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**RESPONSE TO “THE DUKE RAPE CASE FIVE YEARS
LATER: LESSONS FOR THE ACADEMY, THE MEDIA, AND
THE CRIMINAL JUSTICE SYSTEM” BY DAN SUBOTNIK**

*Tracey Jean Boisseau**

There are all kinds of injustices in the world—unwarranted punishments and deprivations of liberty as well as undeserved material, psychological, and emotional injuries, inequities, and wrongs. False accusations provide the basis for one of the most poignant narratives of injustice because we have the sense that someone punished for a specific, discrete act that they did not commit is entirely innocent, not only of that discrete act but in some sort of existential sense of the word. Further, often we see in the injustice wrought in the case of an unjustly accused individual the existence of some greater, more systemic, injustice—a failure of the institutions of justice themselves. Tragic irony is always compelling in a narrative, but, if one can identify with that falsely accused person, either because one shares similar background, circumstances, personal characteristics or because one has experienced a similar situation—or feels vulnerable to the same forces—the injustice seems to outweigh other wrongs, takes on greater importance than other inequities. The suffering rendered in such cases can seem more monstrous than other unwarranted deprivations that also arise from imperfect systems, and the institutional defects appear more glaring. Professor Subotnik’s tale of flawed institutions giving rise to the charges of rape against Duke student athletes is such a case in point, but that depends on the point of identification. By identifying so completely with the white male student athletes, Professor Subotnik loses himself in a story that is only a small subset of the many stories that can be told about our justice system and, in so doing, loses his sense of proportion.

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Several of the most basic assertions that Professor Subotnik makes in his broad treatment of the controversy and prosecution of the Duke rape case are not wrong. I think that we can all agree that prosecutors ought not to play to any audience other than their own professional judgment concerning their cases. Media outlets ought to keep the public informed and publicize news of crimes in ways that do not inflame passions to the point that law practitioners are unable to proceed with prudence, patience, and integrity. University administrators ought to be able to distinguish between those cases in which they need to exercise more rigor in their policing of their campuses—even if it means punishing, expelling, or denouncing members of their community—and cases in which they need to protect and shelter their community from unwarranted external threats. On the face of it, if these are the primary points that Subotnik would like us to consider, there is plenty of room for agreement even if we might disagree on some of the finer points of how he characterizes these parties.

But Professor Subotnik's essay does not confine itself to these fairly reasonable truisms. He elevates some wrongs that he sees embedded in the Duke rape case above others. He decries what he sees as harm done to institutions that he treasures—the Academy, the Media, and the Criminal Justice System—and ranks such harm above even that experienced by the accused athletes themselves. In fact, the possible punishment that these players *might have* (but did not) experience, had a guilty verdict been rendered, is overshadowed in Subotnik's essay. In the end, Subotnik's greatest concern does not lie with the fate of the individual student athletes accused of rape. He expresses even more resentment that the accused athletes managed to wrest away money from the university as compensation for their suffering. Ultimately, Subotnik's specific sympathy is reserved for those wealthy donors that contributed large sums of money to the university in the first place, his most concrete fear lying with the difficulty that a wealthy university like Duke may experience in the future in trying to secure more of such.

Subotnik's more profound insights, of course, go well beyond the Duke University community and its major donors list. He is worried about the institutions of the Academy, the Media, and the Criminal Justice System. But he is not concerned with all aspects of these institutions, only inasmuch as they have been affected and reshaped by the civil rights movements on behalf of racial and ethnic minorities and on behalf of women in the last half century. He is careful to acknowledge the initial need for correctives in the area of race and sex discrimination (sometime in an undetermined past), but then focuses his

essay on what he sees as overzealous efforts to right the wrongs of racism and sexism, and maybe even class inequities, that end up exceeding the more limited goal of deflecting discrimination on these counts. In his view, overzealousness on the part of civil rights and feminist activists and scholars have rent the fabric of these institutions, muddying their sense of mission with ambiguity, and rendering them vulnerable at key moments to the political whims of an inflamed mob. The most vivid and extreme outcome of such zealotry is the unleashing of a lynch mob mentality capable of sweeping aside reasoned public debate as well as effective law enforcement. I hope I have this right when I characterize Subotnik's concerns as lying primarily with those cases when desire for racial and sexual redress by the lowly and their champions produce undesirable results in the form of miscarriages of justice targeting those on the lofty side of the wealth and privilege equation.

