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THE CHILD SEXUAL ABUSE LITERATURE: A CALL FOR GREATER OBJECTIVITY

*John E.B. Myers**

ACCUSATIONS OF CHILD SEXUAL ABUSE. By *Hollida Wakefield* and *Ralph Underwager*. Springfield, IL: Charles C. Thomas. 1988. Pp. xxx, 499. \$68.50.

THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR. By *David Hechler*. Lexington, MA: Lexington Books. 1988. Pp. xiv, 375. \$19.95.

ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN. By *Billie Wright Dziech* and *Charles B. Schudson*. Boston: Beacon Press. 1989. Pp. xv, 227. \$24.95.

For the average adult, few subjects evoke stronger emotions than children, victimization, and sex. Put the three together to form child sexual abuse, and the stage is set for emotional pyrotechnics. Unfortunately, an overly emotional response to child sexual abuse compromises efforts to respond to this serious and widespread social problem. No one knows precisely how many children are sexually abused each year, but the figure is clearly appallingly high. Estimates of the incidence of sexual abuse derive primarily from two sources. The first is the child abuse and neglect reporting statutes which exist in every state and which require professionals who interact with children to report suspected abuse and neglect to law enforcement or child protective service agencies (CPS).¹ The American Humane Association estimates that in 1986 there were 132,000 substantiated cases of child sexual abuse in the United States.² Most child sexual abuse is

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1. For general information on the reporting statutes, see J. MYERS & W. PETERS, *CHILD ABUSE REPORTING LEGISLATION IN THE 1980s* (1987).

2. AMERICAN HUMANE ASSOC., *HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1986*, at 23 (1988). One of the persistent problems in determining the incidence of child abuse is determining when a report of abuse is sufficiently substantiated.

The American Humane Association notes a continuing trend toward increased reports of child sexual abuse. *Id.* at 11, 22-24. "The percent of sexual abuse cases increased between 1983 and 1986, from approximately nine percent to 16 percent of all maltreated children . . ." *Id.* at 22. The report goes on to state that

estimates of the number of children sexually maltreated and the rate of sexual maltreatment have increased significantly between 1976 and 1986. In particular, the increase in 1985 in the proportion of sexual maltreatment translates into an increase of about 27% from 1984 in

never reported, however, and the number of actual incidents is certainly higher.³

The second source of information on the incidence of child sexual abuse is sociological studies. While existing studies employ differing methodologies and definitions of sexual abuse, they consistently point to one finding: child sexual abuse is widespread.⁴ Moreover, child sexual abuse has serious and lasting psychological consequences for many victims.⁵ Lucy Berliner and her colleagues describe the long-term effects of child sexual abuse:

The earliest systematic reports focused on incest victims who were receiving psychotherapy, and found that incest victims have more severe symptoms than patients who have not been sexually abused. Since then, a number of studies of women in the general population have confirmed that abuse survivors experience higher levels of symptomatic distress. Adult survivors are more depressed, more anxious, have more dissociative and somatic symptoms, and have lower self-esteem. Survivors are also at significantly higher risk of developing depression, various anxiety disorders, including post-traumatic stress disorder (PTSD), substance abuse disorders, and sexual dysfunction. High rates of sexual abuse are found in the histories of patients with conversion reactions, suicidality, self-mutilation, multiple personality disorder, chronic pelvic pain, and in women with eating disorders. Childhood sexual abuse is found in a large percentage of adolescent prostitutes and runaways.⁶

Most survivors of child sexual abuse go on to fulfilling and productive adult lives. There is no doubt, however, that sexual maltreatment has devastating consequences for thousands of victims.⁷

the estimated number of children who are reported as sexually maltreated throughout the country.

Id. at 23-24; see also Finkelhor, *CPS Misses Large Amount of Serious Child Abuse Known to Other Agencies*, THE ADVISOR, July 1989, at 10 (newsletter of the American Professional Society on the Abuse of Children) (indicating that the child protective services system is unaware of a significant amount of child abuse that is known to other professionals); Finkelhor, *New National Child Abuse Study Findings Released*, THE ADVISOR, Jan. 1989, at 7 (noting 66% increase from 1980 in cases of child abuse known to professionals).

3. See Peters, Wyatt & Finkelhor, *Prevalence*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE 15 (D. Finkelhor ed. 1986); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133 (1983).

4. In 1986, Peters, Wyatt, and Finkelhor reviewed nineteen studies estimating the percentage of females subjected to some form of sexual abuse. The average rate of sexual abuse across studies was 22.7%. Thirteen of the studies estimated the percentage of males who were abused. The average rate for males was 10.0%. Whatever the methodological shortcomings of individual studies, their cumulative weight cannot be ignored. See Peters, Wyatt & Finkelhor, *supra* note 3, at 20-21.

5. LASTING EFFECTS OF CHILD SEXUAL ABUSE (G. Wyatt & G. Powell eds. 1988); Finkelhor, *The Trauma of Child Sexual Abuse: Two Models*, 2 J. INTERPERSONAL VIOLENCE 347 (1987).

6. Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 53-54 (1989) (footnotes omitted) [hereinafter *Expert Testimony*].

7. No one describes the lasting effects of child sexual abuse more eloquently than its survivors. See L. ARMSTRONG, *KISS DADDY GOODNIGHT* (1978); K. BRADY, *FATHER'S DAYS*

While the scope and consequences of child sexual abuse demand a response, a visceral reaction may impair objectivity, with the result that truth becomes a second victim. This fact has been demonstrated again in three recent additions to the literature on child sexual abuse. *Accusations of Child Sexual Abuse*, by Hollida Wakefield and Ralph Underwager; *The Battle and the Backlash: The Child Sexual Abuse War*, by David Hechler; and *On Trial*, by Billie Wright Dziech and Judge Charles B. Schudson, each enter the fray with comprehensive criticisms of the way in which the American legal system deals with the growing number of allegations involving child sexual abuse. Their approaches and recommendations are very different — where Wakefield and Underwager see a corrupt and inept bureaucracy too eager to prosecute the innocent, for instance, Dziech and Schudson see a court system that unnecessarily traumatizes and discounts child witnesses in protecting the accused. A comparison of the three books, however, proves once again that the greatest progress toward sound reform is made possible only by a scrupulous objectivity. Wakefield and Underwager's book is undermined by the authors' surrender to emotion and exaggeration in their broadside attack on investigation and prosecution of child abuse; similarly, Dziech and Schudson have rendered their book less effective by their too-ready alliance with those who demand more assertive prosecutions without acknowledging the potential for excess. Only Hechler, by refusing to align himself with either camp and by employing the refreshing objectivity of an outsider, has emerged with a book that is a genuine and important step forward.

1. *Accusations of Child Sexual Abuse*

Hollida Wakefield and Ralph Underwager are psychologists. Their book on accusations of child sexual abuse has four central themes. First, because children are developmentally immature, their allegations of sexual abuse are of limited reliability. Second, most professionals who interview children employ improper interview techniques that often lead to false allegations of sexual abuse. Third, the entire child protection system is seriously flawed because "it evolved in the absence of factual knowledge derived from research evidence" (p. 19). And finally, a considerable proportion of the professionals working in the child abuse field are biased or corrupt.

Accusations of Child Sexual Abuse has redeeming qualities. The authors highlight the dangers that arise when professionals use improperly suggestive or coercive interview techniques with children.⁸

(1970); S. FORWARD & C. BUCK, *BETRAYAL OF INNOCENCE: INCEST AND ITS DEVASTATION* (1978); S. FRASER, *MY FATHER'S HOUSE: A MEMOIR OF INCEST AND OF HEALING* (1987).

8. P. 31. When child sexual abuse is suspected, children should be questioned by professionals with special training in interviewing children. Wakefield and Underwager recommend this approach when they write that "specially trained investigators should be called in as soon as possible and a complete record of all interrogations should be kept." P. 96; see also CALIFORNIA

Such techniques can lead children into inaccurate statements. Chapter Four, in particular, describes the psychological process that sometimes leads children to conform their statements to what they think adults want to hear. Wakefield and Underwager offer useful advice about child witnesses:

Those who deal with children as witnesses should not assume they will understand the truth or tell the truth any more or less than adults. They should evaluate children's testimony by other criteria, just as they would judge the testimony of adults. However, they can make special efforts to increase the likelihood of valid testimony by helping children, particularly young ones, become familiar with the setting of the court and with the legal process. They can use a vocabulary that is familiar and keep questions and discussion concrete rather than abstract. They can avoid any suggestion of threat and any procedure that disrupts the witnesses' own organization of testimony. They must recognize that children's conceptions of the world may be vastly different from their own. [p. 95]

The reader is reminded that "[m]uch is not known about children as witnesses" (p. 119), and that there is a pressing need for further psychological research (p. 107). Thus, there are bright spots in *Accusations of Child Sexual Abuse*. Unfortunately, any light is more than overshadowed by the book's many faults.

