



# DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM: A REVIEW OF HOWARD M. WASSERMAN'S *INSTITUTIONAL FAILURES*

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On March 13, 2006, the Duke men's lacrosse team hired two exotic dancers for an off-campus party. One of these exotic dancers claimed that she was raped at the house party by multiple assailants.<sup>1</sup> These accusations ignited a powder keg in Durham, North Carolina, and on Duke's campus. There was extensive national media coverage following the accusations combined with an overtly public handling of the investigation by the prosecutor's office.<sup>2</sup> There were swift and hard-felt consequences for many involved in the immediate aftermath of the accusations. The lacrosse team's head coach was fired and the season suspended less than three weeks after the party.<sup>3</sup> Three lacrosse players were indicted for "first-degree rape, first-degree sex offense, and kidnapping."<sup>4</sup> Two of the indicted players were suspended from the university.<sup>5</sup>

Nine months after the house party, at a hearing on a Motion to Compel, the head of the DNA lab that was responsible for testing the players' DNA admitted to withholding exculpatory DNA evidence in collusion with the District Attorney, Mike Nifong.<sup>6</sup> The fall-out from these events continues

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1. Howard M. Wasserman, *An Institutional Perspective on the Duke Case*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 3, 6 (Howard M. Wasserman ed., 2011).

2. The District Attorney delivered over seventy press conferences and public statements on the case. *Id.* at 18.

3. *Id.*

4. Angela J. Davis, *When Good Prosecutors Go Bad: From Prosecutorial Discretion to Prosecutorial Misconduct*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 23, 24–25 (Howard M. Wasserman ed., 2011).

5. Wasserman, *supra* note 1, at 18.

6. *Id.* at 19.

today with several unresolved lawsuits still pending against some of the institutional actors in the case.<sup>7</sup> While the lingering lawsuits are certainly one remaining facet of this story, perhaps more important lessons arise from studying the events in their entirety with the benefit of hindsight. In order to effectively explore what went wrong in the Duke case, one must spend part of that journey scrutinizing the institutional actors involved.

*Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System*<sup>8</sup> is a collection of essays that takes a critical look at how “three powerful sociopolitical institutions—the legal system, Duke University and American higher education, and the news media”<sup>9</sup> functioned throughout the infamous Duke Lacrosse sexual assault scandal of 2006. Howard M. Wasserman<sup>10</sup> contributes to and edits this collection of essays, which are organized around each respective institution in order to study “the Duke lacrosse case in an institutional context.”<sup>11</sup>

Wasserman begins the book with an overview chapter titled, *An Institutional Perspective on the Duke Lacrosse Case*,<sup>12</sup> where he provides a thorough overview of the events that transpired in the Duke scandal. This overview includes “A Basic Timeline of the Duke Lacrosse Controversy”<sup>13</sup> and a brief summary of each respective institution’s role or failure in the case (each receive full treatment in subsequent essays). This chapter also successfully establishes a major theme of the work, namely, the importance of “identifying incentives and systemic rules” in place at each institution that contributed to their failures in order to “teach institutions (and those within them) to handle the next case better.”<sup>14</sup> This chapter explains why viewing the failures through an “institutional lens,”<sup>15</sup> is important and meaningful. As Wasserman states, “an institution is its people,” but these people or individuals act in ways that are incentivized by the institution.<sup>16</sup> “We cannot evaluate or understand how any individual acted without understanding the institutional structures within which he acted and the incentives that motivate and explain individual and macro-level action.”<sup>17</sup> It is postulated that an understanding of these institutional failures, and why they occurred, will assist future institutional actors to avoid a repeat of the

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7. *Id.* at 8.

8. INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM (Howard M. Wasserman ed., 2011).

9. Wasserman, *supra* note 1, at 4.

10. Howard M. Wasserman, Associate Professor of Law, Florida International University College of Law.

11. Wasserman, *supra* note 1, at 5.

12. *Id.* at 3.

13. *Id.* at 18.

14. *Id.* at 5.

15. *Id.*

16. *Id.*

17. *Id.*

same mistakes,<sup>18</sup> or perhaps “moderate future failures.”<sup>19</sup>

Another major theme of the work introduced in this chapter (that again receives comprehensive coverage in later chapters) revolves around how preconceived notions and beliefs about race, gender, and privilege created fertile grounds for the institutional failures that occurred in the Duke case.<sup>20</sup> Wasserman aptly describes the environment that surrounded the controversy as it unfolded as a “toxic soup of racial, gender, and socio-economic conflict.”<sup>21</sup>

Following the introductory chapter by Wasserman, the book is organized into three parts, each covering a respective institution, its failures, and occasionally its successes. The essays within these sections of the book elaborate on the major themes established by Wasserman. This review will attempt to highlight and summarize the most relevant points in each essay.

