ACCUSATIONS OF CHILD SEXUAL ABUSE

By

HOLLIDA WAKEFIELD, M.A.

and

RALPH UNDERWAGER, M. Div., PH.D.

With

Ross Legrand, PH.D.

Joseph Erickson, M.A.

Christine Samples Bartz, B.A.

Introduction by

Douglas J. Besharov, J.D., L.L.M.

Foreword by

Brook Hart, J.D., L.L.B. *and* **Anthony Bartholemew, J.D.**

To improve our ability to protect children, decrease actual abuse, and avoid needless damage to innocent persons, this book takes a rational, critical look at the system which has evolved to deal with charges of sexual abuse. Topics presented include the interrogation process, the role of the psychologist, the competency of children to testify, the child witness and social psychology, the justice system, and the prevention of child sexual abuse. Discussions concerning the assessment of child sexual abuse are also presented, and include indicators and evidence of abuse, psychological assessment of suspected victims and persons accused, behavior of sexual abusers, and the incidence and demographics of child sexual abuse. The book concludes with suggestions for discriminating between false and true accusations, the effects and treatment of sexual abuse for both victims and perpetrators, and the history of child sexual abuse as it relates to society.

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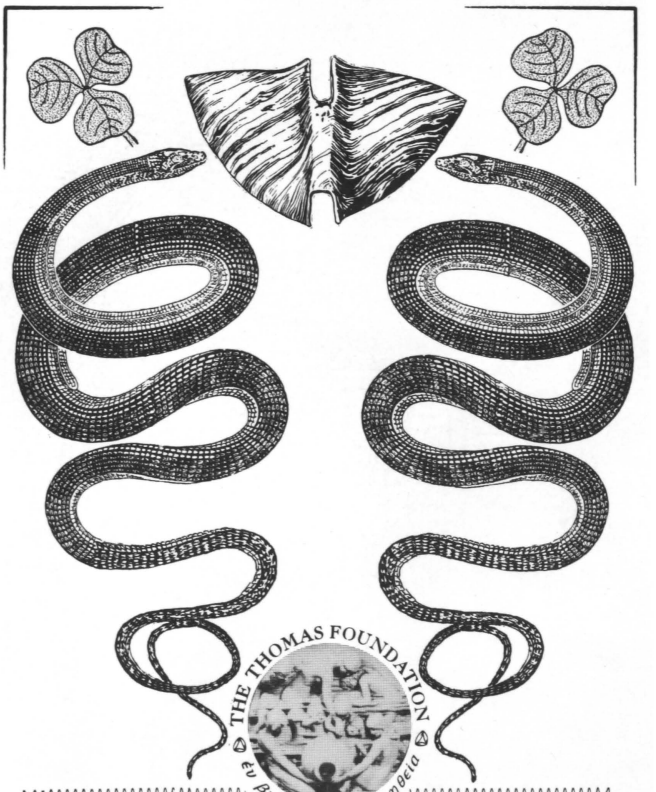

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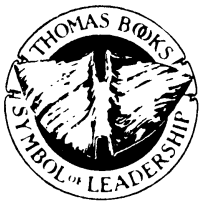

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To our son, James Wakefield Dickson
1965 to 1982

FOREWORD

In May, 1985, James McKellar was indicted in a ten count indictment by the Oahu Grand Jury in Honolulu, Hawaii. At age forty-four, Mr. McKellar seemed an unlikely criminal. He came from a respected family in the community. He worked as a successful real estate salesman for a leading company in Kailua, Oahu. Married to an elementary school teacher, Mr. McKellar had never been in trouble with the law before. He and his wife Sherrie were active in their church, and were then in the process of adopting a five-year-old Korean orphan.

The indictment charged Mr. McKellar with kidnapping, rape, promoting child abuse, sexual abuse and assault. Allegedly, in March of the previous year, Mr. McKellar, along with several other unknown adults, had abducted two girls, aged three and four, from a Kailua pre-school, driven the children to an unknown house and there subjected them to a variety of sexual acts which were photographed. Mr. McKellar was alleged to have fed the children corn and then deliberately burned one child several times on her arm and leg and hit the other child on the back. After these activities, the children were driven back to the pre-school, where they had never been missed by their teachers.

The alleged abduction was not suspected until the following day, when the mother of one of the girls noticed what she thought were burns on her daughter's arm and leg, and questioned her daughter about them. That questioning by the mother led to a report to the police and referral to the Sex Abuse Treatment Center, where after questioning, the child claimed she had been sexually abused.

As the child was questioned further, more details of the alleged abduction emerged, including the involvement of a second child, the girl's best friend and classmate. The two children were then questioned together by the police investigators. Within a day of the initial report, the authorities were certain that the children had been abducted from the school and sexually abused.

After two weeks, an extensive police investigation had produced no

identifiable suspects. Then, one of the mothers told the police that her daughter had named James McKellar, the realtor who had sold the family their home six months previously, as the man who had burned and abused her.

We were retained to defend Jim McKellar. When we examined the discovery materials provided to us by the prosecutor, and began to investigate the circumstances surrounding the supposed abduction of the children, one thing became increasingly clear: aside from the anticipated testimony of the two allegedly abused girls, there was no evidence that the crimes had actually occurred.

The medical examinations of the two girls revealed no physical evidence of sexual abuse, although the inexperienced physician who examined one of the girls at the Sex Abuse Treatment Center initially reported that she had been burned. The police never located the house where the children claimed they were taken. No automobile allegedly involved was ever located. None of Mr. McKellar's alleged accomplices was ever identified or arrested. No pornographic photographs featuring the supposedly abducted children were ever discovered.

Our investigator located all of the teachers and staff of the pre-school, and they were thoroughly interviewed. None of the teachers or staff had missed any of the allegedly abducted children at any time during the day. The longest period of time during which either of the two girls could not be specifically accounted for was about twenty minutes, between 9 and 10 a.m. This was hardly enough time for them to have been abducted, taken to a house, fed corn, raped and photographed, burned and beaten, and then returned to the school.

Not only were the children not missed, their teachers observed nothing during the day in the behavior of the children that suggested anything out of the ordinary. We thought it unlikely that a four-year-old child could be abducted from her school by several adults, taken to a strange house, undressed and raped, burned several times by direct application of an open flame to her skin, returned to the school, and then behave as if nothing at all had happened.

