ECONOMIC CALCULATION AND THE COURTS: A THEORY OF HOAXES

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ABSTRACT

Government courts often are subject to hoaxes in which false crimes are reported and then pursued by prosecutors. From the Salem Witch Trials of 1692 to what was called the "Duke Rape Hoax" in Durham, North Carolina, not to mention the numerous child molestation hoaxes of the 1980s and 1990s, people were charged and sometimes convicted on what nearly everyone today realizes were false charges. In this paper, I examine two court-induced hoaxes from an Austrian point of view. I apply the economic calculation analysis as developed by Mises and Rothbard as well as more general principles of Austrian Economics to explain why hoaxes would be prevalent in government courts, and why they continue.

I. INTRODUCTION

Two years ago, one of the most publicized and riveting public spectacles was the so-called Duke Rape Case.[2] Although the case moved at what seems to have been a glacial pace, in the end the charges brought by Durham County District Attorney Michael B. Nifong in the spring of 2006 could not stand up in a court of law.[3] After a lengthy investigation, North Carolina Attorney General Roy Cooper agreed that the charges were false, and on April 12, 2007, he dropped all charges and declared the charged students "inno-

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[2] *See* Archives of the Duke Lacrosse Controversy, http://www.newsobserver.com/news/crime_safety/duke_lacrosse/ (last visited Mar. 13, 2009); Archive of the Duke Lacrosse Case, http://query.nytimes.com/search/query?query=duke+lacrosse+case&srchst=nyt (last visited Mar. 13, 2009).

[3] *See* Anne Blythe, *Duke Lacrosse Players 'Innocent,'* NEWS & OBSERVER, Apr. 12, 2007, http://www.newsobserver.com/1185/story/563248.html.

cent."[4] Nifong was later disbarred and served one day in jail for lying to a judge about withholding exculpatory evidence.[5]

What distinguishes the Duke case from other controversies is the fact that neither the crimes alleged by the accuser nor those pursued by Nifong and the Durham police actually happened.[6] From the misrepresentation of the medical report to the double-digit number of conflicting stories told by the accuser, it is clear that three young men did not beat and rape the accuser for thirty minutes, or even touch her.[7] (Even ultra-sensitive DNA tests by a private lab were not able to pick up even one cell of DNA from any Duke lacrosse player, despite the claim of a rape and beating.)[8]

The question asked is this: If the charges were not true and the alleged crime was a hoax, how did the case ever come into the courtroom in the first place? It is this question alone that has led some people to claim that "something must have happened" or else the police and prosecutors would not have brought charges in the first place: the ubiquitous belief of "where there is smoke, there is fire."[9]

However, this is not the only criminal hoax in the history of government courts. The Salem Witch Trials of 1692 still live in infamy, and Paul Craig Roberts and Lawrence M. Stratton outlined a number of hoaxes in their book, *The Tyranny of Good Intentions*.[10] Dorothy Rabinowitz in *No Crueler Tyrannies* thoroughly debunks some of the child molestation hoaxes of the 1980s and 1990s in which a number of people were given lengthy prison terms, despite the fact that literally no crimes ever occurred, much less the people in the dock having committed them.[11]

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[4] *See id.*

[5] *See* Shaila Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at 8, *available at* http://www.nytimes.com/2007/09/08/us/08duke.html?n=Top/Reference/Times%20Topics/Organizations/D/Duke%20University/Duke%20lacrosse%20sexual%20assault%20case.

[6] *See* Blythe, *supra* note 3; Durham-in-Wonderland, Overall Case Narrative, http://durhamwonderland.blogspot.com/2007/03/overall-case-narrative.html (Oct. 11, 2007, 11:11 EST).

[7] Durham-in-Wonderland, Overall Case Narrative, *supra* note 6.

[8] *Id.*

[9] *See* Durham-in-Wonderland, Reflections on the Motion to Dismiss, http://durhamwonderland.blogspot.com/2008/06/reflections-on-motions-to-dismiss.html (June 2, 2008, 12:01 EST).

[10] PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND LAW ENFORCEMENT ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE (2008).

[11] DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES (2003).

