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The Phases and Faces of the Duke Lacrosse Controversy: A Conversation

Angela J. Davis
American University Washington College of Law, angelad@wcl.american.edu

James E. Coleman Jr

Michael Gerhardt

K.C. Johnson

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*James E. Coleman, Jr.**

*Angela Davis***

*Michael Gerhardt****

*K.C. Johnson*****

*Lyrissa Lidsky******

*Howard M. Wasserman*******

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* Associate Dean for Special Projects and Priorities and John S. Bradway Professor of the Practice of Law at Duke University School of Law; Director of the Duke Center for Criminal Justice and Professional Responsibility, which includes the Duke Wrongful Convictions Clinic. Professor Coleman also chaired the university committee that investigated the team's behavior and recommended to the university that the program be reinstated.

** Professor of Law, American University Washington College of Law. Professor Davis is the author of *Arbitrary Justice: The Power of the American Prosecutor*, published in 2007 by Oxford University Press. The book won the Association of American Publishers 2007 Professional and Scholarly Publishing Division award for excellence in the Law and Legal Studies Division.

*** Samuel Ashe Distinguished Professor of Constitutional Law and the Director of the University of North Carolina Center on Law and Government at USC Chapel Hill Law School.

**** Professor of History, Brooklyn College and The Community Graduate Center; Fulbright distinguished chair in Humanities at Tel Aviv University (2007-08). Professor Johnson is the co-author with Stuart Taylor of *Until Proven Innocent: Political Correctness in the Shameful Injustices of the Duke Lacrosse Rape Case*, and the editor of *Durham in Wonderland*, one of the leading blogs on the case and named by the ABA Journal as "the best ethics blog in 2007."

***** Professor of Law, University of Florida Levin College of Law. Professor Lidsky is the co-author of case books on media law and first amendment law.

Professor Howard Wasserman

The genesis of this panel is an essay I wrote arguing that the single moniker "Duke lacrosse controversy" encapsulates a broad, multi-faceted legal, political, and social controversy that more accurately consists of five related seriatim sub-controversies.[1] Initially, it was a sexual assault case. An African-American woman, hired as an exotic dancer at a party thrown by members of the Duke University men's lacrosse team, reported to Durham police that she had been sexually assaulted by several white team members.[2] The allegations quickly became a national story, tinged with issues of race, class, gender, privilege, and at some level, the role of athletics and athletes in the university community.[3] It then became a story about an overzealous prosecutor and overzealous police, pursuing and obtaining indictments of three players despite mounting evidence of their innocence and the complainant's lack of credibility. It then became a story of actual innocence. The prosecution's case fell apart in the face of vigorous defense work and the North Carolina Attorney General intervened and, following an independent investigation, declared the three indicted lacrosse players to be actually innocent.[4] It then became about prosecutorial ethics, when the North Carolina Bar instituted an ethics complaint, resulting in the disbarment of Durham County District Attorney Mike Nifong for his actions in misleading the court, withholding exculpatory evidence, and making public statements intended to prejudice the targets of the investigation.[5] Finally, it became a story about the role of

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****** Associate Professor of Law, FIU College of Law. Professor Wasserman organized and moderated the panel conversation.

1. Howard M. Wasserman, *The Civil Suit Arising Out of the Duke Lacrosse Rape Case: How It Illustrates the Limits of Civil Rights Litigation Even When Serious Wrongs Have Been Done*, FINDLAW'S WRIT, Oct. 16, 2007, http://writ.news.findlaw.com/commentary/20071016_wasserman.html.

2. For comprehensive news coverage of the entire Duke Lacrosse controversy, including the content of the allegations, *see* Duke Lacrosse Controversy, http://www.newsobserver.com/news/crime_safety/duke_lacrosse/ (last visited Oct.18, 2008).

3. Stuart Taylor Jr. & K.C. Johnson, Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case 122 (2007); Wasserman, *supra* note 1.

4. TAYLOR & JOHNSON, *supra* note 3, at 351-55; Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007, at A1.

5. R. Michael Cassidy, The Prosecutor and the Press: Lessons (Not) Learned from

civil litigation to remedy unconstitutional and tortuous misconduct in the criminal justice system. Forty-one lacrosse players have filed two separate lawsuits against various government actors, Duke University, and Duke officials.[6] Underlying each phase are issues of race, class, gender, the role of athletics, the role and obligations of university faculty, the role and obligations of university administrators, and the role of the mass media in covering the criminal justice system and how press coverage contributed to the problems in this controversy.

In composing this panel, we sought people who could speak to each of these distinct phases and all of the underlying issues and sub-issues. Several of our panelists were in the eye of the storm in North Carolina.

To begin: Where did Nifong and the police go off the rails? From the accusations that were made forward, at what point did he make his mistakes?

Dean James Coleman: I think the point at which Nifong went off the track was at the very beginning, when he met with the police the morning after they picked up the woman in a parking lot and took her to the hospital. Some of the officers told Nifong that the woman had been raped by students from the Duke lacrosse team, and he immediately repeated that publicly as if it were an established fact.

Professor Wasserman: The mistake was talking to the press about this right at the outset?

Dean Coleman: Well, it was representing to the public that there had been a rape and that it had been committed by the Duke students when he had no factual basis even to make the allegation, let alone to represent it as a fact that he would be able to establish. And I think that's how he presented the allegation. It was not that the woman was claiming it; it was "in fact, this happened."

Professor Michael Gerhardt: Let me acknowledge at the outset that, in fact, there are some things bigger than the Duke-UNC rivalry; one of them is criminal justice. And just

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the Mike Nifong Debacle, 71 LAW & CONTEMP. PROBS. (forthcoming Autumn 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022620; North Carolina State Bar v. Nifong, 06 DHC 35 (July 2007), *available at* http://www.ncbar.com/orders/06dhc35.pdf.

6. Complaint, Evans v. City of Durham, No. 07-CV-739, (M.D. N.C. Oct. 5, 2007); Complaint, Carrington v. Duke Univ., No. 08-CV-119, (M.D. N.C. Aug. 28, 2008).

maybe to add onto what Jim is saying—of course, Nifong compounded his mistakes in numerous ways—but one way was to, I think, quite mistakenly, to try this case publicly. That's a strategy that is fraught with risks. When I was in practice in Washington in a firm that did a lot of criminal trial work, we basically used to take the view that you don't try your case in public. You try it in front of the jury, and with Nifong you saw how he would systematically get ahead of his evidence in trying to get involved in a public spin and got almost intoxicated with the media coverage. I think that just became a toxic sort of problem for him, certainly, in the short and long run.

Professor Angela Davis: I agree with everything that has been said in terms of his announcing this in the media—something, by the way, that numerous prosecutors do.[7] This is not unique to Nifong and, in fact, nothing much of what he did was unique. I think it's important to note that the very thing he did in terms of charging these young men was not uncommon, nor was there anything wrong with him charging them at the beginning. I say that because we're past the day and age when we require corroboration for rape offenses. The nature of the act of rape is such that there are rarely witnesses and, oftentimes, there is not forensic evidence. There are frequently cases where a prosecutor will talk to a rape victim and exercise his or her discretion in making a decision, saying, "I believe that there is enough here for probable cause and I'm going to bring the charge." And, by the way, there was corroboration here because there was a nurse who, in fact, verified injuries that were consistent with rape. So bringing the charges in the first place was not what he did wrong.

What Nifong did wrong was fail to turn over exculpatory evidence. When he found out that there was exculpatory evidence, he had a constitutional obligation under Brady v. Maryland[8] as well as an ethical obligation under Rule 3.8 of the Model Rules of Professional Responsibility[9] and the North

7. *See* Peter A. Joy & Kevin C. McMunigal, *Lawyer Ethics and Expanding the Role of the Media in Criminal Cases*, 17 ABA PROF. LAW. 1, 1 (2006) ("Both prosecutors and defense lawyers often seek to use the media to shape public opinion and tilt the scales of justice.").

8. Brady v. Maryland, 373 U.S 83, 87 (1963).

9. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2000), *available at* http://www.abanet.org/cpr/mrpc/rule_3_8.html.

Carolina rules[10] to turn over that information and he didn't. And that, in addition to talking to the press, was to me—and I know everybody has a different interest—but to me, that was the most egregious thing that he did.

That ultimately resulted in him being disbarred. Nifong's conduct of not turning over exculpatory information is extremely common; it happens all the time.[11] The punishment he received, however, rarely, if ever, happens to prosecutors, and I think race and class had a lot to do with that. I will talk about this more later in the panel.

Professor K.C. Johnson: I would agree with Jim that Nifong was off the rails from the start. There is one contextual item here that is important: the day that Nifong first spoke publicly about the alleged crime, he was down seventeen points in the polls for the upcoming D.A. election, which was being held in six weeks. Nifong's campaign had also run out of money. He had decided to self-fund his campaign, giving a $30,000 loan to his campaign. So, I think that it is quite true that, from a legal standpoint, trying this case publicly was just disastrous, but there is no evidence that Nifong was looking at this from a legal standpoint when he initially went public.

From a political standpoint, at least in the short term, it was a winning strategy. He won the primary. He won the general election. Of course, he paid for it down the road.

One of the things, like Angela said about the decision to indict, the Attorney General's investigation concluded was that, in fact, the sexual assault nurse who did provide this information to the police badly misrepresented the evidence.[12] In fact, she had seemed to have told the police that she had conducted the sexual assault exam when she had not because she was a nurse-in-training. And so, this was a case where no evidence to move forward ever existed.

Professor Davis: But he didn't know that.