The overriding failure of *Accusations of Child Sexual Abuse* is its abdication of objectivity. For example, in their unyielding attack on professionals who testify for the state in child abuse litigation, Wakefield and Underwager lose all sense of balance. They warn of a nationwide network of professionals "who are used by child protection, law enforcement, and prosecutors in all their sexual abuse accusations" (p. 22). These prosecution witnesses "claim expertise in diagnosing and treating sexual abuse," but many of them lack real expertise (p. 22). Furthermore, they can always be counted on to say whatever the prosecution wants to hear — whatever it takes to win the case. Yet Wakefield and Underwager offer no persuasive support for this scathing indictment.⁹ Furthermore, in their zeal to attack prosecution experts, Wakefield and Underwager unwittingly reveal their own bias. They criticize professionals who cooperate with the state, but express no self-reproach when they boast of the hundreds of cases they have evaluated for defense counsel (p. 130). Somehow, alignment with the government is wrong, but equally monolithic alignment with the defense

CHILD VICTIM WITNESS JUDICIAL ADVISORY COMMITTEE 24-27 (Final Report, Oct. 1988) (recommending the selection and training of a corps of child interview specialists).

9. The only support for the assertion that professionals who testify for the state are incompetent and biased is a quotation from what appears to be a newspaper story. P. 22. I was unable to discover the source of the newspaper story.

There is no credible evidence to support Wakefield and Underwager's assertion that there is a nationwide network of professionals who testify for the prosecution. It is true in the child sexual abuse field, as in other fields, that many experts limit their appearances in court to one side or the other. For example, Dr. Underwager testifies frequently in child sexual abuse cases. Apparently, his expert testimony is nearly always, if not always, offered for the defense.

is not. Such unbalanced thinking pervades this book, rendering it of little value.

In addition, Wakefield and Underwager's loss of objectivity finds repeated expression in their resort to exaggeration. Throughout the book, they describe isolated instances of government ineptitude or worse as though such cases represent the norm rather than the exception.¹⁰ Exaggeration is also apparent in the authors' selection of key words. For example, in Chapter One, discussing interviewing, Wakefield and Underwager reject the neutral word "interview," in favor of the emotion-laden "interrogation." In another instance, they write:

In most cases the only evidence available is a statement from the child, often not made by the child but rather by people who report what the child said to them. Social workers, police, and physicians often make their initial decision that alleged abuse is fact on the basis of a history from the reporting adult before talking to the child at all. . . . Once that subjective initial decision by the investigator has been made, subsequent investigation seeks affirmation rather than facts. [pp. 28-29]

The authors cite no authority for the bald assertion that professionals routinely prejudge allegations of abuse and refuse to keep an open mind. This is not, of course, to say that prejudgment never occurs.¹¹ However, Wakefield and Underwager's implication that prejudgment is commonplace is simply not supported by the literature or by experience.

At times, Wakefield and Underwager's distrust of the legal system seems extreme. They write that "[a]n individual accused of sexual abuse of children can expect that the justice system will reflect the society's values and behave in special, unusual, and likely hostile, judgmental fashion from the moment an accusation is made, no matter what the circumstances or merit of the accusation" (p. 125). This excessive distrust is reflected in the introduction to the book, where Douglas Besharov writes that society believes alleged child abusers have "a lesser right to the presumption of innocence."¹² Wakefield and Underwager concur, writing that "[a]ll agree that . . . accused persons are guilty . . ." (p. 124). They go on to assert that in sex offense cases, many prosecutors and judges will find ways to "cheat, break the rules and obstruct justice in order to get a conviction" (p. 127). They conclude with these cynical remarks:

[E]verybody knows that when people are accused they are guilty. When they are clearly guilty, the higher justice demands that the end justifies

10. For examples of the many times Wakefield and Underwager present extraordinary cases as though they were ordinary, see pp. 21, 123.

11. For discussion of the problem of interviewer bias, see White & Quinn, *Investigatory Independence in Child Sexual Abuse Evaluations: Conceptual Considerations*, 16 BULL. AM. ACAD. PSYCHIATRY L. 269 (1988).

12. P. 5. Besharov has made notable contributions to the child abuse literature. See, e.g., Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POLY. 539 (1985).

the means. Judges, prosecutors, and law enforcement have the moral obligation to do whatever is necessary to convict the guilty pervert because it serves their private beliefs about the higher good. It becomes a noble act to . . . obtain a guilty verdict no matter how it is done. This opens the door to all manner of rationalizations, justifications, and certainty that it is virtuous to do whatever must be done to win. . . . Exculpatory evidence is withheld or destroyed. Extraordinary effort is put into investigation and prosecution. Lies, circumventions, subterfuge, and hostile manipulation of legal rules abound. [pp. 130-31]

Wakefield and Underwager employ vitriolic and unfounded accusation to attack the motives, competence, and ethics of professionals working in the child abuse field. The child protection system is far from perfect, and like any large, bureaucratic system, it contains incompetent and corrupt professionals. But Wakefield and Underwager's unbalanced, across-the-board indictment does not ring true.

Accusations of Child Sexual Abuse purports to be a scholarly work predicated on the professional literature. Indeed, the book contains more than 850 references. Unfortunately, close examination reveals frequent misuse of data and authority. Myriad examples exist, but three should suffice to illustrate the point. First, the authors paint an unduly bleak picture of children's ability to differentiate fact from fantasy.¹³ However, much of the authority cited in support of this claim is outdated.¹⁴

Second, during a discussion of interviewing techniques, Wakefield and Underwager write that "[t]he predominant method of obtaining information from children is to use leading and suggestive questions" (p. 33). The only authority cited for this sweeping assertion is a 1956 student law review note.¹⁵ While the note is well-written and useful,¹⁶ it offers little support for Wakefield and Underwager's position. In fact, the note does not deal with interviewing at all, but concerns methods of eliciting testimony from children at trial.¹⁷ The student author observes that leading questions are often used during the direct examination of child witnesses, and that this practice is proper.¹⁸ The

13. Pp. 85-91. For a view of the scientific literature that differs from that of Wakefield and Underwager, see *Expert Testimony*, *supra* note 6, at 103-04.

14. For instance, Wakefield and Underwager emphasize the work of Freud and Piaget, much of which has been superseded by subsequent scholarship. For a discussion of more current thinking, see *Expert Testimony*, *supra* note 6, at 103-04.

15. Note, *The Problem of the Child Witness*, 10 Wyo. L.J. 214 (1956).

16. The author of the note is now a Justice of the Wyoming Supreme Court.

17. Note, *supra* note 15, at 220.

18. *Id.* Many cases authorize the use of leading questions during the direct examination of child witnesses. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). For a collection of cases, see J. MYERS, *CHILD WITNESS LAW AND PRACTICE* § 4.6, at 130 (1987) ("Courts frequently permit leading questions during the direct examination of children who experience difficulty testifying due to fear, timidity, embarrassment, confusion, or reluctance.") (footnote omitted).

student wisely reminds readers that leading questions can induce error by playing upon the suggestibility of child witnesses, but this reference to the interaction of suggestibility and leading questions hardly supports Wakefield and Underwager's sweeping allegation that most professionals who interview children use improperly leading and suggestive questions that undermine the reliability of children's statements. Furthermore, Wakefield and Underwager fail to mention that during interviews it is sometimes developmentally necessary and professionally appropriate to use leading questions that contain a degree of suggestion.¹⁹ Wakefield and Underwager's implication that it is virtually always improper to use leading and suggestive questions finds little support in the psychological or legal literature. As occurs so often in *Accusations of Child Sexual Abuse*, authority is misused, ignored, or distorted.²⁰

Wakefield and Underwager's misuse of authority occasionally degenerates into what appears to be deliberate distortion. Referring to the well-known treatise, *Handbook of Clinical Intervention in Child Sexual Abuse*,²¹ Wakefield and Underwager assert that the authors of a chapter on interviewing techniques advise professionals to lie to children in order to establish interviewer credibility.²² However, Wakefield and Underwager grossly distort the author's words and intent. As part of the interview process, the authors point out the importance of establishing the interviewer's credibility in the eyes of the child. They write:

It is important for the child to know that you are an experienced and knowledgeable person. Tell the younger child, "I've talked to a great many boys and girls who have had things like this happen to them." An older child should hear a similar message, conveyed at an age-appropriate level. Identify yourself to the child as experienced in this fashion, even if you are not. Saying that you have talked to children in similar situations establishes your credibility.²³

19. Young children in particular sometimes require specific, directed, and, at times, leading questions to trigger their recollection for events and to overcome reluctance to discuss unpleasant subjects.

