

THE DUKE LACROSSE CASE AND THE BLOGOSPHERE

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I

INTRODUCTION

On December 28, 2006, Durham County District Attorney Mike Nifong filed his initial response to the North Carolina State Bar grievance committee's complaint that he had unethically withheld exculpatory DNA evidence in the Duke lacrosse case. Nifong concluded his missive with a swipe at the blogosphere:

A well-connected and well-financed (but not, I would suggest, well-intentioned) group of individuals—most of whom are neither in nor from North Carolina—have taken it upon themselves to ensure that this case never reaches trial. (And if this seems like paranoid delusion to you, perhaps you should check out websites such as former Duke Law School graduate and current Maryland attorney Jason Trumpbour's www.friendsofdukeuniversity.blogspot.com/, which has not only called for me to be investigated, removed from this case, and disbarred, but has also provided instructions on how to request such actions and to whom those requests should be sent.)¹

A few months earlier, the District Attorney had similarly complained about the blogosphere. Asked in June 2006 by *Newsweek* reporter Susannah Meadows to comment on the mounting evidence of actual innocence, Nifong replied, "I have seen quite a bit of media speculation (and it is even worse on the blogs) that either starts from a faulty premise or builds to a demonstrably false conclusion. That is not my fault."²

Nifong was hardly the only prominent figure associated with the case who read the blogs. Sergeant Mark Gottlieb, the lead police investigator in the lacrosse case through the summer of 2006, stated under oath that he regularly perused blogs, looking for tips.³ After the players' exoneration, defense

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1. Letter from Michael B. Nifong, N.C. Dist. Attorney, to Katherine Jean, Counsel for N.C. State Bar Grievance Comm. 8 (Dec. 28, 2006) (on file with author), *available at* http://www.newsobserver.com/content/news/crime_safety/duke_lacrosse/20070301_nifongletter.pdf.

2. Press Release, Michael B. Nifong, N.C. Dist. Attorney, (June 19, 2006) (response to Susannah Meadows, *Sex, Lies & Duke*), *NEWSWEEK*, June 13, 2006, at 2, *available at* http://www.wral.com/asset/news/local/2006/06/19/1055761/nifong_newsweek_e-mail.swf (last visited Mar. 29, 2008).

3. Deposition of Mark Gottlieb, Sergeant, Durham Police Dept. at 105, N.C. State Bar v. Michael B. Nifong, 06 DHC 35 (Apr. 19, 2007).

attorneys publicly praised the work of several blogs; Jim Cooney (who represented Reade Seligmann) and Brad Bannon (who represented Dave Evans) even posted items on the Liestoppers forum, thanking bloggers for their efforts.⁴

All sides in the case, then, conceded that blogs affected developments in Durham. This article will examine the reasons why the blogosphere proved particularly well-suited to covering the lacrosse case and will analyze the potential drawbacks to the intersection between trials and the Internet.

II

THE LACROSSE CASE'S SUITABILITY FOR THE BLOGOSPHERE

Three major reasons accounted for the blogosphere's influence in the lacrosse case. Readers looking for information about accuser Crystal Mangum could find it more readily on the blogs, which then provided links to other Internet sources. The blogs established their credibility by exposing poor reporting by the mainstream media, especially that of *The New York Times*, and benefited from the Internet-friendly policies of Raleigh TV station WRAL and the *Raleigh News & Observer*. Additionally, the blogs provided superior coverage of specialized issues, notably the proper procedures for forensic nurses and the agendas of Duke professors, that were important on the fringes of the case.

A. Otherwise Unavailable Information

Between the first press reports of the charges on March 20, 2006, and Attorney General Roy Cooper's publicly declaring the three Duke lacrosse players innocent on April 11, 2007, no newspaper or television-news broadcast identified accuser Crystal Mangum by name. Instead, the mainstream media described her as "the woman," "the accuser," "the alleged victim," or "the victim."⁵

Such behavior is standard practice for rape and sexual assault cases. Rick Gall, news director for WRAL, justified his station's policy in an April 2006 interview, stating that nondisclosure was "really based on a community expectation that we don't release it. We believe the community would be appalled if we released it."⁶ Orange County North Carolina District Attorney Jim Woodall explained the policy's rationale in the *News & Observer*: "Over the years, I have known so many, both women and men, who would tell me they

4. See, e.g., Posting of Jim Cooney to Liestoppers (Apr. 14, 2006, 15:35 EST), http://z9.invisionfree.com/LieStoppers_Board/index.php?showtopic=3080.

5. The first newspapers to identify Mangum by name were the *Chronicle* and the *News & Observer*; both did so after the Attorney General dismissed the case and proclaimed the players innocent on April 11, 2007. Several other newspapers, including *The New York Times* and the *Durham Herald-Sun*, declined to use Mangum's name even after the innocence declaration.

6. Melissa Buscher, *Duke Rape Case Brings Up Longtime Dilemma: Report Victims' ID?*, WRAL, Apr. 19, 2006, <http://www.wral.com/news/local/story/157098/>.

did not want to go forward in a case because they did not want to let people know what happened to them, because of the stigma attached.”⁷ Rape victims’ groups, meanwhile, have claimed that large majorities of accusers would not file complaints if they knew the media would reveal their names.⁸

Good arguments, of course, exist against such a policy. Except in rare instances, mostly national-security matters, the media does not ordinarily withhold information from the public on philosophical grounds. (Complainants for other crimes are not granted across-the-board anonymity.) Moreover, the policy seems one-sided: to my knowledge, not a single newspaper or broadcast program covered the case without reporting the names of the three accused Duke lacrosse players.

However, the Duke lacrosse case revealed that the most powerful argument against the nondisclosure policy is a practical one: if readers cannot obtain information from newspapers or news broadcasts, they will look elsewhere. Having looked elsewhere for one piece of information, they might continue to get news from their new source.