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10. N.C. RULES OF PROF'L CONDUCT R. 3.8 (2006), *available at* http://www.ncbar.gov/rules/rules.asp.

11. *See* Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452 (2006) (stating "prosecutors still frequently fail to perform [the *Brady* doctrine] duty").

12. Roy Cooper, *Summary of Conclusions*, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, *available at* http://www.newsobserver.com/content/news/crime_safety/duke_lacrosse/20070427_AGreport.pdf.

Professor Johnson: That's not clear. He probably did know about the discrepancies in the sexual-assault nurse's versions of events at this time. And, also, in terms of the exculpatory evidence, Nifong actually knew about the exculpatory evidence with regards to DNA before he made the decision to indict, which relates to all kinds of other things he did wrong.

Professor Wasserman

If it was a combination of Nifong's political ambitions and the media, we should focus on the political-ambition point for a second. We know that local prosecutors are publicly elected; they are public officials and electoral pressure comes with the job. How do we control so that the electoral interests do not overcome or overbear on the prosecutorial and the ethical interests?

Professor Davis: Almost all state and local prosecutors (as opposed to Federal prosecutors) are elected officials. They run for office just like any other elected official. So there's this constant tension between being accountable to the constituents they serve, on one hand, and on the other hand, being independent decision-makers in their roles as prosecutors.[13] There is a tension there that I, quite frankly, don't think has been resolved. When I argue all the time that there are not effective mechanisms for holding the prosecutors accountable for misconduct and the regular exercise of their discretion, prosecutors always say to me, "Yes, there is. I'm an elected official. If the people don't like what I'm doing, the people will vote me out." One way to look at it is that Nifong was pandering to his constituents. It certainly appeared that way. The other way to look at it is that he was responding to his electorate because they wanted him to prosecute. But that's inappropriate because prosecutors are not supposed to look to the electorate before making decisions in individual cases. What I do think, however, is that Nifong was probably well aware of the long and rather sordid history of rape complaints being ignored—especially rape complaints by African American women. Jeff Pokorak has written a great article on the history of this phenomenon.[14] Black women,

13. *See generally* Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 163-66 (2007).

14. See generally Jeffery J. Pokorak, *Rape as a Badge of Slavery: the Legal History*

especially if they were accusing a white man of raping them, were never taken seriously. So here Nifong had a complaint that was corroborated. If he knew that the evidence from the nurse was wrong from the beginning, that's a different story. But the point is that prosecutors make these types of decisions every day and the standard for bringing charges is probable cause, which is a very low standard—more probable than not.[15] Of course if there was exculpatory evidence, he should have turned it over to the defense.

What often happens with prosecutors, I think, is that they dig their heels in, and zeal turns into misconduct. I think that's what happened here.

Professor Lyrissa Lidsky: From one perspective, what the prosecutor did, had the facts been slightly different, was admirable. He didn't fold to pressure to let these young, privileged, white men off just because the victim happened to be a woman and black and a sex worker. So it flies in the face of stereotypes about how social class might affect the decision to prosecute. He was trying to not give in to those pressures, but perversely, once he had staked out a position about what the evidence was going to show, he ignored everything after that which might have led him to a contrary position.

Dean Coleman: Could I just add one other thing on this? I think that the political campaign was clearly a factor in what happened, but I don't think Mike Nifong set out to frame the students. I really think that in the beginning he thought that there had been a sexual assault of some kind and he saw it as an opportunity in his campaign. There was an earlier case in 1993, where a homeowner had shot two African American men in the back who had tried to burglarize his house, but were running away. The homeowner was not convicted for the shooting. I don't even know if he was prosecuted for the shootings, because, clearly, there was no need to use deadly force in the circumstances in which he used it.

And I think that what he was doing was saying that, "I'm not going to be that kind of prosecutor. I'm going to be a different prosecutor. I'm actually going to prosecute cases

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of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities, 7 NEV. L.J. 1 (2006).

15. *See* Hoxha v. Levi, 465 F.3d 554, 559 (3d Cir. 2006) (describing probable cause as a "very low standard" of proof); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 996 (2003) (probable cause is a "percentage nestled somewhere between .01% and 51%").

when black people in Durham are victims." So I think that was what he started out to do. The problem was he just didn't—you know, there were no facts to support his conclusion that there had been a crime in the lacrosse case. That was the problem.

Professor Gerhardt: I'm going to beat the same drum which is that I think, accepting everything that's already been said, Nifong still compounded his problems by making a decision to try his case in public. I'm going to go back to Angela's point and the other points made here that trying his case in public helped create a dynamic that explains a lot of what happened. The media moves at the speed of sound, not faster than it. Certainly, in this day and age, the media circus that developed around that case moved quickly and was going to just pounce on and exaggerate everything that was going on if Nifong is going to pay attention to that and worry about that and try to factor that into what he's doing and try to play that. The public side of the case is going to happen much faster than whatever is happening in court. If you go back to Angela's point, yes, state prosecutors, by and large, are elected. But state prosecutors, by and large, when facing cases like this have a choice. They can either figure out a way to break down the tension level or they can choose to play into that tension and exacerbate it the way that Nifong did. There are high-profile cases all the time. Prosecutors have to make choices, and I certainly agree that maybe one of the real things to watch here is the fact that this kind of misconduct is the tip of an iceberg. What we have to worry about are all those cases like this where you don't have as good a defense counsel or the kind of evidence that would help bring the misconduct to light. But having said that, I think Nifong could have made a choice to try his case differently and, in fact, maybe work with the defense counsel not to make it so public and that might have brought about a much different, maybe somewhat more congenial outcome.

Dean Coleman: And probably with the same political benefit.

Professor Gerhardt: Possibly. Although, if he's going to worry about the speed with which public opinion was formed and about election coming up, you'd think that would make him worry about whether he could move fast enough in the case to get that benefit.

Professor Johnson: I think Jim is correct on Nifong's

motive. The Bar panel that disbarred him described it as "self-delusion motivated by self-interest."[16] In his own mind, he probably had convinced himself that there was a sexual assault. At his disbarment trial, he was asked if he still believed something happened—this was after the Attorney General had declared actual innocence—and he said, "Yes." The chair of the panel was just astonished at this remark and Nifong mumbled something like, "Well, intimidation happened."

In terms of this check on the prosecutor, the one conceivable check, which we did see on Nifong later on, was the media. What struck me about the earlier media coverage was obviously, this was going to be something that attracted a lot of attention because of the sensational nature of the charges and the salacious nature of the charges. You have Nancy Grace[17] in it, and you see it every 10 seconds on her show. But what's amazing is this sort of early rush to judgment not from Grace but from highbrow publications—Newsweek,[18] The New York Times[19]—not even asking the question whether Nifong might have had an ulterior motive, not saying that he did have such a motive, but at least raising this question.

I wasn't from Durham, I had no real idea that there was an election coming up, and I suspect most people who were following the case from outside didn't. But if there's an election coming in six weeks and you know this guy is losing, you might at least raise the question as to whether he has another motive. Instead, from the outside, Nifong seemed like he was an admirable man, a white man standing up to privilege in the South. How could you not admire him from the outside, at least initially? I think the media really failed early on in terms of not raising the possibility that there might be an ulterior motive from what was very strange to

16. K.C. Johnson, Durham in Wonderland, Comments and Analysis about the Duke/Nifong Case, *see* http://durhamwonderland.blogspot.com/2007/06/reflections-on-hearing.html (last visited Dec. 29, 2008).

17. *See generally*, Show Pages – Nancy Grace, http://www.cnn.com/CNN/Programs/nancy.grace/ (last visited Dec. 29, 2008).

18. *See* Evan Thomas, *A Rush to Judgment,* NEWSWEEK (Sept. 10, 2007), available at http://www.newsweek.com/id/40778. (last visited Dec. 29, 2008).

19. *See* The NYT's Flip-Flop on Nifong, National Review Online, *available at* http://media.nationalreview.com/post/?q=YzlkMzA4Y2MyNmE4NWIxZTRhM2IwZGQyMGM3NDU4Y2I = (last visited Dec. 29, 2008).

begin with.

Professor Wasserman

It has been suggested that Nifong's initial mistake was talking about this in public in the first place and attempting to try the case in public from the outset.[20] So talk about the media's conduct here. Why was the media coverage so intense? And which came first, the media's interest or Nifong's use of the media? Was he using the media and then everybody started flocking to the story, or were they already interested in the case?

Professor Gerhardt: I don't know if that was Mike Nifong's first mistake, but it certainly was one of many. I think that the media interest, I'm sure, came first. We have a dysfunctional media system, you know, and that's an understatement. The preoccupation with the national media—you have the 24-hour news cycle, the Internet, the soft news which is just speculation and opinion rather than hard facts—is a myth. There's just a proliferation of soft news everywhere, I mean, how do they keep that 24 hours filled up? So the Duke case plays into that a little bit in the sense that you've got some dynamics there which are going to, as Richard Posner likes to say, you know, "It's got sex in it," so that means it's different. Here, it's not just sex, it's got race in it, so you combine those things, and you put those on TV, that would be a good show from the point of view of the media. And I think Nifong, I suspect—and this is just total speculation; I'm sure I'll be proven wrong in a second—did not have that much experience with the media and certainly wasn't media savvy and I think his inexperience surfaced. The media circus either just confused him or he tried to play into it, but obviously in a way that was only harmful.

Professor Lidsky: I'm not going to rise to the defense of the media much here, but on the other hand, Nifong gave over 50 interviews in the first two weeks of the incident.[21] You have a prosecutor coming to the media and bringing them this information. And certainly they didn't question whether

20. Renée E. Moeller & Robert S. Bennett, *NIFONG Texas Style*, *available at* http://www.bennettlawfirm.typepad.com/badprosecutors/files/Nifong.doc.