Another puzzling fact was that early in the investigation the two girls had named at least two other children as also having been abducted with them. One, a girl, had not been in school that day, and the other, a boy, insisted that he had not been abducted or abused by anyone.

In addition, we were able to establish that Mr. McKellar's activities on the day in question made it virtually impossible for him to have been

involved in the alleged crimes. He had been in his Kailua realty office that morning, having notarized immigration papers relating to his and Sherrie's adoption of their Korean orphan son. Then he had driven to the INS office in Honolulu, where the adoption papers were added to the boy's immigration file. Those activities were confirmed by the real estate company's notarial stamp on the papers, and the time and date stamp placed on them by the clerk at the INS office.

The only physical evidence that seemed to support the allegations was the "burns" on the arm and leg of one of the children. If she had not been abducted and abused, where had those burns come from? That dilemma was resolved when we showed color photographs of the alleged burns to four of the leading dermatologists in the state. Each of them concluded independently and positively that all but one of the supposed "burns" were actually a common childhood skin infection, impetigo. The genuine burn was explained at Mr. McKellar's trial, when the girl's mother testified that her daughter had accidently been burned by a cigarette about a week before the alleged abduction.

Still, the two little girls *had* testified at the grand jury, describing how they had been abducted and abused. Each had named Mr. McKellar as being involved. As we prepared for trial, we confronted a situation that is more and more often repeated across the country. Our client, Jim McKellar, faced conviction for heinous offenses solely on the strength of the uncorroborated testimony of two very young children. The questions we knew we would have to answer at trial were: if Mr. McKellar was innocent, if he had not done the things he was charged with, why were the two girls saying that he had? Were they lying? Were they mistaken? Had they been influenced by parents or prosecutor? If we could not satisfactorily answer those questions, we knew that despite the mass of evidence supporting his innocence, Jim McKellar might be convicted.

Our need to understand the testimony of the two girls brought us to contact Dr. Ralph Underwager and Hollida Wakefield, whose work we had heard of in connection with the highly publicized cases in Jordan, Minnesota. Dr. Underwager and Ms. Wakefield agreed to look at all of the evidence and to advise us.

We sent them all of the discovery materials provided by the state. Most important among those materials were the several audiotapes and transcripts of the police interviews with the allegedly abducted and abused children. Eventually, we obtained an additional audiotaped interview conducted by the parents of one of the children, as well as two videotaped

interviews conducted by the civil attorney who had been retained by one of the children's parents.

All of those interviews were analyzed by Dr. Underwager's staff, utilizing the rating protocols described in this book. Additionally, Dr. Underwager and Ms. Wakefield provided us with a copy of the first rough manuscript of this book. When we read that manuscript, particularly the sections relating to child witnesses and interrogation as a learning process, we realized immediately that we had been given the key to Jim McKellar's defense.

At Jim McKellar's trial, we objected to the admission of the testimony of the two allegedly abused children. We did not object on the traditional ground, that the children were incompetent in the ordinary sense, because we were certain that the trial court would find the children competent to testify. That the two girls could understand questions and give responsive answers, and could apparently distinguish between the truth and a lie, had been established by their performance before the grand jury. Instead, we asserted that the prosecutor could not establish that the two girls had "personal knowledge" of the events they would testify to, a necessary foundational requirement for admission of their testimony. We argued to the court that the girls' testimony was not the product of their own remembered experience, but rather was the learned product of the interrogation process the two girls had been subjected to.

Hawaii Circuit Judge Robert G. Klein conducted a lengthy hearing on the "personal knowledge" issue. The judge received into evidence transcripts of all of the children's statements, copies of all of the audio- and videotapes, the transcript of the two girls' testimony before the grand jury, and a videotaped deposition of a third child, the boy who had denied that he was involved. Much testimony was taken, including that of the police officers who investigated the case, the mothers of both of the allegedly abused children, and most significantly Dr. Underwager, including his report of the results of the analysis of the taped statements.

After considering all of the evidence, Judge Klein issued an order excluding the testimony of the two allegedly abused girls. The judge issued a carefully drafted twenty page opinion, explaining in detail the basis of his decision. Essentially, the court was persuaded that the alleged abduction and sexual abuse had never occurred. Based on the record of the repeated interrogations of the children, and the testimony of Dr. Underwager regarding the coercive influences demonstrably present during those interrogations, the judge concluded:

> The questioning process utilized by the layers of adults to understand and organize the information attributable to [the two girls] concerning the "incident" has served to create an "experience" which both . . . merely learned. They lack personal knowledge, because they have no memory which the court can be assured is their personal recollection of the "event." Cross-examination could not effectively penetrate the wall of learned facts to reveal any real perception.

Since there was no evidence against Jim McKellar other than the excluded testimony of the two children, he was acquitted.

The issues relating to the admissibility of the testimony of young children that were confronted in the McKellar case are for many people troubling and controversial. Far from unique, the situation in the McKellar case is confronted increasingly across the country as aggressive prosecutors charge and try cases that rely largely or wholly on the uncorroborated testimony of young children.

Powerful influences now affect the fairness of any legal proceeding relating to child sexual abuse. Most obvious is a climate of public concern that approaches hysteria. The public is primed by repeated sensational reports in the media to believe virtually any claim that a child has been abused. Previously all but ignored in our society and judicial process, the pendulum has now swung to the point where child sexual abuse cases are pursued with a zeal that is sometimes frightening.

Every stage of a child sexual abuse inquiry, whether in the criminal court or in a quasi-civil family court proceeding, is impacted by a persistent mythology. The most prevalent myth is that "children don't lie." Many child sexual abuse investigators see children as incapable of fantasizing in "adult" terms regarding sexual matters. Consequently, any statement made by a child which expresses a sexual awareness presumed beyond the child's experience is automatically accepted as true.

That blind belief in the accuracy of almost anything a child says about possible sexual abuse affects the objectivity of sexual abuse investigations. Accepting uncritically the truth of what the child has reportedly said, investigators do not investigate; rather, they see what they expect to see, and what they are conditioned by their "training" to see. The "investigation" is more an exercise in selective perception than an open-minded, skeptical and rigorous search for the truth.

The research reported in this book makes clear just how unwarranted is this tendency to assume the existence of sexual abuse. Frequently, those in the system operate with a presumption of guilt rather than a

presumption of innocence. Not only is that attitude contrary to the basic principles of our legal system, it can lead to the conviction of innocent people.

