

Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case

by Robert M. Entman and Kimberly A. Gross

In covering the infamous Duke lacrosse case, journalists received enormous criticism for the way they allegedly convicted the defendants in the press. Yet the practice is hardly unusual. Standard media routines and practices often contribute to undermining the presumption of innocence, particularly with high profile crimes. Still, in other respects this particular case was atypical, involving national media attention, a prosecutor engaged in misconduct, affluent white young men in the role of the accused and a poor black woman as the accuser. Although most crimes do not garner the attention devoted to the accusations in this case, crime news in general may also have deleterious effects on the presumption of innocence. Research shows that typical media coverage of crime reinforces stereotypes of black and Latino defendants.¹ We argue this contributes to a weaker presumption of innocence for minority defendants, regardless of the amount of publicity. This article assesses the implications of social science research on media, race and crime to draw out lessons for professionals who must deal with the volatile nexus of publicity and race in the criminal justice system.

JOURNALISTIC ROUTINES, RACE AND PRETRIAL PUBLICITY

Many of the traits present in the Duke lacrosse media coverage characterize not only crime coverage, but news generally. These include over-reliance on public officials, overuse of standardized story scripts and familiar stereotypes, and “pack journalism”—the tendency for reporters from competitive news organizations to converge on the same framings. When applied to crime news, these media routines generally assist the prosecution in publicizing claims of guilt.



Perhaps the most important prerequisite to achieving balanced news coverage of any matter is having reliable and credible sources competing to advance alternative narratives. Without such equally legitimate forces contending to tell their alternative versions, media coverage is *usually* one-sided and arguably unfair to at least some participants. News of criminal cases often does not meet the requirement of two credible sides working to advance alternative narratives. Unlike in news of policy debates over, say, Social Security, healthcare, or the environment, there is no institutionalized party system to provide a two-sided debate that journalists can reflect in their coverage. The result is that crime news is almost always heavily slanted toward the prosecution.

In reporting crime stories, journalists typically rely on law enforcement officials' views, downplaying the defense perspective while minimally acknowledging the innocence presumption.² Although relatively few crimes receive sustained media attention,³ when they do, research shows coverage often includes information deemed prejudicial under American Bar Association (ABA) guidelines. One study measuring the extent of pretrial publicity on Los Angeles television news found that nineteen percent of the defendants in crime stories were associated with at least one category of potentially prejudicial information as defined by the ABA.⁴ Another study found that twenty-seven percent of suspects in crime stories were described using prejudicial information.⁵ Most of this information was cited to law-enforcement officers and prosecutors. The heavy reliance on these sources, with their self-interest in publicizing the guilt of those arrested and indicted, along with the perception that defense attorneys are more naturally biased than prosecutors representing putatively blind justice, helps explain the frequency of prejudicial publicity.

In most instances, media routines and news coverage place poor black and Latino defendants, whose individual crimes do not receive the high visibility attained by the Duke lacrosse case, at a disadvantage as well. Research suggests people of color are more likely to be subjected to negative pretrial publicity.⁶ Beyond coverage of specific crimes, news more generally places African American defendants at a disadvantage because of the strong cultural associations built—particularly by local television news—between blacks and crime, danger and guilt. *Even in the absence of specific prejudicial publicity about a given defendant's case, then, the racial and ethnic patterning of crime news may prejudice potential jurors against minority defendants.*



Kang (2005) uses the metaphor of the “Trojan Horse Virus” to describe how local television news can, without viewers’ awareness and without intent on the part of news producers, create and reinforce associations between blacks and violence in the minds of citizens.⁷ These stereotype-based responses are often automatically, quickly, and unconsciously triggered, and go on to affect a wide range of sentiments.⁸ For example, exposure to images of black, male defendants increases whites’ punitive attitudes toward crime, as well as their tendencies to blame individual rather than social factors for

law-breaking.⁹ Because whites tend to generalize in this way, any poor black (or Latino) defendant—even without media attention to his or her specific case—has received a kind of negative pre-trial publicity.

DISCUSSION AND IMPLICATIONS

The Duke lacrosse case provides a particularly vivid and compelling example of a more general dilemma for the administration of justice. The Duke lacrosse players do not typify crime-news defendants. To the extent that criminal defendants ever enjoy a chance to have their sides presented in equal measure to the prosecution's, the Duke lacrosse players occupied a more promising position than most. Even in the Duke lacrosse case early (but not later) coverage favored the prosecution, and journalists seemed to rely on stereotypes and recipes for crime news that caricatured and misrepresented the three players accused as well as the whole team. But the defendants enjoyed upper-middle class status and financial resources, and there was compelling evidence for their innocence once DNA test results became available; this led to later publicity that actually emphasized not merely the presumption but the likelihood of innocence. Poorer racial minorities—and less affluent whites—can rarely afford the sort of legal representation that helped the Duke students generally obtain more positive coverage after the initial weeks of negativity. Indeed, for most poorer minority defendants, there is usually no second phase to balance initial stories almost always slanted against them.

Based on our findings related to media coverage of this case and the prior research on media coverage of crime more generally, we suggest some possible lessons and remedies, in full recognition that their practical implementation and acceptance may be problematic.

