Prosecutorial Indiscretion

BY WENDY McELROY

Last July 26 former Durham County District Attorney Michael Nifong offered a full and unqualified apology for his crusade to convict three palpably innocent white Duke University students of raping a black woman in March 2006. Nifong acknowledged there had been "no credible evidence" of their guilt. Indeed, there had been exculpatory evidence that he had quashed. His apology was rendered to a judge who would then sentence him to one day in jail and a $500 fine for contempt of court. He could have received 30 days.

Because the Duke "rape" scandal unraveled on national television, it has prompted widespread reconsideration of a legal doctrine that made Nifong difficult to effectively sanction despite his clear misconduct. Absolute prosecutorial immunity is a legal doctrine established by federal precedent and by federal civil-rights statute 42 U.S.C. § 1983; it provides a prosecuting attorney with immunity from lawsuits or criminal charges for his acts, whether or not they constitute intentional misconduct. The doctrine is intended to protect prosecutors from frivolous and retaliatory actions that could cripple their ability to do their jobs. Checks and balances in the legal system—for example, the power of state bar associations to disbar lawyers and of judges to impose sanctions like contempt of court—are supposed to prevent abuse. But Nifong's conduct revealed how such immunity invites abuse and raised questions about what happened to those checks and balances during the Duke "rape" case.

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At the time of the Duke case Nifong was in a hotly contested campaign for DA of Durham County, North Carolina. (Governor Mike Easley had formerly appointed Nifong to the office.) Nifong received only 49 percent of the vote even though one of his opponents was not on the ballot; a second one had stated that he ran only to oppose Nifong and would "refuse to serve." Nifong's slim victory depended on the support of black voters who viewed the "rape" as a racial hate crime and so clamored for prosecution. Durham's population is approximately 44 percent black, and turnout in black districts was not only high but also overwhelmingly for Nifong. In the predominantly black Precinct 42, for example, all but 18 votes went to him. Both the extremely powerful Durham Committee on the Affairs of Black People and the People's Alliance endorsed Nifong's candidacy; both organizations wanted a trial.

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Thus Nifong's overall support in Durham was weak and whatever strength he could flex as DA was tied to a promise to prosecute.

Moreover, Nifong's highly unusual conduct in the early stages of the case raised speculation about whether he wished to use the prosecution as leverage into a more powerful office. Even before indictments had been handed down, Nifong gave several dozen interviews to national media in which he declared his absolute belief that white members of the Duke lacrosse team had raped a black woman. The case catapulted him into national prominence as a protector of women and minorities.

In short, Nifong had a vested interest in prosecuting whether or not evidence or law could support a trial.

From the very beginning his abuse of office prompted comment among legal analysts. For example, the spectacle of a DA on a media tour immediately raised questions of whether Nifong was "polluting the jury pool"—or, rather, the potential jury pool, since no one had then been indicted.

Ultimately, his abuses of office included: the ordering of a police identification that was tainted because the "photo line-up" consisted only of the lacrosse team; relying on the testimony of the only eyewitness (Kim Roberts, "the second stripper"), whose story changed dramatically several times; refusing to consider the well-established alibi of one of the accused (Reade Seligmann) or to meet with defense attorneys; not interviewing the alleged rape victim (Crystal Mangum) of whom he had proclaimed to the media, "I believe her"; and, quashing exculpatory DNA tests.

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In these and other abuses, Nifong undoubtedly drew confidence from the doctrine of absolute prosecutorial immunity that protected him against criminal and civil consequences for acts committed as DA. But why did the other checks against abuse not click into place?

First, what happened with the North Carolina State Bar Association? As the agency that regulates lawyers, it has the ability to impose sanctions ranging from a reprimand to a revocation of license. A local newspaper, the *News and Observer*, reported on December 3, 2006, "Public record requests . . . uncovered at least 17 complaints concerning Durham District Attorney Mike Nifong to the N.C. State Bar. . . . The complaints accuse Nifong of saying too much to the news media and of mishandling the investigation." Because such complaints become public only when copied to the governor or attorney general, there may be many more than 17. The North Carolina State Bar did not act, which may have been appropriate depending on the nature of the complaints. Nevertheless, state bar associations have reputations for being reluctant to sanction their own, especially district attorneys.

Judges also have the power to sanction in several ways, including the dismissal of charges and holding lawyers in contempt. In North Carolina a judge can remove a district attorney from office for extreme and "willful misconduct." Until the revelation that he had suppressed exculpatory DNA evidence, however, the various judges on the case did not seem inclined to curb Nifong. In an essay titled "Reconsidering Absolute Prosecutorial Immunity" (*Brigham Young University Law Review*, 2005), legal scholar Margaret Z. Johns explains, "As the thousands of appellate findings of prosecutorial misconduct show, trial judges fail to protect the defendant from misconduct. Even when the trial court catches the misconduct and has the power to remedy the situation, the offending prosecutor is rarely identified publicly. This problem is exacerbated in states where judges stand for election."

Political Restraint

Political pressure can also serve as a restraining factor. This would have been particularly true with Nifong, a political appointee during the early stages of the case. But Governor Easley is a fellow Democrat who relies on the same voter bloc as Nifong. State Attorney General (AG) Roy A. Cooper could have

acted, but he is also a Democrat. Moreover, Cooper may have had larger political ambitions; Easley became governor after serving as AG. Indeed, before the Duke case Cooper was mentioned as a possible Democratic candidate for governor. Since the collapse of the case he has announced his intention to run for re-election as AG this year. Other officials were similarly disinclined to exert pressure. Bill Bell—then mayor of Durham—commented, "By and large, people want it [the case] to be decided in court." As a Democrat and a black, Bell also drew on the same voter bloc as Nifong.

