Race to Injustice
RACE TO INJUSTICE

LESSONS LEARNED FROM THE
DUKE LACROSSE RAPE CASE

Edited by
Michael L. Seigel

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# Contents

Preface xiii  
Acknowledgments xix  

## Part One  
Introduction  

Chapter One · The Facts and Only the Facts  
*Robert J. Luck & Michael L. Seigel*  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Durham and Duke Before the Storm</td>
<td>3</td>
</tr>
<tr>
<td>March 13, 2006, and the Morning After</td>
<td>4</td>
</tr>
<tr>
<td>The Investigation and Indictment</td>
<td>9</td>
</tr>
<tr>
<td>The Prosecutor and the Press</td>
<td>13</td>
</tr>
<tr>
<td>The Response of Duke’s Administration and Faculty</td>
<td>17</td>
</tr>
<tr>
<td>About the Truth</td>
<td>22</td>
</tr>
<tr>
<td>Epilogue</td>
<td>26</td>
</tr>
</tbody>
</table>

## Part Two  
Lessons Learned about College Campuses  

Chapter Two · Faculty Reactions, Contentious Debate, and Academic Freedom  
*Robert M. O’Neil*  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duke in Context: A Singular Institution</td>
<td>31</td>
</tr>
<tr>
<td>Early Faculty Reactions—and Responses</td>
<td>35</td>
</tr>
<tr>
<td>Possible Academic-Freedom Issues</td>
<td>38</td>
</tr>
<tr>
<td>The Administration Responds—Overreaction?</td>
<td>41</td>
</tr>
<tr>
<td>Dissonant (and Uncollegial) Voices within Duke’s Faculty</td>
<td>44</td>
</tr>
<tr>
<td>Grading: How Strong a Faculty Prerogative?</td>
<td>46</td>
</tr>
<tr>
<td>Is There a Faculty-Student Privilege?</td>
<td>48</td>
</tr>
<tr>
<td>An Embattled Faculty: Did They Deserve Better?</td>
<td>50</td>
</tr>
<tr>
<td>Lessons Learned—and Shared</td>
<td>53</td>
</tr>
</tbody>
</table>
Chapter Three · The Town-Gown Relationship

Sharon Rush

Town-Gown Relations 55
- Generally: The Role of Social Dignity 57
- Durham and Duke: The Role of Class and Race 58
- Class, Race, and Assumptions about “Intelligence” 61
- Inherent Dignity 62
- The Role of Dignity 63
- Prior to That Evening 63
- The Players 63
- Crystal Mangum 66
- That Evening 68
- What’s Race Got to Do with It? 69
- After That Evening: Enter Mike Nifong 72
- Summary 77

Chapter Four · Alcohol Consumption on College Campuses

George W. Dowdall

The Lacrosse Rape Case 79
- Alcohol and Duke Lacrosse 81
- The Duke Alcohol Scene 84
- National Patterns of College Drinking 88
- Health and Behavioral Consequences of College Drinking 91
- Intoxicated Rape 94
- The Culture of College Drinking 96
- Lessons Learned from the Lacrosse Rape Case 99

Chapter Five · Invisible Criminality: Male Peer-Support Groups, Alcohol, and the Risk of Aggressive Sexual Behavior

Michelle S. Jacobs

Introduction 103
- Athletes, Fraternities, and Sexual Assault 104
- Masculinities and Male Peer Support 104
- Support of the Rape-Myth Risk Factor 107
- The Role of Alcohol as a Risk Factor 109
- Exotic Dancers and the Danger of Violence in the Workplace 114
- False Rape Reports 119
- Conclusion 123
CONTENTS

Part Three
Lessons Learned about Race

Chapter Six · Black Venus Hottentot Revisited: Gratuitous Use of Women of Color’s Bodies and the Role of Race and Gender in Campus and Academic Reactions
Michèle Alexandre 127