21. Benjamin Niolet & Anne Blythe, *Judge Warns Lawyers in Lacrosse Case*, NEWS & OBSERVER, July 18, 2006, *available at* http://www.newsobserver.com/1185/story/461685.html.

Nifong had an ulterior motive. They didn't even apply the normal skepticism they should have in dealing with a prosecutor, much less one up for reelection. They didn't take into account the tremendous power of an accusation of criminality, particularly by a prosecutor; once an accusation is made, you've got a black mark by your name that is going to affect your reputation tremendously. It's the media's job to think about the presumption of innocence and to think about the narrative of the story, but this was an irresistible story.

It's an irresistible story because it involves sex but also because of the dualisms in the case: white/black, rich/poor, men/women, well educated/not as-well educated. It also involves athletes versus a woman who is a sex worker and an exotic dancer. It even has a kind of a north/south dualism: most of these young men were from the North even though they went to Duke and the woman was from the South.

It's a morality tale, and the media portrayed it as a morality tale without really digging deeper and seeing if that narrative really held in the long term. But it's very hard for the media not to take seriously a prosecutor giving numerous interviews and holding press conferences. It was very hard for the media not to report on that, but the reporting was truly excessive and lacked solid information to back it up. The media didn't dig for the underside of the story.

Dean Coleman: I agree with the point that this was not initially Nifong using the media. I think he was very unsophisticated in that respect. And my guess is that he probably would not have thought of this as an enormously big case. In a college town, sexual assault is not the kind of story that usually leads on the national news. But I think the national media turned this into sort of a Tom Wolfe novel.[22] And, all of a sudden, Nifong was standing by and they stuck the microphones in his face and turned the cameras on and he started talking. And the reason he did 50 interviews is because 50 people came up to him with the cameras on and he got carried away with that and it kept the story going. Finally, K.C. started his blog[23] and that kept the story going. All of a sudden, people forgot that this is about a sexual assault, and it just sort of became a morality play.

22. *Cf.* Tom Wolfe, I am Charlotte Simmons (2004).

23. Durham-in-Wonderland, http://durhamwonderland.blogspot.com/.

Professor Wasserman

Professor Johnson writes about the extent to which the media perpetuated these underlying issues of race and class.[24] How much did the media drive those issues or really bring those issues to the floor?

Professor Johnson: I think you can look at the good and the bad coverage of this case. The bad was The New York Times' and what was stunning about The New York Times coverage is that the initial reporter on the case—a sportswriter named Joe Drape—did very, very good reporting. In fact, you should go back and look at his articles, which are still online.[25] He raised questions. He asked very serious questions of the defense attorneys.[26] The defense attorneys trusted him. They turned the evidence over to him. He was promising a story that—this was very, very early after the charges were first floated in early April 2006—was going to lay out all of the holes in Nifong's case. And then, as he told the defense attorneys, he was taken off the case by his editors, who wanted a storyline that would emphasize more race, class, gender, sports misbehavior, and presumption of guilt. The reporter that was put in, Duff Wilson, did everything that could've been asked and even more—he was essentially a Nifong PR agent for several months.[27] So the Times coverage was extraordinarily bad and the Times really shaped a kind of

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24. TAYLOR & JOHNSON, *supra* note 3, at 118-26, 269-71.

25. Duff Wilson, Joe Drape, Duke Case Could Turn on Players' DNA Tests, N.Y. TIMES (April 10, 2006), *available at* http://www.nytimes.com/2006/04/10/sports/10duke.html?_r=1 (last visited Dec. 29, 2008); Joe Drape, Lawyers for Lacrosse Players Dispute Accusations, N.Y. TIMES (Mar. 31, 2006), *available at* http://www.nytimes.com/2006/03/31/sports/31duke.html (last visited Dec. 29, 2008); Rick Lyman & Joe Drape, Viv Bernstein, Anahad O'Connor, Nate Schweber, Duke Players Practice While Scrutiny Builds, N.Y. TIMES, (Mar. 30, 2006), *available at* http://www.nytimes.com/2006/03/30/sports/30duke.html (last visited Dec. 29, 2008).

26. See, e.g., Joe Drape, Lawyers for Lacrosse Players Dispute Accusations, N.Y. TIMES, Mar. 31, 2006, at D5, available at http://www.nytimes.com/2006/03/31/sports/31duke.html?scp=3&sq=joe%20drape%20duke%20lacrosse&st=cse. *See also* Joe Drape & Duff Wilson, *Duke Case Could Turn on Players' DNA Tests*, N.Y. TIMES, Aug. 10, 2006, *available at* http://www.nytimes.com/2006/04/10/sports/othersports/10duke.html?scp=4&sq=joe%20drape%20duke%20lacrosse&st=cse.

27. For more information about Duff Wilson, *see generally* Reporter.org, Biographical Sketch, http://www.reporter.org/desktop/rd/duffbio.htm (last visited Nov.22, 2008).

national agenda, based on a Tom Wolfe novel.[28] The combination of the Times news coverage and its op-ed coverage in the sports pages, especially Selena Roberts, really shaped how the national media viewed this.

And if you look at how this could have been done, the Raleigh paper, The News & Observer, very quickly assigned the case to their lead reporter who handed prosecutorial misconduct, Joe Neff, who did extraordinary reporting.[29] Anyone who read Neff's stories understood exactly what was going on. If you read [ ] The New York Times in this case, you would have been stunned that the charges were dropped because, according to the Times, this was a pretty solid case.[30]

Professor Wasserman: Professor Lidsky is beginning work examining the role and responsibility of the press in covering the early, investigatory stages of the criminal-justice process. What is the media's responsibility in a case such as this? What should the media be keeping in mind in sort of descending on a community and covering these early stages of a criminal investigation and police work?

Professor Lidsky: I'm interested in the tort liability perspective. What can the press safely say early on in an investigation? I would point to a series of cases involving incidents where the press rushed to judgment and ended up getting sued in the process.

The Richard Jewell case is an older example now. Richard Jewell, was reported to be a suspect in the 1996 Olympic bombings in Atlanta based on an unsubstantiated leak from law enforcement sources, and his life was ruined and he ended up in a series of libel lawsuits and achieved some settlements, notably from NBC News and CNN.[31]

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28. For more information about Tom Wolfe and his novels, *see generally Tom Wolfe Biography*, Academy of Achievement, Oct. 8, 2005, http://www.achievement.org/autodoc/page/wol0bio-1; The Thomas Wolfe Society & The Thomas Wolfe Review, http://library.uncwil.edu/wolfe/twrcover.htm (last visited Oct. 18, 2008).

29. *See, e.g.*, Joseph Neff, *Lacrosse Files Show Gaps in DA's Case*, NEWS & OBSERVER, Aug. 10, 2006, *available at* http://www.newsobserver.com/1185/v-print/story/468272.html.

30. See *id*; see Joseph Neff, Cop Says Nurse Found Trauma in Duke Case, NEWS & OBSERVER, Aug. 27, 2006, *available at* http://www.newsobserver.com/news/crime_safety/duke_lacrosse/v-print/story/479650.html.

31. See Kevin Sack, Richard Jewell,44, Hero of Atlanta Attack, Dies, N.Y. TIMES, Aug. 30, 2007, at C13, available at

A more recent example that's very interesting is the Steven Hatfill case. Steven Hatfill is the scientist who was originally investigated by the FBI in connection with the 2001 anthrax attacks. Nicholas Kristof of the New York Times started writing about why the FBI was not investigating more vigorously the person whom they privately claimed might be responsible for the anthrax mailings.[32] Hatfill ended up suing quite a few people, including the New York Times, for defamation and intentional infliction of emotional distress.[33] He also sued the government for a Privacy Act violation for leaking his name to the press; that suit settled in June of 2008 for $4.6 million. It's instructive that the New York Times ended up getting dismissed from the suit because Nicholas Kristof, in his columns, didn't name Hatfill until another media outlet had named him, and Kristof also talked about both sides of the evidence. Kristof's columns were really about why the government wasn't investigating Hatfill and clearing him instead of leaving him in limbo.

What ultimately helped Kristof and the New York Times to avoid liability? First, Hatfill was deemed a limited-purpose public figure[34] because he had thrust himself into the anthrax controversies before Kristof named him as a subject of the

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http://www.nytimes.com/2007/08/30/us/30jewell.html?n=Top/Reference/Times%20Topics/People/S/Sack,%20Kevin.

32. Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, Aug. 13, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9404E6DF113AF930A2575BC0A9649C8B63.

33. Hatfill v. N.Y. Times Co., 416 F.3d 320, 324, 337 (4th Cir. 2006). The Fourth Circuit initially reversed a trial court dismissal of Hatfill's claims, based in part on the grounds that the theme of Kristof's columns was that the FBI should investigate Hatfill more vigorously based on the evidence known to Krtistof. *Id.* On remand and after extensive discovery, the district court granted the *Times*' motion for summary judgment. *Id.* The district court held that Kristof's carefully worded columns could not constitute "outrageous" conduct. *Id.* Moreover, Hatfill had produced no evidence that Kristof intended to produce or was reckless in inflicting emotional distress. *Id.* Finally, the trial judge dismissed Hatfill's defamation claims on the ground that the statements complained of were not materially false and that there was no evidence that Kristof was aware of probable falsity. Hatfill v. N.Y. Times Co., 488 F. Supp. 2d 522, 531 (E.D. Va. 2007).

