

# **CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE**

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## **Class Six - Part One Prosecutorial Discretion**

[The prosecutor] is the representative not of an ordinary party to a controversy but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

- *Berger v. United States*, 295 U.S. 78, 88 (1935)

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

- Attorney General Robert Jackson, Address to United States Attorneys, April 1, 1940, 24 J. AM. JUDICATURE SOC. 18 (1940)

The-law-on-the-street – the law that determines who goes to prison and for how long – is chiefly written by prosecutors, not by legislators or judges.

- William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004)

The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning, but without understanding.

- Justice Louis Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 479 (1928)



## **BOB MACY STANDS ON HIS RECORD.**

- 44 Murderers Put on Death Row
- 30,000 Felons Sent To Prison
- 15,000 Juvenile/Gang Crimes Prosecuted
- 85,000 Criminal Cases Prosecuted
- \$10,000,000 of Bogus Checks And Fees Returned to Victims
- 14 Years Endorsed by Oklahoma City Fraternal Order of Police

**VOTE BOB MACY  
OKLAHOMA COUNTY DISTRICT ATTORNEY**

Filed for by Bob Macy Campaign, John Carl Peterson

Legislatures enact laws criminalizing certain behavior and providing penalties for violations. They decide whether some acts are severely punished as felonies with substantial sentences or treated as misdemeanors with sentences of a year or less. Quite often, they may provide for both, such as laws defining and prohibiting “simple assault,” a misdemeanor, and “aggravated assault,” a felony punishable by years in prison.

Legislatures set the maximum punishment for offenses and may provide for mandatory sentences for certain crimes, or a mandatory minimum of prison time before a person is eligible for parole or release. With regard to capital punishment, legislators decide whether a state will have the death penalty and, if so, provide for the process for considering it and the aggravated circumstances required for its imposition.

Legislators have an impact on the way laws are enforced through their appropriations for law enforcement agencies and prosecutors. For example, the state and federal governments have reduced funding for enforcement of wage and hour laws, even though the amount of money stolen out of employees’ paychecks every year (over \$185 million) is far greater than the combined total stolen in all the robberies of banks, gas stations and convenience stores in the country (about \$56 million).<sup>1</sup> A survey in 2009 revealed that 64 percent of low-wage workers have some amount of pay stolen out of their paychecks by their employers every week as employers violate minimum-wage, overtime, and other wage and hour laws. The average low-wage worker loses \$2,634 per year in unpaid wages, representing 15 percent of their earned income. But without sufficient resources to enforce the laws, this theft of wages will continue.

Federal grants also influence law enforcement priorities. Many state and local law enforcement

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1. Gordon Lafer, *THE LEGISLATIVE ATTACK ON AMERICAN WAGES AND LABOR STANDARDS, 2011–2012*, Economic Policy Institute Briefing Paper No. 364 at 28-30 (Oct. 31, 2013) [www.epi.org/publication/attack-on-american-labor-standards](http://www.epi.org/publication/attack-on-american-labor-standards).

agencies give a higher priority to drug enforcement – even paying overtime to offices for arresting people using small amounts of marijuana<sup>2</sup> – than other crimes because of anti-drug grants from the Department of Justice.

Criminal laws as written may have a discriminatory impact. For example, a law providing that someone selling drugs within 1000 feet of a school may result in more black and brown children being prosecuted as adults for that crime. And discrimination is an issue with regard to the application of criminal laws because of the many discretionary decisions that are made throughout the process – from stops by law enforcement officers to decisions by prosecutors with regard to what crime to charge, what plea offer to make, and what sentence to seek.

In these materials, we examine the role of prosecutors in exercising the broad authority in deciding what laws to enforce, how to enforce them, and the punishments to be imposed for violations. The practices and policies of prosecutors vary widely from jurisdiction to jurisdiction (*e.g.*, federal, state, municipal) and from one prosecutor’s office to another’s within jurisdictions. The following describes some of the recurring issues in exercise of the prosecution function.

### **Selection of prosecutors**

In most states, prosecutors – usually called District Attorneys or State’s Attorneys – are elected in judicial districts every four years and, so long as they do not violate any laws or commit any serious breach of ethics for which they could be suspended or disbarred from law practice, answer only to the voters who elected them. In a few states, such as Connecticut, prosecutors are appointed and subject to periodic review of their

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2. Radley Balko, *Anatomy of a pot bust*, WASHINGTON POST, June 5, 2014, (describing the influence of federal grants on the arrest by five police officers, two working overtime, of a person with less than an ounce of marijuana in Golden State Park in San Francisco; the person was acquitted by a jury after a trial.)

performance.