20. As David Chadwick remarks in his review of Wakefield and Underwager's book, "When a given reference fails to support their viewpoint they simply misstate the conclusion. When they cannot use a quotation out of context from an article, they make unsupported statements, some of which are palpably untrue and others simply unprovable." Chadwick, Book Review, 261 J. AM. MED. ASSN. 3035, 3035 (May 26, 1989).

21. HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (S. Sgroi ed. 1982) [hereinafter CLINICAL INTERVENTION].

22. Wakefield and Underwager write that "[a] highly regarded manual advises lying to a child in order to establish the credibility of the interviewer. Such behaviors reduce the validity and reliability of the assessment." P. 196 (citations omitted). The chapter to which Wakefield and Underwager refer is Sgroi, Porter & Blick, *Validation of Child Sexual Abuse*, in CLINICAL INTERVENTION, *supra* note 21, at 39.

23. Sgroi, Porter & Blick, *supra* note 22, at 58-59 (emphasis omitted).

To infer from this quote a generalized endorsement of lying to children, as Wakefield and Underwager appear to do, is dishonest.

Not only do Wakefield and Underwager misuse and distort authority, they sometimes fail to cite authority when it is needed. At one point, for example, they write that at "[a]bout the age of three children begin to be very suggestible and reflect the attitudes, feelings, moods, and ideas of adults" (p. 27). No authority is cited for this assertion. What is more, the authors fail to cite current psychological research indicating that children are in fact *not* as highly suggestible as many adults think.²⁴ At another point, the authors write that the "procedures followed in the typical interrogation of children contaminate, confuse, and make statements made by children unreliable" (p. 33). Again, no authority is provided.

When the many shortcomings of *Accusations of Child Sexual Abuse* are considered together, it is possible to see the book for what it is: a biased, inaccurate, and adversarial indictment of efforts to respond to child sexual abuse. Ultimately, the authors fail to accomplish any of their goals. They do not persuade the careful reader that children's allegations of sexual abuse are inherently unreliable. The psychological literature supports the lesson of experience that children are often credible and accurate witnesses.²⁵ Suggestibility, coaching, and fabrication exist with children, just as they do with adult witnesses, and these dangers are sometimes of greater concern with youthful witnesses. Nevertheless, Wakefield and Underwager overstate the extent of false and inaccurate testimony by children.²⁶

24. For a discussion of current psychological literature on suggestibility, see *Expert Testimony*, *supra* note 6, at 100-03. The degree to which children are more suggestible than adults remains a hotly debated issue. See DeAngelis, *Controversy Marks Child Witness Meeting*, THE AM. PSYCHOLOGICAL ASSN. MONITOR, Sept. 1989, at 1; Gelman, *The Sex-Abuse Puzzle*, NEWSWEEK, Nov. 13, 1989, at 99.

25. See CHILDREN'S EYEWITNESS MEMORY (S. Ceci, M. Toglia & D. Ross eds. 1987).

26. Wakefield and Underwager fail to marshal a persuasive argument that a large proportion of professionals use improper interview techniques. The authors describe their analysis of audio and videotapes of actual interviews of children, from which they conclude that most interviewers used error-inducing techniques. Pp. 33-43. Although Wakefield and Underwager's method of analyzing interviews purports to be scientific, even the nonscientific reader can quickly discern serious flaws in their methodology. With Wakefield and Underwager's method, almost any question an interviewer asks is potentially error-inducing. Apply their method to any interview and the result is practically assured: the interviewer used improper "interrogation" techniques, rendering the child's statement unreliable. The Wakefield and Underwager method seems designed to yield a preordained result.

Not only is Wakefield and Underwager's method of interview analysis defective, their application of the method to actual interviews is troublesome. The authors describe their "ongoing research project of analyzing audiotaped and videotaped interviews from actual cases of alleged sexual abuse." P. 33. Based on this research, Wakefield and Underwager report that "[t]he behaviors of the adults appear more geared to extract testimony rather than to allow the children to tell their own accounts free from pressure and suggestion. . . . Overall, around two-thirds of the adult behavior in the twenty-two cases fell into these error-inducing categories." P. 36. The authors' conclusions are questionable. Not only is their method of assessment defective, but their sample is small and is not randomly selected. Most, if not all, of the 22 interviews were provided

Wakefield and Underwager's most valid criticism of the child protection system is that an appreciable number of professionals who interview children in these difficult and sensitive cases are ill-trained in proper interview techniques, and are consciously or unconsciously biased. Yet, the authors' attack on interviewers is so misleading and adversarial that the value of their insight is lost in their rhetoric. Similarly, Wakefield and Underwager's allegation that the child protection system is flawed because "it evolved in the absence of factual knowledge derived from research evidence" (p. 19) is never established. The allegation seems particularly hollow in light of the authors' own misuse of scientific authority.²⁷

2. *The Battle and the Backlash: The Child Sexual Abuse War*

David Hechler, the author of *The Battle and the Backlash*, is an investigative reporter (p. 376). Hechler begins his book by describing the battle for recognition of child sexual abuse as a serious problem.²⁸ From there he documents the many failings of the child protection system and the growing backlash against the system. Few authors provide a more thorough and balanced analysis of the societal response to child sexual abuse.²⁹ Hechler's objectivity is evident from the outset. On the first page he writes:

Not much in the world of child sexual abuse is clear-cut. One expert

to Wakefield and Underwager by defense counsel. P. 34. Thus, the sample may contain particularly egregious examples of improper interview techniques.

27. Even with its many defects, Wakefield and Underwager's book appears almost balanced compared to another recent addition to the child abuse literature. P. EBERLE & S. EBERLE, *THE POLITICS OF CHILD ABUSE* (1986). The Eberles' book, built upon screeching hyperbole and unsupported attacks, is clearly not worth taking seriously. The authors' agenda is transparent: they set out to paint the increase in the number of reported cases of child sexual abuse as the result of a conspiracy among corrupt law enforcement officials, social workers, and psychologists that has grown into a nationwide "witchhunt." In one telling passage of their book, they attempt to distinguish allegations of child abuse involving violence or torture from merely "benign pedophilia." *Id.* at 18.

On the dust cover of their book, the Eberles describe themselves as investigative journalists; in fact, they are involved in the publication of the *L.A. Star*, a Los Angeles tabloid newspaper devoted largely to advertisements for sexually-related products and services. Moreover, during the 1970s, the Eberles edited and contributed to *Finger*, a magazine featuring stories and photographs of children involved in sexual activity with other children and adults. *FINGER*, No. 14 (undated). Nowhere in *The Politics of Child Abuse* do the Eberles reveal these affiliations, facts that might well be considered relevant in a fair evaluation of their book.

28. For discussion of the difficulty in gaining recognition of child sexual abuse as a widespread social problem, see Summit, *Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse*, in *LASTING EFFECTS OF CHILD SEXUAL ABUSE*, *supra* note 5, at 41; Summit, *Beyond Belief: The Reluctant Discovery of Incest*, in *WOMEN'S SEXUAL EXPERIENCE: EXPLORATIONS OF THE DARK CONTINENT* 127-28 (M. Kirkpatrick ed. 1982) [hereinafter Summit, *Beyond Belief*]; see also Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. CONTEMP. L. 31 (1989).

29. Hechler provides valuable background on the problems and positions of all concerned with the effort to protect sexually abused children. Hechler also does an admirable job of conveying the agony of parents whose children have been abused, and who feel the child protection system does not respond effectively. See ch. 5.

says "X." Many more can be found (some would say "paid") to say just the opposite. Some argue that child molesters are sick; others say they are evil. They battle over whether the criminal justice system favors victims or defendants. And they war over how children who were allegedly abused should be interviewed.