1. Find Ways to Balance Coverage and Combat Pack Journalism

One of the most important lessons for both lawyers and journalists is the way normal news routines—including over-reliance on public officials (specifically the prosecution and police), overuse of familiar stereotypes and standard scripts, and pack journalism—can combine with a determined government official to facilitate pro-prosecution slant in news of alleged crimes. Rightly or wrongly, media routines are such that to yield balanced coverage, two competing sides must have approximately equal skill and resources. The imbalanced perspective in crime news, facilitated by over-reliance on biased public officials, is compounded in high profile cases by the fact that the prosecution often has strong career incentives to maximize publicity for crime-fighting successes. In such cases, journalists have an additional responsibility to search out alternative narratives. At the same time, lawyers must be aware that few reporters covering a case like this—especially those from national news organizations parachuting into a local scene—have the time to do the intensive reporting (to investigate documentary evidence, to interview ordinary citizens, or to otherwise probe alternative sources of information) to generate anything but the most cursory alternative narratives on their own. The Duke case also highlights how, in the current culture of soft news and cable shout-fests, high profile criminal cases will be taken up by cable news personalities and commentators. These individuals are not necessarily bound by journalistic conventions of objectivity.

The tendency toward a pro-prosecution slant in coverage poses a dilemma for those seeking to administer justice. One way to get more balanced coverage would be for the prosecution to refrain from speaking to the press. Criminal law enforcement agencies should adopt stronger rules governing interaction with the press for

both prosecutors and the police. Individual attorneys working a specific case have limited leverage to compel such cooperation. But it seems feasible for attorneys to use initial court proceedings and other early contacts with prosecutors and police to remind them of the dangers in pretrial publicity. Sometimes the publicity can backfire, as it surely did for Durham DA Mike Nifong. Even for less visible trials, professional embarrassment, change of venue or even successful defense appeals are among the pitfalls faced by the prosecution. And at least in theory, the prosecution is bound by the same professional responsibility to ensure fair trials as judges and juries.

Another way to get more balanced coverage is for the defense to provide journalists with narratives that challenge the prosecution. Defense lawyers in recent years have widely recognized that in high-profile cases they need to compete in the media to counter the prosecution bias.¹⁰ Of course in any given high profile case, whether the defense would want to compete in the public arena would depend on the specific details of the case.

In addition, defense advocates should point to ethical guidelines from the ABA discouraging *both* sides from speaking to the press. As illustrated in the *Gentile* case, which dealt with the right of the defense to speak to the media, one of the problems for defense attorneys appears to arise from American Bar Association standards discouraging *both* sides from speaking to the press. In a media-saturated culture that includes 24/7 access to breaking news and to unrestrained speculation on the Internet, outright prohibition of publicity becomes ever more difficult to enforce. In light of this, defense attorneys should organize and press the ABA to revise its guidelines. Any new standards must take into account the modern structure of the media while ensuring equitable enforcement for both sides.

2. Frame Your Media Narrative Early in the Process

When lawyers do engage the media debate they should bear in mind the importance of the early framing contest. Early framing is important because first impressions establish stereotypes that are difficult to dislodge. Early on in the Duke case, Durham D.A. Michael Nifong claimed that the players were not cooperating, and this theme was picked up by reporters and columnists. Editorial writers and columnists often invoked the term “wall of silence” to describe the team. This helped to feed the impression that “they have something to hide” and “they think they are above the law.” In fact, the team captains initially cooperated by giving statements to the authorities and volunteering to take polygraph tests. Yet these facts did not fit conveniently into the initial frame and therefore did not receive narrative prominence. In this instance, given journalistic values, it is not surprising that a resonant, symbolic meme like “wall of silence” trumped the detail that some Duke players were cooperating with the prosecutor. Should defense attorneys find their clients subject to similar treatment, we recommend they directly and publicly challenge damaging simplifications with their own simple factual narrative. Such efforts should include social media (such as Facebook and Twitter), blogs, websites, and email lists, not just the old-fashioned newspaper and broadcast outlets. The newer media can bypass established, cozy relationships between reporters and public officials.

3. Recognize the Role of Defendants' Race

Beyond this, for typical criminal defendants, particularly minorities, whose stories do not get prominent and sustained media play, the concern may be less about PR strategy than about the potential effects of the implicit crime-violence-black stereotype perpetuated by crime coverage in general. Ultimately, this problem could be more consequential because it has the potential to influence many more defendants. Racial minorities are subject to multiple layers of prejudice: they can face institutionalized, pro-prosecution media bias that may be applied to their specific case, *and* the anti-minority stereotypes perpetuated by so many other media productions.



One practical if partial solution with respect to juries might be for judges routinely to include explicit warnings based on social-science research. Judges could instruct that jurors, particularly white jurors considering the guilt or innocence of African Americans and other nonwhites, bring to their roles unconscious mental associations that may prejudice deliberations. A judge's directives could also make clear that this is not a matter of accusing whites of being racist, and similar instructions should apply to African American, Latino, and Asian jurors so they can be more-or-less race neutral. The point is for everyone to think through cultural schemas that encourage unconscious mental associations. Most whites, for example, are not outright racists; few think of themselves as racist and most seek rather to prove to themselves that they are not. Research has shown the best way to combat unconscious racism is by explicitly telling people what might be happening in their minds subconsciously. Some research suggests that awareness of this context can moderate the effects of the unconscious, negative associations in decision-making.¹¹

We also recommend that defense attorneys representing minority clients take into account the ongoing and general prejudicial pre-trial publicity embodied in so many television depictions of crime. Even if a specific client has received little media attention, in *voir dire*, attorneys should ask prospective jurors whether they are frequent viewers of local television news or of such crime reality shows as *Cops*. If so, it might make sense to exclude them from the jury, especially when the attorney has other qualms about them. Odds are habitual viewers have been infected by Kang's "Trojan Horse" virus, suffering from unconscious racial biases that could undermine impartiality.