At this point, let me say that most criminal cases that are tried – at least in state courts – do involve some violation of the law, and the vast majority of alleged crimes are not hoaxes. Furthermore, I add that wrongful convictions for things that actually happened do not fall into the "hoax" category that I am examining. For example, Darryl Hunt was exonerated in 2004 in North Carolina after being convicted twice for the 1984 rape and murder of Debra Sykes, but there really was a rape and murder; authorities simply charged the wrong man, based upon questionable testimony.[12] Paul Craig Roberts explained why wrongful convictions exist, but he was largely dealing with situations in which authorities tried and convicted the wrong persons, which is beyond the scope of this paper.[13]

While I do believe that one can use economic analysis to examine why there are wrongful convictions, I am limiting this paper to situations in which people are charged with alleged crimes *that never occurred*, yet are pursued by the authorities *as though real crimes were committed*. In the Hunt case, there was a body; in the case of a hoax, there is nothing but a claim that is much more easily debunked than substantiated, and over time it becomes clear that the criminal charges were false.

Austrian Economics can provide insight into why hoaxes occur in government criminal courts, why they persist, and why the state refuses to back down even when hoaxes are exposed. Some of the reasons can be explained via the concept of economic calculation, which Mises developed as an argument against the implementation of socialism.[14] Murray N. Rothbard's economic theories, as well as his commentaries on law and justice, also provide a way to systematically evaluate government courts and hoaxes.[15]

Finally, Austrian Economics (and some aspects of mainstream economic theory), with its emphasis upon private property, *ordinal* utility, and other aspects of individual economic calculation, not to mention the price system, incentives, and entrepreneurship, also help lay out a framework of analysis. In this paper, I first will lay out the Austrian position and then apply Austrian thinking to the workings of government courts. Finally, I will examine two hoaxes, the Duke lacrosse case and the 1980s Grant Snowden faux child

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[12] *See* The Innocence Project, Darryl Hunt, http://www.innocenceproject.org/Content/181.php (last visited Mar. 13, 2009).
[13] Paul Craig Roberts, *The Causes of Wrongful Conviction*, 7 INDEP. REV. 567 (2003).
[14] LUDWIG VON MISES, BUREAUCRACY (Yale Univ. Press 1944); LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS (Yale Univ. Press 1951); LUDWIG VON MISES, HUMAN ACTION: THE SCHOLAR'S EDITION (1999).
[15] MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE (1993).

molestation case in Florida.[16] In each analysis, I will demonstrate how Austrian Economics provides at least a partial explanation as to why these hoaxes were perpetrated and continued.

II. AUSTRIAN ECONOMICS AND THE COURTS

When one discusses Austrian Economics, government courts do not necessarily come to mind; yet as one examines the courts, a number of things are clear. First, the Law of Scarcity applies to the courts as well as to anything else. Second, we clearly can observe all of the "fundamentals of human action," as laid out by Rothbard, at work:

- Court actions, while sponsored by government, are determined ultimately by *individuals*;
- Human action is purposeful action;
- Purposeful individuals operate within a *means-end framework* in which "all means are scarce;"[17]
- The role of *time* is significant in the workings of the courts, as investigations, strategies, and trials themselves take place over time.

I will examine each of these points before moving to other aspects of Austrian analysis.

First, while individuals charged with crimes are charged either by a particular state or by the U.S. Government, in reality, individuals ultimately decide whether or not to bring charges. As Rothbard put it,

> The first truth to be discovered about human action is that it can be undertaken only by individual "actors." Only individuals have ends and can act to attain them. There are no such things as ends of or actions by "groups," "collectives," or "States," which do not take place as actions by various specific individuals. "Societies" or "groups" have no independent existence aside from the actions of their individual members. Thus, to say that "governments" act is merely a metaphor; actually, certain individuals are in a certain relationship with other individuals and act in a way that they and the other individuals recognize as "governmental."[18]

While this point might seem to belabor the obvious, it is important as one examines why prosecutors chose to pursue charges based upon hoaxes. Ultimately, *individuals* sought to receive benefits

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[16] *See* RABINOWITZ, *supra* note 11.
[17] *See* ROTHBARD, *supra* note 15, at 4.
[18] *See id.* at 2.

from their actions, and, in the case of at least one person who will be discussed, those benefits were significant. While police, prosecutors, and judges who pursue these cases might be in the employ of governmental bodies and are acting under the authority of the state, residual benefits are captured by the individual state agents (not to mention attorneys, who are officers of the court).