Unique legislation relating to the investigation and prosecution of child sexual abuse has been passed in many states. These laws create special hearsay exceptions so that previously inadmissible statements made by an allegedly abused child may be offered against the accused, or permit the child's testimony to be given through closed circuit television or by means of a videotaped deposition.

The new hearsay exceptions are justified by the "fact" that, since "children don't lie about sex," the hearsay statements of young children are inherently reliable and should therefore be admitted as competent evidence of the defendant's guilt. Even in states where special legislation has not been passed, the courts have strained the traditional hearsay rules to the breaking point in order to admit the statements of allegedly abused children.

The stated purpose for the new laws is to protect children, presumed to be traumatized victims, from the assumed further "trauma" of testifying at trial. Less readily acknowledged is another clear purpose: to make conviction more likely in child sexual abuse prosecutions. As long as it remains unchallenged, the myth of the inherent reliability of children's statements about sexual matters threatens to completely pervert the fact-finding function of the trial process.

Another matter of concern is the admissibility of the testimony of alleged experts. One example relates to the claimed "child sexual abuse accommodation syndrome," a compilation of factors alleged to be typical of sexually abused children. Since almost anything that an allegedly abused child does, including retraction of the claims, is seen by certain "experts" as consistent with the existence of abuse, the "syndrome" provides government with an easily abused prosecutorial tool. No matter what the allegedly abused child has done, or what the child may testify to at trial, the expert will testify that it is consistent with the child having been abused.

In addition to the "syndrome," experts, who say that anything an allegedly abused child does is indicative of sexual abuse, are the proponents of the so-called "anatomically correct dolls." Even though, as Ms. Wakefield and Dr. Underwager note in their discussion of this issue, there is no scientific evidence to support such claims, an army of experts has developed to testify that this or that obscure or ambiguous manipula-

tion of the dolls by a child is persuasive evidence that the child has been sexually abused.

The last decade has seen the development of what is virtually an industry around the issue of child sexual abuse. There is a symbiotic relationship between the prosecutors and social workers on the one hand, and on the other, the treatment professionals and experts whose willingness to "certify" the existence of abuse is directly connected to their reliance on the prosecutors and social agencies for referrals.

Clearly, child sexual abuse does occur. That reality presents our legal system with difficult and troubling issues to resolve. Issues relating to the admission of the testimony of very young children, the admission of expert testimony, the admission of hearsay, the use of videotaped rather than live testimony, raise important questions. But these are questions that must be answered carefully, with a caution appreciative of both the complexity of the issues and our incomplete scientific knowledge relating to child sexual abuse.

This is a book that should be read by anyone who deals with the issue of child sexual abuse. Foremost, we recommend it to anyone charged with the task of investigating and verifying reports of suspected child sexual abuse. People who question children must be aware of the degree to which their own behavior, attitudes and expectations can influence or contaminate the child's account. Clearly, objectivity at this stage of the process is needed to prevent the tragedy of prosecution when no abuse has actually occurred.

Those involved in the judicial process relating to child sexual abuse allegations, especially legislators, judges, prosecutors and defense attorneys, should all be aware of the material presented in this book, for they are the people who make the key decisions that determine the system's reponse to sexual abuse allegations. Changes in our carefully developed system of laws and rules, especially those which raise constitutional issues, ought to be calculated to improve the search for the truth, not simply to increase conviction rates. If our courts become merely the vehicle for public condemnation of persons already "convicted" by the system, then our society will have suffered a profound loss.

To our knowledge, this book is the most thorough and objective presentation of the relevant research on child sexual abuse. It is the only book to identify and explain the psychological factors present during the interrogation process. Supported by the results of their audio- and videotapes analyses, Ms. Wakefield and Dr. Underwager assert that improperly

conducted interrogations can and do result in the generation of false complaints. Our work with James McKellar, and others who have been wrongly accused of child sexual abuse, persuades us that they are correct. That reality, more than any other, underscores the importance of his work.[1]

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[1]A legal bibliography prepared by Mr. Hart and Mr. Bartholomew is found in Appendix B

PREFACE

In 1952 a seven-year-old girl attended the parochial elementary school where Ralph was the pastor and principal. The girl's family, which was not a member of the parish, was marginal and isolated. The mother was in ill health. The girl was often so quiet and sad that one day Ralph called on the mother. Hesitantly, she shared her suspicions that her husband was sexually abusing the child. Ralph confronted the man. He was mortified. Weeping, he admitted that he had been fondling his daughter and having her masturbate him for the past several months. There was no child protection then but Ralph talked to the police who didn't want to become involved. Ralph then asked members of the church to reach out and support the family. He counseled the family which steadily grew less isolated and more functional. The girl developed into a normal, well-adjusted teenager. Over the next thirty years, first in the ministry and then as a psychologist Ralph regularly dealt with sexual abuse.

For years we have provided therapy to sex offenders, victims, families, and adults who were victimized as children. But our first experience with a false accusation was in 1978. A man had been accused by his former wife of abusing his nine-year-old daughter and had been allowed to see her and his other children for only twenty-three hours of supervised visitation in two years. He stoutly denied the sexual abuse. When the case finally went to trial it came out that his former wife was schizophrenic—she had gone to Rome with the intent of marrying the Pope. While on the witness stand the daughter admitted making up the accusations because of pressure from her mother. The judge concluded that there had been no abuse.

After this we saw a few more cases of false accusations but most of our sexual abuse cases involved actual abuse. We were also providing treatment for sexual offenders throughout this period. But in early 1984 something began to shift. A South Dakota woman was accused of sexually abusing her three sons—a young boy and two mentally retarded

adolescents. The attorney for the woman, who denied any abuse, called psychologists in Minneapolis in an effort to find someone who would look at the case. She used the phone book and started with "A." The psychologists she reached told her either that they didn't want to become involved or that the mother was clearly guilty because the boys said she did it and there was no point in examining any other evidence. The attorney had worked her way to "U" when she reached Ralph who agreed to review the case. After examining the transcripts, evaluations and other documents he thought the social worker and sheriff had pressured and influenced the boys. He testified in April and the result was a hung jury. The state did not attempt to try her again.

The trial of Robert and Lois Bentz on charges that they sexually abused at least nine children, including their own, began in August of 1984. This was to be the first of a series of trials of twenty-five adults accused of abusing over forty children in Jordan, Minnesota. These charges came from an investigation by the law enforcement and human services agencies of Scott County, Minnesota under the direction of Kathleen Morris, the County Attorney. The investigation had begun in late September, 1983. By the spring of 1984, most of the children had been taken from their parents and placed in foster care under the protective custody of Scott County where they remained for over a year.