Most state prosecutors operate independently of each other and may pursue different policies and practices in carrying out their duties. Attorneys General in most states are elected, but generally have no power to control the actions of local prosecutors. However, attorneys general may have the power to convene special grand juries to investigate crimes or have other authority to initiate investigations and prosecute crimes.

In the federal system, the Attorney General and United States Attorneys are appointed by the President, subject to Senate confirmation. The Attorney General is responsible for supervising and conducting prosecutions in the federal courts. 28 U.S.C. §§ 516-520. However, the Attorney General delegates most of those responsibilities to the U.S. Attorneys in each federal district, who have a great deal of autonomy in running their offices.

Regardless of how prosecutors are selected, the position may be a stepping stone to higher office. State prosecutors often go on to become judges, attorneys general, governor and senators. Federal prosecutors have been known to have political ambitions as well. Rudolph Giuliani is one of many people whose service as United States Attorney was a factor in helping them obtain elective office. He followed in the footsteps of Thomas Dewey who, as U.S. Attorney for the Southern District of New York and later as a special prosecutor for New York County, prosecuted high profile cases on the way to becoming governor of New York and the Republican candidate for president in 1944 and 1948.<sup>3</sup>

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3. For a colorful and tragic story of a prosecutor's use of a high profile case to obtain higher office, see Mike Dash, *SATAN'S CIRCUS: MURDER, VICE, POLITICAL CORRUPTION AND NEW YORK'S TRIAL OF THE CENTURY* (2007), describing Manhattan District Attorney Charles Whitman's pursuit of the death penalty in 1912 for a police lieutenant. Although the lieutenant was almost certainly innocent, Whitman obtained the death penalty – the first death sentence imposed on a police officer. The case catapulted

### **Prosecutorial discretion**

Prosecutors have broad authority in prosecuting and resolving criminal cases. Among other things, prosecutors decide whether to charge, what charges to bring in instances where the same behavior may be prosecuted under several different statutes with different penalties, when to charge, whether to charge in state or federal court or both, and whether to seek enhanced penalties such as mandatory minimum sentences, life imprisonment without parole or the death penalty. They decide whether and how to resolve cases with plea bargains in which they agree to reduce the charges or agree to a lesser sentence or make some other concession in exchange for the defendant's entry of a guilty plea and waiver of a trial by jury and any appeals. Prosecutors have a power that no other litigant has – the ability to reward witnesses for providing testimony that supports their prosecutions. Prosecutors may dismiss or reduce charges, provide monetary rewards, place witnesses in witnesses protection programs and give other rewards in exchange for testimony.

Prosecutors, usually working with law enforcement agencies, set policies and priorities for with regard to the allocation of resources and pursuit of investigations in the many areas subject to criminal jurisdiction. The way in which personnel and resources are allocated has an impact on what crimes are prosecuted and the way in which they are prosecuted.<sup>4</sup> As previously noted, funding to investigative agencies also influence what illegal behavior is prosecuted and what is not, as do federal grants to state and local law enforcement agencies.

Prosecutors and law enforcement agencies almost always respond to violent crimes such as

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Whitman to governor of New York in 1915.

4. See Harvey Silvergate, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (Encounter Books 2009) (arguing that federal criminal law is so comprehensive and vague that all Americans violate it every day, meaning prosecutors can prosecute anyone at any time).

homicide, rape, robbery, kidnapping and carjacking. But they also decide how much personnel and resources to allocate to pursuit of crimes such as corruption in government or businesses, violation of the tax laws, trafficking in children, domestic violence, violation of drug laws, prostitution and other sex offenses, and enforcement of so-called “quality of life crimes” (such as loitering, jaywalking, and panhandling) that give officers discretion to arrest almost anyone, usually for the purpose of removing the homeless from public places. This is sometimes called “broken windows” policing.

