Post-Modern Prosecutions

by William L. Anderson
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Over the past four years, I have written (or co-written with Candice E. Jackson) a number of articles dealing with the dishonesty of prosecutors in this country. The Duke Non-Rape case, as I see it, is a logical extension to a pattern that is so egregious that all we can do now is damage control. Justice pretty much is dead in the United States.

The final blow in this death of a million blows has been the increasing use of conspiracy theories by the prosecution, something that the law forbids, but the courts let it go anyway. Like so many other trends, this one has its intellectual underpinnings in that academic refuse pile we call Post-Modernism.

Four years ago, I called then-Attorney General John Ashcroft a "post-modern bureaucrat." Unfortunately, the post-modern application of law is not limited to Washington, D.C. and federal prosecutors, as bad as they are. State prosecutors are doing their best to match the outrages we see on the federal level, and they are encouraged by judges, politicians, and the gaggle of television talking heads that constitute a legal definition of air pollution.

Post-Modern Law

First, what do I mean by "post-modern law"? It is the application of post-modern thought to the execution of the law, both criminal and civil. (I will concentrate only on criminal law in this piece, however.) Second, what do we mean by post-modern thought? As I wrote in my Ashcroft article:

> (For those who don't know, postmodernism is a line of thinking that denies any possibility of Truth, and is the dominant "guiding light" — darkness? — in academe these days.) We know it also as a form of "relativism," or what Ludwig von Mises described as "polylogism" in his classic book *Human Action*.

As Paul Craig Roberts and Lawrence Stratton wrote in their book, *Tyranny of Good Intentions,* the courtroom is a place where we are supposed to find that thing called "truth," at least how truth applies to the events being examined. Obviously, it often is difficult to find "the truth, the whole truth, and nothing but the truth," given human limitations and

the predilections of people to lie, but nonetheless those people who are officers of the court and those who testify under oath are expected to be truthful. Those who are not can face charges of perjury or other sanctions, and although we know that lies tend to be the staple of courtroom fare these days, truth still is the standard.

Furthermore, the rules of the courtroom require prosecutors to present a *truthful* rendition, or at least a reasonable account, of what occurred. For example, if I am on trial for robbery, the prosecutor first must establish that an actual robbery occurred, and, second, that I was the one who committed the act. He or she is not *legally* free to concoct an event that never occurred, and then pick me out at random to bring charges. That prosecutors might do such a thing does not change the fact that such conduct is illegal.

The rules for the defense are different. True, defense lawyers cannot *knowingly* present a false defense, but they certainly can stretch that requirement a good bit. (Lawyers rarely are going to ask their clients, "Did you do it?" precisely because they know that if the client replies in the affirmative, they are going to be limited in how they can defend that person.)

Lawyers *can* try to present conspiracy theories, even if the pieces of the puzzle are not easily fitting; it is up to the judge to set the limits of what attorneys can present in defense of their clients. For example, when O.J. Simpson was on trial for murder more than a decade ago, his attorneys presented the defense that the police conspired to frame him, led by a "racist cop," Mark Fuhrman. Although the pieces did not exactly fit, the defense was effective enough to have Simpson acquitted. (I will not go into the claim that the verdict was an example of "jury nullification." It will suffice simply to say that Simpson's defense proved to be adequate for the situation.)

On the other hand, prosecutors are *not* legally free to act like defense attorneys. Christopher Darden and Marcia Clark would not have been able to claim that Simpson was a member of a shadowy drug gang or team of assassins and not be able to introduce any evidence to buttress their allegations. They had to stick with the real-live evidence, period.

What happens when prosecutors are permitted to introduce wild conspiracy theories? We see post-modern law in action. A telling example is the wrongful prosecution of Roby Roby Roberson and his wife in Wenatchee, Washington, 10 years ago. Roberson was the pastor of a small church in Wenatchee, and the prosecution claimed that he and his wife were leaders of a wild sex ring in which church services consisted of the Robersons and people in the congregation having group sex with little children.

The charges came from allegations that police coerced from children. There was no physical evidence of any kind, and after investigators combed the church grounds looking for *any* hint of semen or other clues

that would have demonstrated that sexual activity took place there. They found none.

In a world where truth mattered, such results would have meant that the authorities either would drop the charges altogether or at least take a hard look at the allegations. Instead, the prosecutor in the case declared that the *absence* of physical evidence constituted *proof* that the sex crimes must have occurred.

One has to step back and realize what took place in that courtroom. First, the prosecution admitted it had no real evidence, but the jury was supposed to ignore that fact and convict because no evidence really meant the opposite: the child sex must have happened. Second, this dishonest nonsense was presented only because the trial judge — who had been extremely hostile to the defense — permitted the prosecution to present its non-evidence as ironclad proof. One can be thankful that the jury in that case saw through the prosecution lies and acquitted the couple. The prosecutor since then has been re-elected three times.