In June of 1984, Barry Voss, defense attorney for Lois Bentz, asked if we would examine the case and possibly testify. We met with Mr. Voss for a couple of hours and he gave us police reports, case worker reports, psychological evaluations, some videotaped interviews, charges, and statements allegedly made by the children. We took the reports home and studied them. What we saw persuaded us that Robert and Lois Bentz were most likely innocent and that the children in Jordan were being subjected to intense pressure to produce statements alleging abuse. In addition, the bizarre nature and intrinsic improbability of the accusations meant that they were highly unlikely to be true.

At the trial Ralph testified that the procedures followed by the county authorities and a cadre of mental health professionals retained by the county constituted such a powerful influence that the statements of the children were not reliable. Well-established facts of psychology showed that the process these children had been put through by the county so contaminated the allegations that they were not believable.

On September 19th, after three days of deliberation, the jury returned a verdict of "not guilty." Subsequently, the criminal trial of Don and

Cindy Buchan, the second trial in the prosecution of the alleged Jordan sex rings, ended October 15, 1985, the day after the jury had been impaneled. The prosecutor, Kathleen Morris, dropped all charges against the Buchans and all other adults except James Rud who had already pled guilty.

The sensational quality of the Jordan "sex rings" increased when the Attorney General of Minnesota, Hubert Humphrey III, took over the investigation of these charges and events after Ms. Morris dropped them. In a news conference the Attorney-General promised the people of Minnesota a thorough investigation that would resolve the questions. Ms. Morris claimed that she dropped the charges because Judge Fitzgerald had ruled that she had to give the defense all police notes and that to do so would endanger an ongoing major investigation. It later turned out that by this she meant an effort to establish that the children's accounts of bizarre murders and religious rites were true.

In February of 1985, the Attorney General issued a report of a five-month investigation by the FBI, Minnesota's BCA, and the Attorney General's office. That report came to essentially the same conclusions we had reached in testifying in the Bentz trial. The statements made by the children alleging sexual abuse were not credible because the procedures followed in the investigation exerted undue and coercive influence upon them.

For months afterwards, the parents struggled in family court to have their children returned. In April and May, 1985, after over a year in the "protective custody" of the county, most of the children were back with their parents. However, three years after they were taken away, some of the children still are not home. The reasoning is that they have been away from their parents so long, it would be a difficult adjustment to go back. Therefore, although they were suddenly taken away, they must be gradually and carefully reintroduced into their family.

We have no specific knowledge of any of the adults accused other than those with whom we worked. But we believe that the people we know did not sexually abuse children. Their lives and families have been ruined. Some will never recover. They have been bankrupted. They have lost their jobs, careers, homes, and friends. Some have lost their marriages. Relationships with their children have been drastically altered.

The national publicity given to the Jordan cases led to a flood of calls from all over the United States. Three years later we have consulted or testified in cases of alleged sexual abuse throughout the United States,

the military justice system, Canada, and Australia. We have amassed a file of hundreds of cases of allegations of sexual abuse.

From that experience and our professional knowledge we believe there are serious problems in the procedures followed in dealing with accusations of sexual abuse. The same problems are found all over the country. We also believe that there is enough factual knowledge available that the way accusations are handled can be improved. Children can be better protected and persons accused can be treated more humanely without crushing innocent people or letting the guilty escape.

The typical investigative procedures involve repeated interviews by authorities and mental health professionals. This experience may create confusion of fact and fantasy, elicit ever greater incursions into the realm of fantasy, and train the child to please adults by giving them what they want. Children who have not been sexually abused may be emotionally abused by the procedures followed when an accusation is developed by a combination of unfortunate experiences.

Where a child has not been abused, but the authorities and the mental health professionals and parents who listen to them believe that the child has been, there are months, even years, before the issue is brought to adjudication. During this time the child may receive prolonged therapy for sexual abuse. Such therapy may harm a non-abused child. Families where no abuse has occurred are torn apart and needlessly destroyed and no healing is attempted. Persons who have not committed a crime are accused and jailed.

The total number of reported cases of child sexual abuse has increased tenfold in less than ten years. The efforts to fully protect children from sexual abuse have increased the number of false allegations. The result is that the system is overloaded and children who actually are sexually abused are not properly protected.

Moreover, the procedures commonly followed may subject sexually abused children to additional harm. Families are separated and the child may be placed in a foster home. An abused child may spend months in therapy for the abuse. But there has been no research to find a therapy effective with sexually abused children. In the absence of any data, a therapeutic methodology has been developed that is neither well reasoned nor thoughtfully designed to heal an abused child.

The relationship between the justice system and mental health professionals in accusations of sexual abuse is a major source of confusion and error. The justice system is appointed by our society to be the deter-

miner of fact when there is dispute. In child abuse the justice system has abrogated its role and surrendered determination of fact to mental health professionals.

In all of the cases we have seen, a social worker, psychiatrist, or psychologist decides early on that a child has been abused. This is done shortly after the report is first made. Often an alleged perpetrator is "indicated" as guilty or the report is said to be "substantiated." This causes sanctions and punishments to be imposed long before a trial. Accused persons must prove their innocence, a reality that sets our justice system on its ear.

The nature of the involvement of the mental health professions in this process is the concern that led to this book. We believe that the science of psychology ought to relate to the justice system to provide information to the determiner of fact. The goal is to produce the most reliable and credible finding of fact possible, given the imperfect and complex quality of the process. There is controversy among mental health professionals about accusations of child sexual abuse and some partisanship has developed. These conflicts will be resolved by adherance to the principles of science.

Every person who is in the role of helper to others based upon the application of the science of psychology is caught in a dilemma. "How do I help others when the science I apply is yet in a formative stage and deals with the most complex subject matter possible—the human mind? How do I meet the necessity to think, decide, and act as a helper on the basis of inadequate scientific information?" The mental health professional does not have the luxury of saying, "Wait, while I get some money, design an experiment, run it, get the results, and then I will tell you what will help."

Rational, critical, scientific thought may decay under pressure to give the help needed. Hunches, anecdotes from case conferences, vaguely remembered concepts from hallway consultations, personal experience, intuition, folklore, common-sense beliefs, myths and dogmas, and, sometimes, just plain guesses take the place of science.

