Comments from St. John's Seminary, Brighton, MA
ON Wall Street Journal Articles. 6/1/05

to a select group of seminarians, I suggested that they read the DR articles, and suggested to that they may signal a change of point-of-view down the line. One of the seminarians from another diocese went to law school, passed the bar, and I believe got as far as clerking for a judge in his home state. He is one of the brightest seminarians. Just now, he sent this reply which he had composed after hearing about the WSJ articles from another professor at SJS -- one who may not have the best interests of all concerned at heart. .... I would be happy to know your assessment of his critiques. I apologize that since he wrote this for Father X, he takes the liberty of using a vulgar and slang expression, which I did not excise.

> "I have no idea if MacRae is guilty, but from a lawyer's point of view the article is rubbish. Absolute crap, really. Wrongful-conviction stories are a staple of investigative journalism, but they usually involve a detailed analysis of the facts to lead the reader to the same conclusion that the reporter reached, that the defendant was really innocent and there was a miscarriage of justice. Here, by contrast, she simply assumes his point of view, that he was wrongfully convicted, and then gives a very superficial account of how that allegedly happened.
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> "She either knows nothing about the criminal justice system or, more likely I think, gives a very selective and questionably honest account in order to boost her argument. Not knowing the real facts or the details of New Hampshire law, I can't say that there are any absolute falsehoods, but there are numerous legal half-truths: She says that in NH the jury need only find the accuser credible, the state doesn't have to provide proofs. If she means that a conviction can be based on the testimony of the victim without corroboration from a videotape or DNA or something like that, that is obviously true in all 50 states, and the whole criminal system would collapse if it weren't true. She mentions his lack of assets multiple times without mentioning that he's entitled to a court-appointed lawyer if he is indigent; New Hampshire is not Mississippi and there is no reason to assume such a lawyer wouldn't be competent. She mentions that the judge would not let in evidence of the accuser's juvenile record, but not that he was probably just following the rules of evidence. She does not mention whether MacRae testified and denied the charges. I strongly suspect the quotations from the judge's jury instructions are taken out of context in a misleading way. She mentions his guilty plea to other charges and his view that it was a negotiated lie, but not the fact that the plea must have involved an admission of guilt in open court accompanied by a colloquy with the judge to ensure the plea was free and voluntary. She says what the sentence was but not what crime he was convicted of, nor how many counts. She says that parole is never granted to a defendant who does not confess; I have some doubt that the rule is that absolute, but even if that is now the rule, he won't come up for parole for 30 years and it's just speculation to say that that will be the rule then. She says there was no evidence he possessed child pornography, but this contradicts the earlier statement that the accuser testified to that effect.
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> "If I try to separate the facts from the spin, it looks to me as if MacRae was found guilty of multiple serious felonies because the jury chose to believe that his accuser was telling the truth. He then pled guilty to other crimes, and he was given a long but probably appropriate sentence on the original counts. It is certainly possible that the accuser was lying, and so were the other alleged victims whose claims were taken into account at sentencing, and that MacCrae himself was lying when he pled guilty--but the article doesn't establish any of that."

Fr. Gordon MacRae's response to Seminarian's Comments

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Dorothy Rabinowitz's articles in The Wall Street Journal have evoked many letters and comments written "from a lawyer's point of view." Among those, the lawyer/seminarian's reflection is certainly unique in its criticism. Many legal commentators have expressed to Ms. Rabinowitz that her analysis rings quite true. I asked for responses to the seminarian's comments from three New Hampshire lawyers who were not involved with my case.

