

## THE ROLE AND RESPONSIBILITY OF THE PUBLIC

SCHROEDER: I'm Chris Schroeder. I'm a faculty member here at the Law School, and I've been just delighted to be sitting in a chair with the rest of you all for the last couple of days learning a great deal about various facets of the court of public opinion from the wonderful panels that we've had so far. And I think the rest of the day promises to be just as interesting and informative.

The session now is going to examine some of what we know, not something that I know, but people who study cognition and media and communications policy know about how the framing of news, the vocabulary that news uses in describing stories has an effect on how people perceive the news. We've had a number of people reference the fact that in the court of public opinion perception becomes reality. Well, how is that perception formed by virtue of the different ways that news is framed and then communicated?

And as they say people who study cognition and work in the media studies areas have done a number of experiments and gathered data, and there are some things that we know. I'm sure that they would all tell you there's lots that we

still don't now, especially in making the important next step into how people will translate those perceptions into actions that they take that are of some significance, like how they vote on juries. How much can distorted stories be negated by good jury instructions? We know a little bit less about that kind of thing.

But we're here today to learn some from Kim Gross, who is an Associate Professor at George Washington University in Media and Public Policy, and who has done a preliminary paper with her colleague, Bob Entman, who regrets not being able to be here today. The final version of that will be appearing in the proceedings of the conference. I'm going to ask her to lead off both as I say giving us some general sense of the way news reporting, particularly of crimes, has been studied and what researchers have ascertained about people's reactions and how their thought processes receive this kind of information. And then I'll introduce the remaining two panelists after Kim is done. So Kim.

GROSS: Thank you. And thank you for having us here today. And Bob Entman does apologize for not being able to be here. He was invited to do some journalism training in Nepal and that was hard for him to pass up as well.

Our paper that we're actually writing for the conference actually focuses on media coverage of this particular case and in that we argue that there are clearly important lessons to be drawn from this case. But in order to do that, we really have to do a kind of more systematic analysis of coverage and make some important distinctions about coverage some of which were actually suggested in the talk by Professor Schneider last night.

For example, distinguishing among time periods of coverage. So how does coverage unfold over time and so does early coverage look like it has a different kind of slant than later coverage and how does that all play together, distinctions between opinion and news and things of that sort.

But before I get to that, I want to talk a little bit -- actually I may not even get to that I should say. My preliminary analysis -- we have some preliminary analysis which I'm happy to talk about later or if we get to it.

First I want to talk a little bit about the general concept of media framing and what sort of researchers know about media framing and how that helps us to understand the

potential for media coverage to influence public opinion. And then talk a little bit more about sort of what the normal coverage of crime looks like in the media as a context into which to set this particular case, because in many ways this particular case is not really the norm on crime coverage.

So media framing -- these are two definitions that I'm a political scientist, political scientist tend to use a lot and communications scholars tend to use a lot about what do we mean by media framing. You can see there are definitions offered up here. Frames is a central organizing idea or story line that provides meaning to that unfolding strip of events telling us what the controversy is about or the essence of the issue. Or Bob Entman's definition which talks about selecting aspects of perceived reality to make them more salient in the communicating text.

So frames provide a particular way of thinking about our understanding an issue, and this idea is sort of familiar to us. But just to take a kind of current example domestic wiretapping. Could be about terrorist surveillance, or it could be about civil liberties and breaking the law. And depending on which of those frames carries the day in media

coverage, we might imagine that the public will tend to be more or less supportive of domestic wiretapping and provisions the government wants to use.

A key premise to the framing literature then is that frames by highlighting certain aspects of a policy or an event are going to lead the audience to predictable feelings and thoughts and lead them to kind of predictable conclusions in terms of their opinions. And in general we find...

Oh, I should also note. Frames enter the media coverage in a couple of ways. One they enter through the kinds of storytelling devices that journalists want to use. So the journalist will pull in a storytelling device. So setting the Duke Lacrosse case in the context of this is a story about race and privilege. Or this is a story about students -- privileged student athletes.

But they also come in through the attempts of journalists to sort of pulling the elite to bay. So what are various parties saying? And this means, of course, that various parties have an incentive to get their preferred frame inserted in media coverage. And some parties are better positioned to do that by virtue of a variety of things

related to the particular policy issue or event.

And then also some frames are easier to get into coverage, either because they resonate culturally or they follow a kind of standard script that the media uses and thinks is the appropriate script in this particular context.

So what we know. Numerous studies mostly using experimental methods have demonstrated that framing affects a matter. That we can find in an experimental context that sort of systematically different ways of telling a story does influence opinion. It leads people. If you give people a kind of one-sided, slanted perspective, it does move opinion in a kind of persuasive direction in the direction you would expect it to. As we have a lot of work that tells us that.

But we also have, and I think sort of this is the more recent work in communication on framing, a lot of work that tells us that's there's also limits to this. That we should remember that the media is not all powerful, but it's limited in important ways. So these are things that seem perfectly obvious and predictable in some ways.

What people judge to be weak arguments don't move them very well. Source credibility matters. The exact same information presented from what's perceived as a credible source and what's perceived as a not credible source you see very different reactions to that. Also frames that are inconsistent with your predispositions aren't very likely to move you. In fact, you can kind of counter-argue them. This is a point -- related to a point Professor Schneider was bringing up last night about how two different people can see the exact same information and depending on their own kind of basic understanding of the world they'll read that information very differently. They'll see it as slanted in different ways.

And then last at competitive framing matters. That a lot of those original studies which really showed sort of what people took to be rather dramatic media effects really used these kind of one-sided stories, but a lot of coverage is not particularly one sided. It's often competitive. So in the normal context in political stories you often get the Democratic and Republican perspective. You get a kind of two-sided perspective.

