

RACE TO INJUSTICE

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**LESSONS LEARNED FROM THE
DUKE LACROSSE RAPE CASE**

Edited by
Michael L. Seigel

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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 lineup 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
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