The vast numbers of cases in which civil rights and feminist political redress produced good results—the two full generations of women and people of color achieving educational and professional goals that were simply impossible prior to the feminist and civil rights movement—are either less vivid in Subotnik's view or are less significant in terms of their weightiness than the prospect (not the actual reality because we are not presented with such a case) of innocent white men railroaded by a corrupt system playing to the sentiments of a mobocracy. Professor Subotnik asks us to consider whether the Duke rape case—a case he describes as privileged white men falsely accused by a distinctly unprivileged black woman of sexual violence against her—amounts to evidence of institutions that have, at their core, failed in their mission to ensure that justice and truth prevail, even though apparently and even according to Professor Subotnik, truth and justice did ultimately prevail in this case.

So what is Professor Subotnik's point in devoting a full length article to the damage to the Academy/Media/Criminal Justice System that the Duke rape case, according to him, signals? Because the young men were, in the end, vindicated by this same justice system, compensated (apparently) by their home academic institution, and ultimately portrayed in the press as the wronged party, what is the crux of Professor Subotnik's critique? All we learn from his essay is the assertion that universities have suffered from affirmative action policies and the adoption of some minimal quotas in hiring and enrollment. Given Professor Subotnik's over weaning concern with the Duke rape case, we do not learn *how* it is that “*diversitas*” has diminished the

pursuit of “*veritas*” at universities. Instead we are asked to consider the Duke case in detail as the only evidence presented that something terrible has gone wrong with our society. If the Duke incident is the key case supporting his argument that the Academy, the Media, and the Criminal Justice System are defective—with an inference drawn from mentioning other cases like the Duke incident that add up to, in his view, a massive institutional failure to create a just, fair, and free society—then it is worth at least laying out the argument in more systematic fashion in order to see whether Professor Subotnik has hit on something important.

In order for Professor Subotnik’s argument to hold weight, he would have to show that the Duke rape case is not in fact an oddity, but displays a pattern. A brief tour of the cases that are “like” the Duke rape case, in other words those that involve privileged white men (I will refer to them here as “PWWM” for “Privileged and/or Wealthy White Men”) being unjustly accused and unfairly prosecuted in the press, in the Criminal Justice System, and with the knee-jerk egging on of both from segments of the Academy such as women’s studies scholars and critical race theorists, is warranted. A list should not be too difficult to assemble given that an explosive Media is one necessary component of this recipe. I bet I, as well as the reader (assuming the reader is middle aged or older), could just think back over the last twenty years or so and come up with many (dozens? hundreds?) cases that we would agree belong in the same category as the Duke rape case consisting of a PWWM unfairly accused by a Poor, Black or at least Subordinate Woman (“PBSW”) and made to suffer greatly for it at the hands of a Criminal Justice System unduly influenced by an irresponsible Media and an Academy high-jacked by women’s studies and critical race theorists. Below are those that may come most quickly to mind.

The two most notorious examples have some quirks that, admittedly, might technically knock them out of the category of a PWWM accused by a PBSW and unfairly judged and punished despite the flimsiness of the pretext for prosecution. But they may be worth recalling here nonetheless because they seem to cite the changes in cultural mores and public expectations that have emerged in recent decades regarding accusations of sexual violence enacted by powerful men on the bodies of vulnerable women of low status. In the late 1990s, President Bill Clinton was accused of having an illicit relationship with a young, white, female intern and was publicly vilified and even impeached for the offense of lying about it to a grand jury. The accusations preoccupied Clinton and undermined him in some key ways

that affected his presidency. But, the vilifiers in this case were other PWWMs, mainly in the Republican Party, and not the academic feminist community which remained disunited in the face of Clinton's public disgrace—some focusing on the untenable position in which this scandal had placed his wife, Hillary Clinton, others concerned with a potential and alleged pattern of sexual harassment committed by the President over the course of his long political career. Still other feminists remained unfazed by accusations of infidelity or even sexual misconduct with a subordinate, marking this as a consensual relationship—even if not exactly between adults with equal stature. To quote a 1998 feminist blog written to clarify the position of some academic feminists at the time of the scandal:

Because the Clinton/Lewinsky relationship was consensual, many feminists have argued that it was not sexual harassment. The affair was an example of workplace behavior which objectifies women and should be condemned, they say, but to categorize it with illegal sexual harassment denies women's sexual freedom, just as sexual harassment behavior did before the law empowered women to say no."¹

Neither feminist academics nor race theorists were Clinton's problem constituencies in 1998.