From the perspective of a media researcher there is two

things that we want to take away from this research that's relevant for what we're talking about here at this conference. One is the potential for media frames to influence opinion and influence how the public thinks suggest we probably should be wary potentially of pretrial publicity. We don't know for sure that there aren't ways we can mitigate against that, but we want to be wary. But also that there are limits to these effects and limits that might be kind of important.

A couple of things on that point is one that news norms are such that without contending elites trying to impose different kinds of frames or offering up different sort of perspectives coverage often ends up to be one sided and then arguably is going to be sort of unfair to at least some of those participants. And so to the degree that balance in the news often depends on having these kind of reliable, legitimate, and credible sources who are offering kind of competing alternative narratives or promoting competing alternative narratives we can imagine that pretrial publicity is a case where we're going to run into more problems potentially. Because it has it seems more potential to be one sided. Either because one side is not speaking, because journalists have more ready access to law



enforcement as sources, so they're going to end up with a more pro-prosecution bias.

In general it seems that sort of coverage of crime tends to have this kind of pro-prosecution bias. Tends to treat the presumption of innocence as a formality, use the word allege, but not give you a kind of broader context that makes clear that law enforcement personnel can make mistakes, the district attorney or the prosecutor can make mistakes, they might have political motives, but that is not necessarily the norm in crime coverage to sort of give that kind of balance.

And, of course, that imbalance is, of course, facilitated as well by the fact that I think the general public thinks when someone has been indicted and they've been arrested there's a reason that happened that inclines toward a kind of presumption of guilt even in the absence of Nifong standing up and saying what he said, so that you already have that presumption.

Now, I do also want to set this in the context of more other crime coverage and what we know about crime coverage more generally. In the normal case in crime coverage is in

some respects different than what we saw here. It's largely unintentional slant that reinforces white antagonism toward black defendants, generally equating African-Americans, often people of color and particularly African-Americans, with crime and danger. So it perpetuates, and this particularly comes out of local news, which turns out to be most people's main source of news. Most people still say their main source of news is local television news, and that looks particularly problematic when we consider the fact that local television news is dominated by crime coverage and violent crime in particular is given more play than you would warrant by looking at crime statistics. So perpetuates what political scientists, Franklin Gilliam and Shanto Iyengar have called a crime script in which crime is violent and perpetrators are black.

On this just some examples of the over representation of violent crime in local television news. There's a whole host of this. Basically it leads the news -- if it bleeds, it leads totally applies to local television news. It's a serious problem in local television news. But then more to the point here what is the sort of racialized aspect of this. And what we find in looking at a variety of studies is that in general it has this racialized aspect in which

it sort of looks as though it associates black defendants, blacks with crime and violence. So African-Americans are twice as likely as whites in one study a white defendant to be subjective to negative pretrial publicity, Latinos three times as likely as whites to receive negative pretrial publicity. African-Americans and Latinos are more likely to appear as lawbreakers than whites. Also more likely to appear as perpetrators than they are to appear as victims. And they are more likely, African-Americans in particular, are overrepresented as perpetrators of violent crime in a variety of studies which have tried to match this against the crime rates using the arrest rates in the particular community that they're looking at the television news from. So sort of disproportionate representation.

White's by contrast are overrepresented as victims of violence or as law enforcement officers while blacks are underrepresented in those more sympathetic roles. And then work by Bob Entman has found that African-Americans are also more likely to be shown as more symbolically threatening. They're more likely to have a mugshot used in local television news, more likely shown under physical restraint of the police.

This is one example, I'll just skip over this quickly, but of this overrepresentation. This is from some work looking at Los Angeles local news and what you can see is that they do over-represent the television perpetrators are sort of the crime news coverage. The arrest rate is what we see for the arrest rate from Los Angeles and Orange County and what you see is that they over-represent black perpetrators.

So what might be the potential effects of such coverage? There's a lot of work looking at content. There's just a little bit less work looking at potential effects, but some has been done. Again, experimental work and what it suggests is that there is the potential -- that this news coverage does kind of inculcate into people's heads this kind of association between race and violence in ways that are potentially worrisome.

So for example, in some work by Shanto Iyengar and Franklin Gilliam they show people local news coverage in which they've subtly altered the exact same murder story, but in one they show you an African-American as the defendant and in another they show you a white as the defendant. Those who are shown the African-American defendant are much more likely -- somewhat more likely, significantly more likely,

to support increased -- they're more punitive about their crime policy views. They're more like to say that we should have three strikes you're out legislation, they want to put more police on the street, they want to -- they're also more supportive of the death penalty when shown that black -- that same story with an African-American as the alleged perpetrator than when they're shown -- white as the alleged perpetrator with the exact same murder story you don't get that sort of effect relative to no crime story.

Another one that I think is kind of striking, and we see this in other places, racial sentiments are strongly supported for -- related to support for the death penalty. Another one I think is quite striking is some work by social psychologist, Josh Correll, where he's looked at having people partake in what they perceive to be just sort of computer games, but what they are is a computer game in which you are asked to shoot an armed target but not an unarmed target, and the target individual is either black or white. They're shown in a kind of realistic background and their either holding a gun or not holding a gun. And what they find is under time pressure participants are more likely to mistakenly shoot the unarmed black target and more likely to mistakenly not shoot the armed white target

than the armed black target. So, again, the notion here would be that this kind of television coverage which perpetuates a certain kind of racial scheme about crime is going to be having an effect in such that it inculcates into people's heads this image, and it has these potential consequences in the world.

What we want to suggest is that this kind of normal crime coverage suggests that the more general problem of prejudicial pretrial publicity is going to be magnified in the case of black defendants who also then suffer from this potential that they have this added kind of racial stereotype that people bring that's also inclining them toward a kind of notion of guilt in association with violence.