In short, the usual checks against abuse of immunity did not work. Those who should have exercised restraint even ignored appeals from U.S. Rep. Walter Jones (R-NC) who eventually wrote then-U.S. Attorney General Alberto Gonzales to request a federal investigation.

It was only in December 2006, in the wake of a sharp public backlash against Nifong's behavior, that the agencies and individuals responsible for oversight began to exercise restraint. The specific event: at a pretrial hearing, Brian W. Meehan—the director of the private lab that performed DNA testing on the rape evidence—stated that he had found sperm and other DNA material from several men, none of whom were the accused. Meehan reported the results to Nifong, who chose to omit them from the summary report that he turned over to the defense attorneys.

One week later Nifong dropped all rape charges, but proceeded with two other counts of kidnapping and sexual assault. It was too little too late; the defense attorneys now had the necessary ammunition to effectively ask for sanctions against Nifong and to seek his removal from the case.

Nevertheless, Nifong was still largely protected by the doctrine of absolute prosecutorial immunity. Any action that the falsely accused contemplated would also confront Nifong's immunity as a prosecutor.

The key qualification is the word "prosecutor," and it may provide loopholes through which criminal and civil actions against Nifong by the accused are still possible.

Here the main question about Nifong's immunity is not whether he committed misconduct, but what function he was serving when he did so. Specifically, was he acting in the role of prosecutor?

Court Rulings

The U.S. Supreme Court case *Imbler v. Pachtman* (1976) is often cited in discussion of prosecutorial misconduct. In its decision the court distinguished between "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate" (that is, a prosecutor). Depending on the function he or she is performing, a government official receives either absolute or qualified immunity. It is only in the role of prosecutor that a DA has absolute immunity. Otherwise, his immunity is qualified.

The difference between the two immunities is this: absolute immunity absolves the prosecutor from liability even for malicious acts; qualified immunity only shields the prosecutor if he or she has not violated clearly established law with which the prosecutor should have been familiar. Under qualified immunity Nifong would be open to charges of misconduct.

In short, Nifong's legal vulnerability hinges on the role he was playing when he acted, not on the actions he took. Did he act as a prosecutor, an investigator, or an administrator? Consider the press conferences held by Nifong; most of them occurred before an indictment had been sought—that is, before he functioned in the role of a prosecutor. The case was in the investigative phase. If the defense can prove Nifong knowingly made false and prejudicial statements to the media then, prosecutorial immunity won't necessarily protect him against a civil suit for libel.

Consider also the tainted photo identification on which the indictments drew. It was widely reported that Nifong directed the police to violate their own suspect-identification procedures by omitting non-suspects (men who were not members of the lacrosse team) from the photo lineup; then the accuser was told that all photos were of players who had been at the scene of the alleged rape. If this is true, then Nifong acted as an investigator and has only qualified immunity.

The very fact that it is necessary to jump through hoops to address Nifong's blatant abuse, however, highlights the problems with granting a priori and blanket immunity to anyone in power.

Political Environment

First, the checks do not work and cannot be expected to work in a political environment or in the presence of vested interests. With Nifong it required nationwide public fury and the equivalent of a smoking gun in one hand and a confession in the other for oversight to commence.

Second, the victims are re-victimized by the extreme lengths to which they must go to receive restitution if, indeed, restitution is open to them at all.

If prosecutorial misconduct were rare, the situation might not be so disturbing. But recent studies indicate that the problem arises with some frequency.

Again in "Reconsidering Absolute Prosecutorial Immunity," Margaret Johns observes, "[A] 2003 study presents alarming evidence of the frequency of prosecutorial misconduct resulting in the wrongful conviction of hundreds of innocent people." The referenced study is a report from the Center for Public Integrity, which found that since 1970 there have been over 2,000 cases in which prosecutorial misconduct was deemed sufficiently prejudicial to require the dismissal of charges, the reversal of convictions, or reduction of sentences. In 513 other cases, dissenting and concurring court opinions discussed possible misconduct. In thousands of other cases prosecutorial misconduct was found by appellate courts that, nevertheless, upheld convictions. Given how difficult it is to prove misconduct and how resistant the system can be toward sanctioning "its own," those figures are probably low.

Johns continues, "This conclusion [that prosecutorial misconduct is a frequent occurrence] is reinforced with the ongoing investigation by the Innocence Project . . . which reported that, as of January 2005, 154 people who served time in prison for crimes they did not commit have been exonerated by DNA evidence. In many of these cases, prosecutorial misconduct contributed to the wrongful convictions. . . . [O]ne can no longer dismiss the problem of prosecutorial misconduct as infrequent nor pretend that sufficient safeguards exist in the system to protect the innocent from wrongful convictions."

Indeed, since the Nifong scandal, recent media attention has focused on other cases that appear to involve overzealous prosecution if not outright misconduct.

A reconsideration of this legal doctrine is long overdue. Wrongful convictions are human tragedies not only to the one convicted but also to his or her family; they also mean, when an actual crime has been committed, that the guilty party has remained free to brutalize again.

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Absolute immunity was never meant to protect the suppression of evidence, dilute police procedure, or allow flagrant violation of civil rights. But for unethical and ambitious attorneys it has become a blank check on the misuse of power. The cited study from the Center for Public Integrity provides a fascinating statistic. It found that of the 2,000 established cases of prejudicial prosecutorial misconduct, in only 45 cases were the attorneys disciplined, and none were criminally prosecuted. So even though prosecutorial misconduct may be more common than suspected, there exists no corrective mechanism or deterrent, little accountability, and rarely a civil remedy.

The way to solve the problem is to remove absolute immunity and make prosecutors accountable for their intentional bad acts or for acts they should have known were violations of law. Allow their victims to file civil suits. Prosecutors should not receive more protection than other individuals for their misconduct; indeed, they should be held to a higher standard.