INTRODUCTION

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In March 2006, Duke University was rocked by allegations that Caucasian members of the men's lacrosse team had sexually assaulted an African American woman hired to perform at an off-campus team party during Spring Break. In the days and weeks immediately following the party, as the story unfolded and tensions mounted, members of the University and Durham communities struggled with how to respond to the situation. The coalescence of issues of race, class, gender, and collegiate athletics quickly grabbed the attention of local and national media, who descended on Duke's campus and Durham's neighborhoods, where they remained ensconced for months to come.

When questions surfaced about the veracity of the allegations and the lack of corroborating evidence, the District Attorney, with an election looming, repeatedly opined in the media about the strength of the case and the character of the accused. Three team members were indicted, despite the existence of alibi evidence shared with the prosecution and exculpatory evidence withheld by the prosecution. Yet, even as some within the media, the public, and the bar began to exercise closer scrutiny of the circumstances, others assumed that the students must be guilty as charged.

Months later, the North Carolina Attorney General declared the three indicted team members innocent, concluding that no crime had occurred. The District Attorney was disbarred based on his public comments about the case, his withholding of exculpatory evidence, and his misrepresentations about the evidence. Today, effects from the case continue to be felt at Duke and in Durham. Civil lawsuits are pending against governmental and university defendants, the former District Attorney has declared bankruptcy, and the house where the party occurred sits vacant.

This could have been the end of the story. Duke's experience in the media spotlight might simply have been one more example of a situation, too common by now, in which a case is tried in the court of public opinion, rather than in the courtroom, with the result that there is a rush to judge, rather than to do justice. We wanted it to stand for something more.

To that end, in September 2007, the Duke University School of Law, with the generous financial support of the John S. and James L. Knight Foundation, hosted a conference entitled *The Court of Public Opinion: The Practice and*

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Ethics of Trying Cases in the Media.[1] Over the course of two days, this interdisciplinary gathering of journalists, lawyers, judges, and scholars looked beyond the particulars of the Duke lacrosse case to examine the complex and often conflicting constitutional, ethical, and practical considerations that can arise any time a case draws the attention of the public and the media. The conference featured eight panels, seven addressing the role of a particular set of actors in a high-profile case, and one presenting a comparative-law analysis. Although each panel had a particular focus, panelists frequently drew on the discussion in prior sessions, thus highlighting the interdisciplinary and interrelated nature of the issues and enhancing the level of dialogue throughout the conference.

This issue of *Law and Contemporary Problems* is devoted to the papers arising from the conference. The lead participants on each panel were invited to submit a draft article in advance of the conference to guide that panel's discussion. Following the conference, they were given the opportunity to submit their work for publication in this issue. Several other panelists were inspired by the discussions at the conference to write articles, and those are included here as well. Because each of these articles benefited from the thoughtful and provocative discussions throughout the conference, our thanks extend not only to the contributors to this issue, but to all of the conference participants.

While each article offers a unique perspective on the issues presented by high-profile cases, several themes also emerge. First, it is by no means clear that current practices in the United States serve the legitimate purposes of the First Amendment, upon which so much of the law affecting high-profile cases is based, or that they adequately balance the competing interests at stake. Second, in the combustible atmosphere typical of a high-profile case, justice demands the exercise of skepticism and restraint on the part of both the media and the public. Finally, although it is impossible to predict where the next high-profile case will arise, it is possible for courts and institutions to prepare to weather the storm of media attention that accompanies such an event.

BALANCING INTERESTS

This issue begins with articles that focus on the purposes behind the protections of free press, free speech, and fair trial, and that examine the extent to which the often conflicting interests present in a high-profile case are well served by current law and practice. These four articles offer analyses by both U.S. and European scholars, and draw on lessons from history, from comparative law, and from journalistic and legal ethics in concluding that a proper balance of relevant interests has yet to be achieved.

1. The conference program, information about conference participants, and webcasts of conference proceedings are available at http://www.law.duke.edu/conference/2007/publicopinion. In addition to the eight panels, the conference included two keynote addresses, a "Fred Friendly" roundtable, a retrospective on the lacrosse case, a documentary premiere, and comments by the Duke University President.

