



## Episode 1,137: Absolute Immunity for Prosecutors: The Built-In Bias Against the Accused

Guest: Bill Anderson

**WOODS:** Before we get into the paper that you gave at the conference, let's talk about something that you were very much involved in as a writer and a journalist and an observer, and that is the Duke lacrosse case. Some of my listeners were probably just growing up during those years, but we're talking 2006-2007, and that was a case where people like you and my old TA that I had as an undergraduate, K.C. Johnson, and some others were sure that something was fishy about that case. And I read what people were writing. I didn't know what to think, but as I look back on it now, good grief. To say this was a miscarriage of justice is a preposterous understatement. So I'd like to talk about this, because this is a case where the prosecutor himself was actually punished, and the point of your paper that we're going to talk about in a few minutes is that it's exceptionally rare for that to actually happen.

**ANDERSON:** Yes.

**WOODS:** So something grossly unjust must have happened in this case. What was that?

**ANDERSON:** Well, I think that what happened was that the prosecutor, Michael Nifong, really did everything he could to make this case go national, and he sought out a lot of publicity. He gave more than 70 interviewers, which is something prosecutors really aren't supposed to do. He made a number of inferences about guilt. He just basically shot off his mouth a lot. And here was the problem: that he had put himself so far out in front and had really almost encouraged the rest of the news media and all of the usual suspects in the left-wing establishment to go ahead and jump off the cliff with him. And at the time, they were saying a prosecutor is saying all this stuff, so it has to be true –

**WOODS:** Well, let's remind people: what is all this stuff that is being said about whom?

**ANDERSON:** Okay, well, the case itself involved an accusation by a black stripper that three lacrosse players from Duke University had raped her at a party. And so what they did – and without going into a lot of detail in the case, the accusations themselves just took off, and you had the *Raleigh News & Observer* writing a number of articles at the beginning absolutely inferring guilt, and the paper even took part in creating a wanted poster for the players, having all of the white papers, their photos on a single sheet and calling for people to come forward and things like that. And so in other words, there were no restraints that they were supposed to have about saying whether or not this actually happened.

And what occurred was that the evidence almost immediately was showing up that there was no rape: number one, that the woman had no DNA on her; that we were supposed to believe

the three young men, drunk young men for 30 minutes would beat the woman, rape her, ejaculate in her mouth, in her vagina, on her body, that they would all be naked and rolling all over her and all over this bathroom and yet not leave one speck of DNA on her anywhere; and that all of these things that she alleged simply could not have happened. I mean, and it was pretty good forensic science, to be honest, because a lot of times forensic science is not very good. But in this particular case, they really did everything they could to try to preserve things as well as possible.

But what happened was, because of the statements of the prosecutor especially and the *Raleigh News & Observer* — they had a young, left-wing journalist named Samiha Khanna, who subsequently lost her job at that paper. And they had an editor who later went out to *The Sacramento Bee* to try to turn it around, and she got fired out there too. But in other words, what happened was that nobody would restrain themselves. And I think a lot of people on the left were saying, *Aha, we finally have the case that we need*. And you know, it's the old thing of jumping on the horse and riding off in all directions.

And as a result, the prosecutor, he had also personal and financial interest in this because he wanted to get elected and serve four more years so that he could get an extra \$15,000 on his pension. And it just never occurred to him I think that this was going to blow up in his face. And it did, and so the North Carolina State Bar was left with a real problem, because here was somebody who had absolutely flaunted the rules of conduct that — every state bar in the country, also including the federal bar, has actually very strict rules as to what prosecutors can and cannot do, and here was Michael Nifong just breaking them left and right. And then it turned out later he was hiding evidence, and he conspired to do that. He had conspired with a private firm that does DNA analysis. And so they had conspired to withhold information.

So yes, it was outright lying to a judge, to the public and all. And even with all that, it took *The New York Times* more than a year to finally admit: hmm, maybe all this stuff really isn't true after all. I mean, this was *The New York Times* that gave us the denial of the Ukrainian famine. I mean, this was in all its glory.

**WOODS:** Well, Bill, what was it about the case that made you think something's fishy here? I mean, I'm sure there are a lot of cases you read about in the paper and you just go on to the next page. What was it that made you say this can't be right?

**ANDERSON:** Well, what made me think about that was first that the whole issue of DNA and also thinking: wait a second, what is the evidence? I was an athlete in college, a pretty good one back about 45 years ago. I ran track at University of Tennessee, and I'm fully aware of things that athletes are doing and yes, that there is sometimes that sense of privilege and God-awful behavior that we see. And so that got me interested at first, but I was already writing about prosecutorial misconduct, and I think I was probably loaded for bear, as they might say.

