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Introduction to the Symposium on Child Witnesses in Sexual Abuse Cases

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Foreword

Introduction to the Symposium on Child Witnesses in Sexual Abuse Cases

Carl T. Bogus*

It is estimated that approximately 20% of all girls and 5–10% of all boys across the globe are sexually abused by adults.¹ Those statistics are always a shock to those of us who do not specialize in this area. I heard these numbers for the first time about twenty years ago when I was teaching an Evidence course at the Rutgers University School of Law in Camden, New Jersey. Our Evidence casebook included many cases of child sexual abuse, as do most Evidence casebooks. After class one day, a couple of students

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1. See Jennifer J. Freyd et al., *The Science of Child Abuse*, 308 SCI. 501, 501 (2005). See also John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 461 (2008) (citing a study by David Finkelhor that found that 19.2% of women and 8.6% of men had been sexually victimized as children); Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 207–08 (1995) (citing various studies that place estimates of child sexual abuse between twelve and thirty-eight percent for girls and between three and sixteen percent for boys). Some estimates are higher. See, e.g., Sam Torres, *Review of Professional Publications*, 68 FED. PROBATION 68 (2004) (reviewing a book by J. L. Mullings et al. that estimated that 28% of girls and 16% of boys are sexually abused before the age of sixteen). Like everything else on this subject, estimates about the prevalence of child sexual are controversial. Among other factors, estimates will vary depending on how surveyors define “child” and “sexual abuse.”

observed that if our class of roughly one-hundred students was representative of the general population, about a dozen of us in that classroom had been sexually abused as children. I was stunned. I had not previously realized the prevalence of the problem. Moreover, visualizing the statistic in these terms—as a significant portion of the students who were looking up at me from their seats—made the numbers horrifyingly real to me.

And yet after hearing the statistics, it is easy to forget them. Perhaps we *want* to forget them. Child sexual abuse is simply something most of do not want to contemplate. That itself is part of the problem. There are surely people at Penn State and in State College, Pennsylvania, who are ashamed that they did not do more when they learned, or even just had reason to suspect, that a former university football coach was sexually abusing young boys. In their lonely hours, they undoubtedly ask themselves, “Why did I not act?” or “Why did I not act more decisively?” It is comforting for the rest of us to think the explanation lies with the subculture of Penn State football. How disturbing it would be to acknowledge that the failure to act was influenced not as much by a unique Penn State football subculture as it was by the wider culture to which we all belong. It is certainly true that Penn State is a beloved institution and that many will strive to protect its good name. It is surely also true that luminaries within the Penn State football program are admired and powerful members of the community. But there are beloved institutions and admired and powerful figures in every community. Consider, for example, the longstanding problem of sexual abuse of children by Catholic priests, with bishops often protecting not the children, but the predators.

As I write these words, the media is presently debating the question of whether, twenty-one years ago, Woody Allen sexually abused his adopted daughter Dylan Farrow, who was then seven years of age. The issue reemerged when Dylan, now twenty-eight, married, and living under another name, wrote an open letter lamenting that—*notwithstanding the well-known allegations—*Hollywood was continuing to honor Woody Allen by bestowing upon him a Golden Globe lifetime achievement award and nominating him for an Oscar.² A week later, Woody Allen

2. Dylan Farrow, *An Open Letter from Dylan Farrow*, N.Y. TIMES (Feb.

responded in an op-ed in which he claimed that the case had been thoroughly investigated at the time by the Child Sexual Abuse Clinic at the Yale-New Haven Hospital, which wrote a report concluding that Dylan had not been sexually abused and that the allegations were either “made up by an emotionally vulnerable child who was caught up in a disturbed family and was responding to the stresses of that family” or “that Dylan was coached or influenced by her mother, Mia Farrow.”³ Woody Allen claimed that, among other things, the investigators took into account that he took and passed a polygraph test while Mia Farrow declined to take one.⁴ In the cacophony of media comment stimulated by Dylan Farrow’s open letter, one of the most sensible came from Slate columnist (and lawyer) Dahlia Lithwick, who observed that we sensibly cannot try allegations such as these in the court of public opinion because that court has no arbiter, no rules of evidence, no method for separating lies from truth, and no commitment to fairness or responsibility.⁵ “[T]he Court of Public Opinion is what we used to call villagers with flaming torches,” Lithwick wrote.⁶ True enough, but what should we do with Dylan Farrow’s claim that we do her a terrible disservice by honoring Allen with awards, or arguably by purchasing tickets to his movies?