The first is a Concord attorney whose practice is primarily in defense of parents and others against child abuse/neglect complaints. I sent her the WSJ articles and the seminarian's comments. She replied:

> "I was grateful to read the articles in the Journal, but the other document is a travesty basically. You unfortunately have been one of those to bear the burden of the current witch hunt for child abusers. It is politically incorrect to even think of defending an accused abuser - especially an accused sexual abuser. The very idea that the accused might be innocent never occurs to some judges. The 'error rate' for judges is designed to favor the 'safety' of children while the 'harmless error' umbrella in appellate courts favors inept judges. In your case, the judge - who at the time had been on the bench less than two years - confused his role with that of 'victim advocate.' The WSJ articles left out the fact that the mother of these adult accusers was at the time (and still is) an investigator for the state's child protective services agency who had appeared in that capacity before that same judge on numerous occasions before your trial. The very fact that the judge openly referred to the complainant as 'the victim' throughout this trial is indicative of his confusion of roles....I think your accusers were among the many who have learned through the child 'protection' system that truth makes no difference, that it's okay to fabricate huge stories and exaggerate both facts and consequences to get what they want - which in this case was a substantial monetary settlement for each accuser."

The second person asked to comment on the seminarian's statement is a retired NH lawyer who is Jewish. His reflection is interesting:

> "I re-read the Rabinowitz articles after reading this criticism. I must say that Dorothy Rabinowitz's Pulitzer Prize - and her having been thrice nominated - for commentary on legally sanctioned witch hunts leaves me somewhat well disposed toward her expertise. The former lawyer/student seems to have written for the purpose of impressing someone with limited knowledge about what actually occurs during this kind of criminal trial. The writer lapsed into the very sort of presumptuous and unsubstantiated spin that he accuses Rabinowitz of. His same comments could easily have been made by a legalistic unbeliever in reference to the Christian scriptural account of the trial of Jesus. Surely Pilate followed rules of evidence; surely the jury (the crowd) believed in good faith what had been presented by the authorities; surely Jesus could have spoken in his own defense, etc., none of which extrapolates from the document any of its intended meaning and purpose."

The third lawyer/commentator used his own name in a rather substantial response which I have attached separately.

My own perspective is pointed, but presumptive of the good will of the seminarian/writer who may not have intended that his reflection be disseminated for critical analysis. Most legal professionals and others who have commented on the WSJ articles have correctly concluded that there is much more to be written about this matter. Ms. Rabinowitz has herself said that 90% of this account has yet to be told, but it will be told. Most, I think, have been able to read this between the lines of her work.

In response to the specifics of the seminarian's arguments, the first lawyer (above) makes a valid point: the judge confused his role with that of "victim advocate," and his rulings vis the so-called "rules of evidence" reflected that. For example, it has yet to be commented on that the judge began this trial by instructing my attorney to remove himself to the farthest point possible in the courtroom away from the defense table because, quote:"the victim asked not to have to see the defendant during testimony and cross." The fact that "the victim" was not a child, but a 200-pound, 28-year-old man made this a curious and controversial demand that, for some commentators, violated the basic Constitutional right of defendants to confront their accusers.

The seminarian seems to presume that I was the sole source for Ms. Rabinowitz who, he wrote, "simply assumes [my] point of view." This is without basis. The articles were the result of many months of analysis of trial transcripts, depositions, lawsuits, dozens of witness statements that never came before the jury, media reports, and interviews with me, the police detective, and others. The accusers themselves, their contingency lawyers, and diocesan officials, all refused to be interviewed. Ms. Rabinowitz's quotations from the judge's instructions were not "taken out of context in a misleading way" as the writer alleged but for which he offered no basis. The judge's quotes were lifted entirely and verbatim from the trial transcript, but Ms. Rabinowitz was also aware of how the local news media reacted to some of those intructions at the time. One headline in The Keene Sentinel during my trial read: "Judge tells MacRae jurors to disregard accuser's inconsistencies." The examples given of some of the more egregious comments and instructions were just that, examples.