Introduction 127
Perception of Women of Color’s Bodies, Both Historically and in the Era of Flavor of Love and I Love New York 130
Sexual Profiling and the Erotic-Labor Force 133
Class-, Race-, and Gender-Based Dynamics in Events and Narratives Relating to the Rape Allegations 137
The Accountability and Ethical Responsibilities of University Administrators 142
Possible Equitable or Contractual Claims for Added Protections for Erotic Workers 146
Conclusion 151

Chapter Seven · Racial Politics and Discretion in Criminal Law
Janine Young Kim 155

Case Background 155
Historical and Legal Context 159
Some Lessons from the Case 166

Part Four
Lessons Learned about the Criminal-Justice System

Chapter Eight · The Duke Lacrosse Players and the Media: Why the Fair Trial-Free Press Paradigm Doesn’t Cut It Anymore
Andrew E. Taslitz 175

Introduction 175
Part II: Undervaluing Reputational Injury 178
Part III: Media Coverage in High-Profile Cases 182
Is Media Coverage Antidefendant? 182
Press Dependency on Law Enforcement 183
Cultivating Deviancy 185
The Impact of Media Coverage 186
The Pessimistic View 186
The Optimistic View 189
Implications for the Duke Rape Case 191
CONTENTS

Part IV: Pretrial Publicity and Reputational Harms in the Duke Rape Case 191
The Antidefendant Content of the Press Coverage 191
Tainting the Team: The Publicity’s Negative Effects 193

Part V: Fair Trial-Free Press 197
The Tension 197
The Elected Nature of Most Prosecutors:
A First Amendment Wrinkle? 204
Conclusion 209

Chapter Nine · When Prosecutorial Discretion Meets Disaster Capitalism
Lenese Herbert 211
Prosecutorial Discretion 213
Disaster Capitalism 216
When Discretion Meets Disaster 220
Crisis 221
Shock 224
Disaster Capitalism 226
Shockproof? 227
The Central Park Jogger Case: Mission Accomplished 227
The Duke Lacrosse Case: Disaster Capitalism, Demurred? 232
Conclusion 235

Chapter Ten · The Duke Defendants Reaped the Benefits of a Zealous Defense—But Do Only the Rich Get Real Lawyers?
Rodney Uphoff 237
Introduction 237
The Defense Lawyers: The Early Stages 241
Trying to Stop a Train Wreck 244
The Players Are Indicted and the Defense Does Not Rest 247
The Pivotal Role of Defense Experts and Investigators 253
The Struggle for Justice for Those without Money 255
Conclusion 260

Chapter Eleven · An Examination of the District Attorney’s Alleged Unethical Conduct
Kenneth Williams 261
Introduction 261
The Ethical and Legal Obligations of Prosecutors 262
The Unethical and Illegal Conduct of Mike Nifong 264
  Clear Violations 265
    Failure to Disclose 265
    False Statements to the Court 266
    Prejudicing the Proceeding and Disparaging the Accused 267
  Possible Violations 270
    Pursuing Charges Not Supported by Probable Cause 270
    Intimidating Players Who Remained Silent 271
    Pursuing Cases for Political Gain 272
    Employing an Unconstitutional Lineup 273
  No Violations 274
    Failure to Speak to the Accuser 274
    Failure to Present Exculpatory Evidence to the Grand Jury 274
Prosecutorial Misconduct in the United States 275
Why Prosecutorial Misconduct Occurs and What Can Be Done about It 279
Conclusion 281

Chapter Twelve · The Moment of Truth: The Decision to Institute Charges in a Rape Case

Michael L. Seigel 283
Introduction 283
North Carolina Grand Jury Procedure 286
Does It Really Matter? 290
Basic Grand Jury Procedures 291
Select Grand Jury Reforms 293
  Permitting Counsel in the Grand Jury Room 294
  Requiring Prosecutors to Present Exculpatory Evidence 294
  Prohibiting Prosecutors from Knowingly Presenting Constitutionally Inadmissible Evidence 295
  Providing Targets or Subjects with an Opportunity to Be Heard 295
  Prohibiting Hearsay in the Grand Jury 296
  Requiring Prosecutors to Instruct the Jurors on the Law 296
Application of These Reforms to the Duke Case 297
The Preliminary Hearing as an Alternative? 299
Whither the Balance? 301
Is the Duke Case Special? 302
Proposal 303
Part Five
Lessons Learned about Criminal Evidence