The legal system, of course, is the place where allegations about child sexual abuse must be formally investigated and adjudicated, and where matters involving child custody, freedom

1, 2014), http://kristof.blogs.nytimes.com/2014/02/01/an-open-letter-from-dylan-farrow/?_php=true&_type=blogs&_r=0. The letter was posted on columnist Nicholas Kristof’s blog. Kristof devoted his column, published in the newspaper that same day, to Dylan’s letter. See Nicholas Kristof, *Dylan Farrow’s Story*, N.Y. TIMES (Feb. 1, 2014), <http://www.nytimes.com/2014/02/02/opinion/sunday/kristof-dylan-farrows-story.html>.

3. Woody Allen, *Woody Allen Speaks Out*, N.Y. TIMES, Feb. 9, 2014, at SR-9.

4. Allen’s polygraph argument is of particular interest to me because, as an evidence teacher, I often ask my students to consider not only whether polygraph test results should be admissible but whether a willingness or refusal to take a polygraph test should be admissible, and if so, under what circumstances.

5. Dahlia Lithwick, *Woody Allen v. Dylan Farrow: The Court of Public Opinion is Now Open*, SLATE (Feb. 5, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/woody_allen_v_dylan_farrow_the_court_of_public_opinion_is_now_in_session.html.

6. *Id.*

or incarceration, or payment of damages are at stake. Evidence casebooks typically contain many child sexual abuse cases because this subject area presents enormous challenges for the legal system. The testimony of a young child is often essential, but that testimony is often exceedingly difficult for young children to give. Very young children may not understand exactly what happened to them, and they may have considerable difficulty communicating what they do understand. The person who abused them may be someone they love and trust—a parent, stepparent, uncle, neighbor, teacher, camp counselor, cleric—and they may be emotionally torn about accusing this person of terrible things. They may be intimidated at being questioned by strangers or by the settings in which they find themselves, such as police stations and courthouses. A child may have been able to communicate to someone they know, or to a professional who carefully built a rapport with the child in a comfortable setting, but freeze when thrust into a formal setting and surrounded by strangers. Yet, the legal system can protect children only so far because criminal defendants have a Sixth Amendment right to confront their accusers.⁷ Moreover, even when the Confrontation Clause is not

7. Federal law allows courts to permit children who are unable to testify because of fear or who would suffer emotional trauma to testifying outside the defendant's presence via one-way closed circuit television. See 18 U.S.C. § 3509 (2006). This statute predated *Crawford v. Washington*, 541 U.S. 36 (2004), which dramatically changed Confrontation Clause jurisprudence. The author of *Crawford*, Justice Antonin Scalia, believes that the Confrontation Clause does not permit children to testify outside the presence of the defendant. He once wrote:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

directly implicated, our legal system has long rejected hearsay testimony that does not fit within carefully prescribed exceptions.⁸

If all of this were not enough, the legal system must deal intelligently with the phenomena of repressed and recovered memories. Moreover, young children may be highly suggestible, and for them the boundaries between reality and imagination may be permeable. As illustrated by the Farrow-Allen case, there may be allegations that one parent, engaged in bitter child custody battle, was able to stimulate false memories of abuse, or that well-meaning but inept investigators may themselves implant false memories. To say the least, the legal system has to be far better informed about these phenomena than the court of public opinion.

There is no area where the demands on the legal system to be well informed about what psychologists have learned are higher. For that reason, we assembled both some of the leading psychology researchers and legal scholars working in this area. They came together for a live conference at the Roger Williams University School of Law on February 22, 2013, and thereafter wrote the articles that are published in this symposium edition of the *Roger Williams University Law Review*.⁹ After the conference, the law review editors were fortunate to obtain the article: *The Importance of Conducting In-camera Testimony of Child Witnesses in Court Proceedings – A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, written by Justice Laureen A. D'Ambra of the Rhode Island Family Court, who had not participated. Given that the article was in line with the content of this symposium, the editors decided to include the piece in this edition as well.

Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting). However, *Crawford* itself did not go that far. It held: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 68. The federal statute does permit cross-examination, and therefore appears to satisfy *Crawford*, at least for the time being.

8. Under current Supreme Court jurisprudence, only “testimonial” statements implicate the Sixth Amendment, that is, accusations made for potential use in criminal proceedings. *Id.* at 51.

9. We often reverse the usual symposium format in which contributors present papers they have already written at the live conference. We think it is beneficial for contributors to be informed by the formal and informal discussions that occur at the conference prior to writing their papers.

We are very proud to publish the work you will find in these pages, and hope that people who are interested in this area—and especially people who are working in the area—will find it both illuminating and useful.