In the lacrosse case, blogs provided information about Mangum’s background. In early February 2007, *The Chronicle* (Duke *Chronicle*) columnist Kristin Butler searched for Mangum’s name through Yahoo.com’s search engine. At the time, no newspaper or television station in the country had used Mangum’s name. Despite such policies, Butler discovered 89,500 Web sites containing Mangum’s name—including a 2000-word entry at Wikipedia, a site with Mangum’s last known voter-registration information, and a high-school photo of Mangum at the blog Crystal Mess.⁹

Mangum’s name was first reported by the blog Johnsville News, on April 21, 2006, three days after the indictments of Reade Seligmann and Collin Finnerty.¹⁰ Eventually, every major blog devoted to the case followed suit. In the interests of full disclosure, my blog, Durham-in-Wonderland, was the last case-related blog to identify Mangum; I followed the lead of the *News & Observer* and the Duke *Chronicle*, both of which ceased granting Mangum anonymity when Cooper declared the players innocent.¹¹

The blogosphere functions through links. Johnsville News was especially generous with the practice—the blog’s daily posts linked to everything that had

7. Ted Vaden, *Re-Examining Rape Identification Policy*, NEWS & OBSERVER (Raleigh, N.C.) Nov. 4, 2007, at A31.

8. See Kelly McBride, *Rape in the News: An Evolving Standard*, POYNTER ONLINE, http://www.poynter.org/content/content_view.asp?id=117068 (summarizing arguments).

9. Kristin Butler, *The Worst, Kept Secret . . .*, CHRON. (Durham, N.C.), Feb. 6, 2007, at A7.

10. Johnsville News, Duke Rape Accuser: Crystal Gail Mangum, <http://johnsville.blogspot.com/2006/04/duke-rape-accuser-crystal-gail-mangum.html> (April 21, 2006).

11. Melanie Sill, *Why We’re Naming the Accuser*, NEWS & OBSERVER EDITORS’ BLOG, Apr. 11, 2007, http://blogs.newsobserver.com/editor/index.php?title=why_we_re_naming_the_accuser&more=1&c=1&tb=1&pb=1; Adam Eaglin, *Players Express Relief, Lawyers Laud “Great Day for Justice,”* CHRON. (Durham, N.C.), Apr. 12, 2007, at A1.

appeared about the case in the previous twenty-four hours. As a result, those who found information about Mangum from Johnsville News had easy access to other publications with which they might otherwise not have come into contact. To give one example of Johnsville News's importance, Durham-in-Wonderland ultimately had just over three and one-half million unique visitors and over six million hits.¹² Over the duration of the case, it received more referrals from Johnsville News (around 140,000 unique visitors) than from any other source.

B. The Mainstream Media

1. Critiquing Negative Coverage

Beyond providing information that mainstream journalists chose not to report, the blogosphere established its credibility by critiquing poor coverage from traditional media sources. The most important example came on August 25, 2006, when *The New York Times* ran a front-page, 5600-word article billed as a reexamination of the paper's early pro-Nifong coverage. Authors Duff Wilson and Jonathan Glater claimed to have been the first reporters to examine Nifong's entire discovery file. They concluded,

By disclosing pieces of evidence favorable to the defendants, the defense has created an image of a case heading for the rocks. But an examination of the entire 1,850 pages of evidence gathered by the prosecution in the four months after the accusation yields a more ambiguous picture. It shows that while there are big weaknesses in Mr. Nifong's case, there is also a body of evidence to support his decision to take the matter to a jury.¹³

Though superficially neutral in tone, the Wilson and Glater article was, in fact, heavily slanted toward Nifong. Only those with a comprehensive knowledge of the case, however, could recognize the full extent of the bias. Less than four hours after the article appeared on the *The New York Times* Web site, Liestoppers, one of two major blogs created in response to the case, dissected Wilson's work in a 3000-word post.¹⁴ The post criticized what it termed Wilson's "bizarre" suggestion "that we don't know anything about what the accuser alleges happened and what actually did happen between 12:04AM and 12:53AM."¹⁵ (In fact, as Wilson should have known from his examination of the entire discovery file, photographic and cell-phone records provided a timeline for all but seven minutes of this period.) Liestoppers chided Wilson for terming Mangum's accounts of the alleged attack consistent when, in fact, her "accounts are wildly different from each other and from the account Kim Roberts [the second dancer] gave to police."¹⁶ And the post faulted *The New York Times* for

12. Durham-in-Wonderland: Site Summary, <http://www.sitemeter.com/?a=stats&s=s26kcjohnson9&r=0> (last visited Mar. 29, 2008).

13. Duff Wilson and Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at A1.

14. Liestoppers, Enough from Duff, <http://liestoppers.blogspot.com/2006/08/enough-fromduff.html> (Aug. 25, 2006, 03:20 EST).