The academic feminist community was far more engaged, more unified, and more fired up during the Anita Hill-Clarence Thomas hearings.² Again, that case has a quirk, because it was a black woman accusing a black man of sexual harassment on the job (a man whose job it was to police and prevent such things as sexual harassment on the job from happening to women throughout the nation). But, Thomas' personal defense of himself in his testimony before the Senate and in his comments to the press followed much the same logic as Subotnik's essay: Thomas concluded that the media had rushed to judge him, unfairly, and had done so because feminists had set him up because he

1. Carolyn Waldron, *Feminists, Prostitutes, and Nazis: Media Labeling in the Lewinsky Story*, FAIR.ORG (Jan. 16, 2012), <http://www.fair.org/extra/9811/feminists-clinton.html>. For other feminist viewpoints, see Christina R. Wells, *Hypocrites and Barking Harlots: The Clinton-Lewinsky Affair and the Attack on Women*, 5 WM. & MARY J. WOMEN & L. 151 (1998), available at <http://scholarship.law.wm.edu/wmjowl/vol5/iss1/3>.

2. An often cited collection of academic essays presenting contemporary, feminist, and womanist views on the hearings is RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (1992). The controversy is still inspiring discussion and debate among feminist academics. (see, for example, October 20, 2011 University of California, Davis, School of Law, Feminist Legal Theory blog entry marking the twentieth-year anniversary of the hearings at <http://femlegaltheory.blogspot.com/2011/10/anita-hill-clarence-thomas-hearings-20.html> (last accessed Jan. 16, 2012)).

was black. (Thomas' assumption was that feminists are white, despite the race of his accuser and the race of the over 1600 black feminist scholars who underwrote and lent their signatures to a full-page ad in the *New York Times* in support of Anita Hill and in disgust with Thomas' rhetorical strategies of defense.³) It is unclear whether Subotnik's logic applies the same way to PWBM (Privileged and/or Wealthy *Black Men*) but, because the charge of sexual harassment emanates clearly from a "women's studies perspective" along with critical race theories of sexuality and power in the workplace, I think we can count it as being in the same category as the Duke rape controversy. After all, just like Subotnik, Clarence Thomas pointed to institutional failures that, in his view, put him on trial in the Media (he called it a "high tech lynching") and made him vulnerable to, if not legal processes gone awry than at least to damaging public scrutiny. Of course, in this case, like in the case of President Clinton and the Duke athletes, no one actually went to prison or lost their jobs or even failed to win an appointment to the highest court in the land, even with all this bad publicity, a Criminal Justice System poised to pounce, and feminist faculty across the nation in an uproar. It is still unclear as to whether the controversy actually succeeded in *propelling* Thomas into a seat on the Supreme Court, or whether it merely blemished the proceedings, but in any case, there he sits regardless of what a black woman accused him of, how many black feminist and womanist signatures were listed at the bottom of that *New York Times* full-page ad, or how many women's studies scholars shook their heads in consternation throughout that summer (and have been ever since).

Hmm. When I started down this train of thought two paragraphs ago, I thought surely I could name, just off the top of my head, a dozen cases of powerful, white, and wealthy men brought down, destroyed, punished to the fullest extent of the law, probably imprisoned, for crimes against poor, black, or at least subordinate women without irrefutable evidence to support these accusations even being introduced into the record, in part because of public outrage whipped up by academic feminists and race theorists. PWWMs vilified in the media, even if not in the courts—PWWMs that have lost their lives, or their jobs, or at least their dignity. Now, who was it I was thinking of?

Maybe I was thinking of the two cases closest to the present that have some of this flavor:

3. See Elsa Barkley-Brown, Deborah King & Barbara Ransby, *African American Women in Defense of Ourselves*, N.Y. TIMES, Nov. 17, 1991.