But even the very battle lines are not clear-cut. Some "child advocates" think prosecution of an offender does more damage to a child victim than good; some think it empowers the child and demonstrates society's support. Some critics of the system would like to see children testify in open court; others would prefer to see them testify in a less intimidating setting from which their testimony is transmitted via closed circuit television. "Child advocates" frequently criticize the system, and most critics of the system claim they are "child advocates."

But one thing is clear: there *is* a war. There are those who feel that the country is suffering from an epidemic of child sexual abuse and those who feel that there is an epidemic all right, but not of sex abuse — of "sex accuse," as some have disparagingly called it. The pendulum has swung too far, they say, and what we see now is a blizzard of false accusations. In response they are trying to winch the pendulum back. [p. 3]

Hechler's book is refreshingly objective, nonadversarial, and free of exaggeration. He methodically reports the findings of his study of child sexual abuse and, for the most part, lets readers draw their own conclusions. Unlike Wakefield and Underwager, Hechler recognizes the legitimacy of competing perspectives and willingly gives credit where it is due. For example, Hechler describes his interviews with defense attorneys, and provides these attorneys with a vehicle to express their genuinely held grievances about the difficulty of defending individuals accused of child abuse (pp. 71-72). At the same time, Hechler objectively describes the frustrations encountered by prosecutors (pp. 64-71).

Hechler also recognizes the importance of individuals and groups who are too often written off by the establishment as extremist. A prime example is the organization known as Victims of Child Abuse Laws, or "VOCAL." VOCAL is made up primarily of people who claim to have been wrongfully accused of child abuse. Hechler writes that there are "now more than one hundred [VOCAL] chapters in more than forty states" (p. 119). VOCAL members argue that the current child protection system is out of control, and that many innocent people are caught up in a web of unfounded accusations. VOCAL members lobby for legislation restricting the authority of the child protective service system to intervene in the family. Hechler correctly points out that VOCAL played an important role in exposing the incompetence and bias of some professionals in the child protection system.³⁰

30. Pp. 128-29. Hechler writes that "VOCAL has helped expose some of the incompetence." P. 129. Hechler also gives credit to VOCAL for criticizing the secrecy of legal proceedings in family court. He writes:

Hechler's nonalignment and his readiness to credit the positive contributions of differing perspectives do not prevent him from criticizing incompetence where he finds it. For example, he aptly describes a particularly useless book, *The Politics of Child Abuse*,³¹ as "one of the most biased (and superficial) books on this or any subject" (p. 65). The child protection system and relevant professional groups receive their share of criticism too. For example, Hechler points out that most medical students receive little or no training in child abuse (pp. 24-25). He notes that even some residency programs training pediatricians have an inadequate focus on child abuse (p. 24).

Hechler correctly observes that social workers employed by child protection agencies are "often inexperienced and overworked," a combination that too often leads to "marginally competent work" and unwarranted intervention in families (p. 150). Furthermore, Hechler acknowledges the outright incompetence and bias of some social workers (p. 58) and castigates their sloppy investigative interview techniques (pp. 128-29). What distinguishes Hechler's criticism of the child protection system from that offered by Wakefield and Underwager and some others is that Hechler sees the system for what it is: an unwieldy, underfunded, overworked bureaucracy that is given too few resources to accomplish its herculean responsibility of protecting children, respecting parental autonomy, and supporting troubled families. Given the demands placed on the child protection system, it is a wonder that it staggers along as well as it does.

Hechler reserves his most telling criticism for society at large. He notes that "[o]ur society has always been more willing to pay lip service to its responsibility to protect those who cannot protect themselves than to pay cash" (p. 12). With considerable insight, Hechler writes:

Our society is dissatisfied with the quality of social work, and in many cases justifiably so. There is also general dissatisfaction with the quality of our public schools, and again with good reason. Why are we unable to attract better social workers and better teachers? Because the jobs are difficult, low-paying, stressful, and unappreciated. There is no argument that the best and the brightest are not attracted to these professions. Nor is it difficult to understand why. Yet loud complaints are raised that teachers are not competent, that social workers do not have

The lack of media attention to family court means that much of what goes on there is unknown to the public. The claim that cases must always be kept confidential may be used by Social Services Departments, prosecutors, defense lawyers, law guardians, judges, and even perpetrators to shield themselves from accountability and unwanted publicity. Mistakes and abuses within the system often continue uncorrected, and perpetrators may have continued access to children because their neighbors lack critical information about them. VOCAL's insistence that the process by which cases are investigated and litigated in family court be opened for public scrutiny may well prove persuasive and, if their efforts succeed, salubrious.

P. 65.

31. See P. EBERLE & S. EBERLE, *supra* note 27.

advanced degrees — or any degrees — in social work. What is truly remarkable is that anyone goes into these fields at all, and that some are dedicated professionals who are committed enough to stay.

. . . This country's commitment to children has been highly verbal and woefully inactive. In short, money and mouth seldom meet. [p. 263]

A further reason to praise *The Battle and the Backlash* is that Hechler does not claim to have all the answers. Quite the contrary — he acknowledges that in the field of child sexual abuse, there are "many more questions than answers" (p. 10). David Hechler's book offers invaluable insight into the complex problem of child sexual abuse. *The Battle and the Backlash* earns its place at the positive pole of the continuum of child abuse literature.

3. *On Trial: America's Courts and Their Treatment of Sexually Abused Children*

Billie Wright Dziech, a professor of language arts, and Charles Schudson, a judge, focus most of their attention in their book *On Trial* on the legal system, and in particular, the courts. The overriding theme of *On Trial* is that the legal system does not provide justice for child abuse victims, and that, in many cases, involvement in legal proceedings adds insult to injury by reabusing children and demoralizing and alienating their parents (p. ix). Reforms are needed to render the legal system less hostile to children, and to assure that they are not revictimized by the very system intended to protect them. According to Dziech and Schudson, the legal system and the professionals within it are hidebound and resistant to change; therefore, it is largely up the public to demand reform (p. 5).

Dziech and Schudson advocate two types of reform. First, they emphasize the importance of increasing the knowledge of judges and lawyers about child development and child psychology. Increasing professional sophistication about the developmental capabilities and limits of children, they write, would lead to greater sensitivity to the unique needs of child witnesses. For example, judges who are taught to be sensitive to the young child's perspective on the courtroom and on testifying are more likely to require attorneys to use age-appropriate language and simple, short sentences³² and to understand the need for periodic recesses.³³ Unlike adult witnesses, five-year-olds should

32. For interesting research on children's understanding of the legal system and legal terminology, see Warren-Leubecker, Tate, Hinton & Ozbek, *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 158 (S. Ceci, D. Ross & M. Toglia eds. 1989); Saywitz, *Children's Conceptions of the Legal System: "Court is a Place to Play Basketball,"* in PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra*, at 131.

33. Some states have statutes that expressly authorize the trial judge to recess the proceedings to afford children a break from testifying. See, e.g., CAL. PENAL CODE § 868.8(a) (West Supp. 1990); see also J. MYERS, *supra* note 18, § 4.4, at 126-27.

not be expected to sit still for an hour and respond to difficult and often traumatic questions. Developmentally sensitive judges would comprehend the appropriateness of allowing children to be accompanied to the witness stand by a trusted adult who provides emotional support for the youngster.³⁴

Dziech and Schudson's emphasis on training the bench and bar about developmental psychology is nicely illustrated in their discussion of defense techniques designed to undermine evidence of sexual abuse. Rather than attack the child — a tactic that can backfire with a jury — defense attorneys often assail the interview techniques of parents and professionals who question children (pp. 91-92). Dziech and Schudson describe how defense counsel employed this technique in a preschool sex abuse case:

The . . . defense attorneys knew that the best defense is a good offense, and they proceeded to discredit the allegations by challenging the techniques used to obtain evidence from the children. This strategy places the prosecution in an almost impossible position. Years of research and study, corroborated by surveys of adults who were child victims, contend that children will not risk disclosure unless they sense they will be believed and supported. But by expressing this essential belief in the child, an adult opens the way to charges of contaminating the child's thinking and reinforcing fantasy. Child development experts maintain that children's life experiences are mirrored in their play. This understanding influenced the evolution of the anatomically correct dolls and other methods used in play therapy to help abused children overcome their fears and describe the horrors they have suffered. Yet to most adults, dolls and games are not reality; and it is easy for defense attorneys to convince a jury that a child was "just playing" when disclosure was achieved through the use of specialized techniques developed to help children communicate. . . .