Another remedy would be training district attorneys, their staffs, police departments, and others involved in the criminal-justice process to understand the social science on unconscious racial stereotyping and decision-making. Furthermore, training these personnel to recognize that their interactions with the press may undermine the presumption of innocence could help mitigate deleterious impacts on defendants' rights. However, police officials, individual officers, and certainly district attorneys have many political incentives to promote one-sided publicity. This may not even be done with the precise intention of prejudicing the jury pool and improving the chances of conviction. Publicity simply promotes an image of competence and achievement that is good public

relations for police and prosecutors. The compelling incentives for the prosecution to manage the media provide yet further reason for the ABA to revisit its guidelines.

4. Encourage Responsible Journalism

Finally, the onus must be put on journalists to alter their behavior. In the Duke case, media personnel bear responsibility for the fact they failed to sufficiently question Nifong's frame. In this instance, the prosecutor's potential ulterior motives were perhaps more obvious than normal. Although journalists paid some attention to the connection between the case and District Attorney Michael Nifong's upcoming election campaign, in hindsight it seems obvious they gave his claims undue deference, perhaps because it seemed literally incredible that a D.A. in the national-media glare would engage in blatant misconduct. This example should remind journalists of the need to recognize the self-interested nature of public officials' pronouncements and claims in criminal cases just as they appreciate—and often report—the self-serving motives of public officials in other policy realms. Journalists should also take into account the structural absence of a legitimate, competing opposition of the sort that helps to promote (though certainly not guarantee) more-balanced presentations of controversies in other policy areas.

The forces that promoted the journalistic shortcomings on exhibit in the Duke lacrosse case are not easily countered.¹² Nor are the forces that reinforce the more general crime coverage that promotes stereotyping and racial animosity. Still, as individuals or through their organizations, lawyers can communicate with journalists, news outlets and professional associations to help them understand the damage done by their unintentional undermining of the innocence presumption. Good could come of the Duke travesty if defense attorneys, journalists, and others in the criminal justice system learn from it. Duke's lacrosse players violated expectations of what criminals look like; perhaps this makes the case a good vehicle for learning by the mostly white power-holders in the system. After all, they can empathize with Duke defendants, who look like them.



Although prejudicial pretrial publicity and troubling coverage associating minorities with crime and violence will likely continue to be the norm rather than the exception, not only education but inevitably increasing diversity among those authorities could ease these burdens. And the changing demographics of media audiences should make it profitable if not vital for news outlets to adjust some of the standard journalistic routines that disadvantage non-whites.

LESSONS LEARNED FROM THE DUKE LACROSSE CASE

<p>1. Find Ways to Balance Coverage and Combat Pack Journalism</p>	<ul style="list-style-type: none"> • Provide alternative narratives that challenge the prosecution’s narrative and the public’s presumptions about the facts. • Press for new, equitable ABA guidelines on contacts with the media
<p>2. Frame Your Media Narrative Early in the Process</p>	<ul style="list-style-type: none"> • Get accurate information out in front of misinformation and employ all channels, including blogs, social media and other outlets on the internet.
<p>3. Recognize the Role of Defendants’ Race</p>	<ul style="list-style-type: none"> • Voir dire on jurors’ exposure to and agreement with general stereotypes of crimes and criminals.
<p>4. Encourage Responsible Journalism</p>	<ul style="list-style-type: none"> • Educate journalists on their professional obligations—and economic self-interests—to mitigate the unintended consequences of standard operating procedures; suggest new practices.

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A longer and more detailed description of this research was published in *Law and Contemporary Problems* 71 (Autumn 2008) <http://law.duke.edu/journals/lcp>.

ENDNOTES

¹ See for example, Robert M. Entman & Andrew Rojecki (2000) *The Black Image in the White Mind: Media and Race in America* Chicago: University of Chicago Press; Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM., Spring 2000.

² See Michael Welch, Melissa Fenwick & Meredith Roberts, *Primary Definitions of Crime and Moral Panic: A Content Analysis of Experts' Quotes in Feature Newspaper Articles on Crime*, 34 J. RES. CRIME & DELINQ. 474, 474, 488 (1997); Celeste Michelle Condit & J. Ann Seltzer, *The Rhetoric of Objectivity in the Newspaper Coverage of a Murder Trial*, 2 CRITICAL STUD. MASS COMM. 197, 197 (1985).

³ Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162, 165 (1988).

⁴ Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. BROADCASTING & ELECTRONIC MEDIA 112, 127–29 (2002).

⁵ Dorothy J. Imrich et al., *Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. COMM. 94, 94 (1995).

⁶ Dixon & Linz, *supra* note 3, at 128–29. Accounting for the race of the victim, they find that a black defendant with a white victim more than doubles the odds of prejudicial pretrial information appearing; a Latino with a white victim more than triples the odds that prejudicial information will be aired when compared with a white defendant and white victim.