In the first article, *Back to the Future—Questions for the News Media from the Past*, Loren Ghiglione focuses on the ethical and practical questions that confront journalists as they strive to fulfill their role of informing the public.[2] Ghiglione rejects suggestions that the failures of the media in the Duke lacrosse case were simply the result of excessive political correctness. Instead, he turns to history and uses the lens of the McCarthy era to demonstrate that the same problems that plague the media in high-profile cases now also affected journalistic coverage in that day. He then poses a set of questions designed to shape our inquiry into the proper role of journalists today and in the future. After first asking who qualifies as a journalist, what ethics guide the profession, and what role journalists serve, Ghiglione progresses through a number of queries that focus on the need for journalists to be skeptical of sources, critical of themselves, and careful with their wordcraft. He cautions that, without equal doses of objectivity, skepticism, and humility by journalists, reporting of complex issues is too easily reduced to a form of simplistic storytelling that masks truth, thus disserving the public's interest in being informed and the accused's interest in being fairly tried.

Two European scholars offer comparative law perspectives. In *Trial by Media: The Betrayal of the First Amendment's Purpose*, Gavin Phillipson asserts that constitutional doctrine in the United States has ignored the purposes behind freedom of speech and freedom of the press.[3] He emphasizes that the values underlying freedom of speech, which are designed to ensure that the public is informed about governmental action, are not well served by failing to restrict speech that prejudices an individual's constitutional right to a fair trial, since such injustice undermines the governmental integrity that the First Amendment aims to safeguard. Contrary to those who believe that the effect of adverse publicity can be neutralized, Phillipson stresses that media coverage can indeed prejudice trials, particularly when it discloses evidence inadmissible at trial. Moreover, efforts to counteract such coverage through devices such as cautionary instructions, jury sequestration, and changes of venue are far less effective than we would like to believe. Phillipson therefore calls for a judicious use of prior restraints on the press as a means of reining in the media and protecting the interests of defendants.

Next, Giorgio Resta offers a detailed look at the laws of various nations relating to public trials in *Trying Cases in the Media: A Comparative Overview*.[4] He first acknowledges that the risk of trial by media may be particularly strong in the United States, thanks to the presence of institutional factors—including broad prosecutorial discretion, the availability of jury trials, strict evidentiary

2. Loren Ghiglione, *Back to the Future—Questions for the News Media from the Past*, 71 LAW & CONTEMP. PROBS. 1 *Autumn 2008).

3. Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment's Purpose*, 71 LAW & CONTEMP. PROBS. 15 (Autumn 2008).

4. Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 LAW & CONTEMP. PROBS. 31 (Autumn 2008).

rules, and the strong protections of the First Amendment—that are lacking in other countries. He emphasizes, however, that other nations have faced similar challenges to balancing the rights of free press and fair trial and have developed effective tools for addressing high-profile cases. Resta offers an analytical framework that compares three models of regulation: the American approach, which imposes few restrictions on the press; the English approach, which accords greater weight to the protection of fair trials and public confidence in the courts; and the Continental approach, which places the highest emphasis on the protection of an individual's privacy, personal dignity, and presumed innocence. He then examines a variety of mechanisms used by civil-law nations to prevent harm to individual interests, including penal sanctions for publicly disclosing certain information about a pending case, ethical constraints on communications by judicial authorities and prosecutors with the press, and the availability of private-law remedies for individuals whose rights to privacy and the presumption of innocence have been infringed by members of the media. Resta concludes by stressing that the complex legal problems posed by high-profile cases defy easy solution and require understanding the historical, cultural, and social factors that have shaped the models adopted by various nations.

Michael Cassidy's article shifts the focus from the constitutional protections afforded speech by the media to those that should be afforded speech by publicly elected prosecutors.[5] In *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, Cassidy considers the constitutionality of current ethical restrictions on attorney speech set forth in Rules 3.6 and 3.8 of the Model Rules of Professional Conduct. He opines that had former Durham District Attorney Nifong raised a First Amendment challenge to the disciplinary proceeding against him, such a defense might well have succeeded. Cassidy bases this conclusion on the Supreme Court's recent decision in *Republican Party of Minnesota v. White*,[6] which held that a Minnesota rule of judicial conduct prohibiting a candidate for judicial office from commenting publicly on "disputed legal or political issues" violated the core protections for political free speech enshrined in the First Amendment.[7] Cassidy notes that, like the judge involved in *White*, Nifong was facing election when he made public comments about the Duke lacrosse case. While Cassidy acknowledges the risks posed to the administration of justice by prosecutorial comments, he emphasizes that the ethical rules restraining such comments cannot withstand the strict scrutiny that is required when the right of free speech is infringed.

EXERCISING SKEPTICISM

The second group of articles addresses the importance of objectivity on the part of the media and the public from the moment that a high-profile case be-

5. R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67 (Autumn 2008).

6. 536 U.S. 765 (2002).