But in that particular situation, it was obvious: uh oh, we have a real problem, because I knew that in that situation, DNA would have to play a role. It would have to if everything that was being alleged had happened, including, by the way, that these guys had not cleaned up the bathroom after this infamous party where all of this stuff supposedly took place. And also, I'll be honest. Any time *The New York Times* jumps on something like this, you can usually figure that they're going to be wrong. And so in the end, to be honest, it was kind of like shooting fish in a barrel. It was not hard at all.

But yet what really struck me was the refusal of a lot of people to believe the obvious. They just so wanted to believe this story to be true that they were willing to do anything. I mean, anything to keep it going. And that's the sort of thing that – you've known me for many years, Tom, and you'd know that's the sort of thing that kind of makes me mad. And when I get mad, I write about it.

**WOODS:** Well, what you did, you and the others, was just so important. Did you at any time get to know the family members of the accused?

**ANDERSON:** Oh, yeah, I did, and made some interesting contacts over the years kind of without going into a lot of detail. But yeah, I did, and –

**WOODS:** Did they thank you?

**ANDERSON:** Yeah. It was interesting. I remember meeting Reade Seligmann's father at a party, and he said, "Boy, wait till Cathy" – his wife – "hears that I got to meet Bill Anderson." So he was kind of excited about that. And nobody really just said directly thanks. I think K.C. Johnson got more of that because K.C. was the real star in this. I always considered myself sort of on the periphery. There were people there that, I mean, I was sort of able to make a reputation for myself there and also in the Tonya Craft case a few years later in northwest Georgia. And that one I actually got written up on in blogs because I took the lead in that. I did a lot of what K.C. did. But I think the families were nice and certainly some of the other families I got to be friends with, and they were very good to us. And I've stayed at some people's houses on trips and things like that. So you know, I certainly think that the people were grateful enough, kind enough. I wasn't looking for that and what not, but I thought that the people that I got to know, including the accused families, I thought they were pretty good people, to be honest. I really, really did like them.

**WOODS:** Let's talk about this paper that you gave at the Austrian Economics Research Conference recently. The title of it is "Protected Lying: How the Legal Doctrine of Absolute Immunity Has Created a Lemons Problem in American Criminal Courts." Let's lay out what exactly absolute immunity for prosecutors is.

**ANDERSON:** Well, what absolute immunity says is that as long as the prosecutor is engaged in the duties that are expected of a prosecutor, that that prosecutor no matter what, no matter how outrageous the action, may not be sued by a person that he or she has harmed. For example, let's say that Michael Nifong – now, by the way, he was somewhat vulnerable because of he also became an investigator as opposed to just a prosecutor, but even then, I think he was pretty well protected by the courts. The courts really, they protected the city of Durham. They did not protect Duke University. The players, William Cohan and that horrible book he wrote notwithstanding, they settled with each of them for I think a little under \$7 million apiece, the three people. But the courts really, really protected Nifong in this particular thing. It goes back to a 1976 case, *Imbler vs. Pachtman*, in which the Supreme Court ruled that as long as prosecutors are doing their prosecutorial duties, that if you, the person being prosecuted, even if they lied, even if they broke the law, it doesn't matter because you cannot sue them. And so what you have to do is depend upon the state, which is of course all the good friends and colleagues of the prosecutor, to induce punishment. And by the way, that's why it rarely ever happens. The extraordinary thing about the Nifong case was that anything happened at all.

**WOODS:** Yeah, that was part of my excuse to be able to bring up that case, because you did briefly mention it in the paper as being one of the very few counterexamples to the phenomenon that you're describing.

**ANDERSON:** Yeah.

**WOODS:** So let's say it turns out that there's some prosecutor who either did not bring forth — well, let's talk about the Brady thing. The prosecutor is required to bring forth exculpatory evidence. But why would it be the prosecutor's obligation to do that?

**ANDERSON:** Because it's the prosecutor that generally gets the case filed, and it's the prosecutor who then actually is the conduit of information or at least the information that the police will have that if the police don't give up something to the defense attorney but they've given it to the prosecutor, then the prosecutor is legally required to get that information to the defense. And also, you have to understand that most people in criminal cases, they hire a lawyer, and that's very, very expensive. Most of us do not have a few hundred thousand dollars of spare change. The Duke case, the defense cost about \$5 million, and that didn't go to trial. Tonya Craft in northwest Georgia, she spent over \$1 million that they had through family inheritance. That did not even cover all of the attorney's and research costs. Whereas the prosecutors, they don't have to worry about that, and in fact, the less research they do, the better.