34. A limited purpose public figure is "a person who voluntarily and prominently participates in a public controversy for the purpose of influencing its outcome and who is thus required as a public figure to prove actual malice in a defamation suit." FindLaw.com, Limited Purpose Public Figure, http://dictionary.lp.findlaw.com/scripts/results.pl?co=www.findlaw.com&topic=b2/b22ed7bf61869f9c44b2559647eb4122 (last visited Nov. 22, 2008).

FBI investigation.[35]

Second, there can be no finding of actual malice[36] because there were signs that Nicholas Kristof considered evidence on both sides, and took no position as to whether Hatfill was actually the anthrax bomber or not. They also said Kristof didn't intend to inflict emotional distress. That wasn't the point of the story.

I think these cases are instructive—it's very dangerous for the press to report on a particular suspect before an indictment has been made; there's no privilege to say, "Well, they actually are investigating him." If you say the FBI is investigating Hatfill, the defamatory implication is that he is guilty of being the anthrax bomber. And so, the defamatory allegations in the Duke Lacrosse case would be that the named players were guilty of sexually assaulting the accuser in this case. It's very difficult pre-indictment for the media to come up with any kind of privilege except for perhaps actual malice. In the Duke case, the lacrosse players weren't public figures, probably not even involuntary public figures. Arguably, therefore, they wouldn't even have to show actual malice in a defamation case.

However, once the prosecutor decides to indict, the media have some protection from defamation liability in the form of privileges for reporting on official documents or official actions of the state.

Professor Wasserman

Let me just touch on what you said. Would you say that the players were public figures within the Duke community?[37] Now, obviously, the media coverage extended beyond just the local community, but could they be deemed public figures within that community?

Professor Lidsky: If they were defamed in connection with something having to do with lacrosse rules or a bad referee call in a lacrosse match, maybe they would be limited-purpose

35. *Hatfill*, 416 F.3d at 330-331.

36. Actual malice is "the knowledge that defamatory statements esp. regarding a public figure are false" or a "reckless disregard of the truth." FindLaw.com, Actual Malice, http://dictionary.lp.findlaw.com/scripts/results.pl?co=www.findlaw.com&topic=a5/a5e35fade208529e4b41453bda14eda3 (last visited Nov. 22, 2008).

37. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14-15 (1990).

public figures, but the defamation would have to be in connection with issue that thrust them into the public eye.

Professor Wasserman: Could they be general-purpose public figures just within the narrow community?

Professor Lidsky: This is lacrosse. If you're talking Gainesville and a football player, perhaps, but this is lacrosse, so I really don't see that a viable general purpose public figure argument can be made.

Professor Wasserman

David Elder at Northern Kentucky has written a review of the Taylor and Johnson book and he is particularly critical, as the book is, of the coverage by The New York Times.[38] He talks about whether or not the Times should be on the hook for defamation. He suggests that in this type of coverage: (1) there should not be a fair report or neutral reportage defense in what he calls "rush to judgment" cases[39] and (2) the targets of investigation necessarily should be deemed private figures. Those are the two recommendations that he sort of makes across the board.[40] Any thoughts?

Professor Lidsky: The Fair Report Privilege protects the press from defamation liability when they publish a fair and accurate report of official proceedings.[41] A rationale for the privilege is that the public has the right to scrutinize official actions; when you have an official document or a meeting open to the public, the public has a right to find out what their public officials are doing.[42] So the question is whether that rationale extends to a document such as a leaked police report, which is not really available to the public. A minority of jurisdictions would say, "Well, yes, we need to see what our public officials are doing even if it's not yet a document that's

38. David A. Elder, A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charge—A Book Review/Essay (unpublished manuscript, on file with author).

39. *Id.* at 85-86.

40. *Id.*

41. For more on the Fair and Accurate Report Privilege, *see* MARC A. FRANKLIN, DAVID A. ANDERSON, & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW 349-59 (7th ed. 2005).

42. For a discussion of this and other rationales for the Fair and Accurate Report Privilege, *see* Samuel A. Terilli, Sigman L. Splichal & Paul J. Driscol, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L & POL'Y 143, 158-59 (2007).

opened to the public."[43]

Like Professor Elder, I would not extend the Fair Report Privilege when the document or the official action on which the press is reporting is not opened to the public. Many times such reports will include only preliminary thoughts and should not be treated as authoritative sources of factual information. For those types of reports to be treated as authoritative encourages pollution of the public discourage and unnecessarily damages individual reputations. Besides, as we saw in the Steven Hatfill case, Nicholas Kristof and the Times didn't rely on the Fair Report privilege. Kristof got sufficient protection in that case from the requirement that the plaintiff prove actual malice. The public concern was great enough, the person involved was a limited-purpose public figure, and Kristof was careful in his reporting. He tried to protect the reputation of Hatfill to the extent possible, but he also scrutinized the government's action in the case. Kristof really didn't need the Fair Report privilege, although one might argue that it would have allowed the judge to dismiss the case at an earlier stage.[44]

Professor Gerhardt: I was just going to add a little footnote, which was that I think that, again, at least in my mind, this takes us back to the mistake of trying a case in public and also underestimating what the problems are with the media interest in high profile cases. The fact is that the way the media works these days, they're not entirely interested in facts. They're just an audience. They're interested in market share. That's what they want. So if you go back and replay, for example, just the Duke Lacrosse case, almost from day one, everybody is speculating about what's the evidence, everybody is speculating about, well, what if this happened and what if that happened. There's nothing at all about the facts. I think that is the problem of allowing a case to become part of the media circus. We don't have a good history, I think, of trying the high profile cases in public or trying cases in public. It's just a mistake when a prosecutor makes the judgment that it's the direction to go. It's rarely, if ever, going to be, at least in my mind, a winning strategy. Instead, I think, a more responsible, ethical thing to do would

43. *See* Medico v. Time, Inc., 643 F.2d 134 (1981).

44. For more on the Fair and Accurate Report Privilege, *see* FRANKLIN, *supra* note 29, at 349-59.

have been to try the case like most professional prosecutors have done which I think is to, again, approach this like any case, but seriously as any case and let the evidence take you where it takes you. And if it takes you to the recognition of innocence of the defendants, then the prosecutor should acknowledge this and hang things up.

Professor Johnson: In this 24/7 media cycle, regarding these legal talk shows: as Nifong's case imploded, most responsible lawyers refused to come on these shows to represent Nifong. And so, there were a trio of figures—Wendy Murphy,[45] Georgia Goslee,[46] and Norm Early[47]—who were about the only three who would go on. Murphy was particularly bad, since she was always identified not only as a former prosecutor but as a legal academic. They never quite said that she was only an adjunct professor. And they repeatedly said things that simply were nonsense; they were actually inaccurate. She was asked this past summer about her performance in the American Journalism Review—which did a long article on the media coverage in the case.[48] Her response was that she was there to represent Nifong's viewpoint. She thought no one could assume that what she was saying was true. But the average viewer—given that she's identified as a law professor—why would the average viewer assume that she's there stating inaccurate items? So, in particular, the format of these cable talk shows just doesn't work in a case like this, where you have actual innocence and you can't really defend Nifong's legal ethics. Murphy at one point was saying that she didn't want to see Nifong disbarred; she wanted to see him promoted to become Attorney General

45. Wendy Murphy is an ex-prosecutor and an adjunct professor at New England School of Law where she teaches an advanced seminar in crimes of sexual violence. For more information about Wendy Murphy, *see generally* And Justice for Some, www.andjusticeforsome.com (last visited Oct. 18, 2008).

46. Georgia Goslee is a lawyer practicing in Maryland, as well as a television commentator. For more information about Georgia Goslee, *see generally* Professional Profile of Georgia H. Goslee, http://www.georgiagosleelaw.com/ProfessionalProfileofGeorgiaGoslee.jsp (last visited Oct. 18, 2008).

47. Norm Early is a former Denver District Attorney. For more information on Norm Early, *see generally* Norman S. Early, Jr., http://www.wsmtlaw.com/Attorneys/NEarly.asp (last visited Oct. 18, 2008).

48. Rachel Smolkin, *Justice Delayed*, AMERICAN JOURNALISM REVIEW, Aug./Sept. 2007, http://www.ajr.org/Article.asp?id=4379.

of North Carolina.[49] This is just an astonishing statement.

Professor Gerhardt: I'm just going to state the obvious here. Given Nifong's performance and demonstrated incompetence, how could anybody possibly believe he was actually the one trying to use the media in this case? I mean, it's clear that that just was another erroneous attack on his part.

Professor Wasserman

If we agree Nifong is incompetent, then we can assume the case eventually would have collapsed under the weight of his own incompetence. But there is also the role that defense counsel played that makes this case unique. The three indicted players were able to afford private counsel with funds, not only to represent them, but also to do the hard and very expensive investigation, particularly with respect to scientific and DNA evidence that, again, makes this case unusual.[50]

Professor Davis: Yes. Before I do—why wasn't the media interested in the fact that this prosecutor, who is perhaps the most powerful individual in the criminal justice system, hid exculpatory evidence, and the fact that what he did was common? I can't stress this enough. The Center for Public Integrity, in 2003, did a comprehensive report in which they found widespread and routine prosecutorial misconduct, including the failure to turn over exculpatory evidence.[51] A similar nationwide study was done by Ken Armstrong and Maurice Possley of the Chicago Tribune. They did a nationwide study with 11,000 cases and found similar results.[52] I remember when the Nifong story was first reported. CNN reported: "Breaking News—Prosecutor Fails To Turn Over Exculpatory Evidence." Breaking news? I thought I was losing my mind. I mean, I was a public

49. See, e.g., Michael Gaynor, *The Three are Wendy Murphy's Victims Too*, WebCommentary, http://www.webcommentary.com/asp/ShowArticle.asp?id=gaynorm&date=061228 (last visited Dec. 29, 2008).