7. *Id.* at 788.

gins to unfold. There is a significant risk that public perceptions and biases about particular individuals, groups, or institutions will improperly influence the course of a high-profile case. Because these perceptions and biases have often been shaped by media coverage of prior events, a conscious and concerted effort by both the public and the press is essential to overcoming the very human inclination to prejudge. The existence of new forms of media may foster healthy skepticism because of the opportunities these media provide for individual engagement with and scrutiny of what are often complex issues.

In the first of these articles, *Race to Judgment: Stereotyping Media and Criminal Defendants*, Robert Entman and Kimberly Gross provide an empirical analysis of the media's response to the Duke lacrosse case against the backdrop of research about the media's depiction of crime and race generally.[8] They note that extensive academic research demonstrates a consistent media bias against African Americans not only in crime reporting, but also in news coverage generally. These repeated messages by the media relating to race reinforce existing stereotypes and biases in ways that negatively affect the administration of justice. Although the circumstances of the Duke lacrosse case, which involved Caucasian defendants and an African American alleged victim, are not typical, Entman and Gross demonstrate that early reporting about the case shoehorned the facts into a stereotyped story of race and class struggle in a manner analogous to that employed by the media in other crime reporting. Moreover, even when questions arose about the investigation, many journalists continued to rely on a typical pro-prosecution slant in their reporting, only belatedly exercising skepticism about information provided by public officials. Entman and Gross conclude by advocating education for police, prosecutors, and jurors about the risk that subliminal prejudice poses to an individual's ability to objectively assess evidence and to fairly resolve a case.

The next two articles describe the ways in which new forms of media may offer advantages over traditional journalism regarding the level of scrutiny and analysis that they permit of the issues involved in a high-profile case. In *How Noninstitutionalized Media Change the Relationship Between the Public and Media Coverage in Trials*, Marcy Wheeler describes the distinguishing characteristics of these new media.[9] In her terminology, "noninstitutional media" are Internet-based news sources, including websites, blogs, and wikis, that are not simply electronic platforms for existing media outlets, such as television networks and print newspapers. Wheeler explains that noninstitutional media feature limited editorial structure, a conversational and contributory relationship with readers, fewer rules related to newsworthiness and reporting format, and less reliance on human sources. Taken together, these traits allow such media to offer news analysis that is often more detailed and nuanced than that permitted

8. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93 (Autumn 2008).

9. Marcy Wheeler, *How Noninstitutionalized Media Change the Relationship Between the Public and Media Coverage of Trials*, 71 LAW & CONTEMP. PROBS. 135 (Autumn 2008).

by the conventions of traditional media. In addition, these characteristics allow readers to engage as active participants in the analytical process, through online conversations with others and through assessing for themselves the meaning and credibility of sources posted on the Web. Among the examples of high-profile cases in which noninstitutional media have played a key role in educating the public, Wheeler cites the Monica Lewinsky scandal, the CIA leak case, and the Duke lacrosse case. Although Wheeler acknowledges that the lack of a formal editorial structure and the presence of pseudonymous contributors raise questions about the reliability of noninstitutional media, she emphasizes that evolving and enforceable norms within these media communities have the potential for protecting the public interest in fair and accurate reporting.

KC Johnson's article, *The Duke Lacrosse Case and the Blogosphere*, examines the important role that nontraditional media played in informing the public about the Duke lacrosse case and ultimately in shaping the course of the criminal proceedings.[10] Johnson notes that blogs were an important means of learning details about the case as it evolved, since some information—such as the background of the alleged victim—was not available through mainstream media. In addition, he points out that blogs gained credibility through their detailed and focused criticism of the coverage of the case by traditional media. At the same time, he praises specific media outlets in Durham for posting key documents in the case online, thus affording the public timely access to information that normally would have remained unavailable until trial. Finally, Johnson emphasizes that the ability of bloggers to develop expertise in key areas such as forensics allowed the blogs to educate the public about relevant legal and evidentiary issues. While Johnson echoes Wheeler's cautions about the risks posed by nontraditional media's lack of editorial oversight and reliance on pseudonymity, he concludes, as she does, that such media offer important tools for promoting the truth-seeking function of the criminal-justice process.

PREPARING FOR THE FUTURE

The final three articles in this issue look to the future, offering strategies for minimizing the adverse effects of high-profile cases on courts and other institutions. By adopting techniques that have proven effective in prior high-profile cases, and by recognizing the limitations of those that have failed, judges will be ready to assume the special responsibilities that come with presiding over a high-profile case. Likewise, institutions that draw on the lessons learned by others who have faced the crisis of a high-profile case can enhance their own ability to not only survive, but to thrive in similar circumstances.