The *Legal System*<sup>22</sup> is covered first and begins with an essay by Angela J. Davis.<sup>23</sup> Davis’ essay, *When Good Prosecutors Go Bad: From Prosecutorial Discretion to Prosecutorial Misconduct*,<sup>24</sup> focuses on the prosecutorial misconduct in this case and the realities of the system that allows for this type of misconduct to occur. For those readers not familiar with the facts as they relate to the prosecutorial aspects of the Duke case, a brief summary is warranted. Mike Nifong was serving as the District Attorney of Durham County in 2006<sup>25</sup> and was responsible for the decision to indict three lacrosse players, for “first-degree rape, first-degree sex offense, and kidnapping.”<sup>26</sup> After committing serious prosecutorial misconduct in the case, Nifong was disbarred, found in contempt of court, and subsequently spent one day in prison.<sup>27</sup> Nifong’s misconduct included “failing to provide exculpatory evidence to defense counsel and making misrepresentations to the court in violation of the rules of professional responsibility.”<sup>28</sup>

Davis identifies and analyzes the systemic realities that allowed for this type of misbehavior, while illuminating the unfortunate and alarming frequency with which prosecutorial misconduct occurs. Davis provides a thoughtful analysis of the case law, civil rules, and Model Rules of

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18. *Id.*

19. *Id.* at 15.

20. *Id.* at 14–15.

21. *Id.* at 7.

22. INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM, *supra* note 8, at 21.

23. Angela J. Davis, Professor of Law, American University, Washington College of Law.

24. Davis, *supra* note 4, at 23.

25. *Id.* at 23.

26. *Id.* at 24–25.

27. *Id.* at 27.

28. *Id.* at 26.

Professional Conduct as they relate to Nifong's misconduct and punishment.<sup>29</sup> This analysis highlights how the case law on prosecutorial immunity affects the occurrence of misconduct and illustrates how existing case law is inadequate when it comes to eliminating systemic prosecutorial failure to turn over exculpatory evidence.<sup>30</sup> Davis argues that the practice of holding elections for chief local prosecutors has actually increased "prosecutorial power, independence, and discretion."<sup>31</sup> While acknowledging the harm done to the innocent indicted students in the case, Davis points out that the harm they experienced pales in comparison with the harm done to those wrongly accused defendants who spend years in prison after being the victims of prosecutorial misconduct.<sup>32</sup> "Innocence projects across the country have revealed the prevalence of wrongful convictions, and prosecutorial misconduct is cited as one of the main causes of these injustices."<sup>33</sup> Davis states that:

There is little question that African Americans and Latinos fare much worse in the criminal justice system than whites, and that the poor fare much worse than the middle class or wealthy. Not surprisingly, most victims of prosecutorial misconduct are poor, and a disproportionate number of them are African American or Latino.<sup>34</sup>

Davis argues that in the Duke case, the defendants had access to "first

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29. *Id.* at 27–35.

30. *Id.* at 28–31. The author summarizes the Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1963), where the Court held that a prosecutor violates a defendant's constitutional due process rights by failing to disclose to the defendant evidence that is favorable when the defendant has requested such information. *Id.* at 87. This rule was further expanded in *United States v. Agurs*, 427 U.S. 97 (1976), where the Court held that prosecutors must "turn over exculpatory information to the defense even in the absence of a request if such information is clearly supportive of a claim of innocence." See Davis, *supra* note 4, at 29 (citing *Agurs*, 427 U.S. at 107). It is worth noting that since the publication of this book, the Supreme Court has decided two *Brady* violation cases. In *Connick v. Thompson*, 131 S. Ct. 1350 (2011), the Court held that a municipality was not liable under § 1983 for a conceded *Brady* violation committed by one of its assistant district attorneys who failed to turn over exculpatory evidence. Then, in *Smith v. Cain*, 132 S. Ct. 627 (2012), the Court, in an eight to one decision, reversed and remanded a first-degree murder conviction based on a *Brady* violation committed by the prosecution when they failed to disclose statements from the lead investigator's notes which indicated contradictory testimony from the only eyewitness to identify the defendant as the assailant. The eyewitness testimony was the only evidence linking the defendant to the crime. *Id.* at 630. The Court in *Smith* held that under *Brady* "'evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* (quoting *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)).

31. Davis, *supra* note 4, at 39.

32. *Id.* at 36.

33. *Id.*

34. *Id.* at 37 (citation omitted).

class representation.”<sup>35</sup> This “top-notch”<sup>36</sup> defense team was able to command the attention of the national media, which was a very valuable commodity. The defense team was also able to spend significant time researching and preparing. “One attorney spent 60 to 100 hours reviewing almost 2,000 pages of laboratory data and educating himself about DNA.”<sup>37</sup> Access to national media and wealth to pay “first class”<sup>38</sup> attorneys are not typically enjoyed by the poor minority defendant who has to rely on a public defender who has fewer resources.<sup>39</sup> Davis effectively describes how the case law, civil rules, and Model Rules of Professional Conduct affect prosecutorial misconduct and uses the prosecutorial misconduct seen in the Duke Lacrosse case to make a larger point about how this type of misconduct regularly and severely effects wrongfully accused defendants. Those individuals may in the author’s words “reap unintended benefits” from the national and international attention garnered in this case as prosecutors, judges, and policymakers consider the ramifications of the prosecutorial misconduct in the Duke case.<sup>40</sup>

