] but allows such evidence if offered for some other purpose, such as to prove identity, intent, or motive.[169] In recent decisions, however, courts in the two states have reached different results in applying these similar rules.

In *Grabill v. State*[170] the Wyoming Supreme Court held that

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character to show that he is not a person with the propensity for crime. Once the defendant offers such evidence, the prosecution may offer rebuttal evidence to show a criminal disposition. MCCORMICK, *supra* note 66, at 566-70; FED. R. EVID. 404(a)(1). The accused may also offer evidence of a pertinent character trait of the victim in a criminal case, and the prosecution may offer rebuttal evidence. MCCORMICK, *supra* note 66, at 571-74; FED. R. EVID. 404(a)(2). Moreover, in a homicide case in which the victim is alleged to have been the aggressor, the prosecution may open the door by initially offering evidence of the victim's character for peacefulness. *Id.* Character evidence is also admissible for the purpose of impeaching a witness's credibility. MCCORMICK, *supra* note 66, at 574; FED. R. EVID. 404(a)(3).

Character evidence is also admissible in a case in which character is "in issue," i.e., in which a person's character or a trait of his character is an element of a claim or defense, as in a libel suit in which truth is alleged as a defense. MCCORMICK, *supra* note 66, at 551-53; FED. R. EVID. 405(b).

167. MCCORMICK, *supra* note 66, at 557-65. *See also,* FED. R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id. The word "may" is a reference to the admonition of Rule 403 that "[a]lthough relevant, evidence may be excluded if its probative value is substanitally outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Thus, evidence falling within one of the categories enumerated in Rule 404(b) is not automatically admissible but is subject to the balancing test set forth in Rule 403. *See* FED. R. EVID. 404(b) advisory committee notes, 56 F.R.D. 183, 218, 219. Decisions on admissibility are left to the trial court's discretion, and courts are accorded considerable leeway in the exercise of this discretion. MCCORMICK, *supra* note 66, at 544-48. For an example of a decision in which the appellate court was unwilling to say that the trial court had abused its discretion in admitting character evidence for a permissible purpose, see the discussion of Grabill v. State, 621 P.2d 802 (Wyo. 1980), *infa* notes 170-74 and accompanying text.

168. ALASKA R. EVID. 404(a); WYO. R. EVID. 404(a). For the text of Federal Rule 404(a), see *supra* note 165.

169. ALASKA R. EVID. 404(b); WYO. R. EVID. 404(b). For the text of Federal Rule 404(b), see *supra* note 167.

170. 621 P.2d 802 (Wyo. 1980).

evidence of prior misconduct was properly admitted by the trial court.[171] According to the court, prior incidents involving other children of the appellant were admissible to prove the identity of the appellant as the criminal agent.[172] Such evidence might also be admitted to prove intent or recklessness, each of which is an element of the crime of child abuse.[173] Admissibility of character evidence on such issues, the court conceded, must be balanced against the admonition in Wyoming Rule of Evidence 403 that prejudicial effect may outweigh probative value. In this kind of case, however, the need for evidence tending to establish the identity of the perpetrator outweighs any prejudicial effect likely to be occasioned by its admission. Therefore, the court was unable to say that admission of the evidence of prior misconduct was an abuse of discretion.[174]

The *Grabill* court concluded that appellant's denial of guilt made intent an issue in the case, and this conclusion has been sharply criticized.[175] Likewise, much criticism flows from the holding that evidence of appellant's prior misconduct tended to prove identity,[176] and that the need for evidence in child abuse cases justified admission of otherwise prejudicial evidence.[177] It has been argued that the only purpose evidence of prior misconduct served in *Grabill* was to show the appellant's propensity for violence. This is precisely the kind of evidence intended to be excluded under Rule 404(b).[178] Because Rule 404(b) first states a

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171. Grabill v. State, 621 P.2d 802, 813-14 (Wyo. 1980).

172. *Id.* at 808-11. The evidence conflicted regarding who — the appellant or the child's mother — caused the child's injuries. *Id.* Therefore, identity was an issue in the case. *Id.* Implicit in appellant's testimony was a denial that he was the agent of the child's harm. *Id.* at 809-10.

173. *Id.* at 808-11. *See* WYO. STAT. § 6-2-503 (Supp. 1983). Section 6-2-503 provides:

> . . . a person is guilty of child abuse . . . if:
> (i) the actor is an adult or is at least six (6) years older than the victim; and
> (ii) the actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years:
> (A) Physical injury as defined [elsewhere]; or
> (B) Mental injury as defined [elsewhere].

Id.

174. *Grabill*, 621 P.2d at 810-11. *See also* State v. Tanner, 675 P.2d 539 (Utah 1983). In *Tanner* the court also emphasized the need of evidence, especially in child abuse cases, as a factor to be considered in the balancing process. 675 P.2d at 547.

175. *See* Case Note, *Evidence, Child Abuse - Rule 404(b) of the Wyoming Rules of Evidence: What Protection is Left After Grabill v. State, 621 P.2d 802 (Wyo. 1980)?*, 16 LAND & WATER L. REV. 769, 777-80 (1981) [hereinafter cited as Case Note, *Evidence*].