15. *Id.*

16. *Id.*

relying so heavily on Sergeant Gottlieb's typewritten case notes, which were produced months after the conversations they purportedly described, contradicted the statements and reports of many other law-enforcement officials, and papered over numerous holes that already had emerged in Nifong's case.¹⁷

The Liestoppers post foreshadowed similar critiques of the Wilson article that appeared on blogs such as Johnsville News, Crystal Mess, and John in Carolina.¹⁸ I posted several items at Durham-in-Wonderland, including an item that detected four significant factual errors in Wilson's article, each of which made Nifong's case look stronger than it actually was.¹⁹ *The New York Times* refused to correct three of these errors; for the fourth, it ran a correction that confused rather than clarified the issue.²⁰

The blogosphere's quick response to the Wilson article attracted notice from figures in the mainstream media. Stuart Taylor Jr., senior correspondent for *National Journal*, observed that the article's "flaws are so glaring that it was shredded by bloggers within hours after it hit my doorstep."²¹ *New York Magazine*'s Kurt Andersen added,

For the past few years, I've tended to roll my eyes when people default to rants about the blindered oafishness or various biases of "the mainstream media" in general and [*The New York Times*] in particular. At the same time, I've nodded when people gush about the blogosphere as a valuable check on and supplement to the MSM [mainstream media]—but I've never entirely bought it. Having waded deep into this Duke mess the last weeks, baffled by [*The New York Times*] pose of objectivity and indispensably guided by ["Durham-in-Wonderland"], I'm becoming a believer.²²

2. Old–New Media Partnership

Yet the Duke lacrosse case also showed a positive relationship between the blogosphere and the mainstream media. The Internet strategies of WRAL and the *News & Observer* created a partnership between new and old media that benefited both sides.

Events in Durham provided the state's first high-profile criminal case since 2004, when North Carolina adopted an open-discovery statute requiring prosecutors to turn over their entire file to the defense.²³ Because Nifong had

17. *Id.*

18. Crystal Mess, Mmmmmmm . . . Duff, <http://crystalmess.blogspot.com/2006/08/mmmmmmmduff.html> (Aug. 25, 2006, 22:32 EST); Johnsville News, Duke Case: Poor Review for NY Times Article, <http://johnsville.blogspot.com/2006/08/duke-case-poor-reviews-for-ny-times.html> (Aug. 26, 2006); John in Carolina, Duke lacrosse: "Old grey lady" attacked, <http://johninnorthcarolina.blogspot.com/2006/08/duke-lacrosse-old-grey-lady-attacked.html> (Aug. 26, 2006, 16:24 EST).

19. Durham-in-Wonderland, The *Times*' Peculiar Correction Policy, <http://durhamwonderland.blogspot.com/2006/09/times-peculiar-corrections-policy.html> (Sept. 7, 2006, 00:12 EST).

20. *Corrections*, N.Y. TIMES, Sept. 6, 2006, at A2.

21. Stuart Taylor, Jr., *Witness for the Prosecution*, SLATE, Aug. 29, 2006, <http://www.slate.com/id/2148546/>.

22. Kurt Andersen, *Rape, Justice, and the 'Times'*, N.Y. MAG., Oct. 16, 2006, at 25.

23. N.C. GEN. STAT. ANN. § 15A-903 (West 2007).

blanketed the airwaves with denunciatory statements in the weeks before the indictments—by his own estimate, the District Attorney gave between fifty and seventy interviews—the defense team considered it crucial to make public the relevant documents as soon as they received them.²⁴ In May and June 2006, therefore, both Joe Cheshire (who represented Dave Evans) and Kirk Osborn (who represented Reade Seligmann) attached key items from Nifong's case file to various motions, which then became part of the public record.

The *News & Observer* Web site consistently posted all defense motions, including attachments from the case file.²⁵ Similarly, the WRAL Web site hosted many such documents.²⁶ As a result, anyone—including out-of-state bloggers—had immediate access to critical evidence that in most cases would have remained unavailable until trial. For instance, by May 1, 2006, the *News & Observer* Web site had posted the statement of Kim Roberts, the second dancer, who contradicted Mangum's statement in virtually every important respect.²⁷ Readers could access the statement of the person normally described as one of Mangum's "drivers," Jarriel Johnson, who described Mangum's many one-on-one, sex-related "appointments" in the week before the lacrosse players' party.²⁸ Perhaps most important, WRAL made available the transcript of the April 4, 2006, lineup, which provided the only direct evidence against the first two players indicted, Reade Seligmann and Collin Finnerty.²⁹ The transcript revealed that Nifong had ordered the police to violate Durham's own procedures (which required five filler photos per suspect)³⁰ and instead to confine the lineup to the forty-six white members of the Duke men's lacrosse team, each of whom Nifong's office had publicly identified as a suspect.

If the case were as strong as Nifong had publicly suggested, Roberts' and Johnson's statements should have corroborated—not contradicted—Mangum's story. And, as Duke University School of Law Professor James Coleman pointed out in June 2006, no innocent explanation existed for Nifong's overriding Durham regulations and confining the lineup to suspects.³¹ Access to documents from Nifong's case file, however, would not have occurred without mainstream media organizations posting the items on their Web sites. In this

24. Interview with Joseph Cheshire and Bradley Bannon (Mar. 14, 2007).

25. Duke Lacrosse Controversy, NEWS & OBSERVER, http://www.newsobserver.com/news/crime_safety/duke_lacrosse/.

26. Coverage of Mike Nifong, his handling of the Duke lacrosse case and the aftermath, WRAL, http://www.wral.com/news/local/asset_gallery/1527403/.

27. Joseph Neff and Benjamin Niolet, *Lawyers Want DA Off Lacrosse Case*, NEWS & OBSERVER (Raleigh, N.C.), May 2, 2006, at A1.

28. *Id.*

29. Transcript of Photo Lineup Interview, North Carolina v. Seligmann, No. 06 CRS 4334-36, available at http://www.wral.com/asset/news/local/2006/12/09/1086698/photo_lineup_transcript.swf.

30. Durham Police Department General Order 4077, "Eyewitness Identification," 1 (Feb. 1, 2006), available at http://www.durhamnc.gov/news/files/dl_eyewitness.pdf.

31. James E. Coleman, Jr., Op-Ed., *Special Prosecutor Should Take Over Duke Case*, NEWS & OBSERVER (Raleigh, N.C.), June 13, 2006, at A13.

respect, the *News & Observer* and WRAL made possible the blogosphere's emergence in the case.