The seminarian also presented no basis for his assumption that the judge "was probably just following the rules of evidence" when he decided not to allow the accuser's juvenile record of fraud, forgery, theft, and assault to come before the jury. The judge had much leeway under NH rules to admit such evidence, but ruled that "the juvenile record is from too long ago to be pertinent to this case." In fact, the juvenile record was from the exact time period in which the accuser claimed to have been abused. The seminarian also misunderstood New Hampshire sentencing and parole eligibility. I am sentenced to 3½ to 7 years followed by four consecutive terms of 7½ to 15 years. Every 7½ years I would have to apply for parole to the next consecutive sentence, but only if I meet the prerequisite eligibility for the prison's sex offender program which requires an unqualified and open admission of guilt. Unable to meet that requirement, I remain ineligible for parole

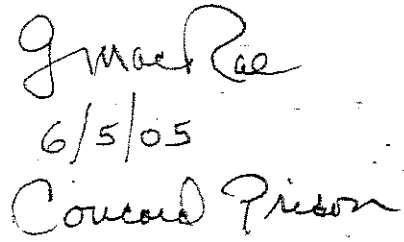
to consecutive sentences and must serve the maximum term of each sentence for a total of sixty-seven years. Further, the prison system has sanctions for those who do not meet parole requirements. For nearly eleven years, I have lived in the prison's punitive housing unit - and all that entails - because I remain ineligible for the general population housing for medium security level prisoners. I have lived in the punitive unit longer than any New Hampshire prisoner, and now face relocation to a much more restrictive prison in Berlin, NH.

This response could go on for pages, but I will conclude with my greatest concern. The Wall Street Journal was willing to devote substantial space and resources to a view of the clergy/sex abuse scandal that ran entirely against the tide of media coverage to date. I am told that there is much more coming in this regard. The Journal has plans for further work, and other media representatives have now made overtures to drive on the road that Dorothy Rabinowitz paved. The response to the articles has been overwhelmingly positive.

In contrast, the most vociferous and negative opposition to revisiting my case has - strangely - come from a few priests and officials of my own diocese, a fact that has been inexplicable for Ms. Rabinowitz and heartbreaking for me. In the weeks following the articles, the judge, police detective, prosecutor, accusers, and various contingency lawyers all had little or nothing to say in response. None of them denied a single detail of Ms. Rabinowitz's assertions. My own bishop's spokesman, however, reminded the news media that I was duly convicted by a jury, that my case has been sent to the Holy See for possible dismissal, and that the articles appeared on the Journal's "Opinion" page making them "invalid." I sent a copy of the WSJ articles to one priest of my diocese who has written letters to local newspapers calling for the dismissal of all accused priests. He sent the articles back to me with a scribbled note: "I have no desire for correspondence between us." Dorothy Rabinowitz also withheld from her articles - at my request - the fact that I have been in prison for eleven years just fifteen miles from the Chancery office of my diocese, but I have never been visited by a priest of this diocese.

I read the lawyer/seminarian's comments with admittedly depressed spirits in regard to the opinion of church personnel that I am guilty and will remain so in their view despite growing evidence to the contrary. Their's is a perplexing response that is beginning to evoke much concern and deserves its own analysis. I can only say in reaction to the written comments of the seminarian that I hope and pray he develops a pastoral and compassionate heart toward his brothers in the priesthood, especially those whom he perceives to have failed. The Church has many lawyers. The Church needs priests.

I prepared the above statement on June 5, 2005, the 23rd anniversary of my ordination to priesthood.



Attorney Seth Dader's response to Seminarian's comments

6/2/05

I have been asked, as a law school graduate ~~and a prison inmate,~~, to respond to a critique of Dorothy Rabinowitz's recent Wall Street Journal articles by Seminarian "Y", said to also be a law school graduate, who is now in a class taught by Father "X". Herewith my observations.

The Rabinowitz articles are not an appellate brief. They contain neither a formal statement of facts, with citations to the trial transcript, nor rigorous legal arguments, with citations to Supreme Court precedents and the like. They are mass-media articles, written by a lay person for lay persons. One might as well fault a yacht for not being an ocean liner.