During the investigation, therapists had used a game to reach one of the children. The child was asked to pretend she was someone else ("Pretend you are a little girl who is afraid to tell something bad that happened to you. Why can't you tell?"). The theory is that in responding through an imaginary child, the victim will feel free to reveal details she would otherwise refuse to communicate. The technique sometimes works with children, but it jeopardized the . . . prosecution when it confronted adult biases about children's fantasy. The defense wisely capitalized on the prosecution's predicament: "Isn't that a terrific thing for a jury to rely upon, that procedure, that contamination, in determining my client's future?" [pp. 91-92]

Dziech and Schudson are right that increased understanding of child development would enable courts to evaluate the developmental appropriateness of interview techniques like these, and would help opposing counsel to respond effectively when the defense concentrates its

34. See CAL. PENAL CODE § 868.5 (West Supp. 1989); see also J. MYERS, *supra* note 18, § 7.3, at 421-23.

attack on the interviewer. It is to their credit that Dziech and Schudson are sensitive to the unique needs of young witnesses. Indeed, sensitivity to the child's perspective is *On Trial's* greatest strength.

The second reform proposed in *On Trial* concerns modification and extension of the rules of evidence and trial procedure. For example, Dziech and Schudson advocate the abolition of rules that require a showing that children are competent before they are permitted to testify. The authors urge expanded use of existing hearsay exceptions and adoption of new hearsay exceptions in child abuse litigation. I will discuss the author's proposals for modifying the rules of evidence and procedure below.³⁵

In addition to advocating reforms in the legal response to child sexual abuse, Dziech and Schudson do an admirable job of compiling diverse sources of information about child development and sexual abuse. The reader with little background in the sexual abuse literature will find portions of the book quite informative. For example, Dziech and Schudson explain some of the myths and misconceptions about children's reactions to sexual abuse. The reader learns why children seldom offer resistance to sexual abuse, why children delay reporting their abuse for weeks, months, or even years, and why many victims retract allegations of abuse and deny that anything happened.³⁶ Useful information is provided on children's suggestibility, memory, and ability to differentiate fact from fantasy (pp. 59-72). Especially helpful is the discussion of children's language development and the need to avoid legal terminology and lengthy or complex questions (pp. 69-72).

On Trial breaks little legal or theoretical ground; therefore, the book is not particularly helpful for professionals who are knowledgeable about sexual abuse and the legal system's response to the problem. The book's greatest contribution could be to raise public consciousness about the continuing need for reform of the legal system. Unfortunately, *On Trial* is unlikely to achieve this goal because Dziech and Schudson fall prey to the exaggeration and loss of objectivity that stalk so many writers who venture into the quagmire of child sexual abuse. In the end, *On Trial's* believability is undermined by Dziech and Schudson's unrelenting anger at a legal system they view as unresponsive.

Dziech and Schudson's anger at the system reveals itself time and again. For example, although the authors are undoubtedly correct that the legal system is sometimes too slow to change, Dziech and Schudson go too far when they charge that "[i]f the public doesn't know about children in courtrooms, it can abandon the legal system to police, attorneys, judges, and legislators, who have little motivation to

35. See *infra* text accompanying notes 49-70.

36. See pp. 53-66; Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

question it" (p. 5). This accusation is entirely unfair. It is precisely these groups that have initiated many of the court reforms already underway.³⁷ Dziech and Schudson go on to paint an inaccurate picture of prosecutorial and judicial resistance to change when they write that "prosecutors and judges learn almost nothing new until they have to. . . . Neither prosecutor nor judge has the luxury of learning much beyond that which is necessary to get through the case, to get through the day" (p. 174). "Some judges study hard and learn fast. Most do not" (p. 179). No authority is cited for this criticism. Nor does it accurately reflect the commitment of many judges and prosecuting attorneys to improving the legal system for children.³⁸ Gratuitous sniping does not help.

In their zeal for reform, Dziech and Schudson also resort to exaggeration. Indeed, the book's first reference to the courts is an exaggeration. They write that "the American courts have generally regarded child victims with indifference and disbelief. So pervasive are these attitudes that the legal system has often precluded the entry of children as witnesses in the courts and has thus increased their victimization by adults" (p. 4). There is truth in the accusation that some judges are insensitive to children's special needs, but Dziech and Schudson make no showing that judicial "indifference and disbelief" are widespread. Nor does their criticism accurately reflect the legal reforms intended to help children that swept much of the country in the 1980s.³⁹ In any event, the picture has never been as bleak as Dziech and Schudson paint it.

Exaggeration appears again when the authors ask why some par-

37. See, e.g., D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* (1985) (report published by the U.S. Department of Justice, National Institute of Justice); ABA NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES* (1982); Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1 (1983); Cramer, *The DA as Mobilizer*, 46 ALA. LAW. 37 (1985); Laibi, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982).

38. Forty-six states have some type of ongoing training for judges. NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS, 1988 SURVEY OF STATE JUDICIAL EDUCATION ORGANIZATIONS. Furthermore, there appears to be a national trend toward expanding judicial education. Telephone interviews with Ms. Joanne Slotnik, Judicial Education Officer, Administrative Office of the Courts, Salt Lake City, Utah, and Ms. Rita Stratton, President, National Association of State Judicial Educators, Frankfort, Ky. (Nov. 8, 1989). The National Council of Juvenile and Family Court Judges was founded in 1937 and trains between 2200 and 2500 juvenile and family court judges every year. When law related professionals such as probation officers, police, and attorneys are added, the Council provides training to between 13,000 and 18,000 professionals annually. Telephone interview with Jeffrey Kuhn, Project Attorney, National College of Juvenile and Family Law, Reno, Nevada (Nov. 7, 1989). Similarly, the National Center for the Prosecution of Child Abuse, located in Alexandria, Virginia, devotes its resources largely to training prosecutors about child abuse.

39. See generally J. MYERS, *supra* note 18; Peters, Dinsmore & Toth, *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649, 657 (1988-1989).

ents decline to report sexual abuse, and why others refuse to let their children participate in legal proceedings. Dziech and Schudson conclude that

[t]he answer is obvious. For most victims, confrontation with the legal system is a second and separate trauma, a process of revictimization. Families that turn to authorities for relief quickly discover that the judicial system is no haven for their children. The courts are likely to add insult to injury, agony to anguish. Parents who expose their children to the system overwhelmingly regret their decision because the legal process so often becomes as devastating a trauma as the sexual assault. [p. 12]

No authority is cited for the proposition that an overwhelming majority of parents regret involving their children in the legal system. Nor do the authors support their allegation that participation in legal proceedings is sometimes as harmful as the sexual abuse itself.

Like others who favor legal reforms to protect child witnesses, Dziech and Schudson repeatedly assert that involvement in legal proceedings is traumatic for children.⁴⁰ It is undoubtedly true that many children are traumatized by multiple interviews, testifying in open court, cross-examination, and face-to-face confrontation with their abuser. Nevertheless, Dziech and Schudson overplay the trauma argument. Not all children are traumatized, and in fact psychological research suggests that some children actually benefit from testifying by feeling empowered by their participation in legal proceedings.⁴¹

40. I have also been guilty of overstating the trauma induced by participation in legal proceedings. See J. MYERS, *supra* note 18, § 6.1, at 383-85.

41. Empirical research is just beginning on the extent to which involvement in legal proceedings is traumatic for children. In a preliminary study, John Tedesco and Steven Schnell found that the interview and prosecutorial process is not necessarily harmful to children. Tedesco & Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 267 (1987). Desmond Runyan and his colleagues found that children who testified in juvenile court appeared to resolve their psychological distress more rapidly than children who did not testify in juvenile court. Runyan, Everson, Edelsohn, Hunter & Coulter, *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647 (1988) [hereinafter Runyan, *Impact of Legal Intervention*]. Runyan concluded that "the opportunity to testify in juvenile court may exert a protective effect on the child victim." *Id.* at 652. Similarly, Lucy Berliner and Mary Kay Barbieri have argued:

[T]he experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled guilty, that they did not have an opportunity to be heard in court.

Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 135 (1984).