C. Specialty Topics

On December 13, 2006, the defense team filed a motion dealing with the state's failure to report all DNA test results.³² The next day, another defense joint motion urged the suppression of the lineup, while also detailing the medical, forensic, and alibi evidence.³³ After the December 15th hearing, defense attorneys filed a third motion, requesting a change of venue if a trial occurred.³⁴ That document addressed the behavior of Duke professors, the Durham *Herald-Sun*, and local civil-rights organizations.³⁵

The range of issues addressed in the three defense motions illustrated the complexity of the Duke lacrosse case. Even the two newspapers that provided the best coverage—the *News & Observer* and the *Duke Chronicle*—could not specialize in each question raised by the defense motions. Through a team of reporters led by Joseph Neff, the *News & Observer* focused on exposing the myriad holes in Nifong's case.³⁶ The *Chronicle's* multi-faceted coverage included award-winning commentary and several first-rate investigative articles examining how the issues related to the case affected Duke students other than the accused.³⁷

The blogosphere, on the other hand, is well-suited to specialization. Without the financial constraints of traditional media, bloggers can afford to spend as much time as they choose developing expertise on seemingly arcane topics. In the lacrosse affair, blogs played a particularly important role in explicating two issues on the fringes of the case—the conduct of the forensic nurse and the conduct of Duke faculty members.

1. The SANE Process

In his spree of spring 2006 public statements, Mike Nifong consistently returned to one theme: the findings of a specially trained nurse who had examined Mangum confirmed that a sexual assault had occurred.

32. Motion to Compel Discovery: Expert D.N.A. Analysis, North Carolina v. Seligmann, No. 06 CRS 4334-36 (Dec. 13, 2006), available at http://www.newsobserver.com/content/news/crime_safety/duke_lacrosse/20061213_dukelacrosse.pdf.

33. Motion to Suppress the Alleged "Identification" of the Defendants by the Accuser, North Carolina v. Seligmann, No. 06 CRS 4334-36 (Dec. 14, 2006), available at http://www.newsobserver.com/content/news/story_graphics/20061214_motion.pdf.

34. Motion to Change Venue, North Carolina v. Seligmann, No. 06 CRS 4334-36 (Dec. 15, 2006), available at http://www.newsobserver.com/content/news/story_graphics/20061215_dukelacrosse.pdf.

35. *Id.*

36. Joseph Neff, *Rush to Judgment*, NEWS & OBSERVER, Apr. 14–Apr. 18, 2006, <http://www.newsobserver.com/1537/story/564100.html>.

37. John Taddei, *Living a Nightmare: Lax Players Speak Out*, CHRON. (Durham, N.C.), July 19, 2006, at A1; Jarred Mueller, *Students Criticize Lax Cop's Behavior*, CHRON. (Durham, N.C.), Sept. 11, 2006, at A1.

1. March 29th, *Abrams Report*, MSNBC: “There is evidence of trauma in the victim’s vaginal area that was noted when she was examined by a nurse at the hospital.”³⁸
2. March 29th, WRAL: “My reading of the report of the emergency room nurse would indicate that some type of sexual assault did in fact take place.”³⁹
3. March 30th, *The Early Show*, CBS: “The victim was examined at Duke University Medical Center by a nurse who was specially trained in sexual-assault cases. And the investigation at that time was certainly consistent with a sexual assault having taken place.”⁴⁰

In the last two decades, most elite hospitals have hired or trained sexual-assault nurse examiners (SANE)—usually experienced nurses who undergo special training to treat patients who claim they have been raped. That Nifong could cite findings from such a seemingly impartial figure appeared to powerfully corroborate Mangum’s story.

In the Duke lacrosse case, however, SANE nurse Tara Levicy provided what could have been a case study in how *not* to handle a sexual-assault complaint. Still a SANE-in-training on the night that Mangum arrived at Duke University Medical Center, Levicy had to ask a resident, Dr. Julie Manly, to perform the physical examination of Mangum, which revealed “diffuse edema in the vaginal walls” and no anal trauma.

Levicy then conducted a detailed interview of Mangum, which formed the basis for her report. In the interview, Mangum claimed that she had last had intercourse one week before (a statement subsequent DNA tests would disprove). Mangum denied digital penetration or penetration by a foreign object (a statement she would later contradict). She thrice denied that her assailants had used condoms. She asserted that she had been penetrated vaginally, orally, and anally, and that at least one of her assailants had ejaculated. She added that one of her assailants said he was getting married the following day. (No one on the lacrosse team was getting married or was engaged to be married.) Levicy also photographed the only “injuries” that she documented during the examination—nonbleeding scratches and bruises on Mangum’s knee and heel.

Even though Dr. Manly actually performed Mangum’s physical examination, no one from the Durham Police Department or the District Attorney’s office ever interviewed the doctor. Instead, they regularly consulted Levicy. Defense attorney Doug Kingsbery, who represented Collin Finnerty, later speculated that “after speaking with Levicy, the authorities felt like they

38. *The Abrams Report: Sex Assault Scandal at Duke* (MSNBC television broadcast, Mar. 29, 2006), available at <http://www.msnbc.msn.com/id/12065803/>.