The first two articles address the challenges facing courts in high-profile cases, one by focusing on legal doctrine and the other by examining practical concerns. In Sheppard v. Maxwell *Revisited—Do the Traditional Rules Work for*

10. KC Johnson, *The Duke Lacrosse Case and the Blogosphere*, 71 LAW & CONTEMP. PROBS. 155 (Autumn 2008).

Nontraditional Media?,[11] Gary Hengstler examines the Supreme Court's decision of four decades ago, in which the Court held that "massive, pervasive, and prejudicial publicity" had deprived Dr. Sam Sheppard of a fair trial on charges that he had murdered his wife.[12] As Hengstler emphasizes, the Supreme Court in *Sheppard* placed responsibility for safeguarding the fairness of the criminal proceeding solely on the trial judge, rather than on the media responsible for generating the publicity. Because prejudicial publicity, including that at issue in *Sheppard* itself, often occurs before a trial judge takes jurisdiction of the case, the tools traditionally employed by trial judges to protect the trial process—such as protective orders, changes of venue, sequestration, and jury admonitions—often come too late. More importantly, says Hengstler, changes that have occurred in the media since *Sheppard* may have rendered the Court's advice obsolete. New forms of media, evolving definitions of journalism, increased market pressures to make news entertaining, and the existence of a World Wide Web all diminish the effectiveness of traditional methods for safeguarding a defendant's right to a fair trial. Hengstler ends with a call for guidance for judges as they attempt to balance the rights of a rapidly evolving media with those of an individual facing trial.

David Sellers offers advice of a different sort for dealing with the carnival-like atmosphere of a high-profile case. In *The Circus Comes to Town: The Media and High-Profile Trials*, Sellers examines practical steps that a court can take to minimize, or at least manage, the media frenzy that surrounds such a case.[13] He urges a judge faced with a high-profile case to develop a media plan that resolves logistical issues, including the use of cameras in the courtroom, access to wireless communications and other technologies, and courtroom seating for media. He includes an extensive description of print, Web-based, and professional resources available to judges seeking guidance about high-profile cases, and provides examples from recent trials of creative strategies that proved effective. While Sellers acknowledges that the judge in a high-profile case faces a difficult task in balancing the First Amendment right of access with the Sixth Amendment right to a fair trial, he offers reassurance that effectively managing the logistical aspects of a trial can go a long way toward protecting the rights of those involved.

In the final article in this issue, Ronald Dufresne and Judith Clair examine what happens when an organization, whether public or private, becomes embroiled in a high-profile scandal. Their article, *Moving Beyond Media Feast and Frenzy: Imagining Possibilities for Hyper-Resilience Arising from Scandalous Organizational Crisis*, suggests that certain characteristics allow an organization to be "hyper-resilient" in the face of crisis, which permits the organization not

11. Gary A. Hengstler, Sheppard v. Maxwell *Revisited—Do the Traditional Rules Work for Nontraditional Media?*, 71 LAW & CONTEMP. PROBS. 171 (Autumn 2008).

12. 384 U.S. 333, 335 (1966).

13. David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181 (Autumn 2008).

only to bounce back from crisis, but also to use the experience as an opportunity for growth and renewal.[14] In the case of a crisis that draws intense media and public scrutiny, public commentary about the events can transform an organization's particular difficulties into an allegory about broader social conflicts. Drawing on their earlier work, Dufresne and Clair identify six outcomes of crisis that offer an organization the opportunity for transformation: seeing stakeholder relationships in a new light, revising the organization's mission and values, recognizing vulnerabilities, adopting the role of issue leadership, renovating underlying organizational structures, and enhancing understanding of the wholeness of organizational life. In considering Duke's experience with the lacrosse-case scandal, Dufresne and Clair conclude that the University has the opportunity to experience the sort of transformative growth they describe, though it is not yet clear that such growth has occurred. They acknowledge that hyper-resilience following a crisis turns on the organization's ability to manage the tension between the desire to get on with life and the need to ask deep and often painful questions about the lessons to be learned. By the time a crisis erupts, however, it is often too late to develop these skills. For this reason, the authors urge organizations to commit now to personal transformation, interpersonal engagement, and experimentation with learning structures, so that when crisis strikes, the organization will possess the tools it needs to emerge stronger than before.

14. Ronald L. Dufresne & Judith A. Clair, *Moving Beyond Media Feast and Frenzy: Imagining Possibilities for Hyper-Resilience Arising from Scandalous Organizational Crisis*, 71 LAW & CONTEMP. PROBS. 201 (Autumn 2008).