⁷ See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1553–54, 1562–63 (2005). Kang draws on psychological work on implicit attitudes in describing how coverage may be detrimental. Implicit-attitudes research shows that whites express some explicit preference for their own group but much greater levels of implicit preference. *Id.* at 1506-1514. Even individuals who honestly self-report positive attitudes toward individuals in other racial categories may hold implicit negative attitudes toward that group.

⁸ *Id.* at 1515–48.

⁹ See e.g. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM J. POL. SCI. 560 (2000).

¹⁰ See generally John Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of their Clients*, 7 COMM. L. & POL'Y. 77 (2002); Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995).

¹¹ See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); TALI MENDELBERG, *THE RACE CARD* (2001) 209-36; Kang, *supra* note 26 at 1528-35.

¹² See Rachel Smolkin, *Justice Delayed*, 29 AM. JOURNALISM REV., Aug.–Sept. 2007, at 20.

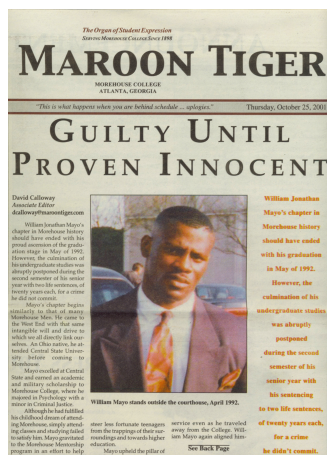
We asked three experienced trial consultants to offer their reactions to Entman and Gross. On the following pages, Alan Tuerkheimer, Sonia Chopra and Andrew Sheldon offer their responses. Following their responses, Entman and Gross give a final reply.

Alan Tuerkheimer responds to Entman and Gross

Alan Tuerkheimer, M.A., J.D. brings his background in psychology and the law to his role as litigation consultant. He has extensive experience conducting jury research including focus groups, mock trials, and venue attitude surveys and has worked with trial teams across the country on *voir dire* and jury selection, trial observation, shadow juries and post-trial interviews.

The article sheds light on two distinct perspectives on the criminal justice process. On the one hand, advice is given to defense attorneys about how to negate what is described as a pro-prosecution slant in the media. The aim is to level the playing field – or even tilt it in a pro-defendant angle - in order to enhance the prospect of winning an acquittal. In essence, then, we might say that this concern is strategic in nature. The other viewpoint contemplates appropriate policy directives directed toward accurate trial outcomes. By diminishing the effects of juror bias, we enhance the odds of determining what truly occurred in any given case. Ascertaining where these concepts align is a challenge, as each of these goals is typically quite distinct. With this in mind, it is important to consider the following question: across the criminal justice system, which is comprised of a wide array of actors with vastly different objectives, what is the impact of prejudicial pre-trial publicity? Only then can we begin to assess the steps to be taken, and by whom.

The authors roundly condemn prosecutors for their public disclosures of information, and the media for reflexively propagating the one-sided message. It is important to remember, however, that the public has a right to learn about crimes that occur and the evidence that supports the charges against those charged with committing these crimes. As a result, the DA faces the delicate task of protecting the rights of the accused to a fair trial while, at the same time, satisfying disclosure obligations (which quite frequently result in the material's public dissemination) and keeping the electorate adequately informed of ongoing criminal proceedings. Nifong is certainly not the only DA to cross the line, but others are far more responsible in their approach. Regardless, pre-trial juror exposure to a pro-prosecution narrative is, to some extent, an intractable feature of our criminal justice system, and one which must be reckoned with.



From a defense advocacy perspective, the strategy of fighting fire with fire (here, matching narrative with narrative) raises a number of potential pitfalls. An aggressive campaign to spread an alternative story risks losing during *voir dire* prospective pro-defense jurors – i.e., jurors who have formed opinions based on exposure to pre-trial publicity generated by a defense attorney.

Moreover, it may not be wise for the defense to publicly commit to any particular version of events, given that inconsistencies during trial will surely be capitalized upon by the prosecution. Many legal commentators believe the wisest defense attorneys do not say a word in public about the circumstances surrounding their client's case. There are many examples of defendants who have been disadvantaged by something they or their attorneys said to the media. In short, there may be a tension between wanting to frame the story before trial and maintaining the flexibility so critical for effective trial advocacy. One other consideration is that, if the defense achieves the prosecution's

level of media discourse, the chances of changing the venue are increased. This may be the goal, but if a venue change is not considered beneficial, defense attorneys should be careful about talking to the media. ASTC has a white paper on changing venues, which can be helpful for determining a proper course of action (or inaction) when a venue may be tainted.

The issue of how the media covers criminal cases – and how this coverage in turn influences jurors - is complex. One aspect of this inquiry not expressly considered by the authors is crime victim demographics. Sensational

crimes, those garnering extensive national media attention, are typically those involving white victims (who are in, in fact, not the most common victims of crime). An excellent illustration of this disconnect is found in the contrasting treatment of domestic homicide victims who are white and professional, as opposed to those who are poor women of color.

Celebrity defendants raise a set of distinct issues of their own. Take, for instance, the prosecution of Kobe Bryant. Here, quite unlike the Duke lacrosse case, the media responded to the state's accusations by skewering the alleged victim. Recall that the national press essentially trashed the accuser – portrayed as a “slut” out to collect a large civil judgment by lying about a rape - until she decided that she was no longer interested in cooperating with the prosecution. In this case, the defense did successfully air its competing narrative and, in the end, Kobe Bryant walked free - but many continued to feel that he had gotten away with something that the ordinary man on the street would not have. Kobe Bryant's legal team offered competing narratives that would germinate doubt in jurors' minds; hence, from the defense perspective, the strategy was a success. As a policy matter, however, we might be wary of a system that incentivizes the deployment of the media in this manner. Here, as in many other trial-related considerations, the chosen end – acquittal or justice – may dictate the best path forward.