39. Joseph Neff, *Nifong’s Words Prompt Filing*, NEWS & OBSERVER (Raleigh, N.C.), June 16, 2006, at B1.

40. *Lawyers: DNA Will Acquit Duke Lacrosse*, CBS NEWS, available at <http://www.cbsnews.com/stories/2006/03/30/sportsline/main1458675.shtml> (Mar. 30, 2006).

had the ‘perfect’ witness, and did not need to interview Manly. It could only have gone downhill from there.”⁴¹

In these interviews, Levicy increasingly expanded upon the version of events presented in her March 14th report. On March 16, 2006, she said that Mangum had exhibited symptoms consistent with rape.⁴² Five days later, she told Sergeant Gottlieb that Mangum had experienced “blunt force trauma.”⁴³ Finally, after the North Carolina State Bar filed a complaint against Nifong for withholding DNA evidence, Levicy dramatically changed her story about what Mangum had told her the previous March—in ways that suggested that the DNA evidence Nifong was accused of withholding might not have been significant.⁴⁴ Levicy said that Mangum had been uncertain whether her “attackers” had used condoms.⁴⁵ And Levicy described herself as being unsurprised that no matches to lacrosse players’ DNA had been found, including from their epithelial cells, since “rape is not about passion or ejaculation but about power.”⁴⁶

In short, Levicy repeatedly changed her story in ways that bolstered whatever theory of the crime authorities were then expressing. Yet few in the media (and even fewer among the general public) had the thorough understanding of SANE procedures necessary to critique Levicy’s work. In the end, the best reporting about the SANE nurse’s performance came not from the traditional media but from a specialized blog published by Kathleen Eckelt, a thirty-year veteran of nursing who trains SANE nurses in her home state of Maryland.

In a series of posts on her blog, Forensics Talk, Eckelt raised serious procedural and substantive questions about Levicy’s conduct. She doubted the procedural propriety of Levicy’s March 21st assertion that Mangum had experienced “blunt force trauma,” a diagnosis nowhere mentioned in Levicy’s report from a week earlier.⁴⁷ “Everything is supposed to be documented,” according to Eckelt, “at the time of the exam.” “We’ve all been taught that, according to the courts, ‘If it’s not written, it’s not done.’”⁴⁸

Eckelt also provided context for Levicy’s March 16th statement that Mangum’s symptoms were consistent with sexual assault—a declaration to

41. Interview with Doug Kingsbery, defense attorney (May 10, 2007).

42. Joseph Neff, *Quest to Convict Hid a Lack of Evidence*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 14, 2007, at A1.

43. Duff Wilson and Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at A1.

44. Joseph Neff, *To the End, the Account Continues to Change*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 18, 2007, at A1.

45. *Id.*

46. *Id.*

47. Forensics Talk, Duke Rape Case: New Facts Aid The Prosecution?, http://harfordmedlegal.typepad.com/forensics_talk/2006/09/duke_rape_case_.html (Sept. 10, 2006, 10:50 EST).

48. *Id.*

which Nifong repeatedly referred in his public statements about the case.⁴⁹ “Experienced SANE nurses can make a conclusion as to whether any injuries are ‘consistent with’ sexual assault,” Eckelt noted, but the “key word here is *experienced*.”⁵⁰ A SANE still in training and with less than two years’ total service as a nurse, Eckelt added, would lack the qualifications to make such a statement.⁵¹

In several posts, Eckelt explained why an experienced SANE nurse would have recognized that the only “injury” diagnosed in the Manly exam (“diffuse edema of the vaginal walls”) was inconsistent with a sexual assault in Mangum’s case.⁵² Smoking, sex within twenty-four hours of the vaginal examination, frequent sex, and tricyclic anti-depressants or other medications with properties similar to them, such as Flexeril, all could cause diffuse edema of the vaginal walls.⁵³ All four conditions applied to Mangum.

Perhaps most impressively, Eckelt used her myriad contacts in the field to bolster her doubts about Levicy’s findings. She obtained statements from two veteran SANE nurses, a registered nurse (R.N.), an emergency-room R.N., two insurance investigators, an arson investigator, three doctors who dealt with sexual-assault cases, a forensic scientist, and a retired matron of a forensic hospital in England.⁵⁴ Each shared concerns about a figure of Levicy’s training and experience making judgments about the evidence, and the type of evidence to which Levicy had attached such importance.⁵⁵ The emergency-room R.N. bluntly told Eckelt that “the sheer experience needed to make judgment calls simply comes with time and time only. For any nurse manager to subject a new nurse to this is beyond the pale . . . unprofessional in the extreme.”⁵⁶

Eckelt’s interpretation of events, which gradually reflected the mainstream media’s approach to Levicy, was vindicated in April 2007, when Roy Cooper dismissed Levicy’s findings. “No medical evidence confirmed [the accuser’s] stories,” the North Carolina Attorney General declared in his April 2007 report.⁵⁷ “The SANE based her opinion that the exam was consistent with what the accusing witness was reporting largely on the accusing witness’s demeanor and complaints of pain rather than on objective evidence.”⁵⁸

49. *CBS Early Show: DA Stands Behind Duke Rape Charge* (CBS television broadcast March 30, 2006), available at <http://www.cbsnews.com/stories/2006/03/30/earlyshow/main1454898.shtml>.

50. Forensics Talk, *Duke Rape Case: New Facts Aid The Prosecution?*, http://harfordmedlegal.typepad.com/forensics_talk/2006/09/duke_rape_case_.html (Sept. 10, 2006, 10:50 EST).

51. *Id.*

52. Forensics Talk, *Sexual Assault & Diffuse Vaginal Wall Edema*, http://harfordmedlegal.typepad.com/forensics_talk/2006/10/duke_lacrosse_a_1.html (Oct. 29, 2006, 06:58 EST).

53. Interview with Kathleen Eckelt, SANE nurse and Forensics Talk blog writer (Oct. 30, 2006).

54. *E.g.*, Forensics Talk, *Duke Lacrosse Nurse Had Only Seven Months Experience?*, http://harfordmedlegal.typepad.com/forensics_talk/2007/01/duke_lacrosse_n.html (Jan. 6, 2007, 11:02 EST).

55. *E.g., id.*

56. *Id.*

57. Office of the Att’y Gen. for the State of N.C., *SUMMARY OF CONCLUSIONS*, Case File Nos. 06 CRS 4332–4336, 5582–5583, at 20.