*Duke Lacrosse, Prosecutorial Misconduct, and the Limits of the Civil Justice System*<sup>41</sup> by Sam Kamin<sup>42</sup> is the second and final essay on the *Legal System* in the collection. This essay focuses on how the Duke lacrosse players sought a legal remedy for the harm they suffered as a result of the rape allegations and investigation. At the heart of the complaints brought by three separate groups of Duke lacrosse players “is the alleged deprivation of their civil and constitutional rights under color of law in the investigation and prosecution of the events at the lacrosse-team party. The constitutional claims were brought pursuant to 42 U.S.C. § 1983, the principal mechanism for seeking civil remedies for constitutional violations.”<sup>43</sup> Kamin provides a careful and concise history of § 1983<sup>44</sup> and then moves on to a thorough analysis of the complexities of the law, describing it as a “maze of interlocking doctrines and defenses that make recovery very difficult, even for the most deserving of plaintiffs.”<sup>45</sup>

Kamin analyzes the reasons why the three groups of plaintiffs are

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35. *Id.* at 38.

36. *Id.* at 37.

37. *Id.* at 38.

38. *Id.*

39. *Id.*

40. *Id.* at 41–42.

41. Sam Kamin, *Duke Lacrosse, Prosecutorial Misconduct, and the Limits of the Civil Justice System*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 43, 43 (Howard M. Wasserman ed., 2011).

42. Sam Kamin, Associate Professor of Law, University of Denver, Sturm College of Law.

43. Kamin, *supra* note 41, at 47 (citations omitted).

44. *Id.* at 52–54.

45. *Id.* at 54.

unlikely to succeed in their § 1983 suits. Section 1983 and the attending case law require that “each plaintiff must allege and prove that the defendant’s conduct violated his constitutional rights in a way that a court has the capacity to remedy through damages, prospective relief, or some other means.”<sup>46</sup> The majority of plaintiffs in this case were never even indicted let alone brought to trial and convicted. Moreover, the three plaintiffs who were indicted were never brought to trial or convicted. Without ever having been brought to trial, there is no “personal constitutional injury”<sup>47</sup> which is required in a § 1983 case. Kamin argues that this lack of a “personal constitutional injury”<sup>48</sup> is “fatal to the prosecutorial misconduct claims in the Duke lawsuits.”<sup>49</sup>

Kamin then analyzes the issue of the state action claim, which was required to bring the private defendants, including Duke University and the DNA laboratory, into the § 1983 lawsuit of the unindicted players.<sup>50</sup> Even though these players may have a strong case that there was the exact type of conduct that would bring private actors into a § 1983 suit,<sup>51</sup> Kamin argues they will likely fail in this regard as well because of their inability to show any type of harm that would be recognized by a federal court.<sup>52</sup>

Kamin provides a detailed breakdown of the “common law of immunities” and how it in essence serves to legally protect District Attorney Nifong’s misconduct in the case.<sup>53</sup> He also establishes why the municipal entity, the City of Durham, is unlikely to be held liable in any of these suits, despite being a named defendant.<sup>54</sup> Kamin argues that the final reason why the § 1983 lawsuits are likely to fail is that the prospective relief requested by the plaintiffs cannot be awarded by the court under § 1983 because the plaintiffs cannot show how the requested relief<sup>55</sup> would prevent any future personal harm to the plaintiffs.<sup>56</sup> In conclusion, Kamin,

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 55.

50. The three indicted players had already settled with Duke University. *Id.* at 43.

51. “[P]rivate organizations and individuals can be liable under § 1983 if they operate in concert with public officials to deny constitutional rights, such as by conspiring with public officials to commit obviously unconstitutional conduct . . .” *Id.* at 57.

52. *Id.* at 58.

53. *Id.* at 58–61.

54. *Id.* at 62–63 (“states are not ‘persons’ subject to suit under § 1983” and “[t]he Court of Appeals for the Fourth Circuit (which includes North Carolina) has held that prosecutors are state, rather than local or county, officials”) (citations omitted).

55. The complaint requested “judicial imposition of an elaborate framework for overseeing and revising the policies of the Durham police department and DA’s office. The proposed structural reforms included appointment of an independent monitor for the police department, a ban on press releases during ongoing investigations, and a plan of remedial training for the department.” *Id.* at 63.

56. Kamin notes, “Not even the most creative of lawyers would have been able to

like Davis before him, argues that the lessons on prosecutorial misconduct learned in the Duke case are far more meaningful as they relate to the other countless victims of this type of misconduct who spend years in prison where the misconduct is never discovered or discovered years later.<sup>57</sup> Kamin's essay illustrates how the obstacles in § 1983 make civil recovery difficult not only for the Duke lacrosse players, but more profoundly in the "run-of-the-mill prosecutorial misconduct case."<sup>58</sup> He argues, in closing, that where the system fails to provide an adequate means to deter prosecutorial misconduct through vehicles such as § 1983 suits, that misconduct will flourish.<sup>59</sup>

The next section of essays entitled, *Duke University and American Higher Education*, delves into the institutional failures witnessed throughout the controversy. KC Johnson<sup>60</sup> contributes an essay titled, *The Perils of Academic Groupthink*,<sup>61</sup> which takes the reader through a less than complimentary review of the Duke faculty and administration's response to the crisis. Johnson states:

The Duke lacrosse case illustrates three major points about contemporary academic culture. First, the case shows how faculty groupthink, oriented around principles of race, class, and gender, has diminished support among the professoriate for due process. Second, the case introduces a difficult issue in higher education law—whether university policies apply when professors publicly target their own students to advance the faculty members' pedagogical or academic agendas through public expression. Finally, the corruption of the academic ideal of dispassionate evaluation of evidence in pursuit of truth exhibited by activist faculty in the case was hardly confined to professors at Duke.<sup>62</sup>

Johnson discusses how preconceived notions related to specific "pedagogical pedigrees,"<sup>63</sup> in particular those "oriented around themes of

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argue that the Duke lacrosse players were likely to be framed by the City of Durham at some particular time in the future for a crime that they did not commit." *Id.* at 63–64.

57. *Id.* at 64.

58. *Id.*

59. *Id.*

60. KC Johnson, Professor of History at Brooklyn College, has written extensively on the subject. See generally KC Johnson, DURHAM IN WONDERLAND, <http://durhamwonderland.blogspot.com/> (last visited Sept. 13, 2012); STUART TAYLOR & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

61. KC Johnson, *The Perils of Academic Groupthink*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 67, 67 (Howard M. Wasserman ed., 2011).

62. *Id.* at 67–68.

63. *Id.* at 74.

race, class, or gender”<sup>64</sup> paved the way for some of the more intense reactions by segments of the faculty. The essay analyzes these reactions including the editorial statement in Duke’s *Chronicle*, which was signed by a group of eighty-eight faculty members who came to be known as the “Group of 88.”<sup>65</sup> The statement was laden with language that seemed to condemn the lacrosse players and assumed their guilt.<sup>66</sup> This faculty-sponsored editorial ad formulated the blueprint for what the “socially conscious” faculty response would look like.<sup>67</sup> It would come out strong and unmistakably against the players and would not tolerate much room for a belief in presumed innocence.<sup>68</sup> In hindsight, with the knowledge of the players’ innocence, the details of some of those responses laid out by Johnson are, at times, unpalatable.

Johnson highlights some of the most egregious and noteworthy faculty reactions which came in the form of letters to the President of Duke, interviews with local and national media, op-eds, and protests saturated with messages of presumed guilt (and at times outright contempt and hatred for the players). Johnson makes a particularly interesting point about this conduct as it relates to the intersection of freedom of speech and academic freedom.<sup>69</sup> Duke’s anti-harassment code prohibits harassment based on “race, class, or gender.” The players in their suit against Duke University used this policy language as the basis for their tort claim, to which the university responded in part that its “policies [such as those against harassment] must be balanced against principles of academic freedom.”<sup>70</sup> Johnson argues that:

[T]his comes close to arguing that if professors engaged in race/class/gender pedagogy chose to harass white male students

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64. *Id.*

65. *Id.* at 68, 73, 84.

66. “The ad opened by asserting unequivocally that something had ‘happened’ to Mangum [the accuser]. The signatories . . . committed themselves to ‘turning up the volume,’ regardless of ‘what the police say or the court decides.’ Moreover, to the ‘protestors making collective noise,’ the Group had a direct message: ‘Thank you for not waiting and for making yourselves heard.’” *Id.* at 73.

67. *Id.* at 74.

68. Twelve days after the infamous lacrosse house party, “dozens of Durham residents assembled outside the lacrosse captains’ house, holding candles and singing ‘This Little Light of Mine.’ The group included Duke history professor Timothy Tyson, whose scholarship focuses on race and the South.” *Id.* at 69. Sixteen days after the party, Houston Baker, a professor of English at Duke, “published a 15-paragraph open letter (addressed to Duke Provost Peter Lange)” that stated in part, “‘How soon will confidence be restored to our university as a place where minds, souls, and bodies can feel safe from agents, perpetrators, and abettors of white privilege, irresponsibility, debauchery and violence?’” *Id.* at 70.

69. *Id.* at 83–84.

70. *Id.* at 84 (quoting Brief in Support of Duke University Defendants’ Motion to Dismiss Complaint at 12, *Carrington v. Duke Univ.*, No.1:08-cv-119, (M.D.N.C. filed May 30, 2008)).



through statements or actions that reflect the professors' academic worldview, such harassment is fair game. In an academy where humanities departments are dominated by devotees of the race/class/gender approach, such an academic freedom exception could affect far more than Duke University or its lacrosse players.<sup>71</sup>

Johnson's essay provides great insight into how faculty might react when faced with a crisis that collided so perfectly with their pedagogical realm.<sup>72</sup> Robert M. O'Neil<sup>73</sup> picks up on a similar theme in his essay, *The Duke Lacrosse Saga: Administration versus Students and Faculty, among Others*.<sup>74</sup> This essay focuses on "the role of the university's administration in facing and handling [the] unprecedented challenges"<sup>75</sup> that it encountered with the Duke lacrosse case. O'Neil begins his essay with a succinct synopsis of the evolution and development that occurred at Duke University from the mid-1980's through the mid-2000's in areas of faculty hiring,<sup>76</sup> department building,<sup>77</sup> student recruitment,<sup>78</sup> and athletics.<sup>79</sup> He identifies how the confluence and types of growth in each of these areas created the "perfect storm"<sup>80</sup> when the Duke lacrosse scandal happened in 2006. O'Neil argues that one "prime ingredient"<sup>81</sup> in the "perfectly

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71. *Id.*

72. "Eighty-five percent of the full-time faculty signers [of the Group of 88 editorial] described their research interests as oriented around themes of race, class, or gender—sometimes all three. These pedagogical pedigrees could not resist the narrative that Nifong spun—wealthy white males sexually assaulting a poor African-American woman." *Id.* at 74.