Response to Less Bad News

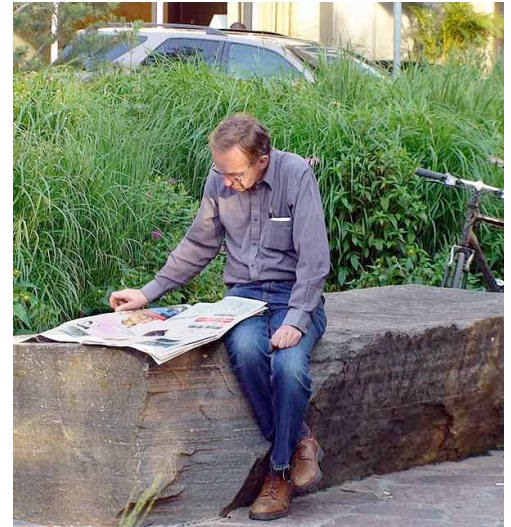
by Sonia Chopra

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The authors' primary contention is that media coverage of crimes results in the dilution of the presumption of innocence, particularly for minority defendants. The idea that negative pretrial publicity is prejudicial to criminal defendants is pretty much irrefutable at this point. Countless empirical studies have demonstrated that exposure to pretrial publicity impacts perceptions of guilt and can influence the way evidence is perceived and utilized. Common sense and one's own experience as a media consumer tell us that media coverage of criminal activity is slanted towards the prosecution. Rarely are stories about criminal defendants accompanied by any assertion that the suspect is innocent, that there are alternative suspects, that exculpatory evidence exists, that police did a sloppy investigation, and so on. In jury selection for criminal cases where there has been pretrial publicity, I have never witnessed a juror mentioning the defendant's possible innocence as part of what they had read, seen or heard about the case. In fact, as Entman and Gross explain, media coverage is usually full of the type of statements deemed prejudicial by the American Bar Association.

For those not familiar with the ABA guidelines defining content with “a substantial likelihood” of prejudice, they include references to 1) the prior criminal record of a suspect or defendant; 2) the character or reputation of a suspect or defendant; 3) the opinion of the lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case; 4) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement; 5) the performance of any examinations or tests, the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; 6) the identity, expected testimony, criminal record or credibility of prospective witnesses; 7) the possibility of a guilty plea; and 8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.¹ Thinking about cases you have seen in the media, this list of *prejudicial* subjects essentially defines the typical press coverage of most criminal cases. One of the reasons so much of the reporting can contain these prejudicial statements is that the ABA guidelines appear to be rarely enforced for prosecutors, and law enforcement officers of course are not bound by the guidelines at all.

Entman and Gross argue that a more balanced representation of the facts is essential in combating the prejudicial impact of pretrial publicity and while I wholeheartedly agree, I don't realistically see the landscape of crime reporting changing any time in the near future. While the authors acknowledge that the prosecution and law enforcement have incentives to provide slanted coverage, and that journalists may not have the time or inclination to get both sides of a story, they suggest that defense counsel can and should (where feasible) provide a competing narrative. The primary problem with this approach as I see it is one of source credibility.



Statements from law enforcement officers and prosecutors, who are often seen as an extension of law enforcement, are given more credibility and weight than basically anything a defense attorney could provide. We know this in part from the way jurors talk about law enforcement personnel and attorneys in jury selection. In any given criminal case there will be a sizable faction of potential jurors who say that they would find law enforcement officers to be more credible and give their testimony more weight than civilian witnesses. We also routinely ask jurors to rate their opinions of law enforcement, prosecutors, and defense attorneys as being “very positive” “somewhat positive” “somewhat negative” or “very negative.” Guess which occupation most frequently receives a negative reaction? While maybe one or two jurors might have had a negative experience with law enforcement and thus rate law enforcement officers less favorably, prosecutors are almost universally well regarded. Juror comments explaining their ratings usually reference the “honesty” of prosecutors and the “protective” nature of their role. In contrast, a sizeable percentage of potential jurors in any given case will indicate negative opinions of defense attorneys, especially in contrast to their opinion of prosecutors. Typical responses include the idea that defense attorneys will do anything for money and that they represent clients they know are guilty and are therefore unscrupulous. Even when a Michael Nifong comes along to sully the good name of prosecutors, he is seen by most as an exception to the rule and not indicative of the profession as a whole. For example, in a juror questionnaire from September 2007 (a few months after all charges in the Duke case were dropped) one potential juror who wrote “Nifong is a prick” when asked his opinion of prosecutors, still rated his opinion of the profession as “neutral.” What about this juror’s opinion of criminal defense attorneys? “Negative. Never met a defense attorney who would let his/her conscious get in the way of a winning argument.”