Examination of the agent-principal problem (or agency theory) has a rich history in mainstream literature. Peter G. Klein[19] wrote: "As developed by Jensen and Meckling (1976),[20] Fama (1980),[21] Fama and Jensen (1983),[22] and Jensen (1986),[23] agency theory studies the design of ex-ante incentive-compatible mechanisms to reduce agency costs in the face of potential moral hazard (malfeasance) by agents."[24] Clearly, agency theory would have a part here. While the cited literature deals with the agent-principal problem in the context of the profit-making firm, the same literature applies to the court system, given that individuals capture residual benefits that, while not easily measured in monetary terms, certainly can be career-enhancing. As I point out later in this paper, one district attorney who pursued a hoax was able to ride that case and others like it all the way to becoming attorney general for the U.S. Department of Justice.

What would be missing in an application of agency theory to the courts is private ownership. The agent-principal problem deals with the conflicting interests of firm managers and owners and how owners must monitor the activities of their managers. Alexandre Padilla,[25] for example, examined the issue of insider trading and agency theory from an Austrian point of view and concluded that government regulation of insider trading is not necessary, given the various safeguards that owners can establish.[26]

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[19] *See* Peter G. Klein, *Entrepreneurship and Corporate Governance*, 2 Q.J. AUSTRIAN ECON., Summer 1999, at 19, *available at* http://mises.org/journals/qjae/pdf/qjae2_2_2.pdf.

[20] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Capital Structure*, 3 J. FIN. ECON. 305 (1976).

[21] Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

[22] Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

[23] Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986).

[24] Klein, *supra* note 19, at 30.

[25] Alexandre Padilla, *Can Agency Theory Justify the Regulation of Insider Trading?*, 5 Q.J. AUSTRIAN ECON., Spring 2002, at 3, *available at* http://mises.org/journals/qjae/pdf/qjae5_1_1.pdf.

[26] *Id.*

In government courts, however, there are no owners and thus no residual claimants. The agent-principal problem in this situation is more difficult to define. It is not difficult to determine the agents – prosecutors, judges, and the police – but the "owners" are more nebulous. Do taxpayers "own" the courts? Given that taxpayers are brought into court every day on criminal and civil charges, it is doubtful that taxpayers would see themselves as having any "ownership" privileges of the courts. Certainly, we cannot say that *governments* own the courts, given that government itself owns nothing. As previously pointed out in quoting Rothbard, ultimately decisions about what the courts will do are made by individuals, but individuals who do not have ownership issues at stake.[27]

Given that the courts are an entity of government, the results of the economic calculus that will drive decisions made by those associated with the courts will be decided on something other than organizational profit. Perhaps a good place to begin is with Rothbard and his concept of "psychic profit." He wrote:

> The aim of the actor is always to achieve a psychic profit from an action by having his marginal revenue exceed his marginal cost. Only after the decision has been made, the action taken, and the consequences assessed, can the actor know if his decision was correct, i.e., if his psychic revenue really did exceed his cost. It is possible that his cost may prove to have been greater than his revenue and that therefore he lost on the exchange.[28]

Rothbard's analysis has merit precisely because of its emphasis on the subjective nature of value, something that Austrians have emphasized well beyond what the lip service that the economic mainstream stresses regarding subjectivity and value. However, the transition of traditional Austrian theory on economic calculation to the courts is made more difficult by the Austrian emphasis on private ownership and market prices. Mises explained:

> The problem to be solved in the conduct of economic affairs is this: There are countless kinds of material factors of production, and within each class they differ from one another both with regard to their physical properties and to the places at which they are available. There are millions and millions of workers and they differ widely with regard to their ability to work. Technology provides us with information about numberless possibilities in regard to what could be achieved by using this supply of natural resources, capital goods, and manpower for the production of consumers' goods. Which of these potential procedures and plans are the most advantageous? Which

[27] *See supra* note 18 and accompanying text.
[28] ROTHBARD, *supra* note 15, at 277.

> should be carried out because they are apt to contribute most to the satisfaction of the most urgent needs? Which should be postponed or discarded because their execution would divert factors of production from other projects the execution of which would contribute more to the satisfaction of urgent needs?
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> It is obvious that these questions cannot be answered by some calculation in kind. One cannot make a variety of things enter into a calculus if there is no common denominator for them.
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> In the capitalist system all designing and planning is based on the market prices. Without them all the projects and blueprints of the engineers would be a mere academic pastime. They would demonstrate what could be done and how. But they would not be in a position to determine whether the realization of a certain project would really increase material well-being or whether it would not, by withdrawing scarce factors of production from other lines, jeopardize the satisfaction of more urgent needs, that is, of needs considered more urgent by the consumers. The guide of economic planning is the market price. The market prices alone can answer the question whether the execution of a project *P* will yield more than it costs, that is, whether it will be more useful than the execution of other conceivable plans which cannot be realized because the factors of production required are used for the performance of project *P*.[29]