Well, then I'll just tell you really quickly about a couple of things that we're looking at in our analysis of the coverage here. Our initial analysis is at this point somewhat preliminary. Three things we think are important to distinguish in the coverages, the early coverage versus the later coverage. In particular we're interested in sort of how coverage changed once the initial DNA results get released. Because we think that's a moment at which the

case should've unraveled. Nifong perpetuated -- but it's also a moment at which seemingly journalists had another signal there that might have allowed them to sort of pickup on and start to be at least more critical themselves, pay more attention themselves. So do we see a sort of distinction from before and after?

Also distinguishing among media outlets, and this was touched on yesterday in the media panels, we want to think differently about print and broadcast and these cable talk shows. We don't consider the cable talk shows news. They're entertainment. Now, that's a problem in part, because in at least our preliminary look, of course, the worst offenders here are the commentators, the editorialists, these cable talk shows.

Now, from one perspective we don't want to damn the media by painting with a broad brush if it turns out straight news stories look different. On the other hand to the degree that the general public can't distinguish those people from news or to the degree that those commentators actually influence how then journalists are thinking about that narrative that is still a problem. So we want to look at those separately, but pay attention to both, and then

distinguish opinion from commentary, which I've already touched on.

And our initial notion is that early coverage does look problematic. What happened in early coverage is that sort news norms. News norms that defer to elite official sources, which become a real problem when the prosecutor has decided to essentially engage in what Nifong has engaged in, news norms which really reinforce the common tendency of the news is to use these kind of stereotypes and standard scripts, so they latch onto that stereotype and standard script.

And this is probably particularly a problem for the national coverage. They've parachuted in. They haven't developed local sources. They don't have other people to talk to. And so they tell a certain kind of story about Duke and Durham that doesn't reflect what the reality of Duke and Durham is from the perspective of people who live here. And last but not least, pack journalism just reinforces that.

So we see these problems and we do see it, our, at least, initial look early coverage looks predictably sort of



slanted pro-prosecution. When we take a longer view, it looks more mixed. And I'll just leave it at that.

SCHROEDER: Great. Thank you very much, Kim. The framing phenomenon is certainly one that lots of people who interact with the media are alert to. Kim's very first example about the NSA wiretap program. If you recall when Jim Risen of The New York Times broke that story in December of 2005, The New York Times was referring to it as a secret NSA warrantless wiretap program covering millions of Americans. And within in days we discovered that the government was calling this the terrorist surveillance program. So it was immediately a contest between protecting America from terrorism frame versus the mass violation of civil liberties frame. So it's a common phenomenon and if government can be on to it, you can be that lots of other people are as well.

Now, Scott Bullock and Steve Shapiro are not criminal attorneys, so they're not going to be directly dealing with the literature and findings that Kim has been describing for us, but they are both seasoned senior attorneys. Scott is a senior attorney for the Institute for Justice and Steve is the Litigation Director of the ACLU who regularly deal with cases that attract an enormous amount of public and media attention.

Just two quick examples. The ACLU has engaged in a number of challenges on civil liberty's grounds to various aspects of the administration's policies in the War on Terror, including several relating directly to the NSA wiretap program. And Scott most recently has been involved in the Kelo litigation and others in which attracted a huge amount of national attention.

So whether they like it or not, the media is coming to them looking for an understanding of the case and I think given the panel we had over lunch, if you're a repeat player in this business, if you've had the media beat itself to your door and beat that door down once, you quickly learn that the worst strategy is to just be reactive and let things happen. So both of these folks I think have some experiences to share about how they go about thinking about the interaction between the justice result they want to achieve in court and the fact that lots of media of all descriptions are suddenly terribly interested in aspects of the case.

So we'll start off with Scott and then go to Steve.

BULLOCK: Thank you, Chris. I should just say that as a public

interest organization, we like the media knocking down our doors and finding out about our cases. And we, like most other public interest organizations, unapologetically incorporate a media strategy into our litigation. And that is a part, a vital part, of what we see as advancing our mission. And when we describe the work that we do, as a matter of fact, we actually incorporate the name of this conference in that we say that we litigate our cases in the courts of law and the court of public opinion.

Now, why do we do that? Well, because in public interest law you're not just trying to win for your client, but you're seeking to advance the mission of your organization. You are seeking really in essence to change the world. And because you are trying to change the world, it is often times an uphill battle. As our organization and most other organizations have learned you can lose in court but you can still win in the overall court of public opinion or in other forms in which public interest lawyers engage. And that is really an important aspect of our work.

Public interest law is really about the use of litigation and all related means in order to advance the interest of a client and a cause to shape jurisprudence.

Now, we've done this and we actually learned some lessons about this from looking at the experiences of earlier public interest organizations, in particular the ACLU and the NAACP. The two kind of granddaddies of the public interest law movement.

The ACLU when it was first founded was called, I think it was the American Union Against Militarism, and it was founded during World War I where President Wilson was imprisoning those who opposed the war, and the American Union lawyers would challenge this in court these flagrant violations of the constitution. But they did not just go into court and vindicate their causes. They would have a rally out in front of the courthouse to draw attention to the injustice of these imprisonments. They would talk to the press. They would try to engage the public about this.

We do the very same thing today. We have rallies before important City Council hearings or before important court hearings. We engage in grassroots activism. And this is a vital part of our mission.

The NAACP also did this, and especially in the early days

of their organization, and they also engaged in some grassroots activism, but also did something else that was very important that we also do, which is to engage opinion leaders to talk to the folks that are shaping public opinion, especially given that they were really trying to change public perceptions about this. They wanted to get public opinion leaders on their side.