58. *Id.*

2. Academics

The Duke lacrosse case appears to have been the first occasion in U.S. history in which defense attorneys cited the statements and actions of students' own professors as a primary reason why the students could not receive a fair trial nearby the university.⁵⁹ In the days after the allegations first became public, dozens of Duke professors responded with guilt-presuming public statements and actions. On March 29th, Houston Baker, a professor of English and African American Studies, publicly demanded the immediate expulsion of all forty-seven lacrosse players, on the grounds that they had left Mangum "injured for life."⁶⁰ Two days later, William Chafe, a professor of history and former dean of faculty, published an op-ed suggesting that the whites who kidnapped, beat, and murdered an African American boy named Emmett Till in 1950s Mississippi provided the appropriate historical context for interpreting the behavior of the lacrosse players.⁶¹ The next day, Peter Wood, a professor of history, told *The New York Times*, "[T]he football players here are often rural white boys with baseball caps or hard-working black students who are proud to be at Duke Too often, there seems to be a surliness about some lacrosse players' individual demeanor. They seem hostile, and there is this group mentality."⁶² Then, on April 2nd, Timothy Tyson, a visiting professor of history, declared in a *News & Observer* op-ed, "[T]he spirit of the lynch mob lived in that house on Buchanan Boulevard."⁶³

The highest-profile faculty action came on April 6, 2006, when eighty-eight members of the arts-and-sciences faculty signed a full-page advertisement in the *Duke Chronicle* asking, "What Does a Social Disaster Sound Like?"⁶⁴ In an e-mail requesting signatures, the statement's author, Literature and African American Studies professor Wahneema Lubiano, was blunt about the ad's intent: it would represent the faculty's response "to the lacrosse team incident."⁶⁵

The signatories, who came to be known as the "Group of 88," declared unequivocally that something had "happened" to Mangum, committed themselves to "turning up the volume" about the case, and concluded, "[T]o the

59. Interview with Jim Cooney, defense attorney (Apr. 15, 2007).

60. Letter from Houston Baker, Duke Univ. Professor, to Peter Lange, Duke Univ. Provost, Mar. 29, 2006, available at http://www.dukenews.duke.edu/mmedia/features/lacrosse_incident/lange_baker.html.

61. William Chafe, *Race and Sex*, CHRON. (Durham, N.C.), Mar. 31, 2006, at A7.

62. Warren St. John and Joe Drape, *Team's Troubles Shock Few at Duke*, N.Y. TIMES, Apr. 1, 2006, at D1.

63. Timothy Tyson, *Ugly Past Echoes in Duke Case*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 2, 2006, at A23.

64. Advertisement, *What Does a Social Disaster Sound Like?*, CHRON. (Durham, N.C.), Apr. 6, 2006, available at http://photos1.blogger.com/x/blogger/2862/372/1600/99636/Listening_Statement_b.jpg (last visited Mar. 4, 2008).

65. Durham-in-Wonderland, Lubiano's Cover E-Mail, <http://durhamwonderland.blogspot.com/2007/09/lubianos-cover-e-mail.html> (Sept. 22, 2007, 12:23 EST).

protesters making collective noise, thank you for not waiting and for making yourselves heard.”⁶⁶ In the ten days before the ad appeared, the two highest-profile protests had been a demonstration outside the lacrosse captains’ rented house in which protesters had carried a “castrate” banner (March 26, 2006), and a “Take Back the Night” rally in which protesters had blanketed the campus with wanted posters containing photographs of forty-three members of the lacrosse team, under the heading “Please Come Forward.”

As Michael Munger, chairman of Duke’s political science department, later noted, members of the Group of 88 “were out of line for (a) a rush to judgment, and (b) presuming to speak, or appearing to be presuming to speak, for Duke and Duke’s faculty as a whole.”⁶⁷ At the time, however, traditional media organizations accepted the Group of 88 and its allies as spokespersons on the case for the Duke faculty. CNN’s Nancy Grace, introducing Houston Baker as a “very special guest,” heard him allege (without foundation) that, well before the party, lacrosse players “had urinated on people’s houses” and “had used racial slurs.”⁶⁸ (Baker also appeared on MSNBC and WRAL.) The *New Yorker* gave Peter Wood a platform to claim (without proof) that lacrosse players in his class had advocated genocide against Native Americans.⁶⁹ A Lubiano *News & Observer* op-ed demanded that Duke immediately institute “targeted teaching” to expose “the structures of racism and the not-so-hidden injuries of class entitlement in place at Duke and everywhere in this country,” since “we don’t have to wait for working class or poorer students to be targeted by fraternity ‘theme’ parties or cross burnings on the quad or in dorm halls, or for sexual assaults to be attested by perfectly placed witnesses and indisputable evidence.”⁷⁰ The *News & Observer*’s initial lead reporter, Samiha Khanna, cited Tyson’s “spirit of the lynch mob” essay as the key “to thorough follow-up stories that we are working to document.”⁷¹

The mainstream media’s initial disinterest in whether the anti-lacrosse faculty had an ulterior motive for their commentary provided an opening for the blogosphere. Four blogs (Durham-in-Wonderland, Liestoppers, John in Carolina, and Johnsville News) collectively published more than 200 posts exploring the faculty’s conduct. Each of these blogs argued that the faculty’s rush to judgment reflected not a dispassionate evaluation of evidence but an attempt to exploit the case to advance the professors’ personal, pedagogical, or

66. Advertisement, *supra* note 64.

67. Munger for NC Governor, 2008, *Lacrosse . . .*, <http://munger4ncgov.blogspot.com/2006/12/lacrosse.html> (Dec. 20, 2006, 05:58 EST).