There's the French former IMF chief, Dominique Strauss-Kahn, like Clinton a really powerful and really wealthy white man who was accused last summer of attempted rape by a black woman (an African immigrant, no less . . . surely who could be more powerful in the double-standard system that Subotnik describes than a poor, black, female immigrant *from Africa* who was sent into his room to pick up his trash and wipe down his toilet?). What happened to that case? It was dismissed on the grounds that Strauss-Kahn's accuser had claimed rape before, and maybe had worked as a prostitute, maybe she had a shady boyfriend, and maybe was either a bad mother or a welfare cheat . . . the list goes on of classic ways to discredit a woman crying rape that were immediately applied to his accuser.⁴ That Strauss-Kahn had, in the past, pawed other women, who claimed for the record that they did not welcome his pawing at them, was established, but that did not seem to undermine *his* credibility. Yes, the case was dismissed but everyone says this PWWM's political career is over or at least severely damaged for now. He might have been the next President of France and now, well, he may not be President of France. Or he still might, we will have to wait and see. This accusation by an African immigrant cleaning woman at the very least might have cost him in another case of sexual harassment that was pending against him in France, given that that case was also brought by a woman who claimed he had heaped unwanted sexual attention on her. But, no, that case was dismissed too. She was not a black cleaning lady, but a privileged white woman, but still could not get a conviction even though Strauss-Kahn's own testimony made it clear that he had committed a sexual assault on her.⁵ The three year statute of limitations made it impossible for the French court to convict him. Given Strauss-Kahn's own testimony that he has sexually accosted women, it may not be that this is a case of a PWWM *illegitimately* accused by a PWSW of sexual violence, but he was cleared of the charges and has since suffered from some significant degree of ignominy in the press which very well may nix his chances of becoming the president of a major European country. Whether a miscarriage of justice occurred remains an open question. But, we should keep this case in Subotnik's category of harassed white manhood anyway. After all, the

4. See Jim Dwyer & Michael Wilson, *Strauss-Kahn Accuser's Call Alarmed Prosecutors*, N. Y. TIMES, July 1, 2011.

5. See Steven Erlanger & Maïa de la Baume, *Strauss-Kahn Is Not Charged In French Case*, N. Y. TIMES, Oct. 13, 2011.

man was severely inconvenienced and (assuming he has the grace to be) publicly shamed.⁶

What about the very latest controversial *mélange* of sex and race swirling about an American? Herman Cain, once-promising Republican candidate for the presidency, admitted to remembering about the settlements he agreed to in order to cut short further legal actions being brought against him by a woman, or perhaps several women, whom he had employed or had had business relations with in the past. Cain's response to the barrage of media attention that descended upon him once this story broke in November 2011 was to borrow the "high tech lynching" rhetoric from Clarence Thomas to delegitimize the media's scrutiny. However, the breaking of these stories did not, initially at least, appear to damage his candidacy. This is perhaps due to Cain's outlier persona and defiance of the sort of "political correctness" that identifies sexual harassment as a crime as well as a personal failing. Indeed, pundits, pollsters, and journalists found themselves scratching their heads trying to understand how it was that Cain's fundraising actually soared in the days following the reports of these settlements.⁷ Cain seemed to weather accusations of *sexual harassment*—an issue academic feminists are very much concerned with—fairly well. What his candidacy could not withstand was verifiable evidence of marital *infidelity* for, soon after an amorous alliance went public with her testimony, Cain retired from the race. Feminist academics and critical race theorists can hardly be blamed for the ignominious defeat of a man accused of not honoring the "family value" of monogamy within marriage—an issue not many academic feminists are invested in, especially as compared to conservatives and the religious right. So, no, I do not think we can count Herman Cain among the cases that support Professor Subotnik's argument that a serious breakdown in our social institutions is evidenced by the sweeping number of incidents where PWWM or PWBM have been unfairly persecuted by a combination of failures at the center of the Academy/Media/Criminal Justice System.

I am sure there are more powerful or at least privileged men who have been brought low, not convicted or legally punished of course, not even failing to be elected or appointed to immense positions of power and authority, but at least made to respond to awkward questions and

6. The degree of shame Strauss-Kahn experienced in this episode is a matter of public debate. See Patrick Sawyer, *Dominique Strauss-Kahn Dines Out as Rape Claim Bail Conditions Lifted*, THE TELEGRAPH, July 2, 2011.