Discretion is also exercised in the ways in which the laws are enforced. Law enforcement agencies decide where to send undercover agents to buy drugs. They decide whether to engage in aggressive stop-and-frisk practices. Prosecutors and law enforcement agencies decide whether to conduct “sting operations” and, if so, whether to direct those efforts at catching corrupt officials, drug dealers, protection rackets, people selling weapons, smugglers of illegal immigrants, people trafficking in people reduced to virtual slavery, people seeking sexual partners or others engaged in activities that might not otherwise come to light and be the subject of prosecution. In some instances, aggressive efforts may result in entrapment of a person who has no intention of committing a crime.<sup>5</sup>

Prosecutors decide in many jurisdictions whether children (usually those under age 18) will be prosecuted in adult or juvenile court. At one time – and still in some jurisdictions – a judge determined whether a child could be prosecuted as an adult. Today, many states have statutes which provide that children over a certain age, such as

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5. See, e.g., *Jacobson v. United States*, 503 U.S. 540 (1992) (finding federal prosecutors had failed to show that Keith Jacobson, a 57-year-old veteran and farmer who lived alone and supported his elderly father in Nebraska, was predisposed to commit a crime independent of the government’s two and one-half-year operation involving twelve solicitations from five separate government-created entities to entice Jacobson to purchase a magazine produced and mailed by the government depicting child pornography).

14, are to be prosecuted in adult court unless the prosecutor declines prosecution.<sup>6</sup> Only then is the case handled in juvenile court.

This power has significant consequences. A child convicted in adult court will be subject to an adult sentence, which may be a term of years or the rest of his or her life in prison, and may ultimately be sent to an adult prison. On the other hand, a child who is found delinquent in juvenile court may – at worst – be committed to a juvenile facility for a few years or until he or she reaches a certain age, such as 21.

Prosecutors decide such things as whether banks and corporations are “too big to jail” and whether perpetrators of financial crimes serve time in prison or pay fines to the government. For example, federal prosecutors accused JP Morgan Chase, the nation’s largest bank, of various criminal activities, some arising out of its relationship of more than 20 years with Bernard Madoff who ran a Ponzi scheme during that time. They reached a “deferred prosecution” agreement with the bank in which it paid more than \$1 billion in penalties to resolve the criminal charges. However, the bank itself – the buildings, cash and other assets – obviously did not make decisions; people working for the bank did. Nevertheless, prosecutors did not bring charges against any of the human beings at JP Morgan Chase who were responsible for the criminal activity and who, unlike the bank, could be sent to prison. This practice results in one class of criminals paying for their crimes with money – often someone else’s money – while other convicted criminals, usually those with no money, are sent to prison.

Prosecutors influence and often determine sentences by their charging and plea bargaining practices. The overwhelming majority of all convictions – 97 percent of all federal convictions and 94 percent of state convictions – are obtained

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6. See generally Rostyslav Shiller, *Fundamental Unfairness of the Discretionary Direct File Process in Florida: The Need for a Return to Juvenile Court Waiver Hearings*, 6 WHITTER J. CHLD & FAM. ADVOC. 13, 13 (2006).

through guilty pleas. Prosecutors decide whether and how to resolve cases with plea bargains in which they agree to reduce the charges or agree to a lesser sentence or make some other concession in exchange for the defendant's entry of a guilty plea and waiver of a trial by jury and any appeals.

There is no regulation of the plea bargaining process. Prosecutors may obtain guilty pleas by threatening severe sentences if defendants go to trial and offering more lenient ones if they plead guilty.<sup>7</sup> Prosecutors have extraordinary discretion to seek very substantial penalties for relatively minor conduct. Except for the maximum punishment for offenses, there is no limit on the gap between sentences that prosecutors deems fair and offer in plea bargains and the sentences they can obtain if the offer is refused. This pressure places great pressure on defendants to accept offers, rendering the prosecutor jury and sentencing judge.

After the federal sentencing guidelines were adopted in the Sentencing Reform Act of 1984, the power to decide sentences in federal cases shifted from judges to prosecutors. One critic said with regard to the guidelines, "Congress created a sentencing system that provides prosecutors tremendous leverage in the plea bargaining process, forced criminal defense attorneys to adopt the role of transactional attorneys rather than zealous advocates, and virtually eliminated the criminal jury as a viable check on government overreaching."<sup>8</sup> (Twenty years after their adoption, the guidelines were found to violate the

Sixth Amendment right to a jury trial in *Booker v. United States*, 543 U.S. 220 (2005), and became "advisory," but the federal courts still follow them and the appellate courts may reverse a sentence imposed by a district judge that out of line with the guidelines.)

Of course, defendants are always free to reject plea offers and insist on trial, but if they are convicted, the consequence will almost certainly be a more severe penalty than if the plea offer had been accepted.