Chapter Thirteen · The Duke Lacrosse Rape Investigation: How Not to Do Eyewitness-Identification Procedures
Gary L. Wells, Brian L. Cutler, & Lisa E. Hasel

Introduction 307
The Logic and Science of Eyewitness Identification 309
Primary Features of Good Eyewitness-Identification Procedures 313
The Duke Lacrosse Rape Investigation 314
Analysis of the Identification Procedures in the Duke Case 318
Final Remarks 319

Chapter Fourteen · DNA Profiling
Paul C. Giannelli

Introduction 323
DNA Exonerations 325
DNA Databases 326
Problems 327
DNA Profiling 328
Short Tandem Repeats (STR) Testing 329
Y-Chromosome (Y-STR) Testing 331
The Duke Lacrosse Case 331
Gathering the Forensic Evidence 331
The DNA Analysis 332
The DSI Laboratory Report 334
More Discovery Requests 336
The Underlying Data 336
The December 15 Hearing 338
The Aftermath 340
An Explanation? 341
Lessons Learned 342
Pretrial Disclosure 342
Defense Experts 344
Nontestimonial Identification Orders 344
Conclusion 346
## CONTENTS

Chapter Fifteen · Presuming Guilt or Protecting Victims?: Analyzing the Special Treatment of Those Accused of Rape

*Aviva Orenstein*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>351</td>
</tr>
<tr>
<td>Competing Narratives</td>
<td>353</td>
</tr>
<tr>
<td>Frat Boys Gone Wild</td>
<td>354</td>
</tr>
<tr>
<td>The Lying Ho</td>
<td>354</td>
</tr>
<tr>
<td>Special Accommodations for Victims in Rape Trials, Special Burdens for the Accused</td>
<td>357</td>
</tr>
<tr>
<td>Naming Names</td>
<td>357</td>
</tr>
<tr>
<td>Rape Shield</td>
<td>359</td>
</tr>
<tr>
<td>Character Evidence about the Accused</td>
<td>362</td>
</tr>
<tr>
<td>Hearsay Issues</td>
<td>365</td>
</tr>
<tr>
<td>Rape Trauma Syndrome and Expert Testimony</td>
<td>368</td>
</tr>
<tr>
<td>Postconviction Experiences in Prison and Beyond</td>
<td>370</td>
</tr>
<tr>
<td>Rape in Prison</td>
<td>370</td>
</tr>
<tr>
<td>Postconviction Limits on Liberty</td>
<td>372</td>
</tr>
<tr>
<td>Concluding Observations</td>
<td>374</td>
</tr>
</tbody>
</table>

Authors’ Biographies

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>379</td>
</tr>
</tbody>
</table>

Index

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>387</td>
</tr>
</tbody>
</table>
Preface

The American criminal-justice system, though undoubtedly one of the best in the history of the world, is far from perfect. We all know this—yet most of the time we pay little or no attention to its obvious flaws. Every once in a while, however, a notorious case comes along and shatters our self-protective complacency by revealing the uglier side of the system—for instance, its differential treatment of whites and people of color. Cases of this kind often garner huge amounts of national media attention and capture the sustained interest of a normally restless American public. Whatever their outcome, these cases provide academics with exceptional opportunities to study, learn, and teach about the system. They also offer the chance to study related matters, such as the conduct of particular law-enforcement and other officials, as well as the underlying causes of the crime and the public’s reaction to it.

The Duke lacrosse players’ rape prosecution is one such case. The basic facts are well known. One evening in March 2006, members of the lacrosse team held an off-campus party during which alcohol was served and two exotic dancers performed. A disagreement broke out between the dancers and the players and, later, one of the former, Crystal Mangum, alleged that three players had raped her. Mangum was black and relatively poor; she was attending North Carolina Central University and was stripping to help pay her bills. The defendants were white Duke students from comparatively privileged backgrounds. Up for re-election in a jurisdiction with many African American voters, District Attorney Mike Nifong pursued the case very aggressively. He used questionable identification procedures and was very vocal in numerous local and national media appearances. Even after DNA evidence indicated that the defendants had not engaged in sexual activity with the victim, he declined to drop the charges.