68. Nancy Grace: *Duke University’s Lacrosse Team Coach Resigns in the Wake of Gang Rape Allegations Against Three of his Team Members*, (CNN television broadcast, April 5, 2006), available at <http://transcripts.cnn.com/TRANSCRIPTS/0604/05/ng.01.html>.

69. Peter J. Boyer, *Big Men on Campus*, THE NEW YORKER, Sept. 4, 2006, at 44.

70. Wahneema Lubiano, Op-Ed., *Whatever Happens, . . . What People Are Asking Is That Something Change*, NEWS & OBSERVER (Raleigh, N.C.), May 7, 2006, at A28.

71. Online interview with Samiha Khanna, Reporter, News & Observer, *Duke Lacrosse Controversy*, <http://www.newsobserver.com/1139/story/425138-p2.html>.

ideological agendas.⁷² In this respect, the professors' responses said far more about Duke's staffing decisions and the professors' intellectual interests than about the lacrosse players.

For instance, one of my posts at Durham-in-Wonderland observed how signatories of the ad seemed to be intellectually predisposed to believe Mangum's allegations.⁷³ Of the tenured or tenure-track members of the Group of 88, 84.1% described their research interests as related to race, class, or gender (or all three).⁷⁴ The group's membership also was bunched in a handful of departments and programs whose pedagogical approach suggested a one-sided view on race or gender issues, such as African American Studies (80% of whose members signed), Women's Studies (72.2%), and Cultural Anthropology (60%).⁷⁵ Another post exposed a major violation of standard academic procedure in the preparation of the ad: though it had claimed the support of five academic departments, in fact none of these departments had ever voted on whether to endorse the statement.⁷⁶

After the description of faculty behavior offered in the change-of-venue motion, the mainstream media turned its attention to how Duke professors had responded to the case. The Group of 88's conduct heightened the scrutiny. In mid-January 2007, after Nifong had recused himself from the case following the North Carolina State Bar's filing of ethics charges against him, more than eighty percent of the Group members still employed by Duke signed a defiant public statement announcing that they would "reject" all calls to apologize and that they continued to stand "by the claim that issues of race and sexual violence on campus are real."⁷⁷

In sharp contrast to April 2006, the media response to the January 2007 statement was overwhelmingly negative: building off the research of the blogs, Duke graduate Dan Abrams of MSNBC, John Podhoretz of the *New York Post*, Mary Laney of the *Chicago Sun-Times*, and Charlotte Allen of the *Weekly Standard* published scathingly negative reviews of the Group of 88's performance.⁷⁸ Even *Diverse*, an academic journal whose editorial bent inclined

72. Liestoppers, Duke Professors and the 610 Protests, <http://liestoppers.blogspot.com/2008/03/duke-professors-and-610-protests.html> (March 26, 2008, 21:59 EST); Johnsville News, Duke Case: The "Listening" Statement, <http://johnsville.blogspot.com/2006/11/duke-case-listening-statement.html> (Nov. 10, 2006); John in Carolina, Two "88" Classic Posts, <http://johninnorthcarolina.blogspot.com/2006/11/two-88-classic-posts.html> (Nov. 14, 2006, 14:42 EST).

73. See *infra* note 76.

74. Durham-in-Wonderland, Open Letter to Brodhead, <http://durhamwonderland.blogspot.com/2006/07/open-letter-to-brodhead.html> (July 19, 2006, 08:42 EST).

75. Durham-in-Wonderland, Sunday Review, <http://durhamwonderland.blogspot.com/2006/11/sunday-review.html> (Nov. 26, 2006, 00:01 EST).

76. Durham-in-Wonderland, The Group of 88: Non-Endorsement 'Endorsements,' <http://durhamwonderland.blogspot.com/2007/05/group-of-88-non-endorsement.html> (May 25, 2007, 00:01 EST).

77. Concerned Duke Faculty, Duke Univ., An Open Letter to the Duke Community, (posted Jan. 17, 2007), available at <http://concerneddukefaculty.org/>.

78. Tucker (MSNBC television broadcast, Jan. 17, 2007), available at <http://www.msnbc.msn.com/id/16689460/>; John Podhoretz, *Orwell University: Duke Profs' P.C. Travesty*, N.Y. POST, JAN. 18, 2007,

toward the Group's race-class-gender approach, published a scrupulously neutral article that gave as much attention to the Group's critics as to the ad's signatories.⁷⁹

III

DRAWBACKS OF THE BLOGOSPHERE

The Duke lacrosse case also revealed three potential drawbacks to the role of blogs in covering criminal-justice issues: the insufficiency of the editorial process, the dangers of anonymous commenting, and the ability of blogs to analyze cases to which the traditional media has not already devoted substantial attention.

A. Editing

A customary, and correct, critique of blogs focuses on the lack of a formal editorial process. Of the four major case-related blogs, three (Durham-in-Wonderland, John in Carolina, and Johnsville News) were published by individuals and therefore lacked an editor. The fourth, Liestoppers, was produced by about two dozen people, but with only a loose editorial process. A formal editorial process obviously will improve almost any published work. That said, the blog's readers functioned as informal editors—correcting spelling errors or unclear clauses shortly after posts appeared.

Moreover, in one way, a lack of editorial process actually improved blogs' quality in this specific case. On April 11, 2006, ESPN.com's Eric Adelson published an explosive column alleging that, in the early morning hours of March 14th, an unnamed source had seen Mangum "pretty banged up" at Duke Hospital.⁸⁰ In their August 25, 2006, article, Duff Wilson and Jonathan Glater seemed to corroborate Adelson's story, writing that "signs of bruises" existed when Sergeant Gottlieb interviewed Mangum on March 16.⁸¹ The account grew even more dramatic in March 2007, when the *Herald-Sun* stated that Mangum's father recalled "in vivid detail his daughter's swollen eyes and cut arms" after the "attack."⁸²

Concrete evidence, however, existed to disprove each of these articles' claims. On March 16, 2006, the police took several photographs of Mangum.

at 37; Mary Laney, *Innocent Duke Lacrosse Players Stuck in P.C. Nightmare*, CHICAGO SUN-TIMES, Jan. 22, 2007, at 29; Charlotte Allen, *Duke's Tenured Vigilantes*, WEEKLY STANDARD, Jan. 29, 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/190uejex.asp>.