And so I know it sounds strange, but it's the prosecutor that has most of the information, and the reason I talk about the lemons problem is that it goes back to a 1970 paper by George Akerlof. And now, Akerlof, even though economically speaking there were some difficulties with it — in fact, Tom DiLorenzo really tore about some of the concepts in that paper. But there were some aspects of the paper I think that were applicable to this. And that is that if I'm selling something to you and I know that something is wrong with it and you don't know that, then I have more information than you do. If you know that, you would demand a lower price, you see, and so it would be to my advantage withholding it. Although, here's the thing: that once I sold you the car, if the car broke down, there are remedies that you would have in order to be able to get at least some measure of wholeness in this. Whereas with the courts, here's the problem, Tom: with the courts, once they get a conviction, they hold onto them very, very tightly. It is extremely difficult to get a verdict overturned, no matter how bad the misconduct. So therefore, prosecutors have the incentive to withhold information. They're absolutely incentivized to do so.

**WOODS:** So that's the key. It seems to be so often the case that critiques of the market hold 50 times more when you apply them to the state itself, because when it comes to asymmetric information, which is what Akerlof is talking about in that paper, well, what better example of asymmetric information could you have than a prosecutor who won't hand over exculpatory evidence and who then is more or less protected by absolute immunity from the possibility that the verdict could be overturned?

**ANDERSON:** Yes, Tom, what happens in this is that prosecutors are incentivized for convictions, that that's how you get not only promotion and raises within that organization, but it's how you also make a name for yourself. Some of these guys end up going to high-priced law firms afterwards. Let me give you an example that a lot of people don't know about, and that was the Enron case. And you had the lead prosecutor in that, the lead federal prosecutor, and right now I can't think of his name, but he was actually sleeping with a

journalist from then *Fortune* magazine and also CNBC who was also writing about the case, and she put forth a lot of propaganda about it. And afterwards, they got married. Now, they denied that they had even had any contact beforehand, which was total nonsense and an absolute lie.

But here was the thing: that the prosecutor afterwards got a job with a high-powered Chicago law firm, and she went on with *Vanity Fair*. So really it was something that financially the conviction was absolutely — I mean, it meant millions of dollars to this wonderful couple, and so on. And so that you are financially and reputationally incentivized for convictions in that position, so that's the positive set of incentives.

However, on the negative side, here is the beauty of it — I say "beauty" in quotation marks — that there is no downside. If you're caught lying, it's no harm, no foul or, *Well, gee, you shouldn't do that. Hold your hand out so we can tap it*, and so on. So you know, the chances of actually being punished, even if you're caught — and that's the thing. Even if you are caught, the chances that you are going to be punished are almost zero, which gives you a true perverse set of incentives. So yes, it's absolutely the state, even though the markets — markets don't have these kinds of incentives, Tom. They just don't. That there's almost always something that you can do to pursue at least some form of wholeness, where in the courts especially, in government-run courts, it is nearly impossible.

And you'll see these stories, so-and-so let out of prison after 20 years for a crime that he didn't commit, and you have to ask yourself: how was it that he got there in the first place if he didn't commit the crime, and are police investigators that bad, are prosecutors simply just that ignorant? No. It's that a lot of times, people know that they're lying, but it doesn't matter because the state encourages.

**WOODS:** I want to just read a little passage from your paper, because here's another angle on the whole question. You cite a 2014 study that finds something that we probably knew already, that: "Most criminal cases result in pleas as opposed to going to trial, and that often results in innocent people pleading guilty to something, simply because they lack the resources to take charges to trial or do not have confidence the system will work for them and they will receive harsher sentences than had they just pleaded guilty. The police system is almost completely free of judicial or legislative oversight and regulation, which makes things even more hazardous for defendants given that prosecutors receive no sanctions for overcharging or coercing guilty pleas for innocent persons." Now, if this went on if we had a private legal system, not a government monopoly system but a private legal system, we would never hear the end of the outrage about this. But instead, I have to dig around in a Bill Anderson paper to find out about it.

**ANDERSON:** Yeah. Oh, yeah, absolutely. And in fact, a private system would obviously work a lot differently. It would work more like a civil system. Murray Rothbard laid out a number of ideas on that, and others have too. But you're absolutely right, that for whatever reason, these folks are always held up as being exemplary. *Prosecutors, well, they could be making big bucks as private attorneys, but instead they choose to serve the public as prosecutors.* And that's frankly a bunch of nonsense. A lot of them, being a prosecutor, if they want to be criminal defense attorneys, you look at the prosecutor's office as sort of serving on the farm team, that you're laying some of the groundwork. It's like, for example, on Wall Street, you have a number of executives on Wall Street who have also been in the Securities and Exchange Commission, and serving in the SEC is actually considered a plus when you work

then later for some of these financial firms. And so there's this revolving door that you're going to find. And in fact, a market system generally has ways to get around this.

So if you want to talk about a government failure, a huge failure, this is it. But it's a failure because the people who are harmed really have no way of getting justice. You'll see people getting compensated, sometimes even awarded a lot of money. But nonetheless, you've taken their lives away. You've altered their lives irreparably. But here's the problem: that the people who have created this issue, the people who did the wrong in the first place, who broke the law, who committed crimes – and I'm talking about real, live, going-to-jail type crimes, they're protected.