The case split the Duke campus into sharply divided factions. Eighty-eight faculty members signed a petition that focused on the campus’ history of racial problems and, to many readers, obliquely criticized the boys. Later, other professors made public statements welcoming the lacrosse players into their classes.
Desperately trying to preserve its hard-won reputation as an upper-echelon school, the university quickly cancelled the lacrosse season, suspended the three indicted players, and commenced a series of internal investigations.

After nine months of dramatic revelations and much discussion in the press and elsewhere, Nifong dismissed the rape allegations because Mangum belatedly claimed that she could not be sure that she had been penetrated. Despite this equivocation, Nifong refused to drop the pending sexual-assault and kidnapping charges. Soon after, however, the North Carolina Bar Association charged Nifong with violating several ethics provisions based on his handling of the prosecution. This was the first time that the Bar had ever filed ethical charges prior to the disposal of the underlying case. Within days of being charged, Nifong passed the case along to the North Carolina Attorney General who, after reviewing the proof, dismissed all remaining charges against the lacrosse players and publicly declared their innocence. After a thirteen-month ordeal, the case was finally over. Eventually, the disgraced Nifong was disbarred.

As this brief rendition of the facts makes clear, the Duke lacrosse rape case presents the opportunity to consider a wide range of issues, including alcohol consumption on college campuses; the impact of race, gender, and class on the criminal-justice system and perceptions thereof; the use of DNA evidence and eyewitness-identification procedures in criminal cases; prosecutorial ethics; and even academic freedom. This book aims to capitalize on this unique academic opportunity.

Chapter One, by Robert J. Luck and Michael L. Seigel, sets the stage by telling the story of the Duke rape case in an essentially chronological fashion. Its goal is to set out the facts gleaned from other sources in a succinct and accurate manner. It strives for as neutral a presentation as possible, leaving it to the authors of other chapters to draw inferences from, and argue positions based on, the raw facts.

Robert M. O’Neil, in Chapter Two, takes up the issue of academic freedom. Although university professors are predictably contentious on many issues, the intensity and occasional acerbity of debate within the Duke faculty following the rape charges were exceptional if not unprecedented. That debate opened, or reopened, many wounds close to the core of faculty concerns, including the treatment of student-athletes and even the proper role of intercollegiate sports in a university of the highest academic standing. It eventually exposed the inherent tension between basic values that a faculty must reconcile, however uncomfortably, at an institution like Duke. A faculty’s capacity to address that tension, and the consequences for academic freedom as well as academic values, has never been so severely tested as at Duke during 2006 and 2007.
In Chapter Three, Sharon Rush explores the peculiar dynamics that often exist between residents of a college town and its university’s students. She demonstrates that, although class and race generally characterize the divide between these two groups, the tension goes much deeper and touches on many human emotions. For example, some people associate having a lot of money with being intelligent (and lacking money with being “not so smart”), which can be quite upsetting to the permanent residents who have no way of defending themselves against accusations that they are “inferior.” Some university students believe that they are the “real mission” of the town and that the residents, who often work at the university, are only there to serve them. To them, the townspeople have no independent identity or worth. As Rush reveals, the incident at Duke offers a perfect illustration of the tensions inherent in the town-gown paradigm: the prosecution premised its entire investigation on underlying and often unstated assumptions about credibility and “worth” that derive from it. Rhetorically, how could an “uneducated” (that is, non-Duke) resident of Durham hope to successfully impugn the integrity of a Duke student? Was Mangum’s accusation doomed from the start—regardless of the “truth?” Did the outcome actually exacerbate the tensions inherent in the town-gown paradigm? Rush answers these questions, and more.

