

The Kings of the Courtroom: How Prosecutors Came to Dominate the Criminal-Justice System

*Oct 4th 2014, New York and
Washington, DC, The Economist*

Background Information

The following article is about the power of prosecutors. It quotes Judge's as saying that even they don't think the power that prosecutors have is just. Unfortunately, this is the world we live in, and its one of the reason why its so important to have a competent attorney who is familiar with the local prosecutor's office to navigate these treacherous waters.

- Johanna Zapp, Esq.

CAMERONTODDWILLINGHAM was accused of murdering his daughters in 1991 by setting fire to the family house. The main evidence against him was a forensic report on the fire, later shown to be bunk, and the testimony of a jailhouse informant who claimed to have heard him confess. He was executed in 2004.

The snitch who sent him to his death had been told that robbery charges pending against him would be reduced to a lesser offence if he co-operated. After the trial the prosecutor denied that any such deal had been struck, but a handwritten note discovered last year by the Innocence Project, a pressure group, suggests otherwise. In taped interviews, extracts of which were published by the Washington Post, the informant said he lied in court in return for efforts by the prosecutor to secure a reduced sentence.

"The prosecutor has more control over life, liberty and reputation than any other person in America," said Robert Jackson, the attorney-general,

in 1940. As the current attorney-general, Eric Holder, prepares to stand down, American prosecutors are more powerful than ever before.

Several legal changes have empowered them. The first is the explosion of plea bargaining, where a suspect agrees to plead guilty to a lesser charge if the more serious charges against him are dropped. Plea bargains were unobtainable in the early years of American justice. But today more than 95% of cases end in such deals and thus are never brought to trial.

The pressure to plead guilty:

Jed Rakoff, a district judge in New York, thinks it unlikely that 95% of defendants are guilty. Of the 2.4m Americans behind bars, he thinks it possible that "thousands, perhaps tens of thousands" confessed despite being innocent. One reason they might do so is because harsh, mandatory-minimum sentencing rules can make such a choice rational. Rather than risk a trial and a 30-year sentence, some cop a plea and accept a much shorter one.

In such negotiations prosecutors "hold all the marbles", says Alexandra Natapoff of Loyola Law School. Mandatory sentencing laws prevent judges from taking into account all the circumstances of a case and exercising discretion over the punishment. Instead, its severity depends largely on the charges the prosecutor chooses to file. In complex white-collar cases, they can threaten to count each e-mail as a separate case of wire fraud. In drugs cases they can choose how much of the stash the dealer's sidekick is responsible for. That gives them huge bargaining power. In Florida 4-14g of heroin gets you a minimum of three years in prison; 28g or more gets you 25 years.

In 1996 police found a safe in Stephanie George's house containing 500g of cocaine. She said it belonged to her ex-boyfriend, who had the key and admitted that it was his. Prosecutors could have charged Ms George with a minor offence: she was obviously too broke to be a drug kingpin. Instead they charged her for everything in the safe,

as well as everything her ex-boyfriend had recently sold—and for obstruction of justice because she denied all knowledge of his dealings. She received a mandatory sentence of life without the possibility of parole. Her ex-boyfriend received a lighter penalty because he testified that he had paid her to let him use her house to store drugs. Ms George was released in April, after 17 years, only because Barack Obama commuted her sentence.

Under Mr. Holder the federal mandatory-minimum regime has been softened for non-violent drug offences. But this has only curbed the power of federal prosecutors, not state ones, and only somewhat.

Another change that empowers prosecutors is the proliferation of incomprehensible new laws. This gives prosecutors more room for interpretation and encourages them to overcharge defendants in order to bully them into plea deals, says Harvey Silverglate, a defence lawyer.

The same threats and incentives that push the innocent to plead guilty also drive many suspects to testify against others. Deals with "co-operating witnesses", once rare, have grown common. In federal cases an estimated 25-30% of defendants offer some form of co-operation, and around half of those receive some credit for it. The proportion is double that in drug cases. Most federal cases are resolved using the actual or anticipated testimony of co-operating defendants.

Co-operator testimony often sways juries because snitches are seen as having first-hand knowledge of the pattern of criminal activity. But snitches hoping to avoid draconian jail terms may sometimes be tempted to compose rather than merely to sing.

Sing or suffer

It is not unusual for a co-operator to have 15 or 20 long meetings with agents and prosecutors. It is hard to know what goes on in these sessions because they are not recorded. Participants take notes but do not have to write down everything that is said; nor do they have to share all their notes with the defense.

Co-operators have become more common in corporate cases since the Justice Department started bringing in more lawyers experienced in dealing with organised crime. Business cases typically involve mountains of hard-to-fathom documents and turn not on actions but intent. Often, the only way

to convince a jury that the defendant knew a transaction was dodgy is to have a former colleague say so.