73. Robert M. O'Neil, Professor of Law Emeritus at the University of Virginia School of Law.

74. Robert M. O'Neil, *The Duke Lacrosse Saga: Administration versus Students and Faculty, among Others*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 89, 89 (Howard M. Wasserman ed., 2011).

75. *Id.*

76. "Recruitment of minority scholars had become a special priority [at Duke University from the mid-1980's to the mid-2000's] . . . . The results were most impressive . . . [f]rom 1994–2004, Duke doubled the number of African-Americans on its faculty to a total of 80, at least 3.5 percent of the faculty." *Id.* at 90–91.

77. O'Neil describes the addition of "extraordinary," "internationally renowned," "Pulitzer-prize winning" faculty that helped to build "academic eminence and visibility" in the liberal arts and in Duke's professional schools of medicine, law, theology, and business. *Id.* at 90.

78. In 1984 more than 90 percent of the entering class was white. Two decades later more than one third of the entering class were minority students. *Id.* at 91.

79. "During these years, Duke achieved prominence in one other significant area—the athletic field, or more precisely, the basketball court. While competing with the Ivy League in scholarship, Duke . . . also matched the major state universities when it came to sports, leaving the prestigious New England and New York institutions in the dust." *Id.*

80. *Id.*

81. *Id.* at 92.

brewing storm”<sup>82</sup> was the uneasy or ambivalent<sup>83</sup> nature of the relationship between academia and athletics that existed at Duke.<sup>84</sup> He argues that comparable state institutions with “successful sports programs,”<sup>85</sup> enjoy a more comfortable<sup>86</sup> relationship between academics and athletics for several reasons including tradition, the difference in size and complexity between Duke and other “huge top-tier”<sup>87</sup> colleges and universities, the higher cost of subsidizing a student-athlete at Duke, and the lack of academic programs available to “scholastically challenged athletes” at Duke.<sup>88</sup> He argues that “[f]or these reasons and others, a typical Michigan or Berkeley or Texas professor is readier than his or her Duke colleague to tolerate aberrations in the athletic program. The contrast is especially pronounced among those quintessentially intellectual scholars who had most recently arrived in Durham during its two-decade rise.”<sup>89</sup>

O’Neil revisits the issue of faculty academic freedom introduced in an earlier essay by KC Johnson,<sup>90</sup> and posits an interesting question regarding the boundaries of academic freedom. Arthur Butz is a professor of Engineering at Northwestern University who openly and publicly denies the Holocaust.<sup>91</sup> “Northwestern steadfastly refuses to curb or silence Butz so long as he continues to fulfill his professorial duties and keeps Holocaust denial out of his classes.”<sup>92</sup> O’Neil argues that if Butz were a professor of modern European history, academic freedom would no longer protect these views.<sup>93</sup> “The conventional wisdom is that, rather like a geologist or geographer who insists that the earth’s surface is flat (a heresy that would not be tolerated from teachers in the field), so clearly erroneous a view within one’s own academic discipline would not and need not be tolerated.”<sup>94</sup> None of the professors comprising the Group of 88 taught in the fields of law or criminal justice. Had they, “the situation might have called for closer scrutiny.”<sup>95</sup> O’Neil offers that while this concept has no direct application to the Duke case, it does “generate a cautionary tale” for future faculty and administrators.<sup>96</sup>

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. JOHNSON, *supra* note 611, at 83–84.

91. O’Neil, *supra* note 74, at 97.

92. *Id.* at 97 (citing Jodi S. Cohen, *NU Rips Holocaust Denial; President Calls Prof. an Embarrassment but Plans No Penalty*, CHICAGO TRIBUNE, Feb. 7, 2006, at 1).

93. O’Neil, *supra* note 74, at 97.

94. *Id.* at 97–98.

95. *Id.* at 98.

96. *Id.*

The essay goes on to examine the response of the administration, focusing on the actions of the president and the provost of Duke.<sup>97</sup> He concludes that, “while accusations of administrative overreaction understandably persisted in some quarters, and faculty-administrative relations surely were not enhanced . . . no charge of undermining academic freedom could fairly have been lodged.”<sup>98</sup> In addition to examining whether the administration improperly infringed on academic freedom, the essay also explores whether the administration went far enough in protecting its faculty when they came under intense fire for their overreaction and abandonment of presumption of innocence principles.<sup>99</sup>

Some other topics covered in this essay include academic freedom as it relates to grade appeals,<sup>100</sup> and the misunderstanding surrounding “faculty-student privilege.”<sup>101</sup> O’Neil offers additional insight as to why the thirty-eight unindicted players who are suing Duke University, including President Brodhead and other senior officials, will likely fail on their claims.<sup>102</sup>