The fourth chapter, by George W. Dowdall, examines the role alcohol abuse plays in the darker side of college life. Internal Duke investigations after Crystal Mangum’s rape allegations indicated that members of the school’s lacrosse team had a history of committing minor infractions on and off campus. Many of these were direct violations of alcohol regulations and ordinances, such as underage drinking and drinking in dorm rooms. Others were alcohol-related, including noise violations, property damage, and physical altercations. In addition, the literature is rife with studies linking more serious crimes, such as sexual assault and rape, to alcohol abuse. This chapter makes clear that, despite the innocence of the defendants on the rape charges, there is still much taking place on college campuses that ought to concern administrators, faculty, and parents alike.

In Chapter Five, Michelle S. Jacobs tackles the link between sports, violence, and male privilege on college campuses. She argues that the Duke case is one of an increasing number in which athletes or members of campus fraternities have become involved in off-campus incidents allegedly involving sexual misconduct. Despite two decades of legal reforms, the problem of rape and other unwanted sexual conduct continues to plague college environments. Jacobs explores this complex topic.
In Chapter Six, Michèle Alexandre analyzes the race and gender implications of the Duke and Durham communities’ reactions to the rape allegations. In particular, Alexandre explores issues involving the historical and ongoing objectification and subjugation of black women in Western society. She also examines existing legal protections for women working in the sex industry and makes proposals for reform.

Janine Young Kim takes the opportunity in Chapter Seven to analyze the Duke rape prosecution as a case study in racial politics, which shape both the substance and enforcement of criminal law in America. She explores the varied racial dimensions of the case within the context of Duke and Durham as well as the history of white-on-black rape in the South. This chapter links the Duke case to more general themes of race and the law, including problems of over- and underenforcement and the role of criminal law in effecting racial (in)justice.

In Chapter Eight, Andrew Taslitz considers the impact that high-profile media coverage, such as that given to the Duke rape case, has on the possibility of providing criminal defendants a fair trial. His major focus is on the tension between the First Amendment right of the press to report the news and the fair-trial rights of defendants. The Duke case, however, raised an unusual, although by no means unique, twist: later coverage was more harmful to the state than to the defendants, thus raising the risk that the prosecution would have been unfairly handicapped had the case gone to trial. This risk arguably involved tainting the victim’s credibility in the public’s mind before trial ever began. The chapter thus fuses social-science research on the impact of media attention on jury pools and sitting jurors with case law on the tension between free speech and trial fairness. The combination yields broader lessons about the state of the law in this area and the best way, as a policy matter, to balance the interests of all concerned.

Lenese Herbert, in Chapter Nine, identifies the Duke case as a moment when prosecutorial discretion met “disaster capitalism.” The latter is an economic theory explaining how capitalists take advantage of catastrophic events, which leave large portions of the public in shock, to impose their private will upon consumers; Herbert applies the concept to political actors and motivations. She first details the vast power that the American legal system grants prosecutors by giving them sole discretion to decide whether to charge a case and, if so, which charges to bring. She then discusses disaster capitalism. Herbert makes the case that, by bringing Durham’s latent racial tension to the surface, Mangum’s rape allegations against the Duke lacrosse players amounted to a public disaster with potential catastrophic results. Nifong attempted to capi-
talize on this disaster by publicly playing the “race card” to win re-election. He failed, but the consequences were still very harmful. Worse, opportunities for other disaster capitalists to wreak havoc will undoubtedly arise in the future.

Rodney Uphoff focuses in the tenth chapter on the sad fact that only a minority of defendants in America could have received the benefit of the zealous representation afforded those in the Duke case. As he sets out, the Duke situation highlighted the enormous difference that competent counsel can make in the outcome of a serious felony case. Sadly, many defendants are doomed to a plea bargain because they are represented by lawyers without the time, ability, or expert assistance needed to mount a successful defense. Ultimately, he concludes, uneven access to counsel in America means unequal justice for many.

Prosecutors are key players in the criminal-justice system. They decide whether to charge a person with a crime and, if there is a prosecution, which charges to bring against the accused; their decisions are effectively unreviewable. Along with this enormous decision-making authority, however, come critical ethical duties. In Chapter Eleven, Kenneth Williams explores the parameters of prosecutors’ ethical responsibilities and discusses how, in the Duke case, Mike Nifong egregiously violated them. He further argues, however, that Nifong was not the aberration that many saw him to be. Williams makes the case that prosecutorial misconduct is a systemic problem, and suggests some tentative solutions.