50. *See generally* TAYLOR & JOHNSON, *supra* note 3, at 94-98, 301-02, 307-11.

51. Steve Weinberg, *Breaking The Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUBLIC INTEGRITY, June 26, 2003, http://www.publicintegrity.org/pm/default.aspx?act=main.

52. Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, CHI. TRIBUNE, Jan. 10, 1999, at C1, *available at* http://www.chicagotribune.com/news/nationworld/chi-020102trial1,1,1548798.story?ctrack=2&cset=true.

defender for twelve years and I can tell you that the prosecutors failing to turn over exculpatory evidence is not breaking news. It's 5:50 p.m. right now so the prosecutors have probably gone home for the day. But otherwise, I would say that, as we speak, there are prosecutors all across the country violating the Brady doctrine.[53]

I mean, we laugh, but it's true. I urge those of you who are interested to look at these studies. The Center for Public Integrity looked at cases over a 30-year period and found rampant prosecutorial misconduct.[54] By the way, they only looked at cases that had gone to trial where appellate courts actually found prosecutorial misconduct. Such findings are extremely rare. Usually appellate courts do not reverse, finding the misconduct to be harmless error. These were just cases that went to trial, and only about 5 percent of criminal cases go to trial; the other 95 percent are guilty pleas.[55] We don't know what's going on in the 95 percent.

Delma Banks is a poor African American man in Texas who was on death row in a capital murder case. He was strapped to the gurney, 10 minutes from being executed, when the Supreme Court stayed his execution and agreed to hear his appeal. The court ultimately found that the prosecutor in that case not only withheld exculpatory evidence, but scripted the testimony of the key witnesses. The Supreme Court reversed Mr. Banks' conviction because of the prosecutorial misconduct.[56] Yet the prosecutor in that case is still prosecuting cases in Texas as we speak.

What is so unusual about the Nifong case is that he actually got punished for what he did. No prosecutor has ever been disbarred for what Mike Nifong did, and I honestly believe it is because those students had the wealth and resources to expose him. They had this incredible defense team. One of their attorneys went through over 1,800 pages

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53. The Brady doctrine requires that prosecutors turn over material exculpatory to the defendant, but does not require prosecutors to supply a defendant with "material that the defendant knew of or should have reasonably known of the evidence and its exculpatory nature." See Brady v. Maryland, 373 U.S. 83 (1963).

54. Weinberg, *supra* note 38.

55. *See* Dep't of Justice, Bureau of Statistics, Felony Defendants in Large Urban Counties, 2000 (Dec. 2003), *available at* http://www.ojp.gov/bjs/abstract/fdluc00.htm.

56. *See* Banks v. Dretke, 540 U.S. 668 (2004). *See* Bill Mears, *High Court Reverses Inmate's Death Sentence*, CNN, Feb. 4, 2004, http://www.cnn.com/2004/LAW/02/24/scotus.death.penalty/index.html?iref=newssearch.

of complicated DNA data and read a book to figure out how to evaluate it. He spent around 60 to 100 billable hours going through this data until he discovered the exculpatory information.[57] Now, first of all, he wasn't supposed to have to do that because that prosecutor had a constitutional obligation and an ethical duty under Rule 3.8 to turn it over. But that's what it took—all of those resources—to discover information that should have been turned over in the first place.

What I'm concerned about is all the poor people out here who are victims of prosecutorial misconduct much worse, believe it or not, than what Mike Nifong did. Many are people who have been on death row—Jim has represented many of them—people who have been wrongfully convicted and no one cares. No one has ever heard of Delma Banks, right? I don't mean to make light of what happened to the Duke students. Being charged with rape is a horrible thing. My concern is that I don't think people understand that this really is a widespread problem and that most of the people who are victims of it —and there are lots of victim of misconduct—are poor people who are disproportionately poor, black and Latino and who don't get relief at all. They go to prison. They're on death row. Sue? Are you kidding me? Suing for damages when they really are damaged, when they're spending 20-25 years in prison? Unheard of.

The good that I think could come of this case, I hope, is that at least one of the young men has spoken out and said, "This happens to poor people." One of the families has started a foundation to help others.[58] Unfortunately, most in the media could care less about the Delma Banks of the world.

Professor Johnson: It is worth remembering that all the lacrosse players didn't ask to become public figures in this case. The initial press coverage was, of course, almost entirely negative, and I doubt the media would have paid nearly as much attention to Nifong's misconduct if not for the early rush to judgment. The lacrosse players had the advantage of being able to hire good defense attorneys. But,

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57. *See* TAYLOR & JOHNSON, *supra* note 3, at 307-11; David Zucchino, *DNA results in rape case withheld*, L.A. TIMES, Dec. 14, 2006, at A12.

58. *See* Patrice O'Shaughnessy, *Cleared Duke Lacrosse Player Works to Help Wrongly Accused*, N.Y. DAILY NEWS, Apr. 12, 2008, *available at* http://www.nydailynews.com/news/2008/04/12/2008-04-12_cleared_duke_lacrosse_player_works_to_he-1.html.

in all likelihood, they would not have been charged—this case would not have been useful for Nifong—if they were poor African Americans. The political element here is sort of an unusual one. That's the only way that I would differ from Angela.

One other point that is worth mentioning. Jim and Angela are two of the only people, as the case was going on, who were publicly making this argument. That, "Look, what Nifong is doing is horrific and this is something that is happening disproportionately to poor people and African Americans around the country, and the media should understand it." The North Carolina NAACP took a very different approach to this case. They aggressively supported Nifong throughout the case, and they did so in a variety of ways. They attempted to quiet defense attorneys and, while they didn't say anything about Nifong's public statements, they put an 82-point memorandum of law on their Web site that was filled with factual inaccuracies that presumed guilt. And so, I think that while we can blame the media for failing to pay attention to this, we also should blame all the civil rights organizations. The North Carolina NAACP had an extraordinary opportunity here. They could have said, "Look, this is a case that's affecting rich white people, but these are problems that usually affect our constituents. Why don't we all pay attention to it?" Instead, what they chose to do is they chose to side with Nifong.

Professor Davis: I'm not blaming the NAACP one bit because they don't have any power, unfortunately. I wish they did, but they don't. The North Carolina NAACP was in a difficult spot. I understand their position and you are right for criticizing them for not taking the other position. But the bottom line is that it's not their fault.

Professor Johnson: No. No. I'm not saying that it's their fault, but I'm saying that we can't blame the media. And, secondly, they weren't impotent in this situation. I mean, their support was critical for Nifong winning. Nifong won. These are people who knew what Nifong did and he still won. It gets to this point that you can argue he was providing the prosecutorial leadership that his constituents wanted.

Dean Coleman: Let me just correct one factual misstatement. Howard said that Nifong was incompetent. I don't think he was incompetent at all, certainly, not as a lawyer. I think he understood what he was doing. He was

fully aware. What made this case different was he didn't get away with it this time. The press paid attention, bloggers paid attention, and the Attorney General of North Carolina paid attention, probably for the first time in his career.

What was unusual about this case was not what happened to the students, but the way it was resolved: the North Carolina Bar intervening; Nifong being disbarred; the Attorney General taking over the case and then declaring that the students were innocent. All of that is unheard of and if it happens again that would be news, because I don't think it will happen again. It certainly wouldn't happen again unless the victims of the miscarriage of justice are the same as the victims in the lacrosse case. I agree with Angela; that is the problem here. I don't think that we in North Carolina have learned the lessons of this case. There is this notion that somehow what happened to these students is the worst miscarriage of justice in history and that these kinds of things shouldn't happen to people in their circumstance and their situation.

It happens all the time. Just as Angela says, it happens every day. We have Darryl Hunt, who spent 19 years in prison and the district attorney who kept him there never bothered to read the record.[59] He finally read the record when Hunt was released and said he was surprised at how little there was to support the conviction. In terms of the prosecutors, what is necessary is for the press to care about what they're doing. The press doesn't care about any individual case. They move on. A prosecutor wrongfully convicts somebody? That's too bad, but there's no accountability at all. The Bar doesn't hold them accountable. I think if anything comes out of this case, I hope it is that the attitudes will change in that respect.

Professor Lidsky: One thing I wanted to say about the role of the media here is that arguably the media were instrumental in getting this case resolved in a positive way. Another thing I wanted to point out is that we talk about "the media" and "the press" as if it's one entity. When we're talking about that, usually we're referring to what might be called the mainstream media. The mainstream media are often lazy. If a story is in the New York Times, then often the

59. *See* Pheobe Zerwick, *For 18 Years, Groping the Truth*, Jan. 4, 2004, http://darrylhunt.journalnow.com/epilogue/20040104.html (last visited Oct. 14, 2008).

way that the New York Times spins it is the way that other mainstream media spin it because they take their lead from the Times. Perhaps the reason this case had a good outcome in the end is that the mainstream media are not the only media out there. There are a lot of people doing their individual digging, and it is a good thing. Arguably the presence of bloggers and other Internet sources of information changed the discourse on this case in a positive way.

Professor Gerhardt: I guess I would respectfully disagree with that to some extent. I think it's a mistake any longer to expect the mainstream media to perform any kind of an educational function or to perform a function like it once did in the "Pentagon Papers" case.[60] The nature of the news business has changed so much that's it is a mistake to think that the mainstream media can serve as a check against this kind of prosecutorial misconduct.