Public interest lawyers today also do this. We talk to syndicated columnists that have columns throughout the country that we talk to them about our cases, why our cases are important, why we think they should write a column about our cases. We meet with editorial boards in every area, in every city in which we practice and in every city in which we have a case. We sit down with editorial boards and talk to them about why we're doing this, why we've come into their community. They might not agree with us, but we at least try to engage them and try to work with them and try to see and explain to them why we're doing what we are doing.

Every summer we also have a training program where we bring in about 40 law students to Washington to have a seminar about how you do public interest law either as a career or

as a sideline when you're in private practice or doing pro bono work. If any law students here are interested in that, you can find out about it on our website at [ij.org](http://ij.org). It's a weekend where we talk to them about the history of public interest law, why we're doing what we're doing, about how you actually engage in the nuts and bolts of public interest law, how it differs from other practices of law.

But we also as a part of that training program have an entire session, almost an entire afternoon on working with the media, how you talk to the media. How you talk like a human being and not like a lawyer. How you speak clearly. How you talk passionately. How you do not speak in legalese. And it's very difficult sometimes for law students and often times lawyers to do that.

We also talk to them about what we call SOCOs. SOCO stands for Strategic Overriding Communications Objectives. A lot of times people say that these are sound bites. They're not sound bites. Sound bites are something cutesy that a politician says on the floor to get on the nightly news and to try to get attention. That's not what this is. This is actually a message that you want people to come away from any interview, any reporter, any member of the public, with

a message that you are communicating, and you want to incorporate these two or three objectives into any interview that you do, and you have to boil a case down to its essence, and we talk to law students about how they can do this and how they can become effective spokespeople for their cases.

Now, how do we do this? I think the keys success very briefly is how you work effectively with the media. Well, one of the things I think is very important to do and something that I think we have been successful in doing and it's something that I know makes a lot of lawyers, especially lawyers in practice, extremely nervous is that you put the client up front. You have the client talk to the media.

Suzette Kelo, the person who was the subject of the Supreme Court case, had a wonderful story, and she became the face of that battle. There were other homeowners, other ones that talked to the media, but it was her and her little pink house that was sought by the City of New London to give to private developers. She became the face of this battle. And that was a very important message for the media.

The media essentially wants that human face, because the media is interested in a story. They want to tell a story. They don't want to necessarily hear about the public use clause and the 50 years of jurisprudence since the time of the Berman decision. You can certainly talk about that to certain audiences, but what's going to get public attention is having a client's story up front. That's what we try to do in our litigation.

It also helps, quite frankly, to have a good villain on the other side of this, somebody that you can point to as representing the problems of the particular issue that you're engaging in. That also is a story that people can easily relate to.

The other thing that we do that I think is very important is that we make it very easy for reporters to find information out about our cases. On our website we have documents on there. Not only our news releases, but we have backgrounders that we put together on all of our cases that talk about the history of the case, the history of the legal issues that we're involved in. We try to have as many legal documents up there as well.



Not only does this provide the necessary information for the reporters, it also allows them to become comfortable with who you are and what you're trying to do. There's no hidden secrets here. There's no agenda that you're trying to -- well, there might be an agenda you're trying to advance, but you're very open about it and you're not trying to hide information. There's one-stop shopping really for reporters when they come to your website and try to find out information.

The other thing too that we're very adamant about doing is being accessible to the media and having our clients be accessible to the media as well. This is something we've heard from reporters over and over again is that when they're working on a story about our case, they know that if they call us we'll either speak the them immediately or they'll get a phone call back very quickly.

You can't be in a situation, and we tell our lawyers this, our young lawyers, all the time where you say "well, listen, I'm working -- I have a hearing tomorrow. I can't speak to the press. I can't do this. I have to focus on the actual legal..." No. You definitely have to focus on your

actual legal work, but a vital part of this is also getting your message out to the broader public. And we also make this an explicit part of our agreement with our clients, too, that we are able to use their image to talk about their cases and that they have to be comfortable speaking to the press. And we actually do some media training with them, too, as to how to make your message more honed as to how you talk to reporters in a more accessible way. This is a very important part of the work that we do and clients have to be comfortable in doing that.

I will stop by just giving you one example of how we, I think, effectively use some of these strategies and that is an issue that Chris had mentioned in our fight against eminent domain abuse.

This was an issue that often times -- mainly we got involved in this in the mid 1990s and it was at a time when most people, most lawyers certainly, thought that this issue was essentially a dead letter. You read about the Poletown case maybe in law school or the Berman case from the 1950s and where governments could use eminent domain not only for traditional public uses like roads or bridges or public buildings and that sort of thing, but now for

private economic development purposes taking a neighborhood to build a big box retail store, taking a set of homes to put in high-end condominiums. And we thought that this was outrageous. We thought this was a violation of the constitution of both the US constitution and state constitutions, and we said listen, the law is very bad in this area, but that's why public interest organizations exist to take on the hard cases, to take on the uphill battle.

So we started getting involved in these cases a little bit at a time, and we had the fortune of having as our first case in this area a situation that arose in Atlantic City, New Jersey, where the government there, the city of Atlantic City, was trying to take the home of Vera Coking, an elderly widow who lived along the seashore, lived in a boardinghouse there, she ran a boardinghouse and lived in it for over 30 years. She was really a very sympathetic person. People saw her as somebody who could their grandmother. So we took on her case and the city of Atlantic City was taking her property to give to none other than Donald Trump. Talk about having a nice villain on the other side of this. It doesn't get much better than Donald Trump as a villain.

And that was a case that got quite a bit of attention given who Ms. Coking was, who Donald Trump was and is, and that was a case that first started putting this issue in the public spotlight. We were able to secure a victory for that. So not only were we able to get some attention to the issue, but we were also able to secure a legal victory where a court for the first time in probably several decades struck down the use of eminent domain on public use grounds under the New Jersey Constitution.