Like the defendant who chooses not to take the stand, defense attorneys face a Catch-22. Those who offer “no comment” can be portrayed as having no exculpatory information to provide on the one hand, but those who do choose to comment in the press have their statements discounted as being biased and self-serving. Had the defense attorneys for the Duke lacrosse players spoken out early to counter Nifong’s portrayal of the players as “uncooperative,” many people would have written off the statements as “high paid attorney” spin. Part of the media narrative of the case was that these defendants were wealthy, white men, which plays into the commonly held idea that money is what gets not guilty verdicts, not factual innocence.

What I think is most novel and helpful about Entman and Gross’ article is the discussion of the more generalized pretrial publicity effect, the idea that portrayals of minority defendants in the news negatively affects defendants even in trials that do not receive vast amounts of pretrial publicity. This group of defendants, those who are charged with crimes in trials that are not high profile and do not receive lots of press, who have appointed counsel or public defenders with limited financial resources, are often at the greatest disadvantage, as they don’t have the “remedies” to prejudicial pre-trial publicity afforded defendants in cases with more media coverage.

While it is always important for attorneys to consider the salience of race and ethnicity when representing a defendant who is a racial or ethnic minority, the authors’ suggestion that defense counsel pay attention to

potential jurors' consumption of not only news media, but also crime reality shows such as *Cops* is valuable. Overrepresentation of minority criminal suspects and stereotypical portrayals of crime are not limited to news and reality TV however, so I like to broaden the inquiry and ask how often jurors view other crime-based talk shows and dramatized TV crime shows as well. Someone who is a fan of Nancy Grace is only consuming prosecution media and is most likely learning a script of courtroom drama which is generally biased against criminal defendants. It can also be informative to ask jurors what it is they like about these shows. Jurors who say they like how fast the bad guys get caught, who talk about how realistic the story lines are, and/or who show deference to and respect for law enforcement may be more likely to fall victim to the "Trojan Horse Virus" Entman and Gross mention.

Although I'm skeptical of the chances that courts will in fact adopt the author's suggestion that judges instruct jurors about the potential for unconscious racial bias to factor into their decision making, I certainly agree that would be a step in the right direction. In the interim, defense attorneys should begin getting this idea across to jurors during the jury selection process. Explaining that we all have biases, many of which we are not even conscious of but which can affect the way we judge cases and perceive evidence can be a good introduction to questioning on race. Where allowed, attorneys could inform jurors that part of the reason we may hold stereotypical views has less to do with being "racist" and more to do with what we are exposed to in the media, through our own individual experiences, and our background and upbringing. I agree with the authors that having a discussion about race and the potential for racial bias at least brings the issue to the forefront, and perhaps as a result jurors who serve could have a heightened sense of awareness for the potential for stereotyping to color their judgment.

Perhaps I'm a cynic, but I am not hopeful that education of law enforcement officers, prosecutors, or even journalists will do much to change the nature of crime reporting and media coverage of criminal cases. As the authors mention, prosecutors and law enforcement have little incentive to change the status quo. The problems with sloppy journalism and the pressure to get the story first in this 24 hour news cycle go beyond crime reporting and are instead endemic. At least for mainstream media outlets, mere education about the one-sidedness of headline making news that sells papers and gets viewers is unlikely to change the profession. The best chance defenders have is to take matters into their own hands, calling attention to biased reporting in any given case and making the potential for racial bias salient in the minds of the jury, with the hopes that they will consciously work hard to avoid their unconscious biases.

Finally, although the Duke case is an outlier in many ways, the jury eligible public incorporates messages from these high profile cases into their own schemas of what the criminal justice system is all about. Defense attorneys can use the lessons from Duke to remind potential jurors that the media is not always right, arrests and accusations are not tantamount to guilt, and sometimes even prosecutors break the rules.

Endnotes

- [1] American Bar Association. American Bar Association: Fair Trial and Free Press (3d ed., 1992)
- [2] Remedies for extensive pretrial publicity include change of venue, extended individual voir dire, additional peremptory challenges, judicial instruction and trial delay. None have proven particularly effective in reducing the negative impact of prejudicial pretrial publicity, but some procedural remedies, such as individual voir dire, could be beneficial to defendants for other reasons, particularly in cases where sensitive issues like race are being discussed.

Response to:

Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case

by Andrew M. Sheldon

Andrew Sheldon, JD, PhD began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. His involvement in the retrials of 8 civil rights murder trials led to his continued study of racial issues in litigation of all kinds.

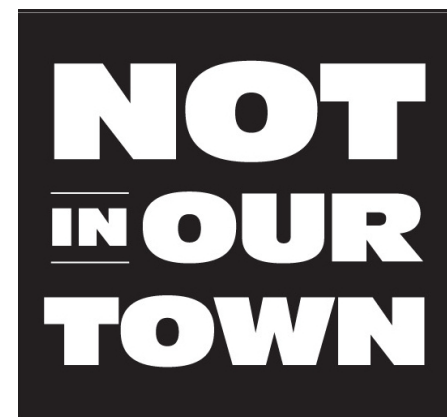
Entman and Gross have proposed remedies for racial bias in juries that are thought-provoking and certainly helpful to those of us who deal with the issue in jury selection. Since I am not a journalist and since I do not advise my lawyer clients about how to impact the community through the media, I am only going to review their suggestions that I as a trial consultant might offer.

I have thought of a way to evaluate their proposals. My evaluative invention is a hypothetical, racist juror named Sauer who is number 13 in a 40 person jury panel. Inventing Sauer gives me a vehicle for evaluating the Entman/Gross suggestions, an instrument, a lens that lets me get a little closer to the realities that I as a jury picker must deal with each week. By this device, I mean no disrespect to the authors. In fact, I am grateful to them for applying their considerable talents to the issues that racism brings into our system.