Not surprisingly, however, Runyan also found that children are "adversely affected by lengthy delays in the resolution of criminal prosecution of child sexual abuse. . . . Protracted involvement with the criminal justice system, especially when a trial is pending, may increase feelings of powerlessness and subject the child to stigmatization by family, the public, and self." Runyan, *Impact of Legal Intervention*, *supra*, at 652. Children in Runyan's study showed considerable psychological distress when they were first evaluated by the researchers. Fortunately, when the children were reevaluated five months later, many had improved. See *id.* at 651.

Gail Goodman and her colleagues spent more than two years following a sample of 218 children through the criminal justice system, collecting as much data as possible about the chil-

Many professionals believe children suffer when multiple continuances are granted. Surprisingly, for children in one study, the greater the number of continuances, the greater the tendency for psychological improvement.⁴² A greater number of continuances may give children longer to improve.

Existing research reveals that, like most aspects of child sexual abuse, the degree to which legal proceedings traumatize children is little understood and exceptionally complex. Dziech and Schudson cannot support their assertion that "[f]or most victims, confrontation with the legal system is a second and separate trauma, a process of revictimization" that is sometimes as bad as the sexual abuse (p. 12). The resort to hyperbole is unfortunate. The knowledgeable reader reacts by casting the book aside unfinished. Equally unfortunate, the uninformed reader may believe the legal system is as callous and hostile to children as Dziech and Schudson contend, and set off to remake the system, armed with misinformation. To assert that "[f]or the young, the legal system offers no refuge and little hope for justice" (p. 119) distorts what is known and does a disservice to the many committed professionals within the legal system who conscientiously work to protect children.

Like many authors, Dziech and Schudson occasionally mischaracterize data and authority, although they appear to do so without any intention to mislead. While such mischaracterization is not a serious failing of *On Trial*, it occurs often enough to merit attention. At one point, for example, the authors discuss the results of a newspaper story estimating that "between 70 percent and 85 percent of child victims become sexual abusers themselves" (p. 3). If this estimate were accurate, it would blight the futures of countless young victims. Fortunately, as David Finkelhor points out in his book *Child Sexual Abuse: New Theory and Research*,⁴³ "a history of molesting may play a role in the creation of some child molesters . . . [However,] most children who are molested do not go on to become molesters them-

dren's reactions to the legal process. G. Goodman, E. Pyle, D. Jones, P. England, L. Port, L. Rudy & L. Prado, Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims (1989) (unpublished manuscript on file with author) [hereinafter G. Goodman]. Overall, most children's psychological adjustment improved over time whether or not they testified in criminal court. Thus, time itself appears to play a healing role. For children who testified, Goodman found that testifying multiple times was related to increased stress.

42. G. Goodman, *supra* note 41. When Goodman evaluated the psychological welfare of children who testified in criminal proceedings, she identified subgroups of children who improved more than others. A number of factors predicted improvement at a seven-month follow-up. The more times a child testified, the less likely the child was to improve. Children with maternal support improved, as did children in whose cases there was corroborative evidence to support the child's testimony. A number of factors one might expect to be related to improved psychological functioning were *not* statistically related to improvement. For example, Goodman found that neither psychological counselling nor the ultimate outcome of the case were statistically related to improvement. *Id.*

43. D. FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* (1984).

selves. This is particularly true among women, who whether victimized or not rarely become offenders."⁴⁴

Another mischaracterization of authority occurs during Dziech and Schudson's discussion of fabricated allegations of sexual abuse. They write that "[t]he veracity of sexually abused children has been analyzed by researchers, all of whom report that false accusations are extremely rare" (p. 57). This statement is incorrect. Not all researchers agree that false allegations are rare. For example, two published studies report significant rates of fabricated allegations of child sexual abuse between parents locked in custody and visitation litigation incident to divorce.⁴⁵ While the results of these studies are open to doubt,⁴⁶ even the most methodologically rigorous studies indicate that in divorce litigation the incidence of fabricated allegations of child sexual abuse may be as high as twenty percent.⁴⁷ Outside the context of divorce, research indicates that the rate of fabricated allegations is between five and ten percent.⁴⁸ Thus, while it is correct to say that fabricated allegations are uncommon, Dziech and Schudson err when they characterize false reports as "extremely rare."

For the lawyer, perhaps the greatest disappointment of *On Trial* is

44. *Id.* at 47; see also D. Finkelhor, *Abusers: Special Topics*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE, *supra* note 3, at 119-24 (criticizing "single-factor" theories of the cause of child molesting).

45. Benedek & Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145, 155 (D. Schetky & E. Benedek eds. 1985) (the authors report that they were unable to document abuse in 10 out of 18 (55%) cases); Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449 (1986) (concluding that 4 of 11 allegations (36%) were probably false).

46. Commenting on the studies by Green and Benedek and Schetky, see *supra* note 45, Kathleen Quinn writes that "these are very small clinical samples with a selective pattern of referrals." Quinn, *The Credibility of Children's Allegations of Sexual Abuse*, 6 BEHAV. SCI. & L. 181, 181 (1988). Lucy Berliner adds that these and similar studies "describe a limited number of cases referred for evaluation. . . . In most of the cases described, there were multiple evaluations and conflicting opinions among professionals. Ultimately, there is no way of knowing that the authors' assessments are accurate." Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 48 (E.B. Nicholson & J. Bulkley eds. 1988); see also Corwin, Berliner, Goodman, Goodwin & White, *Child Sexual Abuse and Custody Disputes: No Easy Answers*, 2 J. INTERPERSONAL VIOLENCE 91, 92 (1984) (criticizing the Green article).

47. Jones & Seig, *Child Sexual Abuse Allegations in Custody or Visitation Disputes*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES, *supra* note 46, at 22. Jones and Seig studied 20 cases in which sexual abuse allegations arose within the context of custody and visitation disputes and found that 20% of the cases probably were fictitious. *Id.* at 29. Based on this finding, the authors write:

Other authors have found a similarly elevated rate in custody disputes. . . . Thus the setting of the divorce and custody dispute does seem to raise the likelihood that clinicians will find an increased number of fictitious allegations. However, in this study nearly 3/4 (70%) were [r]eliable, arguing strongly against the practice of dismissing [child sexual abuse] allegations in custody disputes contexts as most likely to be false.

Id.

48. See, e.g., Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 27 (1987) (8% probably fictitious).

its treatment of the rules of evidence and trial procedure as they pertain to child sexual abuse cases. In particular, the authors' discussion of the rules regarding testimonial competence of child witnesses and children's hearsay statements is unsatisfactory. Dziech and Schudson are exceptionally critical of the traditional method by which judges assess the competence of children to testify.⁴⁹ Today, states follow several approaches to the competence of children. A diminishing number of states declare children below specified ages presumptively incompetent until proved otherwise.⁵⁰ In such states, the judge conducts a preliminary examination of the child to determine the youngster's competence.⁵¹ The great majority of children, including many children as young as three or four, possess the psychological capacity to testify.⁵² Accordingly, following preliminary questioning by court and counsel, most children are found to be competent to testify. There is no support in the cases for Dziech and Schudson's assertion that adherence to traditional competency rules excludes a large number of children from the witness stand (p. 136).

A growing number of jurisdictions follow the lead of the Federal Rules of Evidence and reverse the traditional presumption that young children are incompetent. These states declare that every person, including children, is presumed competent to be a witness.⁵³ Under the Federal Rules approach, children are usually permitted to testify without undergoing a preliminary competency examination.⁵⁴ Even in jurisdictions that have adopted the Federal Rules approach, however, a small number of children should not be permitted to testify, and when serious questions arise about testimonial competence, judges return to the traditional principles of competence to guide decisionmaking.⁵⁵ Thus, even in states where children are presumptively competent to testify, an occasional child is disqualified.

49. The requirements of testimonial competence may be summarized as follows:

To testify as a witness, a child must possess certain characteristics, including the capacity to observe, sufficient intelligence, adequate memory, the ability to communicate, an awareness of the difference between truth and falsehood, and an appreciation of the obligation to speak the truth. A child of any age who possesses the requisite characteristics may testify; there is no minimum age below which children are automatically disqualified from serving as witnesses.

J. MYERS, *supra* note 18, § 3.2, at 54-55 (footnotes omitted).

50. *See id.*, § 3.10, at 72-73.

51. *See id.* §§ 3.22-3.28, at 104-20.