176. *Id.* at 781-82.

177. *Id.* at 783-85.

178. *Id.* at 779-80, 782.

prohibition[179] and then creates exceptions,[180] judges should be especially vigilant in employing the balancing test of Rule 403[181] to insure that the exceptions do not in fact become the rule.[182]

One critic of the *Grabill* decision offers instead the Alaska Supreme Court's decision in *Harvey v. State*[183] as an example of the proper degree of caution.[184] In *Harvey* the appellant's conviction for negligent homicide of an eighteen-month-old child was reversed because evidence of prior misconduct was improperly admitted.[185] The court considered and rejected several theories advanced in favor of admitting evidence that the appellant had severely beaten another child on a previous occasion. The trial court admitted this evidence on the basis that it showed malice and intent. Appellant argued that neither intent nor malice was an element of either offense with which he was charged.[186] The State's response was that the evidence was properly admitted to establish general criminal intent. The supreme court rejected the State's argument, fearing that a contrary decision would mean evidence of prior misconduct would be admissible in every case charging a felony to show general criminal intent. The exception would thus swallow up the rule.[187]

Moreover, the issue in *Harvey* was causation, not intent. Appellent did not deny that he severely spanked the child. Rather, he sought to show that the child was in the custody of his mother immediately preceding his injuries, and that she could have been the agent of his death.[188]

The State also argued that the evidence was admissible to show the harm was not the result of accident or inadvertence. The court conceded that evidence of prior misconduct is properly admissible to refute such a claim, but pointed out that appellant did not raise this claim. The evidence was therefore inadmissible for this purpose. Since the evidence was not admissible for any of the permissible purposes advanced by the State, the court held it was

179. FED. R. EVID. 404(b). For the text of Rule 404(b) see *supra* note 167. The first sentence of Rule 404(b) is a particularized statement of the general rule prohibiting use of character evidence to show propensity. *Id.*

180. *Id.* Reference here is to the second sentence of Rule 404(b). For the text of Rule 404(b) see *supra* note 167.

181. *See supra* note 167.

182. *Id. See also* Case Note, *Evidence, supra* note 175, at 774-75.

183. 604 P.2d 586 (Alaska 1979).

184. Case Note, *Evidence, supra* note 175, at 778-79.

185. Harvey v. State, 604 P.2d 586, 588, 590 (Alaska 1979).

186. *Id.* at 589. Appellant was indicated for manslaughter and negligent homicide but was acquitted on the manslaughter charge. *Id.* at 588.

187. *Id.* at 589.

188. *Id.* at 588-90.

improperly admitted and constituted reversible error.[189]

The court in *Harvey* and the commentator critical of the Wyoming court's decision in *Grabill*[190] view Rule 404(b) as first and foremost a rule of exclusion. Exceptions to the Rule should be rarely considered and cautiously applied due to the high risk of prejudice. They reject the view that the defendant's plea in a case, the posture he assumes at trial, or inferences drawn from his testimony operate to put matters such as identity, intent, or absence of mistake or accident into issue.[191] Rather, they look for positive action such as raising accident as a defense, denying that the injury was inflicted intentionally, or claiming lack of knowledge before the defendant might be said to have placed such matters in issue.

Most courts, however, seem to follow the view of the *Grabill* court that Rule 404(b) is an inclusionary rule, providing that evidence of character is admissible for certain purposes.[192] This view does not require admissibility of such evidence to depend upon a claim of accident, lack of intent, or any other matter mentioned in the Rule. The nature of the case and the other evidence introduced determine whether one of these matters is in issue.[193] Moreover, while the court should inquire into whether probative value is substantially outweighed by the risk of prejudice, need for the evidence is a permissible consideration to be weighed on the side of probative value.[194]

While character evidence of the above-described kind has usually been admitted, a second kind of character evidence has routinely been rejected. Evidence of the latter kind consists of expert testimony on the "battering parent profile," accompanied by testimony that the defendant fits the profile of the battering parent.[195] Such evidence contrasts with expert testimony on the

189. *Id.* at 590.

190. *See supra* note 175.

191. *Harvey*, 604 P.2d at 589-90; Case Note, *Evidence*, *supra* note 175, at 777-85. *Cf.* McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978) (the defendant's plea of not guilty placed intent and absence of mistake in issue).

192. *See* State v. Tucker, 181 Conn. 406, 435 A.2d 986 (1980) (evidence of such prior acts as shaking a child violently is admissible to establish a pattern of behavior that indicates state of mind); People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973) (evidence of parent's prior abusive acts was admissible to show absence of accident or mistake); State v. Tanner, 675 P.2d 539 (Utah 1983) (evidence of other wrongs, relevant to prove some material fact other than to show general disposition, is admissible); State v. Forsyth, 641 P.2d 1172 (Utah 1982) (the list contained in Rule 404(b) is illustrative only, and character evidence is admissible when relevant to prove *any* material fact).

193. *See* State v. Tanner, 675 P.2d 539, 545-46 (Utah 1983); Huddleston v. State, 695 P.2d 8 (Okla. Crim. App. 1985).