The Post-Modern Duke Case

As the Duke Non-Rape case blunders toward an unjustified trial, we must understand that we are now looking at a full-blown application of post-modernism in the legal arena. First, we see many of the Duke University faculty members writing in various venues that while they seriously doubt that the rape, sodomy, and kidnapping charges against David Evans, Collin Finnerty, and Reade Seligmann are true, nonetheless the young men should be put on trial because of their race, sex, and class. Furthermore, the Duke administration, in its various sets of talking points, has said the same thing, except that the administration claims that a trial will present a chance for the Duke 3 to "prove their innocence."

Criminal trials do not "prove innocence." The legal issue at hand is either "guilty beyond a reasonable doubt," or "not guilty," period. There is no such verdict as "innocent." The fact that a prosecutor brings charges is that someone out there believes no matter what that someone committed a crime and that those people on trial committed it. I have yet to hear a prosecutor after a "not guilty" verdict claim that he or she tried an innocent person; instead, we hear the individual on trial really was guilty, but that the jury did not buy the truth.

Second, as we come to understand the medical evidence being presented, we further understand that the medical reports do not suggest that a rape even occurred. As forensic expert Kathleen Eckelt has noted, the examination and the accuser's behavior afterward (she was pole dancing at a strip club almost immediately after the alleged rape, despite the fact that police and prosecutor Michael Nifong claimed that her injuries were so severe she could not even sit up) clearly do not indicate that there was a rape at all.

Perhaps the most "post-modern" of the prosecution claims is that the

multiple stories that the accuser told police constitute "proof" that the Duke 3 raped her. In the aftermath of the lacrosse team party, she told police that she was raped, that she was not raped, that the entire team raped her, that 20 people raped her, that her partner, Kim Pittman-Roberts, helped the rapists, that Pittman-Roberts tried to stop the rapists, that she and Pittman-Roberts fought back, that five men raped her, that three men raped her, and that she was "100-percent sure" at every lineup that Brad Ross was at the party when, in fact, he was not.

The multiple tales would give normal people room for pause, but prosecutors are not normal people. Kerri Paradise, a Massachusetts woman who has been raped, has written in a November 24, 2006, letter to the Durham *Herald-Sun*:

> The Duke rape hoax is just that, a hoax. I am a rape survivor and I can tell you that a true victim will never change her story that many times. No DNA, accuser files false charges in the past, she goes back to pole dancing within days of this so-called rape and she is a drug seeker.

Yet, according to prosecutors, both Nifong and the gaggle of made-for-television prosecutors like CNN's Nancy Grace are claiming that the multiple stories of rape constitute "proof" that the rapes happened. After all, they declare, the rape must have been *so traumatic* that the accuser simply was thoroughly confused. (One of the TV prosecutors, Wendy Murphy, already has been at the forefront of the prosecutorial use of "recovered memories," a thoroughly-discredited tactic which prosecutors in Massachusetts and elsewhere have employed to falsely convict people.)

Like the Wenatchee prosecutor, Nifong and company insist that the multiple stories — which once upon a time would have been recognized as strong evidence *against* the accuser's claims — now constitute proof of rape. Conversely, had the accuser told *only one* story which was consistent, one can be assured that the prosecution also would have used the account as *proof* that the men raped the accuser.

Thus, we see the ultimate post-modern absurdity: conflicting accounts constitute "proof," just as consistent accounts also constitute "proof." In a world where truth means something, people would smell a very large, nasty rat if a prosecutor were trying to say two mutually-exclusive sets of accounts *both* are true. Unfortunately, that world no longer exists, at least in American courtrooms.

Furthermore, Nifong and supporters like Grace and Murphy and others claim that the indictments themselves also establish "proof" of guilt. (As Murphy said during one appearance on Grace's CNN show, "Almost 99.9 percent of people indicted are guilty; you do the math.") Of course, the indictments came as a result of the multiple stories, so we now are expected to believe not only that the mutually-exclusive accounts prove guilt, but also the fact that Nifong obtained indictments using them.

One hopes that if this case comes to trial, that the judge will recognize the dishonesty of Nifong's charges, or that a jury will understand that absurdities are absurdities. I say "hope," because right now, the post-modernists are winning battle after battle. It is one thing when post-modern nonsense dominates a history or English class; it is quite another when it becomes the bedrock of modern law.

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William L. Anderson, Ph.D. [send him mail], teaches economics at Frostburg State University in Maryland, and is an adjunct scholar of the Ludwig von Mises Institute.

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