52. *See, e.g.*, *Jackson v. State*, 239 Ala. 38, 193 So. 417 (1940) (four-year-old competent); *State v. Hussey*, 521 A.2d 278 (Me. 1987) (three-year-old competent); *State v. Kivett*, 321 N.C. 404, 364 S.E.2d 404 (1988) (four-year-old competent despite difficulty answering questions); *State v. D.B.S.*, 216 Mont. 234, 700 P.2d 630 (1985) (four-year-old competent); J. MYERS, *supra* note 18, § 3.2, at 54 n.1; *see also* Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981).

53. FED. R. EVID. 601.

54. *See* J. MYERS, *supra* note 18, §§ 3.4-3.6, 3.8, at 62-72.

55. *See, e.g.*, *State v. Fulton*, 742 P.2d 1208, 1217-18 (Utah 1987), *cert. denied*, 484 U.S. 1044 (1988).

A small number of states have statutes which ensure that victims of child sexual abuse are always permitted to testify.⁵⁶ Such statutes are intended to eliminate all trial court discretion to rule on testimonial competence. Despite credible arguments that in some circumstances these statutes deprive defendants of a fair trial, a number of appellate decisions have upheld their constitutionality.⁵⁷

Dziech and Schudson have nothing kind to say about preliminary competency examinations. Although the authors are correct in saying that barriers to testifying are falling (pp. 135-36), and that this trend is laudable, Dziech and Schudson are unnecessarily harsh on the competence examination. For example, they mischaracterize the examination as an "indignity, which is widely regarded as archaic and unfair" (p. 88). They go on to distort what judges require of children during competency examinations, writing angrily that "five-year-olds have been required to explain to judges the meaning of truth, oaths, right and wrong, reality and unreality when adult thinkers throughout time have struggled unsuccessfully to do so" (p. 69). Dziech and Schudson cite no cases in which children were ruled incompetent because they could not explain the philosophical meaning of truth, although a few such cases may exist.

Contrary to Dziech and Schudson's dim assessment of the competency examination, a review of reported decisions shows that the law is sensitive to children's limited grasp of difficult terms like truth and lie.⁵⁸ Furthermore, in rare cases it remains necessary to evaluate testimonial competence before admitting the testimony of children — or adults.⁵⁹ Thus, Dziech and Schudson go too far when they characterize the traditional competency rules as "illogical" (p. 136). The com-

56. See, e.g., COLO. REV. STAT. § 13-90-106(1)(b)(II) (1987); UTAH CODE ANN. § 76-5-410 (Cum. Supp. 1989); see also J. MYERS, *supra* note 18, § 3.11, at 73-74.

57. See, e.g., *State v. Williams*, 729 S.W.2d 197 (Mo.), *cert. denied*, 484 U.S. 929 (1987).

58. See, e.g., *In re R.R.*, 79 N.J. 97, 398 A.2d 76 (1979) (recognizing that children articulate their understanding of truth and lie in simple terms); *Heckathorne v. State*, 697 S.W.2d 8, 11 (Tex. Ct. App. 1985) (five-year-old complainant indicating that "'telling what really happened' was the truth and 'what didn't really happen' was a lie" properly ruled competent by trial judge); J. MYERS, *supra* note 18, § 3.18, at 94-97.

59. *State v. Fulton*, 742 P.2d 1208, 1218 & n.15 (Utah 1987). Utah has adopted a version of the Federal Rules of Evidence, including Rule 601, which states that all persons are competent to testify as witnesses. Utah also has a statute that states that in sex offense cases, all children are competent to testify as witnesses. UTAH CODE ANN. § 76-5-410 (Cum. Supp. 1989). The Utah Supreme Court has interpreted these provisions flexibly:

The fact that section 76-5-410 and Rule 601 abolished the requirement that a trial court hold a competency hearing before admitting the testimony of a child under the age of 10 does not mean that the trial court may never prevent a child from testifying. Under the Utah Rule of Evidence 403, a court may exclude the testimony of any witness if the testimony's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the past, competency requirements served to ensure that the jury would not be exposed to unreliable testimony; now Rule 403 can be employed to serve a very similar function.

Fulton, 742 P.2d at 1218.

petency rules serve a useful purpose, and as long as the presumption is clearly in favor of permitting children to testify, no harm is done in retaining the traditional competency examination for exceptional cases.

Children's hearsay statements play a critical role in child sexual abuse cases.⁶⁰ *On Trial* does not pretend to offer in-depth treatment of the many evidentiary and constitutional issues raised by hearsay evidence. Rather, Dziech and Schudson's goal is simply to introduce the subject and to advocate expanded use of hearsay. Consequently, the authors' treatment of hearsay is understandably superficial. Not only is the discussion superficial, however, it is also laced with occasional error.⁶¹

Particularly troublesome is Dziech and Schudson's discussion of

60. See Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); see also J. MYERS, *supra* note 18, ch. 5, at 259-381.

61. Several examples of my disagreement with Dziech and Schudson's treatment of the rules of evidence follow.

The relationship between the sixth amendment confrontation clause and the hearsay rule is exceedingly complex. Professors David Louisell and Christopher Mueller observe that "[f]ew tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine." 4 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 418, at 123 (1980). One of the most complicated issues relating to the interplay of the confrontation clause and the hearsay rule concerns the prosecutor's obligation to produce or establish the unavailability of hearsay declarants before offering their out-of-court statements in evidence. Dziech and Schudson can hardly be expected in a few pages to provide a complete analysis of this complex subject. See pp. 136-40. Of necessity, they simplify to make a point. In one respect, however, their simplification goes too far. The authors assert that the Supreme Court's decision in *United States v. Inadi*, 475 U.S. 387 (1986), "clarified that 'unavailability' is not a prerequisite to the admission of hearsay." P. 138. *Inadi* may indeed have an important impact on the prosecutor's obligation to produce available hearsay declarants, but it is too early to tell whether *Inadi* relieves prosecutors of the obligation to produce or establish the unavailability of hearsay declarants with respect to the hearsay exceptions that are most important in child sexual abuse litigation. See *Nelson v. Farrey*, 874 F.2d 1222, 1231 (7th Cir. 1989) (Flaum, J., concurring) ("The *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements."), *cert. denied*, 1989 WL 114,736 (1990); see also J. MYERS, *supra* note 18, § 5.28, at 315-22.

In another passage, Dziech and Schudson describe evidence of a victim's "fresh complaint" of sexual offense as hearsay within an exception. Pp. 140-41. Properly understood, fresh complaint evidence is not hearsay at all. Thus, it is a mistake to refer to a hearsay exception for fresh complaint evidence. See *People v. Stewart*, 181 Cal. App. 3d 300, 226 Cal. Rptr. 252 (1986); see also J. MYERS, *supra* note 18, § 5.34, at 348. Dziech and Schudson are not alone in mistaking fresh complaint evidence for hearsay. An occasional appellate decision makes the same error. See, e.g., *State v. Sanders*, 691 S.W.2d 566, 568 (Tenn. Crim. App. 1984); see also J. MYERS, *supra* note 18, § 5.34, at 348 n.410. Furthermore, a few states have statutes that define fresh complaints as hearsay within an exception. See, e.g., OR. REV. STAT. 40.460(18a) (1987).

As a final example, the Federal Rules of Evidence contain an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment. FED. R. EVID. 803(4). This exception plays an important role in child abuse cases. See J. MYERS, *supra* note 18, § 5.36, at 357-60. Dziech and Schudson discuss the positive aspects of the medical diagnosis or treatment exception. They do not, however, give adequate attention to the fact that when it comes to young children, some applications of the exception are problematic. See *Morgan v. Foretich*, 846 F.2d 941, 950 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part); Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989).

the "excited utterance" exception to the hearsay rule. The excited utterance exception is codified at Rule 803(2) of the Federal Rules of Evidence, which states that the hearsay rule does not bar statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."⁶² The excited utterance exception has three requirements.⁶³ First, there must be an event which excites or startles the child. Second, the child's statement must relate to the startling event. And finally, the child's statement must be made during the period of excitement caused by the event.⁶⁴

While there is no predetermined limit on the amount of time that may elapse between a startling event and a child's out-of-court statement describing the event,⁶⁵ it is clear that a statement will not be considered an excited utterance unless the child is excited when the statement is made.⁶⁶ Thus, Dziech and Schudson err when they write that "courts have expanded traditional excited utterance exceptions in child sexual abuse cases. Excited utterance no longer refers only to immediate statements in reaction to an assault but may also encompass the child's first disclosure, whenever it comes."⁶⁷ While courts sometimes stretch the excited utterance exception to admit children's statements, courts nevertheless require statements to be made under the stress of excitement caused by a startling event. If a child is not excited when a statement is made, the statement simply is not an excited utterance.⁶⁸ Equally erroneous is Dziech and Schudson's state-

62. FED. R. EVID. 803(2).

63. See J. MYERS, *supra* note 18, § 5.33, at 331-33.

64. See FED. R. EVID. 803(1)-(3).

65. See *Gross v. Greer*, 773 F.2d 116, 119 (7th Cir. 1985) ("It is well-established that the lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive . . ."); J. MYERS, *supra* note 18, § 5.33, at 333 n.359.