7. Steve Holland & Kim Dixon, *Herman Cain: Sexual Harassment Allegations Help Campaign Fund Raising*, CHRISTIAN SCIENCE MONITOR, Nov. 2, 2011.

made to endure scrutiny injurious to their dignity due to the unfair and unsubstantiated accusation of a poor and black or at least subordinate woman of some sort. Of course, if we expand the category to include any sexual impropriety (John Edwards had an affair and fathered a child with a member of his campaign staff while his wife was battling cancer), defiance of a hegemonic norm (Senator Larry Craig was accused of suggestively tapping the toe of a male undercover policeman in an airport bathroom), embarrassing unseemliness (Congressman Anthony Weiner sent close-up photos of his lightly clothed crotch to a young woman who was not his newly-wed wife), or alleged failure to take full responsibility for sex crimes committed under one's watch (a number of very privileged and wealthy white men have just lost their jobs at Penn State for just such alleged negligence), we would have many more cases of PWWMs brought low in recent years by media attention involving sex scandals to discuss. But because these do not involve lowly women accusing high ranked white men of sexual violence, or women's studies and critical race theorists egging on the media resulting in mob hysteria and premature arrests, these examples take us pretty far afield from Subotnik's trifecta of Media/Academy/Criminal Justice System. These cases are in the media spotlight simply because the topic of sex or violence, especially when connected to a famous person, has proved intoxicating to a large swath of our populace, and not because women's studies faculty, or critical race theorists, or any other academic cohort have been exerting undue influences on either the Media or the Criminal Justice System.

The only other case of a wealthy man accused of a crime against a woman who then was vilified in the press in ways that impinged upon his efforts to vindicate himself that I can recall in my lifetime is the murder case brought against O.J. Simpson in the 1990s. This case, like the others above, does not rise to the full status of locating institutional failure that Subotnik identifies as lying at the nexus of the Academy/Media/Criminal Justice System, but it involves two of the three and, represents a watershed cultural moment tantamount to or surpassing the Duke rape controversy in cultural significance. Of course, again, this is a case of a wealthy black man accused of a crime against a wealthy white woman, which requires a kind of twist of Professor Subotnik's logic, but the case certainly did turn on issues of sexuality, race, and violence and inspired an enormous media storm so we could include it as a case in point that may support Subotnik's argument that major American institutions, such as the Media and the Criminal Justice System, are in a state of failure due to the over-zealous

efforts of Civil Rights activist-scholars and women's studies faculty to root out racism and sexism from institutions such as the Academy. Yes, it might be hard to make the case, but let us at least explore the possibility that we can.

Simpson weathered intensely negative media portrayals and was vilified in feminist (as well as non-feminist) corners, despite being judged, in the end, not guilty by a jury of his peers. Indeed, Simpson's not guilty verdict was itself a source of outrage for many. Simpson is the only example in the list I compile so far of a wealthy man accused of a crime as serious as murder and also the only example of a wealthy man fully prosecuted—even if, again, the system that Subotnik charged with zealotry when it comes to violence against women was unable to convict him. Simpson's later near-confession of his guilt in the murder of his wife and another man casts a shadow over his innocence, so we may not even be talking about an *innocent* man falsely accused.⁸ Still, his case does bring to the fore many of the same questions that Professor Subotnik wrestles with in his essay. Some who see failure in the criminal justice system in the case of the O.J. Simpson trial still question whether the failure lies with the State's illegal and unethical attempt to plant evidence (the bloody glove) in order to pursue a case against a beleaguered black man. Others wonder whether the most salient failure lies with a system that is inordinately skewed towards wealthy clients—whatever their race—to the extent that it is nearly impossible to make the wealthy pay for their crimes, even when that crime is the butchering of one's wife and even when that wife is a thin, pretty, blond-haired white woman (“PWW” for “Pretty White Woman”?) and the husband is a black man. What is our system coming to, many wondered in the aftermath of the O.J. Simpson trial, if a black man in a bi-racial relationship, with as much damaging evidence against him as O.J. Simpson had, could not be found guilty of murdering a PWW? At this point in our history, does money really trump race and other cultural biases? And, if so, is that cause for celebration or grieving? In light of Simpson's virtual confessions, no less in his self-authored *If I Did It* and in the aftermath of reading Professor Subotnik's essay, I have to wonder also what we should consider to be the true influence and power of the civil rights movement and women's studies faculty at prestigious institutions like Duke University. Should we see feminist academics as weak because they could *not* compel Simpson's conviction? Or should we see this as a double standard—had Simpson been white, would he be

8. The Goldman Family, *IF I DID IT: CONFESSIONS OF THE KILLER* (2007).

in prison now? Because women's studies faculty and critical race scholars at prestigious universities like Duke would have gone after him with more gusto? Does anyone really believe that?