In conclusion, the essay offers some *Lessons Learned—and Shared* relating to how the structure of athletics and the relationship of athletics to academics at an institution can affect how an institutional crisis unfolds.<sup>103</sup> The conclusion also notes that in times of crisis on campus, a functioning and developed relationship between faculty and the other campus offices is important.<sup>104</sup>

The final essay in the section on *Duke and American Higher Education* is written by Ellen J. Staurowsky.<sup>105</sup> *In the Shadow of Duke: College Sport and the Academy Divided*,<sup>106</sup> provides an overview of the relationship between collegiate sports and higher education. This essay examines the perennial problem of finding the proper balance between sports and study in higher education. Staurowsky argues that:

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97. *Id.* at 98–101.

98. *Id.* at 101.

99. *Id.* at 107–108.

100. One student sued Duke and his professor for the issuance of a failing grade attributed to a month of missed classes because of meetings with lawyers. The dispute was settled with a “P.” *Id.* at 101–102.

101. At a meeting with co-captains of the lacrosse team, university officials assured the co-captains that “‘faculty-student privilege’” would protect that communication. “As appealing as it may sound to a lay person’s ear, ‘faculty-student privilege’ is nowhere recognized by statute, rule, or judicial ruling.” *Id.* at 102–103.

102. *Id.* at 104–106.

103. *Id.* at 109–110.

104. *Id.* at 110.

105. Ellen J. Staurowsky, Professor and Chair of Graduate Studies, Ithaca College Department of Sports Management and Media.

106. Ellen J. Staurowsky, *In the Shadow of Duke: College Sport and the Academy Divided*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 111, 111 (Howard M. Wasserman ed., 2011).

The Duke lacrosse controversy reflects studied ignorance, willful neglect, political impotence, and unconscious denial by higher education officials and the general public about what it means to run a large college athletic program in the twenty-first century. With increased public scrutiny comes increased awareness of the need for institutional accountability and the current lack of effective accountability mechanisms. If college campuses remain divided and if disconnects between college sport and the values of higher education become more pronounced, colleges and universities will no longer be able to assert moral authority, prepare our leaders for tomorrow, or be viewed as contributing to the public good.

If these divisions are left unaddressed, the academy cannot stand.<sup>107</sup>

The essay describes the myriad of factors that have contributed to the “uneasy”<sup>108</sup> relationship that exists between collegiate sports and higher education. Among these factors, Staurowsky discusses the role of the NCAA and how its governance model has contributed to the increased “dysfunction”<sup>109</sup> at all levels of collegiate sports.<sup>110</sup> She also discusses the way in which introduction of big money through high profile sports has reduced the power of the faculty and administration to make decisions related to athletics.<sup>111</sup> The author cites a study where it was “reported that the reliance on external sources of funding, such as large TV contracts, has undermined presidents’ ability to exert authority over athletics on individual campuses or to affect changes that might bring athletics more in line with the academic mission.”<sup>112</sup> This point is substantiated as facts continue to pour out from the Penn State scandal, including recent information from the Freeh report<sup>113</sup> that condemns high level officials at Penn State accused of intentionally covering up the sexual abuse of children to protect the image of the football program.<sup>114</sup> The essay

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107. *See id.* at 127–128.

108. *Id.* at 113.

109. *Id.* at 126.

110. *Id.* at 125–126.

111. *Id.* at 126.

112. *Id.* (discussing 2009 Knight Commission on Intercollegiate Athletics study of the FBS programs).

113. Freeh, Spokin, & Sullivan LLP, *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* (2012) [http://www.washingtonpost.com/wp-srv/sports/penn-state-freeh-report/REPORT\\_FINAL\\_071212.pdf?hpid=z2](http://www.washingtonpost.com/wp-srv/sports/penn-state-freeh-report/REPORT_FINAL_071212.pdf?hpid=z2).

114. *Id.* at 14–17. “Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University—Spanier, Schultz, Paterno and Curley—repeatedly concealed critical

suggests that the “level of rancor” displayed on the Duke campus after the allegations was reflective of a “brewing tension” related in part to the frustrations felt by members of the community about the division and dysfunction found in the relationship between athletics and academics.<sup>115</sup> The author highlights the importance of increased faculty involvement and oversight in order to move towards a better balance between athletics and academics.<sup>116</sup> “Faculty members are expected to serve as primary guardians of academic integrity, yet they have been largely peripheral in scrutinizing athletics on their own campuses. If there is to be legitimate faculty oversight of athletic programs, faculty must be at the center of leadership . . . rather than on the margins.”<sup>117</sup> This essay provides a candid look at some of the challenging realities surrounding collegiate sports programs and how those realities threaten the legitimacy of the academic mission of higher education in America. Further, this essay takes on particular relevance as the Penn State scandal unfolds and the gravity of those challenging realities, related to who controls the institution, are exposed and examined.