A common way to recruit co-operators is to name lots of a defendant's colleagues as "unindicted co-conspirators". An unindicted co-conspirator can be indicted at any moment; his lawyer will therefore usually advise him, at the very least, not to annoy the prosecutor by helping the defense.

Disquiet over prosecutorial power is growing. Several states now require third-party corroboration of a co-operator's version of events or have barred testimony by co-operators with drug or mental-health problems. Judge Rakoff proposes two reforms: scrapping mandatory-minimum sentences and reducing the prosecutor's role in plea-bargaining—for instance by bringing in a magistrate judge to act as a broker. He nevertheless sees the use of co-operators as a "necessary evil", though many other countries frown upon it.

Prosecutors' groups have urged Mr. Holder not to push for softer mandatory-minimum sentences, arguing that these "are a critical tool in persuading defendants to co-operate". Some defend the status quo on grounds of pragmatism: without co-operation deals and plea bargains, they argue, the system would buckle under the weight of extra trials. This week Jerry Brown, California's governor, vetoed a bill that would have allowed judges to inform juries if prosecutors knowingly withhold exculpatory evidence.

Most prosecutors are hard-working, honest and modestly paid. But they have accumulated so much power that abuse is inevitable. As Jackson put it all those years ago: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts with malice or other base motives, he is one of the worst."

How This Man Built A \$3M Business A Year After Four Years In Prison

By Hollie Slade, *Forbes Magazine*
Edited by Johanna S. Zapp, Esq.

Frederick Hutson is a man who sees business opportunities in everything.

By his own admission, this doesn't always work out for the best. Hutson spent over four years in prison after getting busted for an opportunity he saw in drug trafficking, a huge market, and one that was as he saw it, ripe for disruption. Police busted him at his Vegas mail store, where he'd been reducing inefficiencies by rerouting marijuana through his Florida business via FedEx, UPS and DHL.

Hutson, who'd built several businesses before and after a stint in the Air Force, which he left with an honorable discharge, began meditating on new ideas soon after he started his 51-month sentence in 2007, aged 24. "I did my time that way," he says. "While I was there I just saw how grossly inefficient the prison system was and there was just so many opportunities."

A big gripe for the 2.3 million doing time in the US is keeping in touch with friends and family on the outside. There's no internet in prison so all communication is through snail mail or the phone. Calls are often expensive and long distance. Relatives and friends, leading increasingly digitized lives, write less and don't get around to sending photos for weeks on end.

"It was a pain point I experienced firsthand," says Hutson. "I'm very close with my family and I knew they cared about me but even with knowing how much they cared about me they were still sometimes unable to send me photos."

Transitioning from digital to analog is tough, says Hutson. It's hard to sit down and write a letter now but simple to text or email. What if you created a website that printed out emails, texts or photos from your computer, Facebook or Instagram and mailed them for you in the plain white envelopes these institutions favored?

The idea for Pigeonly was born. Essentially, it's a platform that centralizes the myriad state-level databases making it a quick search to find where an inmate is in the system – Hutson himself was moved eight times during his stay – as well as a way to communicate. "People get lost in the system all the time," he explains. "We have attorneys contacting us trying to find their clients."

When he started as part of the winter 2013 cohort, he and his cofounder Alfonso Brooks had already launched a version of Pigeonly while Hutson was still in his halfway house. They'd quickly picked up 2,000 customers by

directly mailing inmates touting their services.

"In the very beginning I was hesitant to even talk about my background but the question would always come up, well how do you know?" he says.

NewMe's founder Angela Benton gave Hutson some advice. "She said, look some people are not going to vibe with you and they're not going to be able to get on board with what you're doing – there's going to be a block because you've been in prison and you don't look like the typical person they invest in," he remembers.

When he focused instead on the people who were open and understood that his background was why he knew this problem exists he started gaining ground. "A lot of times a thing that can be perceived as a weakness actually turn into the greatest strength and for me it was that. It actually became the reason people invested – because I'd been there, and I know and understand this market better than anybody else," he says.

Hutson thinks prisons are a natural pool of entrepreneurs. "When you take away that seven percent or so that did something violent that people are afraid of, people who we need to have locked up, most of the other guys were selling drugs or involved in some kind of scam or did some kind of wire fraud, or white collar crime that was motivated by finances," he says. "So you just really got the business model wrong, you got the product wrong, the goal was wrong but if you can apply that same drive and bottom line principles to something positive then now you have a viable business."

David Zapp and Johanna Zapp articles are available on the web at <http://davidzapp.com>

Mr. Zapp and Ms. Zapp (daughter) are criminal defense lawyers specializing in narcotics, extradition and money laundering cases.

Mr. Zapp can be contacted at 917-414-4651 or davidzapp@aol.com.

Ms. Zapp can be contacted at 917-742-4953 or jszapp@aol.com

Write to us:
Legal Publications in Spanish
P. O. Box 5024
ATTN: David Zapp, Johanna Zapp
Montauk, NY 11954