Our goal in this book is the approach suggested by Aristotle in *Nicomachean Ethics,* " . . . for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits," and Occam's razor, "Do not needlessly multiply entitites!" We have tried to stay close to the rational, critical scientific mode of thought that seeks ever closer approximations of truth.

We aimed at this goal because we believe that this is necessary to sort through the claims and counterclaims that are made in dealing with accusations of sexual abuse. There are children who are abused. This is indisputable. It is desirable to find ways to protect children from sexual abuse. But at the same time, the society must avoid systematizing injustice. We hope that this book, taking a rational, critical approach, will improve our ability to protect children, decrease actual abuse, and avoid heedless damage to innocent persons.

There have been two steps in the development of this book. The first draft of several of the chapters was prepared by Search Institute, Minneapolis, Minnesota, a free-standing research facility. We have extensively revised their work and we take responsibility for the present form of the book.

The staff of the Institute for Psychological Therapies, Minneapolis, Minnesota, a private practice of clinical psychology, has been involved in the balance of the book. The first draft included the work of members of our staff. Where the final product includes the work done by staff members, they are listed as co-authors of the chapter.

After the initial work in 1985, we spent two years gathering more information and more experience. We have heavily revised the first manuscript to reflect the latest research and to add material we have learned to see as important. In the present form we take sole responsibility for its content and views.

Hollida Wakefield
Ralph Underwager

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The staff of Search Institute, Minneapolis, Minnesota, contributed to the first draft of the literature review of several chapters.

Douglas Besharov, not only encouraged and supported us, but wrote the introduction to the book.

Brook Hart and Anthony Barholomew provided legal insights and wrote the foreword.

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ACCUSATIONS OF CHILD SEXUAL ABUSE

INTRODUCTION

THE CENTRAL DILEMMA: PROTECTING ABUSED CHILDREN WHILE PROTECTING INNOCENT PARENTS

DOUGLAS J. BESHAROV

This book will get people angry. Some people will get angry reading about the overzealous prosecutions it describes; they will rightly ask how such things can happen in our country. Others will get angry at this book's strongly critical comments about child protective efforts; they will legitimately point out that the most shocking cases are often aberrations from standard practices and that many unproven charges of sexual abuse are, in fact, true.

Both reactions are understandable—and reasonable. They reflect the central dilemma raised by current efforts to protect sexually abused children: How to protect abused children while also protecting innocent parents. This book draws our attention to this dilemma and helps identify the sound diagnostic tools with which to resolve it.

Troubling Practices

For too long, the tragedy of child sexual abuse was hidden behind closed doors. When children came forward seeking protection, they were too often disbelieved—many were punished for saying such terrible things about their parents (or other adults). Sexual abuse is a serious national problem, requiring a sustained community response.

In recent years, much progress has been made in exposing the plight of sexually abused children and in providing them with needed protection and treatment. In 1976, about 6,000 confirmed reports of sexual abuse were made to child protective agencies. By 1985, the number had risen to about 113,000. Although many more reports of suspected child abuse are deemed unfounded and closed after an investigation, this still means that there has been a 19-fold increase of verified cases in nine years.[1]

[1]American Humane Association, *Protecting Children*, Spring 1986, p. 3, Table 1.

There is no denying, however, that, during good faith efforts to protect children, innocent parents have suffered. Heightened public and professional concern over all forms of child maltreatment, but especially over sexual abuse, has led to a number of troubling practices, as amply documented in this book. One does not have to agree with everything said in this book, certainly this writer does not, to be chastened by the many miscarriages of justice it recounts.

Some agencies, for example, now authorize (or require) intervention based on the most tenuous evidence. It is almost as if the presumption of innocence has been suspended in cases of suspected child abuse. Here is how one Minnesota mother described what happened to her family when two of her children were taken into custody based on an anonymous report of sexual abuse:

> Try to imagine your home invaded without warning by armed policemen and to watch helplessly as your frightened, screaming, crying children are whisked off in the dark of night by strangers. There is not a thing you can do to save them from their nightmare, though their eyes plead with you to protect them. That kind of violation does not ever fade from your lives. . . .
>
> The first time anyone from the county [child protective] agency finally came to meet our family was nearly 1 month after the abduction of our children. The following day they were returned to our custody, and all charges were dismissed.[2]

The parents have sued the agency for $16 million. They claim that the agency violated state law by failing to conduct an appropriate investigation before seeking a court order to remove their children. (The only contact with the family was when the mother called to say that the report was unfounded.) The parents attributed the agency's conduct, in part, to its "*policy of treating as true all allegations of abuse,* regardless of source and [the fact that the agency's staff] manual has no references to the possibility that the maker of a report may have improper motives. This results in a failure to investigate, contrary to statutory duty. . . ."[3] A court has ruled that the parents made a "sufficient showing that fact questions exist

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[2]Letter from Margaret and Steve Doe to Hubert Humphrey, III, Attorney General, State of Minnesota, November, 1984.

[3]*Doe v. Hennepin County,* ••••••F.Supp.••••••,••••••, Civ. No.4-84-115 (D. Minn. 1984), *Family Law Reporter* 10, (24 July 1984), p. 1504 (emphasis added).

concerning whether defendants' actions were reasonable and in good faith."[4]

Surely, one thinks, we can protect endangered children without abandoning due process and the presumption of innocence. This book takes us a large step closer to being able to do so.

The Presumption of Innocence

This book is first of all designed to reorient our thinking about charges of sexual abuse. For those unfamiliar with the problem of overzealous prosecution, its unsparing criticism of current investigative and prosecutorial practices is meant to serve as an unwelcome splash of cold water. Its strong rhetoric deliberately seeks to shock readers—and to remind them that untested allegations of sexual abuse, no matter how serious, are just that: allegations.

Most people feel torn between their humane concern over the welfare of abused children and their respect for the presumption of innocence. They fear that, if child protective agencies and prosecutors are held to ordinary standards of proof and procedure, many abused children will go unprotected.

In ordinary criminal cases, we have reconciled ourselves to the fact that due process protections may "get a guilty man off." We cherish the right of every defendant, even the worst miscreant of our society, to enjoy the presumption of innocence. But because of the tremendous sympathy that abused children arouse, we somehow feel that an alleged "child beater" has a lesser right to the presumption of innocence. The need to protect children from their parents is no greater than the need to protect the elderly from street crime.