The final section of essays in the collection entitled, *News Media*, focuses on the media response to the Duke lacrosse case. The first essay in this section is written by Rachel Smolkin.<sup>118</sup> The essay titled *Justice Delayed*<sup>119</sup> focuses on the media’s rush to judgment in their coverage of the Duke case. “The lessons of the media’s rush to judgment and their affair with a sensational, simplistic storyline rank among journalism’s most basic tenets: Be fair; stick to the facts; question authorities; don’t assume; pay attention to alternative explanations.”<sup>120</sup> This essay takes the reader through the myriad of ways in which journalists did not stick to these basic tenets when covering the Duke case. Smolkin gives examples of the sensational and over-the-top coverage that came with the Duke case such as when Nancy Grace asserted the following statement on a national broadcast, “‘I’m so glad they didn’t miss a lacrosse game over a little thing like gang rape!’”<sup>121</sup> Much of the media, including Grace, failed to answer for their mistakes during the coverage once the players were exonerated, but rather chose to move on without addressing their failures and certainly

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facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.” *Id.* at 16.

115. Staurowsky, *supra* note 106, at 121.

116. *Id.* at 124.

117. *See id.* (citations omitted).

118. Rachel Smolkin, Assignment Editor, *USA Today*; Former Managing Editor, *American Journalism Review*.

119. Rachel Smolkin, *Justice Delayed*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 131, 131 (Howard M. Wasserman ed., 2011).

120. *See id.* at 132.

121. *Id.*

without apologizing for them.<sup>122</sup> However, there were some who published corrective accounts<sup>123</sup> and even apologies<sup>124</sup> in their columns. Smolkin believes there are important lessons for journalists that come out of the Duke case about not rushing to judgment and exercising “prudence and skepticism”<sup>125</sup> even when covering a “lurid crime story.”<sup>126</sup> However, the author doubts those lessons will be applied by a media that operates under intense “competitive pressures”<sup>127</sup> and has a “notoriously short memory.”<sup>128</sup>

The next essay in the collection, written by Jane E. Kirtley,<sup>129</sup> *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*,<sup>130</sup> thoroughly examines the role of ethical guidelines in the “profession”<sup>131</sup> of journalism. Kirtley provides an in-depth look at the ethical framework that is typically applied in the “profession” of journalism and how this framework was abandoned by many news media outlets during their coverage of the Duke case. In addition to providing examples of the least ethical coverage of the case, the author also points out some of the best coverage of the case such as that done by bloggers:

Bloggers exposed poor reporting by the mainstream media and offered information unavailable to or ignored by the mainstream press. By relying heavily on documents rather than on cultivating government sources, blog coverage both contrasted with and complemented conventional reporting. Bloggers fact-checked mainstream-media stories. Bloggers and online sites posted legal filings and documents from both sides, allowing visitors to read, learn details, and draw conclusions for

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122. *Id.* at 144–145.

123. David Brooks, New York Times Op-Ed columnist stated in a corrective account, “‘Witch hunts go in stages . . . [b]ut now that we know more about the Duke lacrosse team, simple decency requires that we return to that scandal, if only to correct the slurs that were uttered by millions of people, including me.’” *Id.* at 144.

124. Ruth Sheehan, *News and Observer* columnist wrote the following after penning numerous anti-player pieces: “‘Members of the men’s Duke lacrosse team: I am sorry.’” *Id.* at 145.

125. *Id.* at 146.

126. *Id.* at 145.

127. *Id.*

128. *Id.* at 146.

129. Jane E. Kirtley, Silha Professor of Media Ethics and Law, School of Journalism and Mass Communication, University of Minnesota; Director, Silha Center for the Study of Media Ethics and Law, University of Minnesota.

130. Jane E. Kirtley, *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 147, 147 (Howard M. Wasserman ed., 2011).

131. Kirtley notes that journalists are not like other more typical “professions” such as law and medicine. “Whether journalism constitutes a ‘profession’ is hotly debated, even in media circles.” *Id.* at 147.

themselves.<sup>132</sup>

Kirtley provides thoughtful discussion on the topic of whether the codified ethical goal of “minimizing harm”<sup>133</sup> is achieved when the practice of the mainstream media is to name the accused from the outset in sexual assault cases while generally not naming the accuser.<sup>134</sup> The author also makes some keen insights regarding the effect that statements from the “pundits and commentators”<sup>135</sup> in the news media (whose opining is constitutionally protected)<sup>136</sup> have on a story.<sup>137</sup> The bad journalistic behavior was not reserved for pundits and commentators though, many mainstream sources in their actual news reporting failed as well:

Journalists disseminated factual errors: some because of inadequate or sloppy reporting, others because of blind acceptance of misinformation deliberately leaked or presented by government officials. Journalists’ willingness to take official pronouncements at face value, to buy into a narrative of race and class, and to propagate stereotypes produced inaccurate news accounts. These accounts, in turn, fueled irresponsible commentary. The result was a rush to judgment that turned out to be wrong that disserved not only the defendants in the case, but the public.<sup>138</sup>

Kirtley states in closing, “The Duke lacrosse case is a sobering reminder that no one is immune from error. But if the news media own up to and learn from those errors, perhaps they will not repeat them.”<sup>139</sup>

The final essay in the collection is a substantial piece by Craig L. LaMay<sup>140</sup> titled, *Covering the Notorious Case: Narrative and the Need for Sensationalism Done Well*.<sup>141</sup> This essay dissects the “narrative frame”<sup>142</sup>

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132. *See id.* at 154.