194. *Tanner*, 675 P.2d at 547. For a general description of the balancing analysis a court uses when determining whether to admit character evidence, see MCCORMICK, *supra* note 66, at 544-48.

195. *See, e.g.*, State v. Loebach, 310 N.W.2d 58, 62-63 (Minn. 1981).

"battered child syndrome," which is admissible on the issue of cause of death or injuries to the child-victim.[196] "Battering parent" evidence is evidence of the defendant's character, and its only relevance lies in demonstrating the positive matchup between the defendant and the battering parent profile. Moreoever, "battering parent" evidence is propensity evidence of the kind prohibited under Rule 404(a) and similar rules. In a leading case, *State v. Loebach*,[197] the court held such evidence inadmissible for the same reasons character evidence to show propensity is usually held inadmissible:

> First, there is the possibility that the jury will convict a defendant in order to penalize him for his past misdeeds or simply because he is an undesirable person. Second, there is the danger that a jury will over-value the character evidence in assessing the guilt for the crime charged. Finally, it is unfair to require an accused to be prepared not only to defend against immediate charges, but also to disprove or explain his personality or prior actions.[198]

For these reasons the court in *Loebach* held that "battering parent" evidence is inadmissible unless the defendant first puts his character in issue.[199] Other courts uniformly agree with the *Loebach* decision.[200] An interesting variation is found in *State v. Maule*,[201] in which a Washington appellate court held it error to allow an employee of a sexual assault center to testify that perpetrators of most assaults on children in their program were male parent figures, usually biological fathers, where the defendant was the father of the eight-year-old victim.[202] A further interesting point is that in all but one[203] of the latter cases, the courts held that use of

196. *See, e.g., id.*; State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Tanner, 675 P.2d 539 (Utah 1983).

197. 310 N.W.2d 58 (Minn. 1981).

198. State v. Loebach, 310 N.W.2d 58, 63 (Minn. 1981) (citing State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965)).

199. *Id.* at 64.

200. *See, e.g.*, Sanders v. State, 251 Ga. 70, 76, 303 S.E.2d 13, 18 (1983) ("battering parent" evidence would be admissible if the defendant raises a defense to which such evidence would be relevant in rebuttal); Duley v. State, 56 Md. App. 275, ____, 467 A.2d 776, 779-80 (1983) ("battering parent profile" evidence is not relevant to culpability, and thus is not admissible). If the defendant puts his character in issue, "battering parent" evidence would appear proper under Rule 404(b). *See supra* note 167 and accompanying text.

201. 35 Wash. App. 287, 667 P.2d 96 (1983).

202. State v. Maule, 35 Wash. App. 287, 293, 667 P.2d 96, 99 (1983).

203. *See id.* In *Maule* the court held that admission of prejudicial character evidence constituted reversible error. *Id.* at ____, 667 P.2d at 99-101.

character evidence was harmless error in light of the overwhelming evidence of the defendant's guilt.[204] As a general rule, then, use of character evidence has not affected the outcome of cases to any appreciable degree.

IV. CONCLUSION

This article has sought to review three separate developments related to child abuse today: the changing concept of child abuse as evidenced by current statutes that give it an ever-expanding definition; the most current efforts to measure the incidence of abuse and some of the difficulties limiting accurate measurement; and some of the most controversial and problematical evidentiary issues confronting the courts in reviewing child abuse determinations by lower courts. Except in a very limited way, no attempt has been made to propose solutions to some of the problems reviewed.[205] That task remains to others. The author's purpose has instead been to give the reader a fuller understanding of the nature and scope of child abuse and how they relate indirectly to the actual handling of child abuse cases by the courts. How much human behavior is defined as child abuse determines how many cases of abuse are measured as such. This determines in large part how many cases actually reach the courts. As more cases reach the courts, courts — and legislatures — will have a better opportunity to resolve evidentiary questions based on a firmer understanding of the child abuse phenomenon itself.[206]

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204. *See* Sanders v. State, 251 Ga. at 76-77, 303 S.E.2d at 18; Duley v. State, 56 Md. App. at 283, 467 A.2d at 783; State v. Loebach, 310 N.W.2d at 64.

205. To the extent solutions were mentioned they were solutions proposed by others. *See supra* notes 84-91, 110-15 and accompanying text.

206. As more child abuse cases reach the courts, legislatures will have the opportunity to resolve evidentiary questions by enacting legislation controlling admissiblity of children's out-of-court statements based on a better understanding of children's credibility versus that of adults. In Washington, for example, the legislature recently enacted a hearsay exception applicable to sexual abuse cases. *See supra* notes 110-15 and accompanying text. Courts similarly can reach more informed decisions on the competency of children to testify based on a better understanding of the psychology of victims of traumatic crime, particularly child victims of sexual offenses. *See supra* notes 75-79 and accompanying text. Courts can also make more informed decisions on the admissibility of character evidence based on increased awareness of policy considerations and whether there is a genuine "need" for such evidence. *See supra* notes 170-74 and accompanying text.