What neither the Rabinowitz articles nor Seminarian "Y"'s critique make clear is that the MacRae case is by no means unusual. On the contrary, the problem is a systemic one, which has crept up on the legal system over several decades. The insidious nature of the problem is exemplified by Seminarian "Y"'s remarks,

> If she means that a conviction can be based on the testimony of the victim without corroboration...that is obviously true in all 50 states, and the whole criminal system would collapse if it weren't true.

This was not always true, it still is not quite true in all fifty states, and its absence would not cause the "whole criminal [justice] system" to collapse. The legal system of the entire English-speaking world is based on a collection of legal doctrines - derived from experience, not abstract principles - which began to be assembled in medieval England and which are known as "common law". Over about the past century, there has been a growing trend towards legislative abrogation of ancient common law doctrines, with uneven results. At common law, a witness could not testify if he had some personal stake

in the outcome of the case. This doctrine was intended to keep off the witness stand anyone with a motive to commit perjury. Because this doctrine had the harsh effect of preventing the accused from testifying in his own defense, it was abolished throughout the English-speaking world in the latter half of the Nineteenth Century. At common law, no one could be convicted of a crime absent proof of the corpus delecti (the "body of the crime"), that is, physical proof that a crime had occurred. That requirement faded away in the first half of the Twentieth Century. At common law, no one could be convicted of rape on the victim's accusation, absent corroboration. That requirement has been abrogated throughout the English-speaking world within recent decades, due to lobbying from feminists. At common law, no one could be convicted of a crime on a minor's accusation, absent corroboration. That requirement now exists in only a few jurisdictions. At common law, no one could be convicted of a crime on an accomplice-witness's (i.e., a "snitch"'s) accusation, absent corroboration. That requirement made convictions in organized-crime cases almost impossible; it now exists in only a few jurisdictions. At common law, no one could be convicted of perjury on a single witness's accusation, absent corroboration. Curiously, that requirement is still the law in most jurisdictions. In many jurisdictions, a prosecutor need not specify, much less prove, the exact time and place of a crime.

The result of all these modern legal innovations is that trials, especially in sexual-assault cases, have been reduced to Method-acting competitions. Whoever emotes most convincingly in front of the jury will get a favorable verdict. To say that a jury verdict arrived at under modern rules of evidence is reliable is to expose touching faith in the "papal infallability" of twelve people too unsophisticated to conjure up an excuse from jury duty.

Seminarian "Y" says that MacRae's judge was "probably just following the rules of evidence". From this I infer that "Y" has never actually tried a case. The rules of evidence, in New Hampshire and throughout the United States, give trial judges very nearly open-ended discretion as to what evidence to admit and what to exclude. Trial judges are almost never reversed on appeal for evidentiary rulings. As a practical matter, a trial judge can pre-determine the outcome of a trial through his evidentiary rulings, in the serene confidence that he will be affirmed on appeal.

Seminarian "Y" is quite correct that New Hampshire provides indigent defendants with public defenders, who have at least a threshold level of competence. In addition, most public defenders have good intentions. But the fact is, public defenders are wildly over-worked, and they do not have even a fraction of the investigative and expert-witness resources of prosecutors and good private criminal defense lawyers. As a result, public defenders tend to pressure their clients to accept plea bargains.

Parole does almost invariably require an admission of guilt, at least for sex offenders. This has been so for many years. Given this country's conservative trends, there is every reason to expect parole boards to continue that policy. This has the perverse and Kafkaesque result that confessed child molesters who admit guilt and promise not to do it again are likely to obtain parole at an early date, whereas a middle-aged man with a long sentence who insists he is innocent will likely die in prison.

I do not know for a fact that MacRae is innocent, but neither do I know for a fact that he is guilty, and neither does Seminarian "Y" or anyone else whose knowledge of the case is limited to the bare fact that he was convicted. Systemic reforms are needed if jury verdicts are to be taken as near-absolute proof of guilt.

S.B.