Laws against child abuse are an implicit recognition that family privacy must give way to the need to protect helpless children. In seeking to protect children, however, it is all too easy to ignore the legitimate rights of parents. Many state laws and court decisions recognize and seek to protect parental rights. The Supreme Court's most widely quoted statement on the subject was written by Justice White in *Stanley v. Illinois:*

> It is plain that the interests of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. The Court has frequently emphasized the importance of the family. The rights to

[4] *Id.* at *FLR* p. 1505.

> conceive and to raise one's children have been deemed "essential," "Basic Civil Rights of Man," and "rights more precious . . . than property rights."[5]

The well-intentioned purpose of child protective proceedings does not prevent them from being unpleasant—and sometimes counterproductive—intrusions into family life. A petition alleging that a child is "abused" or "neglected" is an explicit accusation of parental wrongdoing or inadequacy, which can be deeply stigmatizing. In the words of Supreme Court Justice Hugo Black, the parent "is charged with conduct—failure to care properly for her children—which may be viewed as reprehensible and morally wrong by a majority of society."[6] Researchers have documented the effect of such labelling on the parents:

> Once an agency . . . labels a parent as abusive, other agencies tend to accept this label and treat the family accordingly. Consistency across agencies occurs even though initially a second agency may not have labelled the family as abusive by its own criteria. Similarly, informal communication of the label through the family's court appearances or social worker visits may promote adoption of the abuse tag by friends and relatives . . .[7]

Besides the stigma involved, an adjudication of abuse or neglect may result in the parents being placed under long term court supervision and being forced to submit to court or agency treatment programs, may result in the removal of the child from the home for months and perhaps years, may lead to the permanent termination of parental rights, and, ultimately, may mean the parent's incarceration.

Parents have a fundamental right to contest any state deprivation of their liberty or intrusion into their private family life, no matter how benevolent its putative purpose. After all, they may be innocent. As Justice Brandeis warned in a different context, "experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent."[8]

If society is to intrude into family matters, it should do so with due regard to parental rights, as well as the needs of children. While trying to

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[5]*Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citations omitted.

[6]*Kaufman v. Carter*, 402 U.S. 964, 969 (1971) (Black, J., dissenting from a denial of certiorari).

[7]Parke, "Socialization into Child Abuse: A Social Interactional Perspective," found in: *Law, Justice and the Individual In Society* p. 183, 184–185 (1977).

[8]*Olmstead v. United States*, 277 U.S. 438, 479 (1928), (Brandeis, J. dissenting).

protect maltreated children, traditional American values of due process and basic freedom should also be protected.

Even though the law requires the reporting of "suspected" child maltreatment, it must be remembered that only suspicions are being reported. The parents' innocence should be presumed—unless and until evidence establishing their guilt is obtained. Child protective workers should be attentive to reasonably available information, they should consider all relevant factors before reaching a decision, and they should adhere to the relevant legal or professional standards.

Those who feel uncomfortable about respecting the presumption of innocence should ask themselves whether, if they were charged with child abuse, they would want anything but full legal protection.

Parental rights, moreover, can be protected without jeopardizing the safety and well-being of maltreated children. A vigorous defense need not make it impossible for the state to protect children adequately. If there are sound reasons for believing that abuse has occurred, the government, with sufficient planning and preparation, and with the aid of a well-functioning child protective agency, should be able to prove it in court. The array of protective workers, police, prosecutors, and so forth, that the state typically musters in child protective proceedings should be sufficient to build a case against a parent. They should not need the assistance of a compliant judicial system to make their case stick.

Harmful Intervention

Therefore, even if society had the finest services conceivable for abusive parents, concepts of fundamental fairness and legality would still require that parents be accorded due process. But it does not. An adjudication of abuse or neglect may only lead to inappropriate and even harmful intervention into an already tenuous family situation.

Long term foster care, for example, can leave lasting psychological scars. It is an emotionally jarring experience which confuses young children and unsettles older ones. Over a long period, it can do irreparable damage to the bond of affection and commitment between parent and child. The period of separation may so completely tear the already weak family fabric that the parents have no chance of being able to cope with children when they are returned.

While in foster care, children are supposed to receive treatment services to remedy the effects of past maltreatment. Few do. Worse, children who stay in foster care for more than a short time, especially if they are

older, tend to be shifted through a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need. Increasingly, many graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home environment. In fact, when these children start to engage in anti-social behavior caused by these traumatic conditions, they are often dumped back on the parents. These realities led Marion Wright Edelman, President of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."[9]

Society benefits, therefore, when court intervention is limited to situations of real danger to children. This is not meant to suggest that abusive or neglectful parents do not need treatment services or would not benefit from them. On the contrary, many parents need outside assistance in caring for their children and are willing to accept it. But if parents claim innocence or refuse such services, they have a right to put the state to its proof.

Moreover, to ignore clear violations of parental rights is to court disaster. In the short run, it may be possible to avoid admitting the problem. In the long run, though, as more people realize that hundreds of thousands of innocent people are having their reputations tarnished and their privacy invaded, and that some are being wrongly jailed, continued support for child protective efforts will surely erode.

By describing how we often lose sight of these fundamental realities, this book is an important step in safeguarding the rights of innocent parents. It asks all supporters of strong child protective programs, as is this writer, to be equally sensitive to the need for proof to rebut the presumption of innocence. It does not seek to limit legitimate child protective efforts, but, rather, to improve them. And, because it also identifies more accurate diagnostic tools that can help professionals and courts to decide whether a child has actually been abused, it will—in the long run—strengthen child protective efforts by helping us build a fairer and more effective system.

The Child's Statements

In some cases, there is unambiguous physical evidence of abusive sexual contacts. A child who was violently forced into sexual activity, for example, may have visible signs of the assault, such as suspicious inju-

[9]Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care*, p. xiii (1978).

ries or torn or bloody clothing, perhaps showing signs of semen. One appellate court described how: "While the record does not establish a *prima facie* case of sexual abuse on the part of either parent, the unexplained evidence of vaginal and rectal penetration and the marks and contusions on the children's bodies overwhelmingly support a finding that they [were maltreated]. Several caseworkers, a doctor and a nurse observed bruises on the children's torsos and faces."[10] Unless they can be explained, such injuries are sufficient proof of sexual abuse.