Just to think about a few statistics here that will drive all this home. Even on important things, the mainstream media cannot focus on facts—if you go back to the 2000-2004 elections, if you have statistics on this—in the 2000 election, the coverage of Gore, basically, less than 10 percent of it was on the issues.[61] Most of the coverage was on strategy and personality. Now, I'm going to make a wager right now. It is my understanding that we have a presidential election going on, but in the coverage of McCain and Obama, at the end of the day, it's not going to be about the issues. It hasn't been about the issues thus far, as far as I can tell from the mainstream media. It's going to be about personality and strategy. They will seize on things that are little because they find that it draws audiences and maintains those audiences. And so, I think we would be mistaken to turn to the mainstream media to fix this kind of problem. I have no magic solution here, but I do think that part of the difficulty is in finding a way to ensure that your prosecutors have the right ethics.

And public accountability isn't going to serve as an adequate check either because the public is largely disinterested and uninformed. They don't participate enough

60. N.Y. Times v. United States, 403 U.S. 713 (1971).

61. *See generally,* Eric Boehlert, The Press v. Al Gore, ROLLING STONE (Nov. 21, 2001) *available at* http://www.rollingstone.com/news/story/5920188/the_press_vs_al_gore.(last visited Dec. 18, 2008).

in these local elections, much less national elections, to be able to know what's going on to keep prosecutors in check. I think back in North Carolina, we recently had elections for judges in which remarkably few people participated.

So when you've got problems like that, you can't turn to public accountability or the media to check government abuses; I think you've got to go back and learn some more basic things like trying to make sure that the people in these positions are people with the right kind of ethics and that the people who work with them are capable of saying to them, "You've got to stop," or "You've got to think about this," or "Here's the problem with this."

Dean Coleman: Can I just add one point? One of the really extraordinary things that happened in the case was K.C.'s blog,[62] which I think really contributed significantly to the outcome in the case. Everybody read it. The defense lawyers read it, the university officials read it, people who were interested in what was happening in the case read it. And, for the most part, until he got off the track and started talking about political correctness, it was extremely accurate, carefully done, and well sourced. Much more so than any of the local press—except for the News & Observer, which I think was equally as good. It was that, if you wanted a daily source of what was going on in the case, you would read K.C.'s blog. That was different and I think it actually influenced a lot of the media and, certainly, a lot of the key participants in the case.

Professor Johnson: One of the strange things for me in terms of the national coverage of the case is this reputation of North Carolina as a kind of criminal justice backwater. In a lot of ways, it's a very progressive state, especially with regard to this requirement that the discovery file has to all be turned over.[63] One of the reasons why the blog was able to publish every day was that the defense attorneys got access to all of these documents, made a conscious decision because the early press coverage was so guilt-presuming that they needed to get these documents published as parts of motions. And so, someone like me, sitting in my apartment in Brooklyn, could get access to material that, in a normal case, only a few

62. Durham-in-Wonderland, *supra* note 17.

63. N.C. RULES OF PROF'L CONDUCT R. 3.8 (2006), *available at* http://www.ncbar.gov/rules/rules.asp.

reporters would have because the documents were all posted online. If this had happened in just about any other state, that wouldn't have been possible because even if the defense attorneys had wanted to get these documents out, they wouldn't have been able to. And so, the irony of this is that the North Carolina criminal justice system as a whole, I think, came across—well, I mean, there were things about it that were good. The ethics panel—while, certainly, I would agree with Jim and Angela that they don't occur enough—the specific ethics hearing for Nifong was a very impressive trial. The Bar and the three-person panel did a really good job. So there were aspects of this case that were positive. And if there was one reform that might be good in terms of protection, it would be that all states have open discovery because at least then there would be a fighting chance for defense attorneys to get actual innocence cases out.

Professor Davis: I agree with that 100 percent. Open file discovery would make all the difference in the world. North Carolina actually does a lot better on these issues than most. Most states do not have open file discovery. Florida is another state that has open file discovery in criminal cases.[64] It's rare in other states, and I think that's one of the necessary reforms. I talked about the Center for Public Integrity study and the study by the two reporters from the Chicago Tribune.[65] That was a week-long, very extensive story on misconduct. The story came out and nothing changed. I was stunned, but nothing changed, and so, I think you're right. We can't rely on the public. In addition to open file discovery, we need to pay a lot more attention to the disciplinary process. The fact that prosecutors are rarely brought before bar counsel is a huge problem. The United States Supreme Court has decided that it's not going to reverse in cases involving "harmless error."[66] The Court also

64. FLA. RULES OF PROF'L CONDUCT R. 4-3.8 (2007), *available at* http://www.law.cornell.edu/ethics/fl/code/.

65. *See* Weinberg, *supra* note 38; Ken Armstrong & Maurice Possley, *supra* note 39, at C1.

66. *See generally* Chapman v. California, 386 U.S. 18, 22 (1967) (adopting the harmless error rule and deciding that some constitutional errors are not significant or harmful and therefore do not require an automatic reversal of the conviction). *See also* Rose v. Clark, 478 U.S. 570, 580 (1986) (holding that the harmless error standard dictates that courts should not set aside convictions if the error was harmless beyond a reasonable doubt).

stated that prosecutors who engage in misconduct may be referred to their state and local disciplinary authorities.[67] That was the end of that. They said it, but it didn't happen. It absolutely did not happen.

Why don't people refer prosecutors to bar counsel when judges find that they have violated the Brady doctrine? We know why defense attorneys don't do it. There is a saying: "If you shoot at the king, you'd better kill him." When referring to prosecutors, I don't mean that literally, but the point is that you don't go after the almighty prosecutor because you'll never get another good plea offer. They have all the power and all the discretion. They may never give you a good plea offer again. So defense attorneys are usually afraid to refer prosecutors.

I don't know why judges don't refer prosecutors more often. Some people say it's because lots of judges are former prosecutors, but that sounds a bit simplistic. The same Center for Public Integrity study I mentioned earlier also looked at the number of bar referrals for prosecutors and they found that between 1970 and 2003, there were only 44 cases of prosecutors that were referred to disciplinary authorities.[68] And those were not all Brady violations; they were for a variety of ethical violations. We need to figure out why prosecutors are not referred more often. Is it that the rules are inadequate? Is the process inadequate? We can't rely on the public for that; the Bar needs to get to the bottom of this.

I spoke to a judge in D.C. right around the time that the Mike Nifong case was going on, and he said that all of these prosecutors were showing up in his court saying, "Your Honor, I have some Brady I want to turn over." I think that unlike the clients I used to represent, prosecutors are actually deterred by the prospect of punishment. They would be deterred by the threat of disbarment.

Professor Lidsky: We appear to be saying that attorneys shouldn't try their cases in the press. But what do you do if you're the defense attorneys in this case? If you're going to protect your clients' interests, don't you have an obligation to use the press appropriately to protect those interests? Even if

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67. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

68. Neil Gordon, Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct, CTR. FOR PUBLIC INTEGRITY, (2003), http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39.

the case is dismissed, your clients' reputations could be ruined forever unless their story gets into the press. If your clients' story gets to press, maybe that is what leads to the entire case being dismissed. If you're the defense attorney in a high profile case, it's very dangerous to use the press, and if you're not media savvy, it's going to backfire. But the defense lawyer can't just say, "There's no way for me to try my case in the press," because that has to be part of the clients' legal strategy.

Professor Wasserman

With the last few minutes before we open it up to Q&A, I want to talk a little bit about the last actor in this process: the Duke faculty and the Duke University administration, all of whom came in for particularly harsh criticism in Professor Johnson's book. In particular, he criticized certain faculty members who, in the guise of talking about this case, aired larger issues about race, class, and gender.[69] And among the claims in the lawsuit by the 38 un-indicted players are contentions that the charged rhetoric created by these faculty members constituted a tort.[70] The allegation is that the faculty speech created a harassing environment, which constituted intentional infliction of emotional distress and other tortious harms. How much of a role did the faculty as a whole play in this and what was the university's obligation, both with respect to the faculty and with respect to the players?

Professor Johnson: First of all, there have been two settlements regarding the students. One involved the three falsely accused players, with whom Duke settled out of court very quickly after the exoneration. And, secondly, one of the non-indicted players sued Duke and a member of the Group of 88—which were the faculty members that had criticized the team through a statement in April 2006[71]—for grade retaliation. Duke settled that with an undisclosed financial settlement plus a public announcement that the grade had

69. *See* TAYLOR & JOHNSON, *supra* note 3, at 144-48, 290-91; Complaint in *Carrington v. Duke University*, *supra* note 6, at ¶¶ 366-75.

70. Complaint in *Carrington v. Duke University*, *supra* note 6, at ¶ ¶ 574-81 (Count Fourteen).

71. *See* TAYLOR & JOHNSON, *supra* note 3, at 144.

been changed.[72] This was as obvious a case of grade retaliation as you can get. The grade dropped from B to F after the Professor appeared at an anti-lacrosse rally. The professor even wrote about it in an email. Not a wise move. It's an interesting one from the standpoint of higher education law because the assumption is that academic freedom means that universities can't discipline their professors for saying anything; there's this kind of merger between the first amendment and academic freedom.

In this case, though, there are a couple of restrictions. There are anti-harassment policies that are on the books and Duke, like any other university, has a Faculty Handbook which, among other things, requires faculty members to treat students with respect. And it is worth asking, is it treating your students with respect if you announce in a classroom that you've researched the case and your research in the case shows that a sexual assault occurred and ejaculation occurred? This occurred in a Duke History class taught by Professor Reeve Huston. It occurred three days after the case first went public and, even though allegations of in-class harassment were brought to the attention of the Duke administration, there's no evidence that these were ever investigated by the administration. In fact there's good evidence that they were not. The first person outside of their group to have ever asked any of the lacrosse players about what happened in class was me, around nine months later; they were never asked by anyone at Duke.