After we did that case, we learned about the extent of the problem. People were calling us from throughout the country saying "hey, this isn't just some isolated case in New Jersey. This is happening in my neighborhood, this is happening in my city and we need your help." And we realized that this was not just isolated examples. This was a nationwide problem, so we made this a major part of our litigation program.

But we faced some challenges in doing so. One of the main ones being that the story arose on a local level, and so it was tough to get national attention for the issue, because it was Vera Coking in Atlantic City or Suzette Kelo in New

London or a battle down in Mississippi or out in Mesa, Arizona, so you had these little pockets of problems, but it was hard to get a national focus on this.

The other thing that we recognized in trying to raise awareness of this is that reporters would often times say, especially the national reporters, is that well, we've heard about this, we're hearing more about this, but what are the numbers on this? How often does this occur? It seems like there might be a national story here, but we don't know. What do you know? And there were no numbers out there. Nobody was compiling statistics about this. Nobody was documenting the extent of the problem. So we made it a part of our mission to put together a study that took us over two years to complete, which was the first ever attempt to document a nationwide the extent of this problem.

We published this in I think 2003, and it documented over 10,000 instances of already completed or threatened condemnations for private development purposes in 41 states. And this was able to generate a lot more interest in this story, because people could then document the extent of the national problem, reporters could look at

their states and say wow, our state is really bad in this area or our state is actually pretty good. And it really raised awareness of this, because quite frankly, most people were not even aware that this was going on. And when they were aware of it, they were most often outraged about it and could not believe it was actually taking place.

This study actually was instrumental in getting us a piece on 60 Minutes. And the 60 Minutes piece aired actually one year to the day before the US Supreme Court accepted the Kelo case. And this was really the first instance that this case was put into the national spotlight. Mike Wallace did a story that was very critical of the use of eminent domain for private development. It focused on two of our cases and clients. And it really got people quite upset about this and 60 Minutes had said that they got one of the best responses they ever had for a story, because of people being quite upset about what the cities in these areas were doing to homeowners and to small business owners.

Of course, nothing got more attention to this issue than The Court accepting and then eventually deciding the Kelo case. This was -- I really took this issue to the next level and now just about every reasonably well-informed

person in the country is aware of this issue, and as polls show, virtually everybody is opposed to these types of takings. And this cuts across geographical divides, it cuts across political divides, people in red states oppose eminent domain for private development as much as people in blue states. And it led to this backlash against the Supreme Court decision that's manifested itself in State Court decisions, in legislature where now 40 states have changed their eminent domain laws in response to the Kelo decision. It's led to a change in the public climate about this where developers and local officials were often times able to get away with this under the radar screen. Now people are more aware of it, more willing to fight against it, and city officials, I think, and developers are much more reluctant at least in many places to engage in this type of behavior.

So I think that is a classic example of losing a court battle, because the Kelo case, as most of you know, was a narrow five to four loss, but then beginning to win the overall war. And working with the media and raising public awareness of this was a vital part of our mission in doing so. Thank you.

SCHROEDER: Thanks, Scott. Steve?

SHAPIRO:

Thank you. Well, for better or worse, the ACLU does not seem to have much trouble attracting public attention to its cases. Being the third speaker on an ultimate panel of a two-day conference reminds me of the old saying that everything that needs to be said has been said, but not everyone has said it. So I will try to the extent that I can to avoid repetition and in the service of that goal, let me begin with one clear answer to a question that was raised at the beginning of the panel, which is I suppose that the domestic surveillance program could be framed either as a national security issue or as a massive abuse of civil liberties, but the right answer is it's a massive abuse of civil liberties.

The strategies that we employ at the ACLU are very much like the strategies that Scott was talking about and that the Institute for Justice employs. And truth be told, many public interest organizations across the political spectrum now employ. Scott said something that was interesting and I just want to pick up on, which is he said well, you can lose in court and still -- lose in a court of law and still win in the court of public opinion. That is certainly true. But the opposite is also true, and that has been an even more painful lesson I think for many public interest



lawyers, which is that you can win in the court of law and lose in the court of public opinion.

And if there are two sort of signature lessons that I think the public interest community has learned over the years, they come from two of the most important civil liberties and civil rights decisions that the Supreme Court has issued in the 20th century. The first, of course, was Brown v. Board of Education. Brown V. Board of Education was the culmination of an effort that had gone on for many decades. And I think there were many people who in 1954 really thought that the battle over segregated education had been won and that it might take a few years to achieve integrated education not only in the South, but throughout the country, but we now had a piece of paper from the United States Supreme Court saying separate educational facilities were inherently unequal, and the war was really over. What was left were a few skirmishes, and we, of course, know that that is not true. That sometimes what Supreme Court decisions can provoke is noncompliance and Kelo may be another example of this, but kind of a massive political and public backlash, and now what is it, 53 years later we are continuing to fight many of the same battles that were fought in Brown v. Board of Education not only in

the political arena, but back again in the United States Supreme Court.

Likewise with Roe v. Wade. When Roe v. Wade was decided in 1973, that one seemed even more clear-cut. You had a decision from the Supreme Court that said state laws criminalizing abortion were unconstitutional and women had a basic and fundamental constitutional right to control their own reproductive choices.

The ACLU in the wake of Roe V. Wade created something that we called our Reproductive Freedom Project, and we thought that we would have a Reproductive Freedom Project for two or three years to engage in what was described as mop up work. Just go around the 50 states and deal with state laws that remained on the books but that were inconsistent with the Supreme Court's decision in Roe V. Wade. Here we are 34 years later and our Reproductive Freedom Project is still there and busier and busier than it has ever been.

I think the lesson that we have learned from that in the public interest community is that the fight for civil liberties, the fight for civil rights, the fight for human rights is largely a political struggle that litigation is

one advocacy tool within that larger political struggle, but it is not the only advocacy tool. And if you focus on it to the exclusion of other advocacy methods, you do a detriment to your cause and to your client.