The conduct of economic affairs, as described by Mises, clearly is not the central issue that is faced by those who make decisions in the courts, which do not make monetary profits. Instead, prosecutors, judges, and those who push the system must decide by means other than profitability which cases to pursue, what kinds of resources to devote to those cases, and when they should be heard. In short, they must adhere to principles of bureaucratic management, of which Mises wrote:

> The objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods. Take a nation-wide police system like the F.B.I. There is no yardstick available that could establish whether the expenses incurred by one of its regional or local branches were not excessive. The expenditures of a police station are not reimbursed by its successful management and do not vary in proportion to the success attained. If the head of the whole bureau were to leave his subordinate station chiefs a free hand with regard to money expenditure, the result would be a large increase in costs as every one of them would be zealous to improve the service of

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[29] MISES, BUREAUCRACY, *supra* note 14, at 22-23.

> his branch as much as possible. It would become impossible for the top executive to keep the expenditures within the appropriations allocated by the representatives of the people or within any limits whatever. It is not because of punctiliousness that the administrative regulations fix how much can be spent by each local office for cleaning the premises, for furniture repairs, and for lighting and heating. Within a business concern such things can be left without hesitation to the discretion of the responsible local manager. He will not spend more than necessary because it is, as it were, his money; if he wastes the concern's money, he jeopardizes the branch's profit and thereby indirectly hurts his own interests. But it is another matter with the local chief of a government agency. In spending more money he can, very often at least, improve the result of his conduct of affairs. Thrift must be imposed on him by regimentation.
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> In public administration there is no connection between revenue and expenditure. The public services are spending money only; the insignificant income derived from special sources (for example, the sale of printed matter by the Government Printing Office) is more or less accidental. The revenue derived from customs and taxes is not "produced" by the administrative apparatus. Its source is the law, not the activities of customs officers and tax collectors. It is not the merit of a collector of internal revenue that the residents of his district are richer and pay higher taxes than those of another district. The time and effort required for the administrative handling of an income tax return are not in proportion to the amount of the taxable income it concerns.
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> In public administration there is no market price for achievements. This makes it indispensable to operate public offices according to principles entirely different from those applied under the profit motive.
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> Now we are in a position to provide a definition of bureaucratic management: Bureaucratic management is the method applied in the conduct of administrative affairs the result of which has no cash value on the market. Remember: we do not say that a successful handling of public affairs has no value, but that it has no price on the market, that its value cannot be realized in a market transaction and consequently cannot be expressed in terms of money.[30]

Although the actions of those involved with the courts do not produce transactions of the market type as Mises described, they clearly are valuable to at least some individuals. To paraphrase

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[30] *Id.* at 46-47.

Rothbard, while there is not *organizational profit*, there certainly is *psychic profit* for individuals who benefit from the system. The economic calculus that is involved is one that will be geared to provide the most psychic profit to those who have the power to shape the direction of court actions. It is not that economic calculation *fails to exist* in a setting like government courts; instead, the economic calculation of the free market is replaced with a calculation that is geared toward claiming benefits for individuals within the system, political or otherwise.

A couple of years ago, I attended a session on law and economics at the annual meeting of the Eastern Economic Association. One of the session participants presented a theory of prosecution based upon the "maximization of a social utility function." The participant apparently was not familiar with Arrow's Impossibility Theorem,[31] nor was the participant able to articulate what would constitute the "greater good of the community" in such a situation. Indeed, every prosecutor will say something to the effect of "serving the community," but something as nebulous as "the public good" simply cannot serve as a mechanism for determining the daily workings of the courts.

Thus, how does one apply Austrian theory to the courts? One begins where this section begins, realizing that governments cannot repeal the Law of Scarcity. Thus, all components of *any* economic action fit here, from the fact that the courts are directed by *individuals* who engage in a means-end framework to achieve personal goals or psychic profit. In short, one still can apply economic analysis to their actions.

The Public Choice School applies neo-classical economic analysis to legislative votes, although the school has not developed any meaningful analysis of the courts themselves.[32] This is understandable, given the methodology used by Public Choice practitioners of examining the voting process as a mechanism of utility maximization.[33] Still, portions of the larger analysis developed in Public Choice is useful, in that it eliminates the bifurcated analysis of "private" versus "public" behavior.[34] Robert E. McCormick and Robert D. Tollison wrote:

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[31] *See* ALEX TABARROK, ARROW'S IMPOSSIBILITY THEOREM (2005), http://mason.gmu.edu/~atabarro/arrowstheorem.pdf.