Given the political survival of Clinton, the successful ascension to the Supreme Court of Thomas, the dropping of charges against Strauss-Kahn, and the not-guilty verdict in the Simpson trial, it would seem that all those feminist and anti-racist scholars in the Academy calling for the head of any privileged and/or powerful white man and most powerful and wealthy black men accused by vindictive and possibly irrational poor and black or at least subordinate women (or at least on behalf of dead pretty white women) are not doing all that well in terms of social influence over the other two institutions of the Media and the Criminal Justice System. Based on the few instances of wronged powerful men that I can summon to my memory, their ability to avoid being fully prosecuted (or in the one case of O.J. Simpson, their ability to avoid being judged guilty and sent to prison) is quite remarkable. Somehow, the civil liberties of these powerful men were, in the end, safeguarded despite the influence of feminist and critical race scholars legitimizing the sort of "high-tech lynchings" that, in Professor Subotnik's view, severely threatens the integrity of the Criminal Justice System.

But, even if we have no instances of the Criminal Justice System, abetted by a Media spinning out of control at the behest of an Academy tilting in favor of critical race and feminist academics, unfairly punishing wealthy or even just well-heeled white or black men, can we not still evaluate the larger points that Professor Subotnik is convinced the example of justice *nearly* gone awry in the Duke case betokens? Indeed. What if DNA testing was not possible or did not carry the weight of evidence, would not those Duke Lacrosse players be sitting in prison right now? Does not the close call that *they* experienced tell us something important about where we are as society today, more than half a century since Emmet Till's murderers did their ugly work on a fourteen-year-old and chortled over their not guilty verdict in a *Look* magazine article published a short time later? Almost sixty years after Emmet Till died for smirking at a white woman and his killers let go free, has the system actually become rigged in reverse—in *favor* of women and blacks? And is blame for such rigging to be placed, at least partly, at the doorstep of feminist scholars and critical race theorists for egging on a rabble thirsting for privileged blood? For making white males into the "reviled community" as Professor Subotnik writes?

That is the central question Professor Subotnik's essay raises. And to answer it, he lingers on the details of the Duke rape controversy. So,

let us bring the conversation back to the particulars of the Duke case—even if it is, as I have established above, fairly *sui generis*. Professor Subotnik—as well as the book that has occasioned his reverie—draws our attention to the deeper institutional failures that the media storm and rush to judgment of those athletes may signify. Professor Subotnik is not just critical of a rush to judgment in the specific sense—whether the student athletes were guilty—his critique extends and is far more concerned with the way that feminist and anti-racist scholars legitimized the anger directed against the athletes by pointing to larger systemic systems of race and gender inequality and oppression. Of course, what these scholars believed they were doing was *deepening* the public conversation that the controversy kindled so as to encompass a larger discussion about what *they* see as the failure of institutions such as the Academy, the Media, and the Criminal Justice System to protect those without much power and few or no resources. Professor Subotnik’s accusation that Duke professors’ eagerness to seize on the media storm surrounding the charges of rape as a “teachable moment” was improper rings hollow to me not least because, of course, this is also exactly what Professor Subotnik is doing in his essay. We *all* see in the controversy a “teachable moment”—we just disagree on which teachings the moment offers up for learning.

While, even five years later, Subotnik sees in the controversy an opportunity to describe a disturbing lack of restraint exhibited by an Academy, Media, and Criminal Justice System in a rush to indict a group of privileged white young men unfairly, others saw the opportunity to explain to a largely ignorant public the deeper meanings and historical reasons for the outrage that the incident occasioned in the local community and among blacks and women especially. That deeper history that the controversy invokes is, of course, a history of privileged and wealthy white men enslaving, systematically raping, legally disenfranchising, and/or economically impoverishing those they had power over as powerful and privileged white men. As scholars who study history and whose expertise lies with reading cultural moments for their enactment of deeper, institutionalized, systems of power, it should come as no surprise that women’s studies and African Americanist faculty at Duke and elsewhere sought to explain the rage directed at the lacrosse athletes through reference to a past and present replete with injustice and sexual violence. That is what we humanities professors do; we explain things like that, often with reference to the past. Professor Subotnik sees in this attempt to explain the rage, rather than simply and utterly deride, dismiss, or condemn it, as a failure of the Academy. In

this, his analysis parallels that of many following the crisis of 9/11 who viewed intellectuals, particularly those working in the Humanities and Social Science fields who sought to explain the rage fueling the terrorist acts of 9/11, as traitors.