And so in the ACLU we have three program departments. We have a Litigation Department, which is what I am in charge of. But we have a Legislative Department and we have a very large and sophisticated Communications Department.

The Communications Department deals not only with the media, traditional and nontraditional, but we also now increasingly try to find ways to frame our own message. So like everybody else we have a website. We have our own blogs as well as contributing to other blogs that are out there. We have even in the last two years started to produce our own television show that we call The Freedom Files that's available on Link TV and it's been available to some degree on PBS stations around the country. And all of that is an effort, as Kim said, I think, to frame the issues, and we think in a way that we think is appropriate.

One of the things that we have also learned over the years, and this was a lesson that took us longer to learn than it

probably should have, is that lawyers are not always the best public spokespeople. And even lawyers who are good at it need to be trained at how to be good at it. And so one of the things that we say at the ACLU all the time is that we would never send a lawyer into court without preparing that lawyer, without mood courting them, without making sure that lawyer had anticipated the questions he or she was likely to be asked and knew what the responses were and we were sending people off to the McNeil-Lehrer Show and to the nightly news with absolutely no preparation whatsoever, and no understanding that it was a different form and a different vocabulary and a different language that they needed to engage in. We no longer do that. We now make sure that the people who appear in public for the ACLU have been trained to perform that function.

One of the things that struck me in the comments that have been made over the last couple of days, and actually pretty much in today's panels, was first a comment by Sergio Quintana, the local reporter from Raleigh/Durham, who was describing Duke's reaction and response to the Duke Lacrosse team and he said, I admired their principles, I admired the eloquence of their rhetoric, what they didn't understand is they were in a knife fight. And likewise

during the panel on crisis management part of the advice that we got was that in the middle of a crisis perception is more important than reality.

Both of those things may be true. Duke was certainly in a knife fight and there may well be many circumstances in which perception is more important than reality. Having said that, I have to say I find both of those observations very personally difficult in my interactions with the press, because I am not inclined or disposed to want to pickup a knife and I happen to believe that reality is important and that facts matter. That we have obligations to our clients certainly, but we're not merely engaged in a process of spin and that we have some obligation to the truth and we have some obligation both as a matter of institutional and personal integrity to be honest about what is going on. And how one shapes that message when they're in the food fight and everybody else has picked up their knives and everybody else is engaging in personal attacks is often a very, very difficult problem when you're in the middle of it.

And frankly there are some news outlets that I personally simply will not go on because I don't think they're

interested in a serious dialogue or a serious debate about the issue. They want people to come and yell at each other, and I'm not particularly interested in being in that forum. I don't think it serves anybody's interest, mine, the ACLU's, or the public's interest just to engage in that kind of debate.

Let me make also just two other comments about the issue of fair trial/free press. Although -- as Chris said -- neither Scott or I are primarily criminal defense lawyers. And that makes a very big difference. We are plaintiffs. Not only are we civil litigators and not criminal lawyers, but we are by in large plaintiff's lawyers not defendant's lawyers. And not only are we plaintiff's lawyers, but we are plaintiff's public interest lawyers, which means that the government -- we are generally initiating litigation against the government. The government is not initiating litigation against us or else we're in a lot of trouble. And because we are public interest lawyers, we have a certain latitude under the ethical rules that the traditional lawyers -- not traditional lawyers -- lawyers operating in for profit law firms do not have in terms of our ability to go out and seek clients.

So our ability to seek clients, our ability to initiate litigation gives us an opportunity at the very outset, I think, that criminal defense lawyers often do not have to shape the story. The way a criminal case is normally shaped is the DA stands on the steps of the courthouse and announces the indictment and the criminal defense lawyers are always playing catch-up.

We, on the other hand, have chosen our clients, have framed our complaint, are in control of the timing, and generally have the benefit of the first press release and the first press conference, and that makes an enormous difference in being able to get your story out there.

Kim -- the few quick points I wanted to make -- two quick points I wanted to make though on the fair trial/free press issue was Kim I think made a very, very important point, and that is that there has been a lot of discussion at this conference, and understandably so and correctly so, about the media's resort to stereotypes in the way that they covered the Duke Lacrosse case and how damaging that was and how unfair those stereotypes turned out to be. All of that is true, but what is equally true is that the stereotypes that were at play in the Duke Lacrosse case

were the opposite of the stereotypes that dominate most media coverage of the criminal justice system, and therefore, they present a somewhat distorted picture of the problem that we face when we talk about how the media covers the criminal justice system.

The other thing that I think has to be said, and Latisha Faulk touched on this very briefly during her talk in the last panel, is as concerned as I am about the sensationalism and the pack mentality and the lynch mob mentality that can develop in these high-profile criminal cases whether at Duke or elsewhere that is a miniscule proportion of the cases that go through the criminal justice system. And I ultimately am concerned, but less concerned, about prejudicial publicity in these high-profile cases, because often these high-profile defendants, truth be told, have the ability to deal with it themselves and the criminal justice stories the media is not covering at all. And those are -- I mean there's virtually an endless list.

And as Latisha said in the last column what the prosecutorial misconduct that took place in this situation was egregious, but it was not unique. And where is the



media even in the wake of the Duke Lacrosse story writing stories about going through the North Carolina Appellate decisions looking for all of the other cases of prosecutorial misconduct and said what happened to those prosecutors in those cases? You know what happened? They went back to their jobs the next day and they continued to do their jobs and nobody said anything. And if the defendant was lucky he got the conviction reversed and maybe the defendant didn't get his conviction reversed at all despite the prosecutorial misconduct.