[32] *See* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT (1981).

[33] *See id.*

[34] *See id.*

> The interest-group approach to politics implies that the behavior of political actors within given political institutions can be usefully analyzed by following the guideline that individual economic agents obey the postulates of self-interest generally, whether they are participating in a market or non-market setting. Put in so many words, politicians are not different from anyone else. They are economic agents who respond to their institutional environment in predictable ways, and their actions can be analyzed in much the same way as economists analyze the actions of participants in market processes.[35]

Keep in mind, however, that McCormick and Tollison are speaking of *empirical* analysis in which economists use statistical analysis to "test" the propositions of whether or not politicians engage in market-oriented, self-interested behavior while acting in a legislative capacity.[36] Furthermore, these individuals still are "maximizing utility" subject to constraints, which has somewhat different connotations than the "psychic profit" approach. Moreover, the Austrian approach emphasizes *a priori* analysis, not *a posteriori,* as it is popular in the neo-classical mainstream.[37]

This is not to say that the Tollison-McCormick approach is not helpful. Indeed, it does remind us that individuals do not suddenly turn on a "public interest" switch just because they become government employees. Likewise, Armen A. Alchian and William R. Allen also give a picture of what happens when one takes profit out of the picture:

> In a capitalist economy, the increase in marketable wealth belongs to an identifiable owner. However, if there were no owner – no one who was able to keep the increase - the selection of inputs would be more influenced by nonmarketable productivity. More congenial colleagues might be employed by such an operator if the gains of hiring lower-salaried workers who were equally productive of *marketable* values of goods could not be retained. For example, a legal limit on income or a heavily taxed income would induce employers to hire employees with more nonmonetary appeal to them – good looks, or shared race, ethnic background, religious affiliation, and the like. Production will be less closely oriented to market-valued demands.[38]

Yet, there still must be some sort of production. In the case of the courts, the production (disposition of cases) will be maneuvered in

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[35] *Id.* at 5.
[36] *See id.*
[37] *See* Murray Rothbard, *In Defense of Extreme Apriorism*, 23 S. ECON. J. 314 (1956).
[38] ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE & PRODUCTION 176 (1983).

a way that will most benefit the participants of the system, who then must contend with the real elements of scarcity to see which cases will be pursued, by whom, and what resources will be used.

There is another important element that will figure in the economic calculation of the courts: who pays. Prosecutors, police officers, and judges spend those resources provided by taxpayers, while those in the dock must depend upon their own resources to defend themselves. This is not to say that government employees have *unlimited* resources, but rather that the situation exists, as explained by Milton Friedman,[39] in which someone is spending someone else's money on someone else.

This does not mean that individuals who are charged with crimes have no defense. In order to avoid what at the time seemed to be a certain conviction for murder, O.J. Simpson spent an estimated $4 million of his own money for a legal defense team that succeeded in placing "reasonable doubt" in the minds of jurors.[40] However, the reality is that most individuals are not able to match the financial resources that are made available to prosecutors.

I have a friend who faced federal charges under the so-called RICO statutes in which the government froze his assets pre-trial. He had to dismiss his own counsel and was left with the choice of using a federal public defender who mostly pleaded out drug cases or representing himself. He chose to represent himself, openly realizing the old adage that "he who represents himself has a fool for a client." Candice E. Jackson and I lay out a longer account of his case in a 2004 paper in *The Independent Review*.[41]

The rewards to individuals in the system vary. Prosecutors who win cases obviously benefit in both monetary and non-monetary ways. Successful prosecutors are more likely to receive promotions and raises, and those prosecutors who have high conviction rates (especially on state levels) who run for election are likely to be re-elected. In the examples I am giving, the pursuit of a hoax did not endanger the re-election chances of the prosecutors – in fact, they helped the prosecutors win. However, one of them, Michael B. Nifong of Durham County, North Carolina, ultimately faced serious ethics charges from the North Carolina State Bar in conjunction

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[39] MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE (1980).

[40] "[Simpson's] criminal case cost at least $3 million, possibly as much as $6 million." Richard Price, Jonathan T. Lovitt, & Gale Holland, *Fight Over Money may Follow Court Battle*, USA TODAY, Jan. 28, 1997, at 3A, *available at* http://www.usatoday.com/news/index/nns183.htm.