The great majority of sexual abuse cases, however, do not involve violent, or forced, physical assaults on the child.[11]

> Patterns of family incest usually take place over a long period of time, from six months to several years. Incestuous practices are not usually related to a single event, but follow a continuum of increased sexual involvement beginning with parental fondling and leading to overt sexual stimulation. The propriety of incest may be rationalized by parents who see their children as property. This rationalization is often reinforced by their social isolation from the community. Characteristically, the participation of children in incest is willful, resulting from learned behavior that is motivated by eagerness for acceptance and compliance with parental authority, rather than being a product of violence.[12]

In cases of non-violent sexual abuse, physical evidence is often ambiguous —or non-existent. This is especially true in cases of alleged fondling, oral sex, and minimal penetration.

Hence, although sexual abuse sometimes comes to light during a routine medical examination of the child, it is usually revealed only when the child, a sibling, another family member, or a parent claims that there has been abuse and seeks outside help. (Some cases are also discovered when trusted outsiders who, concerned about a child's apparent unhappiness or discomfort, try to find out what is bothering the child.) In *Matter of Dawn B.*, for example:

> The testimony of the teachers was that in late January, 1982 the child came to them and said "she was having problems at home. Her father was touching her and making her do things." About three weeks later, she came to the teacher again crying that the "same things are going on." The school counselor then called the child's mother and filed the child abuse complaint.[13]

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[10]*In the Matter of Cynthia V.*, 94 A.D.2d 773, 462 N.Y.S.2d 721, 723 (2nd Dept., 1983).

[11]*See generally* D. Finkelhor, *Sexually Victimized Children* (1979).

[12]R.D. Ruddle, ed., *Missouri Child Abuse Investigator's Manual*, p. 65 (Institute of Public Safety Education, College of Public and Community Services, University of Missouri-Columbia 1981).

[13]*In the Matter of Dawn B.*, 114 Misc. 2d 834, 452, N.Y.S. 2d 817–818 (Fam. Ct., Queens Co., 1982).

The child's testimony can be used to prove any form of child maltreatment. But in cases of sexual abuse, where there are often no witnesses and only ambiguous physical evidence, if there is to be an adjudication, it must be based *solely* on the child's statements.

Children, even very young children, then, are often the main source of information concerning possible maltreatment. They can give moving—and frequently decisive—evidence about their parents' behavior. So much importance is attached to their testimony that most states are relaxing the rules of evidence concerning corroboration, hearsay, and the testimony of very young children.

Generally, any child who can provide information about the alleged maltreatment can be called to testify.[14] Even children too young to be sworn as witnesses can be called. "There is no rule which excludes . . . a child of any specified age, from testifying, but in each case the traditional test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth."[15] So long as the child's testimony is coherent and seems reasonably reliable, the judge will allow it.

These days, there is a tendency for judges to believe that "children never lie." Contrary to current rhetoric, though, there is always the danger that a child's description of being maltreated is untrue. Like some adults, some children, lie, exaggerate, or fantasize. Some older children try to escape what is for them an unhappy home situation by claiming to be maltreated.

Or, a distorted version of the incident may have been fixed in the child's mind by others who questioned the child about the possibility of abuse. As documented in this book, a real danger of "programmed learning" is created when children are interrogated with leading questions. For example, in one case, a three year old child told an adult that some candy had fallen into her underpants. By the time a child protective worker interviewed the child, the candy in the underpants had become a candle in the vagina. It took many months to establish that her initial statement had been accurate and that the candle story had been the result of a sequence of adult misinterpretations which had eventually become fixed in the child's mind. Custody disputes between estranged—and hostile—spouses (or ex-spouses) are an especially fertile ground for such cases.

Thus, in many cases of alleged sexual abuse, the central question becomes: How does one gauge the reliability of the child's statements as

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[14]In one court case, the son was able to testify that he observed his father commit an act of sodomy on his sister. *In re Hawkins*, 76 Misc.2d 738, 351 N.Y.S.2d 574 (Fam. Ct., N.Y. Co., 1974).

[15]McCormick on Evidence sec. 62, at 156 (3d ed. 1984) (footnotes omitted).

well as those of others who are, perhaps, biased against the defendant? For the clinician as well as the scholar, this book reviews and synthesizes the growing body of research on this fundamental question.

Physical Indicators

Because questions necessarily arise concerning the reliability of a child's statement, the existence of corroborative physical evidence lends *great* credence to it. The absence of any physical signs does not mean that the child has not been abused, but it does make it many times more difficult to prove. For, without physical evidence, the issue comes down to whom you believe—the alleged perpetrator or the alleged victim?

The physical signs of non-violent sexual abuse, if there are any, are usually limited to *signs of sexual activity,* such as minor injuries or bruises to sexual organs (caused by forced penetration or rough handling). These signs include: vaginas that are torn, lacerated, infected, or bloody (as well as broken hymens); penises or scrotums that are swollen, inflamed, infected, or showing signs of internal bleeding; bite marks on or around genitalia; anal areas that are swollen, torn, lacerated, infected, or that have very lax muscle tone suggestive of internal stretching; mutilated sexual organs, or other parts of the body; venereal diseases in oral, anal, and urogenital areas (especially in prepubescent children); and unusual vaginal or urethral irritations or discharges. Physicians are becoming increasingly adept at finding such evidence, even when it is microscopic.

Unfortunately, these signs of sexual activity are often assigned more diagnostic significance than is justified. In older children, for example, they may just be a sign of sexual activity with peers. Whether we like it or not, young children today become sexually active much earlier than in past generations. Hence, for older children, signs of sexual activity cannot be equated with signs of sexual abuse. Unfortunately, there is no specific cut off between the age when one or the other is the case. Children under the age of 13 are unlikely to be involved in intimate sexual activities with their peers, but even here mores are changing.

In young children, though, these signs can be a ground for an adjudication because young children ordinarily do not engage in the types of sexual activity that would cause such conditions. But here, too, there can be ambiguity. For example, a frequently noted suspicious symptom, unusual vaginal or urethral irritations or discharges, can have an alternate medical explanation or can be the result of excessive rubbing (during cleaning) or self-stimulation. And it is often impossible to tell which it is.

Signs of sexual activity, therefore, may or may not be related to sexual abuse; they are not *automatic* proof that the child was sexually abused. Whether they establish the basis for a diagnosis of sexual abuse depends on the child's age, apparent maturity and social situation, as well as the statements of the child, the parents, and others familiar with the situation. This naturally leads to psychological assessments of the child's credibility.