Sauer is white, just turned 39, is married to Mary Alice who is a teller at the bank, and has four children. Sauer went to school in North Carolina with African American and Hispanic children. He never liked any of it, not that he had to sit next to “them” in school, not that they were even in the same cafeteria line, not that “they” were sitting in the same lunchroom with him. If Sauer had learned one thing, he had learned not to go around spewing his racial hatred in public. He just kept quiet about it. And now Sauer, if he is chosen to be on this jury, may have to judge the guilt or innocence of an African American accused of beating to death a white convenience store clerk.

The authors suggest that the judge explicitly warn Sauer’s jury panel that, based on social science research, it is known that people harbor “unconscious mental associations” that may prejudice them in jury deliberations involving African Americans. Sauer listens to this warning and, while he’s not so sure what “unconscious” means, he guesses that the judge may be talking about him and his feelings about Blacks. He’s heard people warn him not to “be racial” a lot and it’s nothing new to him. He works with Blacks and while he doesn’t have a beer with them, he doesn’t think of himself as prejudiced. He just thinks Blacks are more likely to be violent than Whites. He makes no move to alert the judge to his thoughts.

Entman and Gross suggest that the judge might also assure the jury panel that he or she is not accusing anyone of being a racist. The hope is that speaking openly about racial issues may “moderate the effects of the unconscious, negative associations in decision-making.” Using Sauer the Imaginary Juror as my lens for evaluating this suggestion gives me no solace. Having grown up with people who think and feel like Sauer, having dealt with adults who think and feel like Sauer, I doubt seriously that the judge’s admonitions will cause this juror to raise his hand and responsibly own his inability to be fair in this situation, even though the authors cite research that claims otherwise. One does not, after all, openly own racist views, especially not in open court surrounded by strangers with diverse ethnic, cultural, and religious views. Sauer stopped doing that a long time ago. “No reason to stir people up,” he might say.



Moreover, Sauer may not even connect his racism to his inability to be fair, perhaps the meanest issue of all, because it allows racism to flourish in the face of a judge bearing down on jurors who hedge about their ability to be absolutely fair. (In my firm, we fondly call this judge-led journey “the Magical Mystery Tour” as the juror swears he or she can and will be fair even when its clear the juror is not at all sure he or she can follow through on the promise.) Like Sauer, many people do not seem to associate their own fairness with their biases.

Entman and Gross recommend next that the lawyer representing a minority client use voir dire questions to ferret out viewers of television shows (e.g., *Cops*) that perpetuate negative racial stereotypes. Experience tells me that, short of a private response on a supplemental juror questionnaire, parallel lines of voir dire questioning that appear to be asking about, as in this case, TV-viewing habits have a somewhat greater chance of successfully exposing bias than more direct, frontal strategies. Still, this is a very iffy proposition in light of the common courtroom practice of either avoiding the topic of racism altogether or of truncating voir dire to the point that it is pointless.

The authors next suggest that the law enforcement community (D.A.’s, police) receive training “to understand the social science on unconscious racial stereotyping and decision-making.” While this “remedy” for racism is laudable and while we hope our law enforcement friends are sensitive to the many flavors and varieties of racial bias in their communities, I do not believe it adequately confronts the intractable nature of embedded racism in modern America.

To be candid, while I applaud the authors for making these suggestions for dealing with racial bias in our juries, I have difficulty accepting the suggestions as effective. In a culture like ours where racism is so much a part of the fabric of our daily lives¹ (see, for example, the widespread “belief” that President Obama was not born in the United States), much more is required. Perhaps the most impressive of the suggestions made by these authors is that both sides in a case stop trying the case in the media. I would support that recommendation.

¹ As one index of the existence of embedded racism, the studies that show that Whites overestimate the numbers of African Americans in the population (E.g., citations in Sigelman and Niemi, *Innumeracy About Minority Populations*, JSTOR, Vol. 65, No. 1 (Spring, 2001), pp. 86-94).

Entman and Gross reply to the trial consultants

We want to thank Sonia Chopra, Andrew Sheldon and Alan Tuerkheimer for their thoughtful comments and challenges.

Although in many ways it is unusual, we use the Duke case to highlight and draw attention to what we see as the larger structural problems causing media coverage of criminal activity to slant toward the prosecution. As Chopra notes, the list of content with a substantial likelihood of prejudice “essentially defines the typical press coverage of most criminal cases.” We see this as particularly detrimental in the case of poor people of color. They are often doubly disadvantaged because the general pattern of crime news leaves many prospective jurors, police and prosecutors predisposed to associate blacks with crime and guilt irrespective of how a minority defendant’s own case is covered (and even if it’s not covered at all).

Chopra notes that “one of the reasons that so much reporting contains these prejudicial statements is that the ABA guidelines appear to be rarely enforced for prosecutors” and do not bind law enforcement. Perhaps the best option to address this is simply for the prosecution to abide by the rules and refrain from trying cases in the media. While there may be some public interest served by reporting on crimes as Tuerkheimer notes, this does

not extend to a need for prosecutors and police to promote their case in the press. Although Nifong is an extreme case, district attorneys and law enforcers have a professional responsibility to protect the rights of the accused when deciding what information to provide as well as how and when to convey it. Journalists should also take seriously the possibility that their coverage may be undermining the rights of the accused as it misinforms the public. Outside the realm of crime, journalists routinely take into account the self-serving career and bureaucratic interests that often shape and distort officials' talking points. The same skepticism should apply in criminal cases, and the same solution: guided by their own professional norms, seek out a balanced story.