And if you want to know why there are wrongful convictions in this country on a daily basis, very little of that has to do with media misconduct or prejudicial publicity. It has to do with unequal resources. It has to do with an under-funded indigent defense system. It has to do with a punitive sentencing system that forces people into pleas because they can't risk going to trial. Those are the real stories of the criminal justice system and those stories are not being covered in the media at all. And so when we think about media coverage, I think we have to address those issues as well as the question of pretrial publicity. Thank you.

SCHROEDER: Fair enough. Thank you very much. We've got some time for

questions or comments. Yes, sir.

AUDIENCE: A couple of questions. First, when you are dealing with the media for a public interest entity, I harken back to Mr. Haddon's comment about fear the wolf. How do you deal with tough questions, ones which may put you to a situation where you may (inaudible) actually you'll have to make a concession here or admission against interest even if it's about some fact or some interpretation of case law or something like that? And then secondly, this is a different question, to what extent do you have to be concerned about violating the prohibition about materially tainting the potential pool of jurors or potentially tainting the judiciary or something like that?

SHAPIRO: Well, we rarely -- in response to the second question first, we rarely have to worry about that. Most of our cases are civil cases and really are tried by -- decided by judges, because you're really challenging the constitutionality of a law or a regulation, and judges have to make those determinations. So you definitely have more leeway in making comments to the press than you would in a criminal situation.

The other thing to with dealing with hostile questions or even sometimes hostile reporters is that we train people on

how to deal with that. We are just honest and as up front as possible. And then try to, especially when you're dealing with in a hostile forum, is to still try to get your message out. Respond to the question that's asked, but then also incorporate your SOCO that we had talked about as well. Get it back out on -- get the debate or get the questioning back to the terms that you want it to be on and the messages that you want to send. So you don't let a, for instance, a hostile reporter completely drive the agenda.

SCHROEDER: Yes, sir.

AUDIENCE: I have a comment and a question. My comment is (inaudible) I'm a member of the ACLU.

SHAPIRO: Good.

AUDIENCE: I'm also a former prosecutor and I've tried cases in a lot of jurisdictions. It's extremely rare to see prejudicial prosecutorial misconduct (inaudible). And it's (inaudible) that's (inaudible) wide concept and there's different kinds of prosecutorial misconduct. I think it's a mistake to lump it all together. But that was my comment.

My question relates to the two of your train your people to talk to the media, and earlier you were talking about frames of reference very important concept. When you train your people to talk to the media, you've got your frame of

reference you want to sell them. If you go visit with Mike Wallace when you do your filming for 60 Minutes, his frame of reference is going to be different than your guys' frame of reference. How do you deal with that in that training process?

SHAPIRO: Let me respond to your comment first. And I agree with you. I think the vast majority of prosecutors in this country do their role and do their role well and follow the rules. My sister was a career prosecutor. But I also think just to take the one example of prosecutorial misconduct that occurred here and that's the failure to disclose exculpatory evidence there are certainly a fair number of cases in which convictions are reversed on Brady grounds and what I worry about is there isn't often either enough attention paid to that by the media or enough disciplinary action taken by Bar Associations or prosecutorial offices when their own ADAs or whoever it may be engage in that misbehavior. I don't think it's the norm. I think it's the exception, but it happens enough that we ought to be paying more... It's not just this case was my only point.

And your answer about -- your question about the media is exactly right. You can go in with your frame of reference and the journalist or reporter is likely to have his or her

own frame of reference. And I think that it's not much different than when you are appearing in court and the judge asks the question and you have to try to answer the question as honestly as you can, but you always want to answer in a way that's most favorable to your client that enables then you to get back to the sort of thread of the argument that you wanted to present. And I think that when you go and you prepare for something like a 60 Minutes interview, what you try to do just as when you're preparing to go into court is you try to anticipate what perspective Mike Wallace is going to bring into that interview room, what kinds of questions he's going ask and how are you going to respond when he asks those questions. And if you're good and you're lucky you're able to anticipate most of what is coming. And if you're not and you're surprised then you've got to do the best you can under the circumstances.

BULLOCK: I think that's exactly right. And you just have to look for the pivot. You have to take the question, answer it as honestly as you can as you said and then look for a pivot to bring it back to the points that you would like to make.

And there's little things, too, that we train people not to do, especially if you're doing TV interviews where they

want to use the sound clip and there's just a brief thing is that if you get a hostile question you don't repeat the hostile question. In other words if somebody -- isn't your client a liar. No, my client is not a liar. Whoa. You just no and then so that it's not on -- you're not then bringing up the fact that the accusation is that your client is actually lying or something like that. So it's little things like that that you do to try to avoid getting yourself into that sort of hostile pitfall.

AUDIENCE: Quick follow up. So when you do the interview with Mike Wallace and he sits there and you know you're representing your clients (inaudible) and (inaudible) you don't give the right answer (inaudible) Mike Wallace (inaudible) you know that's going to end up on the cutting room floor and it's not going to make it, it's not going to happen your way. It's not going to happen his way either and you've wasted your time. Unlike the comment (inaudible) the judge when you answer it (inaudible) you're going to get what you have to get (inaudible). So there's got to be some tension there between performing your services for your client and finding your sort of Faustian notion of well, I want to make a deal with this devil and get my day on TV.

SHAPIRO: It's actually not a Faustian exchange and as one of the things -- because I think the answer is clear. I think the

ethical answer is clear and it's something that I say to ACLU lawyers all the time and that is that once we agree to take on -- the decision to take on a case is a decision that we make in light of what the ACLU's principles are and the ACLU's priorities are. The moment we take on a case and we have a client, we as ACLU lawyers are no different than any other lawyer out there who is representing their client. And that our first and only obligation is to represent that client as zealously as we possibly can and if there's any conflict between the client's interest and the ACLU's interest, you're obligation is to represent your client. And if the ACLU has to withdraw, they withdraw, but as long as you're that client's lawyer, you're that client's lawyer. And I think that's the only way that this system can possibly operate.