In the case of 9/11, it was not enough to bemoan the violence amid an explanation for it. *Any* attempt to explain *how* or perhaps *why* the violence came about was viewed by many as traitorous to America.⁹ The only explanation that was deemed acceptable was one that labeled the terrorists and their supporters crazy and evil . . . or evil and crazy. That was the only room for discussion—were they more crazy than evil or more evil than crazy? This range of discussion did not appeal to many humanities and social science scholars (women’s studies and critical race theorists prominent among them) who sought to understand the origins of the violence and believed only understanding the underlying tensions, systems of power, and historical reasons for conflict could produce genuine dialogue and resolution. As with 9/11, Professor Subotnik’s resentment of women’s studies and critical race scholars’ efforts to provide context and clarity regarding the outpouring of rage directed at the Duke lacrosse players leaves us with only one direction to move in: viewing the outrage expressed as unwarranted, irrationally-based, and as inexplicable as the accusation itself. This is where Professor Subotnik leaves us . . . but this place is nowhere.

Professor Subotnik’s essay tells us there was no legitimate reason for the outrage expressed against the lacrosse players once the charges of rape were made public, and also no call for an explanation of that outrage that did not outright condemn it as irrational and unfair—even before any evidence was presented to counter the accusation. Instead, he sees portions of the Duke University who seized on this opportunity to deepen the public discussion of class, race, and gender oppression as lending unwarranted credence to the accusation and, in so doing, abetting an overzealous prosecution. Both, he tells us, are signs of serious institutional failure. We could argue the ins and outs of whether the Duke University president took an appropriately distanced position or whether the women’s studies and critical race faculty could have been more clear in their personal refraining from judgment about the case in particular within their broader attempts to explain the historical bases for

9. For a more in-depth discussion of controversy centering university professors in the aftermath of the 9/11 crisis, see my article co-authored with Karen Coen Flynn, *Teaching the Day After: An Anthropological and Historical Assessment of University Faculty Pedagogical Strategies following September 11, 2001*, ANTHROPOLOGY & EDUC. Q. 33:3, 350-67 (2002).

the outpouring of outrage against the athletes, but these quibbles do not speak to the largest point of Subotnik's essay—or mine.

The largest point, in my view, is that of all the many injustices, wrongful accusations and prosecutions, of all the genuinely suffering innocents out there that Professor Subotnik could see as indications of the failure of key institutions in our society, the Duke lacrosse athletes sit at the center of the institutional failures that Professor Subotnik believes are endangering the integrity of our social system. Given the Duke athletes' exoneration—despite the improprieties of a venal prosecutor trying to get himself re-elected and in the face of a barrage of outrage funneling centuries of history of privileged and powerful white men lording over legions of Americans in the direction of these few young men—the system that protected the civil liberties of those young men seems fairly healthy to me. The Duke lacrosse players were not strung from a tree, were not rammed through the Criminal Justice System without benefit of defense counsel, and are not even now rotting away in some prison. *And even if they were*, the rarity of that case—without real parallel unless we stretch the criterion almost beyond sensibleness and even then only if we include cases of other powerful or at least privileged men who beat their raps too—tells us that the powerful still typically do just fine when up against the lowly regardless of the quality of evidence arrayed against them.

This is not shocking . . . has it not ever been the case? Maybe we should be surprised, as Professor Subotnik surely is, that the strength of the civil rights and feminist movements of the past generation or two could *even for a moment* provide a black stripper with the opportunity to launch an attack against a group of well-heeled white men who had hired her to sexually titillate them and then insulted and humiliated her. Maybe we should be surprised that feminist analyses of sexual relationships as relations of power could help bring a few powerful men's perfidy or alleged perfidy into the limelight of public scrutiny, occasioning outrage as well as reasoned debate about ethics and what comprises admirable behavior in a public servant to flow freely? If this is the extent of institutional "failure" in our society today, I would say we were doing okay.