79. Christina Asquith, *Duke's Devil of a Mess*, DIVERSE, Feb. 26, 2007, at 1.

80. Eric Adelson, *Source: Alleged Victim Was 'Hysterical' at Hospital*, Apr. 11, 2006, <http://sports.espn.go.com/ncaa/news/story?id=2404866> (last visited Mar. 4, 2008).

81. Duff Wilson and Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, at A1.

82. Brianne Dopart, *AG's Office Denies Lacrosse Case is Dead*, HERALD-SUN, Mar. 23, 2007, at A1.

None showed any bruises; all were in the discovery file.⁸³ *The New York Times* obtained the photographs on August 24, 2006; the *News & Observer* had access to them at about the same time.⁸⁴ Yet neither paper published the photos—despite their obviously newsworthy nature. After the March 2007 *Herald-Sun* article, I published one of the photographs at Durham-in-Wonderland. The general lack of editorial restraint regarding identifying rape accusers gave me, as a blogger, freedom that a journalist would not have possessed.

B. Ethics

Commenters form an integral part of the blogosphere. They create a virtual community, provide a source of often-lively debate, and sometimes offer useful tips. Yet they also pose two problems. The first involves the potential for abuse in on-line forum discussions. In the Duke lacrosse case, three Web sites—Court TV, Talk Left, and Liestoppers—hosted discussion forums about events in Durham.⁸⁵ Most participants in these forums posted pseudonymously. Although it did not occur in this case, the anonymity of the Internet could tempt attorneys ethically restricted from speaking out in their own name to make pseudonymous comments on case-related message boards.

The second problem involves those who use the Internet's freedom to offer vile comments. The Talk Left discussion boards were all but overwhelmed by two pseudonymous posters who, day after day, made vile character assaults on the lacrosse players.⁸⁶ Faculty defenders of the Group of 88, meanwhile, suggested that (anonymous) stray racist comments left at Durham-in-Wonderland and Liestoppers reflected the viewpoint of the blogs' publishers.⁸⁷ (Bill O'Reilly had previously used this tactic in a vain attempt to discredit the powerful, left-leaning blog, Daily Kos.⁸⁸) Each of the major case-related blogs and discussion forums ultimately implemented comment moderation to deal with the distractions posed by "trolls" who attempted to hijack discussions with vile comments.

C. Publicity

The Duke lacrosse case was extraordinary in the extensive coverage—including the Internet availability of all major case-related documents—

83. Durham-in-Wonderland, A Thousand Words, <http://durhamwonderland.blogspot.com/2007/03/thousand-words.html> (Mar. 24, 2007, 11:27 EST).

84. Interview with Bradley Bannon, defense attorney for Dave Evans (May 10, 2007).

85. See, e.g., Talk Left, Archived Duke Players Discredited Sexual Assault Case Topics, <http://forums.talkleft.com/index.php?board=1.0>; Court TV, <http://www.courtstv.com/news/duke-rape/index.html>.

86. See Talk Left, New Posters Need to Be Aware of the Forum Rules, <http://forums.talkleft.com/index.php?topic=445.0> (Oct. 21, 2006, 22:39 EST).

87. Charles Piot, *KC's World*, 15 *TRANSFORMING ANTHROPOLOGY* 158, 161–63 (2007).

88. Posting of A.I. to Media Matters, (July 26, 2007, 14:50 EST), <http://mediamatters.org/items/200707260006>.

provided by the mainstream media. Could blogs exercise a considerable impact in a case that did not attract such media attention? Perhaps, but doing so would require on-the-ground coverage from the start, as a way of building readership. Readers, it is clear, do respond to blogs providing original, even rough-draft, content. For instance, the seven days in which Durham-in-Wonderland attracted the most visitors were all occasions in which I live-blogged from either the pretrial hearings, while the criminal case remained in place, or the June 2007 Nifong ethics hearing. Blogs are, in fact, very well-suited for such coverage—which, for reasons of space if nothing else, print media cannot provide.

IV

CONCLUSION

A few days after his August 2006 article appeared, Duff Wilson rationalized its arguments in a conversation with defense attorneys. The Gottlieb memorandum, he noted, was “newsy,” a scoop, and therefore *The New York Times* was correct in giving it such priority in the paper’s case narrative.⁸⁹ Defense attorneys believed that Wilson valued maintaining access to his prosecution sources above exposing the truth.⁹⁰

Just over a year later, in a Duke University School of Law conference, blogger Marcy Wheeler explained how blogs had a different approach to covering legal affairs. Because of its reliance on documents rather than personal sources, she argued, the blogosphere could treat the criminal justice process as a *process*, engaging in often painstaking analysis of source material to attempt to determine the truth.⁹¹ In the Duke lacrosse case, blogs used this tactic well; perhaps the performance will serve as a model for future intersections between the blogosphere and criminal-justice matters.

89. Interview with Bradley Bannon (Mar. 14, 2007).

90. STUART TAYLOR, JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 268 (2007).

91. Marcy Wheeler, Panel Discussion at the Duke University School of Law Symposium: The Role of Responsibility and the New Media (Sep. 28, 2007), available at <http://www.law.duke.edu/webcast/?match=Court+of+Public+Opinion>.