

## The Duke Lacrosse Case and the Rule of Law

*By Richard B. McNamara*

Now that the Duke lacrosse case has slipped from the front pages, it is worthwhile to consider what can be learned from it. What occurred appears to be straightforward: a cynical prosecutor, hoping to win a contested election, brought charges against defendants whose race and status made them attractive targets. He obtained grand jury indictments with no evidence. But the defense was able to show that the prosecution did not comply with legal and ethical rules. A trial judge found that the prosecutor suppressed evidence that showed the defendants' innocence. After taking over the case, the North Carolina Attorney General declared that the defendants were innocent, and the prosecutor is now facing ethical charges.

The abuses which occurred could occur because of our adversary system of justice. Yet, in the wake of the case, no one seriously claims that our adversary system of criminal justice is flawed.

True, the District Attorney, Michael Nifong, was an elected official, and brought charges to curry favor with part of the electorate. But there are good reasons to have prosecutors responsive to the public, so that the public can have some control over what kinds of cases are or are not prosecuted. Here in New Hampshire, county attorneys are elected to two-year terms; while the Attorney General is appointed, even the Attorney General is subject to appointment by the Governor and Council for five year terms. This responsiveness to the public is necessary if public confidence in criminal justice is to be maintained.

The grand jury which indicted the three innocent defendants operated in total secrecy and we now know, either was given no evidence, or false evidence. But grand jury secrecy is important. In the words of the New Hampshire Supreme Court, grand jury secrecy protects jurors from persons who may be affected by the outcome of grand jury proceedings, encourages witnesses to testify freely and "may save an innocent person whom charges have been considered from the infamy of having been accused of committing a crime." It can protect not only defendants but victims of crime from intimidation.

In this case, the prosecutor's case crumbled once it was determined that exculpatory evidence – evidence which showed that the defendants were innocent – was not turned over to the defense lawyers by the prosecutor. Ironically, nowhere in the press account was there much discussion about the prosecutor's obligation to provide exculpatory evidence to the defendants. In fact, however, it was not until 1970 that the United States Supreme Court finally decided in *Brady v. Maryland*, that a prosecutor has a constitutional duty to produce such evidence. That constitutional right, which appears nowhere in the explicit text of the Constitution, was asserted by lawyers to protect the rights of their clients, and they convinced the Court that the constitutional guarantee of due process of law requires a prosecutor to turn over evidence which shows a person is not guilty. And therein is an important point.

As Professor Randy Barnett of the Georgetown Law School recently noted, "Our criminal justice system does not rely solely on the fairness of the police and prosecutors to get things right. In every criminal case there is a professional whose only obligation is to scrutinize what the police and prosecutor have done. This professional is a lawyer." The lawyers who represented the three innocent defendants in the Duke lacrosse case worked within the constraints of the law to fulfill their obligation to their clients. They were also subjected to the scorn and indignation heaped on their clients by the media and some in their community at the beginning of the case, despite the constitutional presumption of innocence. But these attorneys persisted, and forced the prosecutor to release exculpatory evidence. Their investigation showed that the prosecution's case could not be true. They did their job. In doing so they not only protected their clients, they protected the constitutional rights that protect all of us.

Determining the truth is not an easy process. The Duke defendants had the advantage of capable private attorneys. Here in New Hampshire, our constitution provides that any person charged with a crime is entitled to a lawyer at state expense. The Duke case reminds us of the importance of ensuring that a poor defendant, guilty or innocent, is entitled to capable legal representation to make sure that our adversary system operates fairly.

The Duke case reminds us of the role of lawyers in a free society.

Maybe the next time someone tells you a lawyer joke, you can think of the lawyers who represented these three defendants in the face of public scorn and death threats to their clients, and who saved them from perhaps the most terrible punishment of all – years in jail for horrible crimes they didn't commit. Just maybe the lawyer joke won't seem so funny.

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