[41] William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 INDEP. REV. 85 (2004).

with his case, and he was disbarred.[42] He faces possible civil losses in the future, but at this writing he has not suffered any more consequences other than losing his law license and his job as Durham County District Attorney, as well as a symbolic day in jail.[43]

There is another important point to remember, the public predilection for believing prosecutors and judges. While the standard for conviction is "guilty beyond a reasonable doubt," jurors still are likely to believe (or at least *want* to believe) prosecutors, something that Rabinowitz pointed out occurred in a number of the so-called child molestation witch hunts of the 1980s.[44] Furthermore, the seriousness of the charges made it difficult for opposing views to be published, and, as Rabinowitz noted, defendants in such cases not only found hostile jurors, but also hostile judges.[45]

The ethics charges against Nifong might be seen as a downside of pursuing a hoax, but that is not entirely accurate. It is clear, given North Carolina's grand jury system which is dominated by prosecutors, that Nifong could have gained his indictments against the three Duke lacrosse players even without having committed the acts for which he is charged. Furthermore, the charges against him stem not from the hoax itself, but rather because of actions that he took that were intended to make it easier for him to win a conviction, had he been able to take the case to trial. In the next section, I examine both the Snowden and Duke cases and apply the Austrian principles which have previously been discussed.

III. THE SNOWDEN AND DUKE CASES

Grant Snowden was a police officer in Dade County, Florida, in the early 1980s, and, according to Rabinowitz, he was highly decorated.[46] In 1984, he confronted another police officer after he found welts and bruises on the face of that officer's child for whom his wife had been baby-sitting.[47] However, the other officer retaliated by claiming Snowden had performed a sexual act on the child.[48]

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[42] Joseph Neff, Anne Blythe, & Mandy Lock, *Nifong Stripped of Law License for Misconduct*, NEWS & OBSERVER, June 17, 2007, at 1A.

[43] Anne Blythe & Joseph Neff, *Nifong Gets 24 Hours in Jail for Contempt*, NEWS & OBSERVER, Sept. 1, 2007, *available at* http://www.newsobserver.com/news/crime_safety/duke_lacrosse/nifong/story/689305.html.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Janet Reno, who at that time was the state's attorney for Dade County, was attempting to build a reputation as a "child advocate" and announced that her office was investigating Snowden. While that charge fell apart, Reno decided to further investigate Snowden and her office began to question other children.[49]

For those who are not familiar with what happened during the 1980s and early 1990s, a very familiar pattern developed from the infamous McMartin case in Manhattan Beach, California, to Wenatchee, Washington. Investigators (who often had dubious professional credentials) would question children with what Rabinowitz called "'let's pretend' games and . . . exhortations and explicit sexual suggestions."[50] Investigators would use "anatomically-correct dolls" to have children "demonstrate" what happened to them.[51]

As Rabinowitz pointed out, in all of the cases, children would tell investigators that "nothing" happened. The investigators would come back with more questions until the children would "disclose" what investigators wanted to hear. Again, the pattern of questioning for those who have followed these cases was similar across the country, something the "child advocates" and judges somehow failed to notice.[52]

Reno put Snowden on trial three times. The first two times, juries acquitted him, as prosecutors often presented conflicting evidence. The third time, however, a jury convicted him. According to Rabinowitz's account of the trial, Reno claimed Snowden had given a four-year-old girl a venereal disease, but the state destroyed the physical evidence before the trial, making it hearsay. Furthermore, Judge Amy Lee Donner, who clearly was hostile to the defense, refused to permit a specialist in sexually-transmitted diseases to testify because he was not a "specialist" in "sexually transmitted diseases in children," credentials the doctor explained did not exist, since the medical procedures in that area for children and adults are the same. To put it mildly, the trial effectively was rigged.[53]

Snowden was duly convicted and sentenced to five life sentences. No state appeals court, nor the Florida Supreme Court,

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[49] RABINOWITZ, *supra* note 11, at 49.
[50] *Id.* at 52.
[51] *Id.*
[52] *Id.*
[53] *Id.*

would hear his case. However, in 1998, a federal appeals court overturned the conviction and Snowden was freed.[54]

The Duke case has been well-played in the news media since it broke in March of 2006. The details of the story have been in the news and on a half-dozen blogs, as well as in a number of articles which I have written. For brevity's sake, I will go over the bare outline of this case.