133. Society of Professional Journalists promulgates a code of media ethics, which includes the principle of “minimizing harm.” “Minimize harm: Ethical journalists treat sources, subjects and colleagues as human beings deserving of respect.” *Id.* at 149 (citing SOC’Y PROF’L JOURNALISTS, CODE OF ETHICS (1996)).

134. *Id.* at 158–159.

135. *Id.* at 160.

136. “The Supreme Court has recognized that ‘there is no such thing as a false idea,’ and pure opinion is absolutely protected under the First Amendment and cannot form the basis for a libel suit.” Kirtley, *supra* note 130, at 160 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

137. *Id.* at 160–161.

138. *See id.* at 163–164.

139. *See id.* at 165.

140. Craig LaMay, Associate Professor of Journalism, Northwestern University, Medill School of Journalism.

141. Craig LaMay, *Covering the Notorious Case: Narrative and the Need for Sensationalism Done Well*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 167, 167 (Howard M.

that propelled the Duke story through the media with such historically “bad reporting.”<sup>143</sup> LaMay proffers that “two cornerstones of American journalism—crime and sports—individually and at their intersection”<sup>144</sup> framed and drove the narrative in the Duke case. He analyzes how existing “narratives are embedded in Americans’ understanding of the role [of] sport[s]”<sup>145</sup> and how that affected the coverage in the case:

One [of these narratives] is essentially functional, a conception of sport as an embodiment of Judeo-Christian values—hard work, perseverance, and respect for authority . . . the ultimate meritocracy, rewarding achievement and blind to class, race, or ethnicity. . . .

The other major narrative in sociology (and with predictable regularity in sports journalism) sees sport as a tool of social control . . . driven by self-interest and characterized by manipulation and coercion. . . . At its most competitive levels—professional and Division I college athletics—sport converts athletes into commodities, tools for generating revenues for owners, including universities and their athletic departments.<sup>146</sup>

Throughout this analysis, LaMay provides a comprehensive yet concise historical overview of how we arrived at modern day, big time college athletics<sup>147</sup> (and all the troubles that have come with it). He also addresses the culture in American higher education as it relates to athletes and violence on campus.<sup>148</sup> He criticizes the news media<sup>149</sup> and their predictably unsophisticated coverage of all things related to higher education, including athletics:

The central news story in college sports today is the same story as in the late nineteenth century—who is responsible for student games? To the extent the Duke story is part of a larger tale about the role of the modern university, it is complex and of interest only to a small audience; news organizations rarely cover higher education, except in terms that exaggerate petty conflicts and

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Wasserman ed., 2011).

142. *Id.* at 169.

143. *Id.* at 167.

144. *Id.* at 169.

145. *Id.* at 174.

146. *See id.*

147. *Id.* at 175–178.

148. LaMay cites a 2003 study of attitudes on campus related to athletes and sex crimes and another study that examined twenty colleges and universities with Division I athletic programs which found that male athletes made up 19 percent of those charged with sexual assault, despite making up only 3.7 percent of the student population. LaMay criticizes the results of the study based on the study sample and other factors. *Id.* at 181–182.

149. LaMay referred to the media generally though excluded the *Chronicle of Higher Education* from his criticism. *Id.* at 183.



ignore serious ones. Many of the caricatures that carried the Duke lacrosse story for so long were the same caricatures that appear in reporting about higher education generally. There is no better way to become a quotable expert on higher education than to play to character.<sup>150</sup>

Another highlight in this essay includes LaMay's exploration of how current trends in the demand for and consumption of sensational stories over "serious policy"<sup>151</sup> news contributed to the poor coverage in the case.<sup>152</sup> In conclusion, LaMay opines that:

The Duke story is . . . about what universities are for and who runs them, though that part of the incident will never interest the general public or the news media. It is also about the privilege enjoyed by student-athletes for whom normal rules often do not apply in the modern American university, especially in a private, academically and athletically competitive institution such as Duke. The story was also undeniably about race, although most of that narrative was cynical and unproductive.

The journalistic failure in the Duke case was the failure to verify, to meet the obligation that separates journalists from entertainers and propagandists. Whatever the medium, journalists' moral and professional obligation is to discover and present evidence. That means journalists must do more than find facts consistent with their hypotheses; proof requires them to find, wherever possible, evidence that disproves other explanations or points of view.<sup>153</sup>

This collection of essays is a must read for any college or university administrator who finds themselves embroiled in a high profile controversy. It allows the reader to consider the totality of the events that transpired at Duke with the benefit of hindsight and expert analysis. There are important lessons in this book not only for senior college and university administrators, but also for faculty members, college and university public relations/communications personnel, government prosecutors, the media, and perhaps most importantly, consumers of media. The essays are presented in a highly digestible way, and there is cohesiveness to the book as it relates to the major theme of institutional failures. The legal analysis in the book is precise and thorough, but accessible to non-lawyers as well.

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150. *Id.* at 183–184.

151. *Id.* at 170.

152. *Id.*

153. *See id.* at 184.