And there has never, ever in the history of the United States been a prosecutor who was convicted of actually conspiring to bring about a wrongful conviction. You had a case in DuPage County in the late 1990s, and some prosecutors went after a young fellow named Rolando Cruz and convicted him of murder. And then they found out later that, boy, did these guys ever make stuff up. And Cruz was not a particularly, let's say, attractive person. He is somebody with a criminal record, but he clearly got framed. But the jurors would not convict the prosecutors. They just wouldn't do it. The system protects them. And I know that we're all shocked by that, but there it is.

**WOODS:** Well, let me again if you don't mind read another passage from your paper. And here you're going to use an analogy. You're going to say the same way that Akerlof uses the lemons example, let's try and examine prosecutorial misconduct as if it were the selling of a bad car to an unwitting customer. It breaks down almost immediately. And here's what you write:

"When the customer complains and demands that the dealer give him a refund" – now, again, think of this as an analogy with prosecutors – "the dealer refuses and turns to other employees of his business, and all of them agree that it was a good car and that the buyer should accept the results and not carp about them and that the dealership followed all of the proper procedures for preparing the car for sale and that it had no known defects. Furthermore, in this particular example, the wronged buyer is prohibited from using the tort system and is told to check with government agencies that regulate used car sales. When the buyer turns to those agencies after having discovered documented proof that the dealer knowingly lied about the car that he sold, the employees of those organizations tell him that they are sorry but that the dealer was just doing his job and that they will neither require the dealer to take back the lemon he sold nor discipline him. It is near impossible to imagine such a scenario in the event a car dealer sells a lemon to a customer. However, this was the reality that John Thompson and thousands of other wrongly convicted people have experienced after prosecutors engaged in illegal and unethical conduct to place them behind bars. After having their freedom taken from them, sometimes for decades, they found that the judicial and law enforcement agencies so protect their employees that no meaningful redress is possible."

Holy cow.

**ANDERSON:** Yeah.

**WOODS:** Not a lot of academic journal articles read like that, Bill. Where are you going to publish this one?

**ANDERSON:** Well, actually, I have sent it to a journal, yours and my favorite journal of course, *The Quarterly Journal of Austrian Economics*. And I sent it to them I believe on Sunday, and so I'll just wait to see what happens, what they see. They'll put it through a blind process and then somebody may ask for revisions or something like that. But I did want to get this published in a journal, and then what I'd like to do from there is actually work on things from them. Part of it is with me I need to get back into the academic portion of my work too as opposed to just popular press stuff. And so this is kind of almost a combination of the two, except what I'm doing here is using just straight economic analysis. In economics, we hold that incentives matter. They matter a lot. And when you look at structures of incentives, you can see how behavior is going to go. I don't care if you're a neoclassical economist, an Austrian economist, or whatever. Incentives matter.

**WOODS:** Now, this paper unfortunately, until it gets published, there's no way people can read it? You don't have like a working paper version I can link people to?

**ANDERSON:** Well, that is the working paper. You can do it; the one problem is that — and I don't know. It might. It's one of these things that it could affect the so-called blind —

**WOODS:** Ah, yeah, that's true. Yeah, if people know — yeah, all right.

**ANDERSON:** However, chances are people are going to know it's my paper anyway, because they know I write about this kind of thing.

**WOODS:** Right, yeah, they're going to have to find — yeah, it'd be like finding a jury that's never heard of O.J. Simpson. Good luck finding a reviewer for Bill Anderson's paper.

**ANDERSON:** Yeah, I'd like to do — what I'm thinking about doing is doing a shortened version for the Mises page, but for now I'm just holding off because I want to make sure everything is done right, and also because, say you're the editor of the journal — I won't mention the editor's name. But that person could maybe interpret it as I'm trying to put some pressure on him in order to be able to do it, which you don't want to do.

**WOODS:** No, no, no. Absolutely. If I'm responsible for this paper not getting published, I'm going to have to go out and get drunk and who knows what I'll wind up doing, so we don't want that to happen.

**ANDERSON:** Hey, we'll get drunk together. Oh, I didn't say that.

**WOODS:** But listen, what I will do is I will link people to two things if they want more Bill Anderson: first, your article archive at Mises.org, and secondly, your article archive at LewRockwell.com, which is where I know you published some of the Duke lacrosse stuff at the very least. So we'll link to both of these things. This being Episode 1,137, the show notes page will be TomWoods.com/1137. That's where you can get your fix of Bill Anderson articles. Well, Bill, I appreciate your coming on. I love the paper, and I hope to see it published someday.

**ANDERSON:** Thanks, Tom, and keep doing the good work that you're doing and thank you very much for having me as your guest.