Beyond this, we suggest that defense attorneys may need consider, *where possible and appropriate for the individual case*, providing a compelling alternative narrative in those instances where a case reaches high levels of media attention. The commentators correctly point out some of the challenges involved in this. We agree with Tuerkheimer that this strategy “raises a number of potential pitfalls” that must be considered by the defense. Most important, as Tuerkheimer writes, it is not always wise for the defense to commit publicly to any particular version of events. We agree there can be a tension between wanting to frame a story before the trial and maintaining flexibility. However, in high profile cases dominated by the prosecution narrative, not providing any account does lend itself to the interpretation that there is no exculpatory information.



Turkheimer also suggests that when the defense achieves parity with the prosecution in media discourse, this will enhance the chance of changing the venue, which may not be desirable. We find this argument less compelling. From the defense perspective, we suspect that the alternative in a high-profile case – one-sided publicity favoring the prosecution – may be equally problematic in

terms of ensuring an impartial jury pool. If the point is that a two-sided story might generate more total publicity and thus contaminate more jurors, the solution is a reduction in all publicity, rather than letting the prosecution side continue to dominate coverage.

Of course, Chopra rightly notes that the low credibility of defense attorneys poses a problem when they try to engage the media to ensure more balanced coverage. She suggests that defense attorneys face a catch-22; those who say “no comment” appear to have no exculpatory information and those who do speak have their statements discounted as biased. While many write off the defense comments, we suspect others would be more open to the defense narrative if only it is given voice. Furthermore, the low credibility of defense attorneys may be reinforced by media depictions in movies and TV shows that simultaneously reinforce the credibility of law enforcement and the mental association of darker-skinned individuals with crime and guilt. Not much can be done about lawyers' negative reputations in general, though perhaps the defense bar might consider more general public relations efforts as a tactic that could spill over to augment their own credibility.

While we believe that defense attorneys in high profile cases must bear in mind media routines that lead to one-sided coverage, we are ultimately more concerned with the “pretrial publicity” effects yielded by routine media portrayals of minority defendants. The day-in, day-out coverage of crime may be just as likely to taint the jury pool in a more insidious way. Sheldon, using the hypothetical racist juror “Sauer” suggests skepticism about some of the suggestions we offer to lessen the potential deleterious effects of routine crime news. We do not believe that the juror Sauer will suddenly alert the judge that he should be removed from the panel or that he will suddenly be less prejudiced. What the literature shows is that when individuals are made aware, they tend to base decisions less on these unconscious stereotypes. Obviously there is no guarantee, but the idea is getting the notion out into the open. Sheldon's comments do raise important interpersonal communication and deliberative dimensions to our suggestions that we view as positive. If judges explicitly instruct jurors as we propose, it might

discourage Sauer from openly expressing his more racist views during jury deliberation. It could also empower other jurors to argue if Sauer does raise ostensibly non-racial “empirical facts” that do play on racial stereotypes. Perhaps Sheldon fears such warnings might actually boomerang, stiffening the resolve of jurors like Sauer to apply what they sincerely see as non-racial empirical facts (“blacks don’t work as hard as whites”) to their decisions. This would seem to be a question worthy of research.

As the comments suggest, no matter what they do, attorneys cannot eliminate, but only ameliorate, racism and its effects. Chopra notes that messages from the Duke Lacrosse case itself likely informed audiences’ ideas about criminal justice. Defense attorneys can use the case “to remind potential jurors that media is not always right, arrests and accusations are not tantamount to guilt, and sometimes even prosecutors break the rules.” We couldn’t agree more.

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Editor's Note

Welcome to the May 2010 issue of [The Jury Expert](#)! It's spring (although in Texas it definitely feels like summer)! This issue we have reptiles in the courtroom (and in a departure from tradition, we have four trial lawyers responding to the article rather than trial consultants); a *Batson* update; a piece on juror intimidation inside the jury deliberation room; an article from two journalists on pre-trial publicity and what defense advocates can learn from the Duke lacrosse case (with responses from three trial consultants); a piece using sense-making theory to discuss how Supreme Court Justices behave like jurors; that age-old question of whether size matters when it comes to juries; an essay on persuasive communication and attorney likability; and finally--a trip across the country (and, kind of, through time) as consultants tell stories about rural courthouses time forgot (and stories about a few other things too).

Of course, we also have a couple of Favorite Things and want to remind you about the upcoming [ASTC conference](#) in beautiful Minneapolis, Minnesota. The theme this year is '[Perfecting Your Game](#)' and it's always a good time for that.

This is the first issue in which we have benefitted from visual graphics experts in pulling together the issue. Special thanks to Jason Barnes ([Barnes & Roberts](#)), Ted Brooks ([Litigation-Tech](#)) and Nate Hatch ([Resonant Legal Media](#)). Click anywhere in this issue of [The Jury Expert](#) for challenging, educative and fun reading for Spring 2010. You'll see us again in July and 24/7 on-line. Read us. Tell your friends and colleagues.

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