Behavioral Indicators

To assess ambiguous physical indicators—as well as otherwise uncorroborated statements—an increasing number of therapists are using certain behaviors in children as diagnostic tools. The most commonly of these "behavioral indicators" are: sexual behavior or references that are bizarre or unusual for the child's age; sexual knowledge that is too sophisticated for the child's age; seductiveness which is not age appropriate; behavior that is withdrawn, infantile, or filled with fantasy; dramatic changes in behavior or school performance; excessive fear of being approached or touched by persons of the opposite sex; fear of going home; and running away from home. The presence of these behavioral indicators is used to prove that abuse occurred. (Their absence, though, does not prove that the child was not abused.)

Although there are strong reasons to question the legal propriety of allowing such testimony,[16] many agencies and courts now base their decisions on professional interpretations of these kinds of behavioral indicators. Using behavioral indicators is tricky business, however, because that's all that they are: "indicators." They have many other, more likely, explanations—having nothing to do with sexual abuse. And yet, as this book persuasively describes, they are often used by persons with insufficient expertise to make the sophisticated psycho-social distinctions needed. Few therapists, and ever fewer child protective workers, have the necessary skills to do so.

Behavioral indicators have an important role to play in child protective efforts, but they must be used with more circumspection. They should not be used, even by the most impressive expert, unless the child describes having been abused or the existence of suspicious injuries is established. Even then, alternate explanations for the child's behavior must be considered.

Moreover, while *in themselves* not a ground for an adjudication, they

[16]*See In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789, 804 (2d Dist. 1984).

are, nevertheless, an indication that the possibility of sexual abuse should be explored. To medical personnel, for example, they may suggest the need for a full physical examination of the child. To *any* caring individual, these behaviors should suggest the need for further inquiries about the child's situation. For example, a teacher who observes a child's unwillingness to change for gym class (or a sudden deterioration of school work) should keep the possibility of sexual abuse in mind while seeking to help the child. Discrete—and open ended—questions (such as "How are things going?" and "Is there anything happening that you want to tell me about?") can open the way for children to share their problems with a teacher or other reassuring adult. (The gym class situation, by the way, is one of the most common ways in which sexual abuse is discovered.)

Children sometimes retract their previous description of being maltreated—whether given spontaneously or in response to questioning. Obviously, there is strong reason to disbelieve a statement that has been retracted. However, child protective agencies and judges often conclude that the child retracted an earlier statement, not because it was untrue, but because of parental coaching or threats. For example, one court described how, on "at least four instances . . . caseworkers observed bruises or welts on the child's ankles, hands and on other parts of her body. Upon questioning, the now seven-year-old child either attributed the injuries to her mother, remained silent, or remarked that 'mommy says not to tell.' "[17] Other children retract previous statements when, after having been placed in foster care, they decide that they want to return home to their family, friends, and accustomed environment. Thus, there are good reasons to question the validity of such retractions.

Nevertheless, a retraction places a question mark over the child's original statement. Both must then be carefully evaluated before coming to a conclusion. But some experts will ignore this common sense. Some testify that a recantation is actually a sign that the child was abused! They may describe a "Sexual Abuse Accommodation Syndrome,"[18] in which the child "accommodates" to the abuse by denying it. Unfortunately, this theory does not leave room for bona fide recantations, and is, therefore, dangerously deficient. Along a similar vein, for example, a

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[17]*In the Matter of Tonita R.*, 74 A.D.2d 830, 425, N.Y.S.2d 172 (2nd Dept., 1980).

[18]*See, e.g., Lantrip v. Commonwealth of Kentucky*, 713 S.W.2d 816 (1986). *See also* "The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims," 74 *Geo. L.J.* 395 (1985); Annot., "Admissibility at Criminal Prosecution of Expert Testimony on Rape Trauma Syndrome," 42 *A.L.R.* 4th 879 (1986).

manual for child protective workers explains that "a child who has fabricated sexual abuse allegations in order to punish or get even with the caretaker may be less likely to retract her statements than the child who is upset with negative repercussions of her acknowledgment and who reverses her position in an attempt to return life to normal."[19]

One of this book's most important contributions is its critical evaluation of the current use of psychological assessments to establish the truth of the child's statements.

More Accurate Diagnostic Tools

It is natural to fear that a true case of sexual abuse will be dismissed for want of proof. Although this is the essential meaning of the presumption of innocence, the desire to protect children is great, so we should expect many borderline situations to be decided in favor of protecting the child, even at the risk of unjustly convicting an innocent parent. To an extent, this reality will always be a part of child protective decision-making. That is what makes this book so potentially important. It provides tools to better assess ambiguous cases, so that the number of cases in which we are all tempted to ignore the presumption of innocence is limited.

In section after section of richly researched and amply referenced discussion, this book provides indispensible tools for distinguishing between the sound—and unsound—methods currently used to determine when a child has been sexually abused. It tells us what we know—and what we don't know—about psychological assessments of the child's credibility. While many readers will not agree with particular conclusions, as well as being offended by the often sharp tone of some passages, in sum total, the book is an intensive, thoughtful, and provocative guide for mental health professionals.

A Word to Mental Health Professionals

One last point for a book directed to mental health professionals: Professionals frequently forget how truly frightening the court process can be. They should, therefore, evaluate the parents' emotional condition and help them cope with the inevitable stresses of court action. They should also explore with the parents whether or not personal and family problems exist for which a social agency might assist. When

[19]Illinois Department of Children and Family Services, *Child Abuse and Neglect Decisions Handbook*, Appendix E, p. 6 (1982).

appropriate, they may counsel parents to accept certain services in order to prevent recurrence of abuse or neglect.

Whatever the final outcome of the case, if the parents need help—and want it—the professional should help them try to get it. Moreover, if there is an adjudication against the parents, the professional should help interpret the court and its objectives to the parents, working with them to accept the disposition and the role of the child protective agency.

* * *

This Introduction has focused on one deficiency in the nation's child protective system: the overzealous prosecution of sexual abuse charges. I believe that the failure to address this problem imperils the future credibility of all child protective efforts. However, I want to emphasize the importance of strong child protective efforts at the state and local level—and of strong yet flexible leadership at the national level. The nation's child protective capacity is many times greater now than it was ten short years ago. Given the choice between what things were like then and what things are like now, I would unhesitantly choose our present system—warts and all. But that is not to say that we cannot try to do better. And that is the spirit in which I hope this book will be read.