SCHROEDER: Yes, ma'am.

AUDIENCE: I just want -- it's kind of an observation, but Scott and Steve both talked a lot about (inaudible) media but also influence (inaudible) as part of your package. I wanted to come back to Kim and say to what degree are you looking at that in this case, in the Duke case, because while the TV coverage may have been really sticky, a lot of the important changes (inaudible) were influenced (inaudible) Jena Six. You could argue that what happened in Jena Six

and what happened here had a lot to do with some of the civil rights organizations that were involved in Jena Six and not here. So I'd just like (inaudible) comment about (inaudible).

GROSS: Yeah. We haven't looked at that particular part of it as carefully. Yeah. It's part of what we're trying to look at now as sort of sorting out. We've done a kind of quick thing about what kind of -- who gets sort of directly quoted and on what side and how does that workout. But now the next step is to sort of sort out those kinds of things. But it's certainly the case that the media will -- going to opinion leaders make sense because the media is going to quote those people, too. So you're trying to get your message in one way, but that's the other way you get your message in is that the media is going to pickup on those other opinion leaders and bring them in.

SHAPIRO: Just one other quick thing I wanted to add, which is a struggle that we sometimes have in the public interest world, which is, again, different than the issues that a criminal defense lawyer would face, is how to persuade the average person that the issues we are fighting about matter to them. And that's a different kind of conversation. How do you persuade the American public that what is going on in Guantanamo matters to them? They're not going to be



imprisoned in Guantanamo. And so how do you frame that discussion so that people care about it. And that's an issue that we spend a lot of time thinking about and talking about as well.

AUDIENCE: I'd like to follow up on that, because as I think ACLU is probably more successful (inaudible). And one reason --

SHAPIRO: That may be damning by faint praise.

AUDIENCE: Sorry. One of the reasons I raised opinion leaders and not just the big ones, not just (inaudible) is the people if you look at elections people who tend to be most successful persuading somebody to vote a certain way are the opinion leaders within a community (inaudible) and not necessarily a professor at Duke or (inaudible). It just seems like the Duke case is one where that was beginning to change the way (inaudible).

SCHROEDER: Yes, sir.

AUDIENCE: (Inaudible).

SHAPIRO: Maybe things are.

AUDIENCE: (Inaudible) media outlets that shed more (inaudible) light whether it's (inaudible) or (inaudible), whatever (inaudible), (inaudible) one thing to say that that particular media personality is not interested in getting (inaudible) audience. (Inaudible) Bill O'Reilly (inaudible) how do we go about reaching (inaudible)?

SHAPIRO:

Let me be clear. The ACLU does not have lists. But -- no, I just think that there are a variety of -- we now have niche media. It's part of the problem. People go to media sources that reinforce their own preconceptions and that is part of the reality that we all have to deal with. But I think my view of this is if you don't have anything nice to say don't say anything at all. If you're going to -- if your aim is to reach out to an audience and you're going to a forum in which you don't think you're going to be given a fair opportunity to express your message, you're not achieving anything in reaching that audience, and so you simply have to hope that those people, niche media notwithstanding, are going to have access to your audience through other outlets.

And you're right. I mean, it made just mean that there are some people that we're not reaching and we certainly don't want to be in a position of only preaching to those people who already agree with us. But I just think getting yourself in a situation where you're being invited to speak just so that you could be attacked without being given a fair opportunity to defend yourself doesn't do much to advance your cause. That's just my view.

SCHROEDER:

There's not a thing wrong with a little bit longer than

normal break.

SHAPIRO:

I just want to add one other thing. One of the things that I don't know, Scott, if you do this though, but one of the things that we have tried now to do is we've tried to actually sort of understand what issues and what messages resonate with the American public. Our principles at the ACLU I think are pretty firmly set. But we still are constantly trying to learn how to express those principles in a way that will be more persuasive. And one of the sort of interesting little episodes we had was when there was a public debate going on about whether or not the Geneva Conventions applied to people being held at Guantanamo. Alberto Gonzalez said they were quaint and obsolete, Bush said we weren't going to apply them to Al-Qaeda, and there was a large national debate going on.

I have to say my first instinct was to say that the most powerful and persuasive argument you could make to the American public for why the Geneva Conventions mattered was because if we didn't obey the Geneva Conventions then we sacrificed any moral authority to say that our soldiers were entitled to claim the Geneva Conventions when they were captured by the enemy and that this was really about protecting our soldiers, because the American public wasn't

going to care about people they saw as captured terrorists. That was my instinct.

Turned out to be that that was not the most powerful and persuasive message. And it was not the most powerful and persuasive message because the American public was really more sophisticated than that and they said it's not about reciprocity. Osama bin Laden is not going to follow the Geneva Conventions no matter what we do. And so, yes, we want our soldiers to be able to have the benefit of the Geneva Conventions, but we're not going to achieve that by saying to Osama bin Laden we follow them, therefore, you should follow them.

Nonetheless the American public felt overwhelmingly that the Geneva Conventions were important and that we should obey them. And the reason they thought that was because they said we're better than they are. It says something about who we are as a society. And so partly I think what we are also all trying to do now, and this is part of the framing issue, we're becoming more sophisticated, I think, in sort of trying to understand what framing works and what framing doesn't work and why it works and how it works and to what audiences and maybe there are different messages to

different audiences. And that all of that inquiry is not only an appropriate thing for a public interest lawyer and organization to do, but I think a necessary thing for a public interest organization to do.

SCHROEDER: Let me ask you to do two things. One is come back in 15 minutes for the judges' panel. We haven't blamed the judges for very much yet. We'll get a chance to do that at 3:15. And the second thing is to give our panelists a round of applause.