And so, if this case goes forward—and I suspect that it won't—I think that it will either be dismissed or, if Duke loses the motion to dismiss, I suspect it will be very quickly settled. It will be a test case of whether or not faculty can, in fact, say anything towards their students and whether there's any obligation by the university to uphold its own policies. The Group of 88's statement, among other things—quite apart from the content of the statement—falsely claimed the five Duke departments officially endorsed the ad. This is a violation of Duke procedures. None of these departments ever voted on endorsing the ad. The ad was paid for out of official Duke funds. That was a violation of Duke procedures as well. There were—quite apart from the content of these broader

72. Samuel Spies, *Duke, Lacrosse Player Settle – Student Sued Over Failing Grade in '06*, THE RECORD (Bergen Cty., NJ), May 15, 2007, at A11.

allegations that they were raising broader issues—clear procedural violations here that Duke decided not to enforce. If you flip this and assume that you have a race-baiting prosecutor who desperately needed white votes and was targeting African American students on campus, and you had faculty signing guilt-presuming statements, does anyone here really believe that any university's administration would have stood silently by? I mean, we all know the answer to that.

Dean Coleman: Well, I disagree with that. This is the one aspect of your book and what you have been doing recently that I think is regrettable. There are a lot of things happening on campus. Some of the things I think you've identified raise legitimate concerns: professors who take advantage of students in classrooms, abusing students in classrooms, that kind of stuff. I think that, to the extent that was happening, Duke had an obligation to take action if it knew about such abuse. I would be very surprised if Duke was aware and did nothing about it, but I don't know the facts. You said the students were not asked. Generally, when a student is abused or harassed, I think the obligation is on the student to bring it to the attention of the university and not the university to go out and poll students about how they are being treated.

Professor Johnson: Well, the women's lacrosse coach brought it to the attention of the university.

Dean Coleman: Well, okay, for example, I know what people have said. The question is what actually happened. You talk about the Group of 88 as if it were some kind of an organized group. These are just 88 people who signed the petition. My guess is that some of them probably were not as familiar with the terms of the petition as you are. If you read the petition, I think it is clear people have overstated the attack that it made on the students. I think it was an insignificant event in terms of what happened to the students; it didn't contribute anything to the various circumstances that the students faced, either in terms of Nifong or what he did. I don't think he was influenced for a second by anything that the Duke faculty members signed.

But the idea that somehow a university can stop a professor from showing up when the cameras come on campus and saying something about some controversy that's before the public, I just don't think we're going to get to that point. Nor do I think the university can be blamed for what

professors do with academic freedom in that circumstance. Their colleagues could have, perhaps should have, suggested to them that they act more civilly towards the students. But I think the idea that somehow the university needed to intervene formally to stop them from speaking runs counter to everything I think the universities stand for.

Professor Johnson: Duke is a private university that can have basically any standards it wants. And so, if it wants, just to take this point, it can say, "Look, we have a Faculty Handbook, but we're not going to say that the professors are required to treat students with respect. Academic freedom trumps on this issue. We have an anti-harassment policy, but it doesn't apply when professors are talking about students." Duke has a perfect right to do so, and any private university, basically, has that right. The problem, of course, is that Duke has these policies on paper which sound very nice. I mean, if you're a parent and you're paying $50,000 to send your kid to Duke, you assume that if it says faculty are going to treat the students with respect, that that means a professor, if he comes out and says that the lacrosse players committed perjury (as a Duke professor, Grant Farred, did), that there will be some accountability therein. But there wasn't. So I think that the question is, if Duke is going to have these policies, it doesn't seem unreasonable for parents to assume that Duke will enforce the policies. And if Duke doesn't want to enforce the policies, then they shouldn't have the policy.

My criticism of Duke wasn't that professors shouldn't have academic freedom, but that if Duke is going to have a policy saying that professors have to behave in certain ways with regards to their treatment of students, then Duke has to enforce the policies and, if it doesn't, it should simply abolish the policies.

Professor Lidsky: First, there is no tort of failing to treat students with respect. Is it a bad thing to fail to treat students with respect? Absolutely. Is there a tort of failing to respect people? Not that I'm aware of. So bad behavior on the part of faculty members doesn't necessarily mean the commission of a tort on the part of the faculty members. In addition, the university must be cautious in interfering with the free speech rights of its faculty members. The university doesn't have any business dictating what its professors say about a political issue.

In the classroom, however, I have always thought that it is

an abuse of a professor's power to inflict her views on students in class, especially if those views are on a matter totally unrelated to the subject matter of the class. This is particularly true if the professor singles out a particular student in class on the basis of the student's views or behavior outside the classroom. That type of behavior could subject the professor to discipline by the university, but the question here is whether it constitutes a tort. An additional issue is whether the university is vicariously liable for the professor's behavior, because that is going to be the theory of the case, unless you're going to say the university negligently supervised its faculty. I don't know all of the facts concerning what individual faculty member might have done in their classes, but if they just said something that made a student uncomfortable, they didn't commit a tort. It's a poor teaching strategy, it's unprofessional, but it's not a tort. Even if the university had an anti-harassment policy and failed to enforce it, that would not automatically constitute a tort. In terms of the university's liability, I would need a lot more facts than I currently have to think that lawsuits by the accused students would be viable.

QUESTION AND ANSWER

Professor Wasserman

On that note, we will turn it over for some audience questions.

Question; Unidentified Audience Member: Is it a responsibility for the people of Durham who reelected Nifong—and it's kind of a disagreement with K.C., and you know I don't disagree very often with you. There was very little information out then. There were no good candidates. The bigger problem is the November election. I worked very hard, as did a lot of people, to find a running candidate getting 10 percent of the electorate total to get—we got 3,000 extra votes and we got somebody on the ballot to run against him. He then announced he would not take the job. It's very hard to get people to vote for somebody when he's publicly saying, "I will not take the job." Nifong won by like 2 or 3 percent (49-to-46). We almost elected somebody who wouldn't take the job.

The second point with the press, the group that really

deserves tremendous credit is Jim Coleman and others for speaking out. But the North Carolina State Bar elected to file ethics charges against Nifong in the middle of the criminal case. That was unheard of. Normally, they wait until the end, but there is a lesson for lawyers to take back to their states—make that happen. Because the minute they did that in December, right after the election, unfortunately, they voted 9-to-8 to file within the tenancy of the case in October, but that's not public until they filed the case. For two weeks, Nifong thought that and there were some other professors in Durham who said he didn't have to, but a lot of people would say that is a clear conflict and he has to get it out. Once he's disqualified from the case, then it's in the hands of somebody who's going to look at the evidence. That happened. So the state bar of North Carolina deserves a lot. And there's a teaching point for all [ ] involved with ethics things, so I just tossed that out to the people on the panel.

Professor Johnson: I agree completely. The state bar's performance, in this particular case (and you can debate whether they should be more aggressive otherwise) was good from start to finish. If the state bar had not intervened, Nifong would have brought this case to trial. It probably would have been dismissed in a procedural hearing early on, and the statement would have been, "Oh, these guys had rich attorneys and they got off on a technicality." The bar's performance really was wonderful. And Tom Metzloff is correct about Nifong's other opponents in the primary. Nifong's two opponents, one had been sanctioned by the bar for ethical violations himself in an unrelated case previously, and the second was a woman who, shall we say, did not have any pristine ethical reputation herself in Durham. So yeah, if you were an ethically inclined voter in Durham, your choices were limited.

Professor Davis: Why was this the very first time the North Carolina Bar did this? Why couldn't they have done it in all the other cases in North Carolina where there have been egregious cases of prosecutorial misconduct? They should do it in all the cases, not just the ones where they are wealthy victims, wealthy white lacrosse players.

Question, Professor Arnold Loewy: Arnold Loewy, Texas Tech, and perhaps more relevant for this case, North Carolina emeritus. I was in Chapel Hill at the time this was going on and one of the things that hasn't been mentioned that I think

is relevant is that we are talking about the group that, before this happened, was rather unpopular in the community. I remember one of the newspapers, after the rape charge, listing like eight or nine other complaints against the lacrosse team. They constantly make too much noise, destroy property, that sort of thing. I don't know the truth of it, but we can't get sued for saying it. But there were a number of things about them that made them as rich, white, spoiled kids an unpopular group.

Dean Coleman: Hooligans.

Professor Lowey: Hooligans. Yes. And, consequently, I see some real analogy between this case and, as perverse as it is, the Scottsboro case.[73] In both cases, you've got a very unpopular group, right, in the Scottsboro, the boys are probably more so, but these guys were pretty unpopular in the Durham/Chapel Hill area. You've got the D.A. latching on it. You have a natural tendency to believe wealth. "These guys that tore up property here, that make too much noise there, that disturb the neighborhood here and think they can get away with damned near anything because of all the money they have, well, they probably did it." And I think there was a lot of that kind of rush to judgment that was a piece of it, and I don't think we can consider the case without thinking about that kind of context. I don't think this ever would have happened if they did not have that kind of a reputation going into it and were not unpopular for exactly the opposite reason that the Scottsboro boys were unpopular; that these were rich, white, spoiled kids and the people in the neighborhood didn't like them very much.

Dean Coleman: I was chair of a committee that was appointed to look into those allegations, and we concluded that they were greatly exaggerated. That the students, in fact, were not significantly different than Duke students, generally. They have money and they party hard during the weekends. And even at the time, I'm not sure that they were universally unpopular. I think there were people on campus, students, who didn't like them and perhaps because of their parties and their privilege and whatever and they, certainly, talked about the players and that sort of became the storyline.