An African-American stripper (called "exotic dancer" in the press) "performed" at a spring break party hosted by some members of the Duke University lacrosse team in Durham, North Carolina, very early on the morning of March 14, 2006. During the performance, the woman told police that she had been assaulted, beaten, and raped by three white males, something that no one else at the party – including the stripper's partner – says that they observed.[55]

However, the local district attorney, Michael Nifong, was running behind in a primary race for that office (he had been appointed in 2005 to that office by Governor Mike Easley), and he soon took over the case and gave about 70 interviews, according to his own accounts.[56] In many of those interviews he declared members of the team guilty of rape, statements which ultimately would be found by the state bar to have violated codes of conduct set by the state bar. On April 17, two weeks before the election, Nifong secured indictments against lacrosse team members Finnerty and Seligmann and later indicted David Evans. Nifong also won the primary, and would win the general election in November 2006.[57]

Despite Nifong's claims that he was "sure" that there was a rape, the kind of activity the woman described – including nude men raping her without wearing condoms – left no DNA traces whatsoever of *any* Duke lacrosse player. (Lab investigators found the DNA of seven other men who had engaged in sexual activity with her, despite her claims that no one other than the lacrosse players had done anything with her for more than a week.)[58]

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[54] Dororthy Rabinowitz, Afterwards, *Freedom is never the same for those who've been to prison on phony charges*, WALL ST. J., Dec. 30, 2000, at A16, *available at* http://opinionjournal.com/editorial/feature.html?id=80000393.

[55] Samiha Khanna & Anne Blythe, *Dancer Gives Details of Ordeal*, NEWS & OBSERVER, Mar. 24, 2006, http://www.newsobserver.com/102/story/421799.html.

[56] Durham-In-Wonderland, Overall Case Narrative, *supra* note 6.

[57] *Id.*

[58] Joseph Neff, Benjamin Niolet, & Anne Blythe, *Lab Chief: Nifong Said Don't Report All DNA Data*, NEWS & OBSERVER, Dec. 16, 2006, http://www.newsobserver.com/1185/story/522112.html.

There was strong exculpatory evidence elsewhere, something Nifong refused even to acknowledge, despite the codes of conduct of his office. The photo line-up in which the woman "identified" her alleged assailants also went against the policies of the Durham Police Department.[59]

Even with attorneys releasing some (but certainly not all) of the exculpatory evidence, many in the community supported Nifong, including a sizeable number of faculty members from Duke University.[60] However, because Nifong allegedly conspired with the director of a private DNA laboratory to withhold some DNA results that clearly were exculpatory, the North Carolina State Bar charged him with numerous violations, including lying to the court and to the bar itself. In early January, Nifong asked to be off the case,[61] which was taken over by North Carolina Attorney General Roy Cooper, who then dropped charges.

Both cases, I believe, fall into the paradigm that I have laid out in the previous sections. First, and most important, these cases were hoaxes. The evidence simply did not fit the charges – even though a jury actually convicted Snowden. Second, prosecutors individually benefited from pursuing the charges, with Reno becoming U.S. Attorney General and Nifong winning the election. As pointed out earlier, it should be noted that Nifong did not face legal troubles because he pursued the case, but rather because of the manner in which he pursued it. In both cases, prosecutors were aided by sympathetic judges, Reno by Judge Donner[62] and Nifong by his former supervisor, Judge Ronald Stephens, who had been a prosecutor, and Nifong's boss, before being elected a judge in Durham County.[63]

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[59] Durham-in-Wonderland, The Gottlieb Files, http://durhamwonderland.blogspot.com/2007/08/gottlieb-files.html (Aug. 7, 2007, 00:01 EST).

[60] Durham-in-Wonderland, A Lubiano "Publication," http://durhamwonderland.blogspot.com/2008/04/lubiano-publication.html (Apr. 23, 2008, 00:09 EST).

[61] Anne Blythe, Joseph Neff, & Michael Biesecker, *Nifong Steps Aside*, NEWS & OBSERVER, Jan. 13, 2007, http://www.newsobserver.com/news/crime_safety/duke_lacrosse/story/532014.html.

[62] *See* RABINOWITZ, *supra* note 11.