But, a very few isolated examples of powerful men put on the spot to explain themselves by a media hungry for headlines, exposed for their unseemly sexual predilections by political rivals and bankrupt political campaigns, or charged with—but not convicted of—crimes they may in fact have committed, does not exhaust the list of institutional failures that Professor Subotnik might have pointed to as devastating

indictments of our present day society. Such cases do not even scratch the surface of the deep, systemic, and severe failures of our most precious institutions such as the Academy, the Media, and the Criminal Justice System. For I agree with Professor Subotnik that the Academy/Media/Criminal Justice Systems *are* failing us. And, like Professor Subotnik, I will offer a few assertions of how they are failing, assertions that I think are hard to argue with:

Number one: The Academy is still one of the most obvious class-perpetuating institutions in our society. Rather than a vehicle of class mobility, the rarified privatized echelons of the Academy (of which Duke University is a good example) mostly presents a venue for the renewal and reinvigoration of class hierarchy. Despite the exceptions to this rule—surely Barack Obama is one high-profile example—this is generally the case and no one who teaches at these sorts of institutions of higher education would demur on that point I warrant.

Number two: The Media appears to be free-wheeling, under no one group's control. But in the absence of an effective public education system, a mass media obsessed with banality, celebrity, and sensationalism offers only distraction and results in the de-edification of a populace charged with the task of attempting to govern itself. Absent the critical tools or even basic information with which to discern even one's own best interest never mind how to translate individual self-interest into advancement of the whole collective, that populace often seems to flounder when it comes to effective political decisions. It seems apparent that the Media is not serving our democracy all that well. Many would agree, but how many would say that the most fundamental failure of our Media lies with an unfair targeting of powerful white men for being white and powerful? Is this issue even in the top ten of ways that the Media appears to undermine our nation's democratic promise of life, liberty, and justice for all? To bring this back to the Duke case specifically, who is more likely to be presented by the Media as a member of, in Subotnik's words, a "reviled community": a golden-haired, tanned young man playing an elite sport at one of the most respected and expensive universities in this country? Or a poor black woman who strips for men in order to support herself?

Number three: the Criminal Justice System. Unlike the first two, this is an authentic apparatus of the State, thus the institution we as members of a republic absolutely should be able to hold accountable to the larger public good. When this system is not functioning well or fairly, we are compelled to speak out. However, do we imagine that the Duke lacrosse players of this world are the primary targets of that

system? Do they represent the typical innocents caught up in the punishing machine of criminal justice? How many powerful or at least privileged white men have been railroaded—did I overlook many in my brief overview of the last twenty years? If not, the question becomes: why is Professor Subotnik’s greatest concern not reserved for the masses of poor, uneducated, defenseless persons who actually *are* sitting in prisons, even on death row, or have already been put to death—despite the existence of DNA evidence in some cases that could exonerate *them*? Are there one or two examples of such from the past twenty years or so that we could point to as evidence of a truly failed institution? Are there hundreds? Are there thousands? Are many of those men poor and uneducated? Are a suspiciously disproportionate number black? Are a horrifying number suffering from mental illness or disabilities? Does Professor Subotnik’s internal alarm go off when thinking about the way that the ultimate one-two punch of failed public schools and privatized prisons come together to put semi-literate poor men (and an increasing number of women) in prison in the millions in this country, more than any other society has ever imprisoned in the history of the world? Does he write law review pieces about those who are clearly innocent but could not get fair trials in the first place because they had neither the money nor the political clout to compel the system to provide fair trials, as well as those who cannot get new trials because the system does not want to admit its mistakes? Why are some tales of innocence and wrongful accusation so vivid and distressing to Professor Subotnik—even though they end “happily” with justice prevailing and eight-figure settlements—while others, truly frighteningly tragic others, are either invisible or perhaps just not compelling enough to add to his scale of weights and measures?

If Professor Subotnik had taken some of those women’s studies and critical race theory courses from “identity scholars” he sees as contributing to the current failure of the Academy, he might be able to see and weigh his investment in the Duke case and in the tragic portrait of privileged white men wrongfully accused that he paints with such flourish. Benefitting from such courses myself, I can. It is not surprising to someone like me that Professor Subotnik identifies with privileged white men. But it is regrettable to me that this identification is all that his essay amounts to.

I suggest that Professor Subotnik take his eyes off the sympathetic portrait of wronged white manhood that the Duke lacrosse players represent in his mind, and cast his gaze in the direction of all those innocents and maybe even those not-so-completely-innocent-but-

tragically-impooverished men and women trying desperately to avoid coming into contact with the police and the courts, languishing in our prisons, awaiting our death sentences. Maybe he could try to shift his identification away from the mirror that the Duke case represents and onto people whose prospects and opportunities are a lot less plentiful. I guarantee the failure of the institutions he can spend his time worrying about will look quite different from their perspective.