66. For cases rejecting children's statements because too long a period of time had elapsed, see J. MYERS, *supra* note 18, § 5.33, at 335 n.362.

A number of cases approve admission of children's out-of-court statements under the excited utterance exception despite the fact that the excitement of the original event had abated by the time the child made the statement. Two theories are employed to accomplish this end. First, some decisions state that a child's statement can qualify as an excited utterance if the child made the statement at the first safe opportunity to do so. See, e.g., *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988); J. MYERS, *supra* note 18, § 5.33, at 335-36. A second theory is commonly called "rekindled excitement." A child's statement can be admitted as an excited utterance if the statement is made in reaction to the presentation to the child of a stimulus that reminds the child of a startling event that occurred some time earlier. The presentation of the stimulus rekindles the child's excitement for the original event, providing sufficient assurance that the child's testimony will be spontaneous and truthful. See J. MYERS, *supra* note 18, § 5.33, at 336-37.

67. P. 144. Dziech and Schudson may be referring to the complaint-of-rape doctrine rather than the excited utterance exception. For a discussion of the complaint-of-rape doctrine, see J. MYERS, *supra* note 18, § 5.34, at 344-55.

68. See, e.g., *Brandon v. State*, 778 P.2d 221, 226 (Alaska Ct. App. 1989) (statement made at least 45 minutes following severe physical assault of adult victim could not have been excited utterance; statement by victim's child made at least six hours after child witnessed assault not excited utterance); *State v. Allen*, 157 Ariz. 165, 173, 755 P.2d 1153, 1161 (1988) (statement

ment that "[w]hen a child discloses a sexual assault to an adult days, weeks, or even months after it took place, his or her statement should be allowed under a true and traditional interpretation of the excited utterance exception" (p. 145). An out-of-court statement made after excitement has ended may be admissible under another appropriate exception to the hearsay rule, but it cannot be considered an "excited utterance," at least as that phrase is commonly understood.

Thus, Dziech and Schudson fall into the same trap that has claimed some courts: In their desire to admit children's out-of-court declarations, they stretch the excited utterance exception beyond recognition. As a result, the exception is distorted, potentially unreliable evidence is admitted, and the interests of justice are ill-served.

The past decade has witnessed increased use of video technology during the investigation and trial of alleged child sexual abuse.⁶⁹ Considerable debate surrounds the wisdom of videotaping investigative interviews of children. Dziech and Schudson emphasize the advantages of videotaping. They note that many interviews take place while the child's memory of the event is still fresh (p. 149). By contrast, when the case finally comes on for trial, the child's memory may have faded. If the child is to testify at trial, the taped interview can be used to refresh the child's recollection about events that occurred months or even years earlier (p. 149). Videotaping the initial interview reduces the need to interview the child multiple times. As additional professionals become involved in the case, they can simply review the tape rather than interview the youngster again. Moreover, the videotape of a child disclosing sexual abuse may lead to a guilty plea that spares the child the need to testify in court, for the tape may reveal to the defendant that the child will be a convincing witness (p. 149). Finally, Dziech and Schudson correctly point out that videotaping interviews leads to improved interview techniques. When the interviewer knows his work is being recorded for all to see, there is considerable incentive to avoid improper interview techniques (pp. 148-49).

While there are definite advantages to videotaping investigative interviews of children, it is important to note the disadvantages that Dziech and Schudson fail to mention. For example, parents of sexually abused children worry that copies of videotaped interviews will find their way into the hands of the press, and that the trauma of sexual abuse will be compounded by the invasion of privacy that accom-

made two months after event not excited utterance); *In re Doe*, 761 P.2d 299 (Haw. 1988) (statement made half a day after event not excited utterance); *People v. Straight*, 430 Mich. 418, 424 N.W.2d 257 (1988) (statement made one month after event not excited utterance); *Leatherwood v. State*, 548 So. 2d 389, 399 (Miss. 1989) ("Statements made by her some six weeks later simply cannot qualify as having been made 'while the declarant was under the stress of excitement caused by the event'"); *Mitchell v. State*, 539 So. 2d 1366, 1370-71 (Miss. 1989) (statement made two weeks after event not excited utterance).

69. See J. MYERS, *supra* note 18, ch. 6, at 383-415.

panies an appearance on the evening news. While concern about improper use of videotaped interviews is legitimate and cannot be eliminated, it can be reduced to acceptable levels through protective orders that impose stiff penalties for improper use or release of videotapes.

Many professionals worry that videotaping investigative interviews simply provides ammunition for the defense to attack the child and the interviewer. There are bound to be inconsistencies between a child's description of abuse during an interview and the child's later trial testimony. The defendant can be expected to emphasize those inconsistencies to the jury. Furthermore, interviews are rarely completely free from improperly leading or suggestive questions. The defense will focus the jury's attention on deficiencies in the interviewer's technique.

While some commentators worry about the defendant's use of videotaped interviews to impeach, this concern does not outweigh the advantages of videotaping. It must be recalled that the defense does nothing improper when it points out inconsistencies in the child's description of abuse and mentions flaws in interviewing technique. Furthermore, such impeachment can be placed in perspective by informing the jury that over time, many sexually abused children are inconsistent in their description of the abuse,⁷⁰ and that leading and suggestive questions do not necessarily undermine the credibility of children's statements during interviews. On balance, Dziech and Schudson are right that the arguments in favor of videotaping are persuasive.

In the final analysis, *On Trial* is a disappointment. Dziech and Schudson are capable and committed, and it is unfortunate that they did not avail themselves of the opportunity to produce a more balanced and objective argument for continuing the reform process designed to make the legal system more hospitable for children. As it is, *On Trial*'s apparent bias and frequent resort to exaggeration regrettably undermine its value.

CONCLUSION

The social and legal issues engendered by child sexual abuse are too important to be obscured by adversarial rhetoric. The emotions swirling around this subject are exceptionally intense, and no one is immune from their influence. Yet those who employ the written word to influence public policy relating to child sexual abuse have a special responsibility to be objective and balanced.

The legal profession should set the pace in the quest for greater objectivity and balance because lawyers are responsible for a consider-

70. For a discussion of the psychological and developmental reasons for children's inconsistency in describing their sexual abuse, see *Expert Testimony*, *supra* note 6, at 97-100.

able portion of the bias and exaggeration that abounds in child abuse literature related to the law. Wedded as they are to the adversarial system, with its roots in trial by ordeal and its emphasis on winning at almost any cost, lawyers tend to ensconce themselves in warring camps, with the defense bar entrenched on one side of the battlefield and prosecutors dug in on the other.

Unfortunately, the contentiousness, distrust, and controlled hostility of adversarial decisionmaking seem to have infected the nonlawyers who interact with the legal system as well. Thus, journalists writing about the legal response to child sexual abuse occasionally lose their objectivity and align themselves with one warring faction or the other. Mental health professionals who evaluate children or who testify in child sexual abuse litigation are equally vulnerable to adversarial alignment and consequent loss of objectivity.

The legal profession can make a positive and important contribution to the child abuse literature by lowering the level of invective and working cooperatively with professionals within and without the legal system to improve the societal and legal response to child sexual abuse. The result will be increased protection for all concerned, especially for children and individuals accused of sexual abuse. David Hechler's *The Battle and the Backlash* is a refreshing step in that direction; regrettably, *Accusations of Child Sexual Abuse*, by Hollida Wakefield and Ralph Underwager, and *On Trial*, by Billie Wright Dziech and Charles Schudson, miss the mark.