

INTRODUCTION

THE CENTRAL DILEMMA: PROTECTING ABUSED CHILDREN WHILE PROTECTING INNOCENT PARENTS

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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

¹American 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

²Letter 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

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).

⁷Parke, "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-

⁹Children'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

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

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

¹²R.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).

¹³In *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

¹⁴In 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).

¹⁵McCormick 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

¹⁶See *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

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

¹⁸See, 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 indispensable 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

¹⁹Illinois 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.

ACCUSATIONS OF CHILD SEXUAL ABUSE

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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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