In Chapter Twelve, I take a hard look at a critical but undervalued step in the criminal-justice system: the moment when a grand jury is asked to return a true bill. Although our Founding Fathers intended the grand jury to be a bulwark against unwarranted prosecutorial power, it no longer serves this function in most jurisdictions. In North Carolina, in fact, it operates as an unreviewable indictment mill that actually hampers a defendant’s ability to mount a pretrial challenge to the charges against him. I argue that the present grand jury system should be abandoned and replaced by one of two charging methods. For run-of-the-mill cases, the ideal procedure would consist of prosecutor-instituted charges followed by a preliminary hearing; for cases involving reputation-ruining accusations, such as rape and child molestation, a grand jury inquiry with significantly beefed-up protections for the accused would be best.

In Chapter Thirteen, Gary Wells, Brian L. Cutler, and Lisa E. Hasel review the basic principles of proper lineup procedure and demonstrate the many flaws in the lineups conducted by Nifong and the Durham police. Indeed, they demonstrate how the procedures in the Duke case violated almost every important standard of how lineups should be conducted, including the failure to use known-innocent fillers. Their conclusion is that, as conducted, the
Duke lineups offered no real opportunity to assess the credibility of Mangum’s identifications.

Chapter Fourteen, authored by Paul Giannelli, examines the DNA evidence in the Duke case. It starts out as a primer on DNA evidence in general, setting out its scientific basis and discussing the powerful effect it had on the criminal-justice system immediately upon its introduction in criminal cases in the late 1980s. Next, Giannelli delineates the DNA evidence gathered in the Duke case and analyzes its significance. He reaches the frightening conclusion that the only thing that may have prevented the wrongful conviction of the Duke defendants was the DNA evidence.

The final chapter, contributed by Aviva Orenstein, explores how American law and society treat those accused of sex crimes differently from other criminal defendants in both favorable and (mostly) unfavorable ways. For example, evidence law provides special shields excluding victims’ sexual history but admits character evidence of the accused’s prior sexual misconduct. Additionally, in prison, inmates tend to single out sex offenders, particularly pedophiles, for especially harsh treatment, including rape. Even after completing their sentences, sex offenders may face preventive detention if a court deems them dangerous, and must comply with laws limiting their privacy and, sometimes, their mobility. Orenstein establishes, however, that the public’s heightened awareness of these issues and its increased concern about false rape accusations has complicated this situation in recent years, particularly when the accused is rich, white, or famous. The backlash against perceived false allegations and the cultural suspicion of alleged rape victims, particularly those who are seen as promiscuous, incautious, inebriated, crazy, or vindictive, make the legal and social status of sex offenders more nuanced and ambiguous than would initially appear.

I expect that the reader will agree with some of the chapters in this volume and disagree—perhaps vehemently—with others. That, at least, is my intention, because that is the nature of the academic enterprise.

Michael L. Seigel
Tampa, Florida
October 29, 2008
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I would like to thank, first and foremost, the thirteen contributors to this book. Each of these scholars embraced this project from the outset and signed on to it even before it had a publisher. Without their enthusiastic support, and their hard earned reputations as experts in their respective fields, this endeavor never would have been launched. In addition, of course, without their hard work and dedication, the book would not have been completed.

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Next, I say thank you to the many research assistants who worked with me on this project. First mention goes to Tiffany Cummins, now law clerk to the Honorable Mary Scrivens, United States District Court, Middle District of Florida, who headed up a team of students assigned to the task of bringing me up to speed on the details of the case. The other students in this group were Lisa Blum, Ryan Maxey, and Ryan Nelson. After Tiffany graduated, Elizabeth Manno filled her shoes spectacularly, spending countless hours assisting me in editing drafts, tracking down sources, and checking footnotes for proper citation form.

Finally, I am grateful to Keith Sipe, publisher of Carolina Academic Press, for immediately believing in the value of this project and my ability to get it
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Michael L. Seigel
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