[63] *See* Durham-in-Wonderland, The Hon. Ronald L. Stephens, http://durhamwonderland.blogspot.com/2007/04/hon-ronald-l-stephens.html (Apr. 2, 2007, 00:11 EST). Stephens ultimately turned the case to another judge, and it ultimately fell into the hands of W. Osmond Smith III, who forced Nifong to give up material he was hiding in violation of North Carolina's Open Discovery Law, now is in charge. *See* Durham-in-Wonderland, On Judge Smith,

Due to the various legal protections and the lack of accountability for prosecutors embedded in North Carolina law, Nifong was able to pursue indictments even though he had no physical evidence of rape and no eyewitnesses save the accuser herself. Because of the publicity the case received, Nifong instantly became well-recognized and, for a while, was a real celebrity in Durham's African-American community, which solidly backed all the criminal charges.[64] (Nifong is white, but is a Democrat, as are almost all elected officials in Durham County.)

The disparity of who pays is also evident. In the Snowden case, Reno was able to try the cases on three occasions, while the state picked up the expenses, while Snowden's personal finances were exhausted.[65] In the Duke case, I have been told by representatives of the three families of the defendants that they faced more than $3 million in legal fees.[66] Clearly, this is a financial picture that favors prosecutors.

Furthermore, the explosive nature of these cases guarantees that they will be very expensive. In the mid-1980s, the McMartin case was one of the most expensive cases in California history and at the time was the longest trial in the criminal history of this country.[67] The Little Rascals case in Edenton, North Carolina, of the late 1980s and early 1990s (with convictions that were later overturned – a typical pattern in child molestation hoaxes) up to then was the most expensive case in the history of North Carolina.[68]

One can apply the Austrian theory of economic calculation here. According to Mises and Rothbard, socialism fails because of the lack of an effective accounting mechanism to tell which factors of production (or "producers' goods") should be used for which purposes. The absence of private property and market prices, they argued, would make economic calculation impossible to achieve. Instead, we see economic calculation replaced by a political calculation which could be financed through coercive means (taxation).

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http://durhamwonderland.blogspot.com/2007/09/on-judge-smith.html (Sept. 3, 2007, 00:01 EST).

[64] Posting of maggief to ZetaBoards, http://s1.zetaboards.com/Liestoppers_meeting/topic/343026/?author=102425 (June 12, 2008, 09:07 EST).

[65] *See* RABINOWITZ, *supra* note 11, at 15.

[66] *See* Anne Blythe & Joseph Neff, *Nonprofit Raises $750,000 Toward Lacrosse Defense*, NEWS & OBSERVER, Feb. 6, 2007, http://www.newsobserver.com/1185/story/540218.html.

[67] *See* Robert Reinhold, *How Lawyers and Media Turned the McMartin Case into a Tragic Media Circus*, N.Y. TIMES, Jan. 25, 1990, at 1D.

[68] *See Innocence Lost* (PBS television broadcast May 27, 1997), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/.

Certainly, the courts have used vast resources to pursue hoaxes, and the lack of an effective accounting mechanism ensures that prosecutors will expend large amounts of resources that could have gone elsewhere to dispose of "legitimate" cases. While government courts are socialistic enterprises, nonetheless they do not have the power to end scarcity, so prosecutors ultimately continue to push transparently false charges at the expense of justice, not only for those who must defend themselves from false charges, but also to those who are forced to stand in line and wait longer than would be the case if the hoax did not exist.

IV. CONCLUSION

In this paper, I have discussed Austrian approaches to analyzing why criminal courts pursue hoaxes. This is not a claim that the various actors in the court system that perpetuate the hoaxes are acting as representatives of *Homo Economicus*. Yes, they are self-interested agents who work purposefully using the means-end framework that is well-explained in Austrian literature.

However, there is a form of economic calculation at work that permits these hoaxes to continue. In the absence of market prices and private property, one sees the economic calculation that Mises and Rothbard held is necessary for an advanced economy to exist replaced by a system of political calculation that is aimed at benefiting the individuals employed within the system.

Unfortunately, these individuals also have the force of law behind them, and the laws of the court system grant many of these actors either full or qualified immunity. Like entrepreneurs who might take on a project with little worry about having to absorb losses, these actors in the system – prosecutors, judges, and investigators – find that there is little downside for pursuing hoaxes, but the potential rewards for success can be enormous.

Obviously, juries that convict and much of the public that supports convictions in cases that are hoaxes do not see things this way. They believe that justice has been served, and even if the original tales might have been fanciful, *something* must have happened. Unfortunately, that *something* turns out to be the product of one's imagination, but it is a project that people will pursue when there are rewards given to those who achieve legal success.