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73. Powell v. Alabama, 287 U.S. 45 (1932); see generally Douglas O. Linder, Without Fear or Favor: Judge James Edwin Horton and the Trial of the "Scottsboro Boys", 68 UMKC L. REV. 549 (2000).

I think that the facts were different, that they did not stand out in that way. But it's what made it believable that a rape could have occurred and that's what fueled the story initially. And one of the things that the committee found out is that a lot of these complaints were against the lacrosse players, but others were against other Duke students who lived nearby. And the assumption was, "Well, they must be all lacrosse players," and this deals with the broader problem.

Professor Lowey: That must have happened after I left North Carolina.

Professor Johnson: No one read Jim's report.

Question; Unidentified Audience Member: You keep referring to these kids as "young, rich, white kids," and my understanding is that it really runs a gamut in terms of wealth. Has it been verified that their parents have tens of millions of dollars? Are they rich kids, or are these just kids that go to Duke because, you know, having to travel in Houston, Texas, you know, those little gas deals, I think there's a difference of what money can do at different levels. If we take a rich, white kid—how rich were their families? Were they rich enough to—I just want to know how wealthy were these people?

Professor Johnson: I got to know quite a few of the lacrosse families, and I can answer this. The three people who were indicted, two were from families that were very, very wealthy. The third, actually, was upper-middle class. However, the lacrosse team, which is 46 players, runs the gamut. They have a couple of sons of New York City firefighters. The co-captain was the son of professors. As a professor, I can assert, we are not wealthy people. So I think there's this assumption, which is not an incorrect assumption, that lacrosse is sort of this upper class elitist sport which is what it was like 15 years ago, and it's begun to—especially in the Northeast—it's changed a lot. Now, it's this very popular growing sport—so it's a more economically and even a more racially diverse sport than it was a while back. And so, there was this play on this in terms of the media that, "Oh, this is the equivalent of country club golf." There was an article in The Guardian in Britain which explains that "lacrosse is the equivalent of polo." You know, it's not. And the team did run this sort of gamut, although the guys who were indicted, they were wealthy and this is the reason they had very good attorneys. But even if there had been—because this was a

random indictment. I mean, the accuser just picked three people off the wall. It just as easily could have been the two sons of New York City firefighters and the son of the professor who'd gotten indicted.

Question; Unidentified Audience Member: Why do we know that it was haphazard the way she chose people? Why do you believe that?

Professor Johnson: It was.

Dean Coleman: Well, this has to do with the way that the lineup was set up. The police told her they assumed everybody in the lineup was at the party. From these photographs, she was asked to identify the people who assaulted her. So there were no wrong answers.

Professor Johnson: That's after she failed to identify them in normal circumstances.

Dean Coleman: Right. From a normal lineup that included photographs of people the police knew were not involved in the alleged crime.

Question; Neil Siegel, Duke University: Neil Siegel from Duke. I lived in a house down the street from the lacrosse house and, let me tell you from personal experience that Duke students, in general, have a long history of bad behavior in these houses.

But I think the more important point/question is we've indicted, so to speak, Mike Nifong today. We've indicted the media. And what about the rest of us? It seems kind of futile to indict society because what do you do about it? But it seems to me that there's a real fundamental indictment of us in at least two ways. The first is that we, who the media feeds, don't care about the facts nearly as much as we care about salacious stories. We've talked about that. So my immediate reaction was facts matter. Let's find out what happened. No one was saying that. And the other is it seems to me, even though the year insists on being 2008, we have an extraordinarily limited ability to identify with people across lines of race and class and we've seen some of that enacted here today.

As you were speaking, Professor Davis, I was thinking about Banks v. Dretke[74] and I know about the case. It is a blatant Brady[75] violation in a death penalty case. Nothing

74. Banks v. Dretke, 540 U.S. 668 (2004).
75. Brady v. Maryland, 373 U.S 83, 87 (1963).

happened as a consequence. It was reversed by a super majority of the Court, they're completely called out. Nothing happens. No one cares.

I mean, a case with respect and responsible—Professor Davis saying this—your response is, identification with the white students. They didn't ask to be put in this position and turning the tables and blaming the local NAACP and you may very well be right about both of those points. But there's a fundamental sense in which if there's any capacity to identify along the lines of race and class, if we could do that, this case would not have unfolded that way and, in the wake of this case, we wouldn't be proceeding in the way we are. If you would get outraged about Banks vs. Dretke,[76] that happened. I don't know how often it happens. I don't have the experience that Jim has and Professor Davis has, but it happens all the time. In my very limited experience, I saw a lot of death penalty cases in which this was happening in the Fourth Circuit and at the Supreme Court and no one seems to care. Certainly, no one is setting up a blog or doing anything about it, and I think if we could see our children in the black people on death row or not on death row. It's not just, "It could happen to me and my family because they're white or because they're wealthy or middle class," but it could happen to any of us regardless of social status or power. I think we have very different reactions to this case and very different reactions to what to do about it going forward.

Professor Davis: Amen!

Professor Gerhardt: All I'm going to do is echo that point—I'd like to use this example that defines Neil's point. Maybe the fact that we've got these predominantly white lacrosse players as the defendants in this case was also part of the mix that created this perfect media storm. You know, obviously, if it were a different group of people that were charged, even different race, predominantly, that would make the media coverage probably less like it was precisely because the media doesn't want to make vulnerable to criticisms for being racist. But in this case, precisely because you've got defendants that look to be privileged, it's easier to dump.

Question; Unidentified Audience Member: I'm from Texas and have nothing to do with North Carolina. I think Professor Davis is absolutely correct. Maybe the thing is

76. *Banks*, 540 U.S. 668.

prosecutorial discretion or misuse is still commonplace?

Professor Davis: He's still prosecuting.

Question; Unidentified Audience Member: Is he being disbarred? The real question is why?

Professor Davis: The Jena Six case is an excellent example.[77] There was a huge national civil rights march. People from all over the country came down and marched on Jena, Louisiana. But you know what happened? Nothing. I mean, first of all, what that prosecutor did, interestingly enough, was actually not a violation of the Louisiana ethical rules. He was finally referred to bar counsel, but it was for making public statements in the press about the case,[78] not for the abuse of discretion that happened there, the selective prosecution. That's actually not a violation of the ethical rules, not the model rules, not anybody's local rules that I'm aware of. The ABA in 2000 had an opportunity to put some meat on the bones of those rules, but there is still only one rule, Rule 3.8,[79] that applies to prosecutors, and it is weak. There was an effort to try to include selective prosecution based on race which is what the Jena prosecutor did. But that effort went nowhere. So there's so much work to be done with the rules and the process.

Question; Glenn Reynolds, University of Tennessee: Hi. It's Glenn Reynolds from the University of Tennessee. Sometimes the prosecutor plays it close to the vest, as they're supposed to. In Knoxville, we have a case, it got some attention but not very much. This is a couple that was abducted and tortured for a period of days, raped both of them, and murdered them. Because the suspects were black, the lone prosecutor has played it very closed to the vest, without a lot of public statements. But someone started a blog about conspiracy theory, and we had a white supremacist march. Some said it was a hate crime and it was being covered up. The prosecutor actually called me and asked me, "What do I do about all this stuff on the blog?" And what they wanted involved releasing the politics of debunking a lot of the specifics and wrong statements that went out there, but

77. For information on the Jena Six case, *see generally* Wikipedia.com, Jena Six, http://en.wikipedia.org/wiki/Jena_Six (last visited Nov. 22, 2008).

78. LA. RULES OF PROF'L CONDUCT R. 3.6(a) (2005), *available at* http://www.ladb.org/Publications/rules_of_prof_conduct.pdf.

79. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2000), *supra* note 9.

the wrong statements had started because of the absence of any hard information. I yield to no one in disrespect to Nifong on this, but if you're completely shy, it just opens up space for all these wrong ideas. I would like to hear your response on what you want to do about that?

Professor Gerhardt: Just a couple quick points, Glenn. The first: I don't believe it's nearly as much of problem for a prosecutor to keep his mouth shut as maybe you suggested. He or she can't take responsibility for whatever is happening out there in society. That's not his or her job. And for a prosecutor to think, he or she has control of the amount of public opinion and public debate on an issue, is to exceed their authority by just monumental proportions. A prosecutor's job is to prosecute cases and, hopefully, do it by the rules and then run for election.

The second: I certainly would agree, the new media—I wouldn't want to offend any of the new media here—but the new media certainly did a better job than the mainstream media. To some extent, and I hope you will take this kindly, it gets lost in the new-media chaos. It's like you're getting information out there, but it may not be gotten out in such a way that it actually helps to put public pressure. It helps because you get information out there, obviously, and you help to inform people. That's the media's job. I don't think it's the prosecutor's job.

Professor Lidsky: I think in all of these cases, you're going to have parallel discourses going on. In order for the public discourse to be an informed discourse, you must have inputs of truthful, factual information. I can think of instances where a prosecutor might be irresponsible if he failed to provide truthful information to the public. For example, if there were a serial killer at large, public safety might require the prosecutor to say something such as, "We've got the suspected killer in custody." I believe it is incumbent on prosecutors to use their public statements to educate the public about the limits of prosecutorial authority. For example, a prosecutor might say, "This case will be adjudicated at trial. I can only tell you limited facts about the case. You may hear other things in the media about the case, but it will be resolved in the trial process."

Professor Wasserman

This concludes our program. Thanks to our panelists and all of you for joining in the conversation. We have raised some important issues, and I hope we continue this conversation in other forums.