Prosecutors may accept input from defense counsel in making some of their discretionary decisions. For example, some prosecutors are willing to hear from defense counsel with regard to whether the client should not be prosecuted as an adult or why the client should be accepted into a pre-trial diversion program.

#### **Decisions to seek the death penalty**

In the states, each local district attorney sets his or her own policies in the prosecution of cases. With regard to capital cases, no state which authorizes capital punishment has state-wide standards which govern whether the death penalty is to be sought. Thus, prosecutors in Philadelphia have sought the death penalty more often than those in Pittsburgh and prosecutors in Houston have sought death far more often than prosecutors in Dallas. In Connecticut, almost all of the death sentences were imposed in Waterbury because the district attorney there sought death far more often than prosecutors in other parts of the state.

In the federal system, the Attorney General has issued protocols regarding the determination of whether to seek the death penalty. Eligible cases are reviewed by a committee at the Department of Justice. Attorneys for the defendants in those cases may make a presentation to the committee as to why the government should not seek the death penalty in their cases. The committee makes a recommendation to the Attorney General who makes the final decision. A similar review is conducted with regard to plea bargains. Attorneys General John Ashcroft, Alberto Gonzalez, Michael Mukasey and Eric Holder, have have

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7. Human Rights Watch issued a report in December, 2013, "An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty," which details how federal prosecutors obtain guilty pleas from defendants in drug cases by charging or threatening to charge them with offenses carrying harsh mandatory sentences and offering much lower sentences in exchange for pleading guilty. Only three percent of drug cases go to trial. The report is at <http://hrw.org/node/120933>.

8. Jackie Gardina, *Compromising Liberty: a Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 373 (2005) (citations omitted).

overruled U.S. Attorneys with regard to plea bargains in several cases and required that cases go to trial.

A mixture of legal, political and other extra-legal factors may influence a prosecutor's decision to seek the death penalty in any particular case and whether to resolve a case with a plea disposition, such as the circumstances of the crime(s), the record of the defendant, nature of the crime, the strength of the prosecution's evidence, the amount of publicity regarding the crime, community sentiment, the prominence of the victim or the victim's family in the community, the opinions of members of the victim's family on whether to seek the death penalty, the competence of the defense attorney and the ability to mount a defense, the personal attitudes of the prosecutor regarding capital punishment and the political strength and ambitions of the prosecutor.

The two most important decisions that determine whether defendants are sentenced to death are made by prosecutors: whether to seek the death penalty and, if death is sought, whether to resolve the case with a plea bargain in which the defendant agrees to waive a trial and plead guilty in exchange for the prosecution agreeing to a sentence less than death (usually life imprisonment without possibility of parole). The overwhelming majority of capital cases are resolved by one of these two decisions. A substantial number of people executed and on death rows had the opportunity to avoid the death penalty by taking plea offers. But prosecutors do not always make plea offers and defendants are always free to reject the offer and go to trial.

### **Grand jury investigation and charging**

The federal government and many states require that a grand jury – a group of citizens that meets in secret, investigates cases and hears evidence presented by the prosecutor – make the final decision with regard to charging a person with a serious offense by voting on whether to issue an indictment. (Petit juries are the juries that hear and decide trials.) In some jurisdictions, grand juries also conduct investigations of government functions, such as the operation of jails, and issue

reports and make recommendations.

In deciding whether to issue an indictment, grand juries may issue subpoenas for documents or individuals. Prosecutors recommend what witnesses and documents to obtain and decide which witnesses to present to a grand jury. The defense has no right to present evidence to a grand jury. A prosecutor has no obligation to inform the grand jury of exculpatory evidence. *See United States v. Williams*, 504 U.S. 36 (1992).

Although historically the grand jury was to investigate cases in secret to protect people from being falsely and publicly accused of crimes, today most defendants have already been arrested and accused before the grand jury considers their cases. A person arrested before indictment, such as one arrested soon after a violent crime, may be informally charged by the prosecutor and, upon a finding of probable cause by a judicial officer, held in jail or released on bond before grand jury consideration of the case.

However, grand juries may conduct investigations into some crimes before any arrests are made. In these cases, prosecutors may identify “targets” of the investigation or “persons of interest.” Prosecutors and grand juries may engage in investigations that are not resolved for a long time despite the desires of the targets of those investigations that they be promptly resolved.

As then-Attorney General and later Justice Robert Jackson noted in his speech to United States Attorneys in April, 1940, prosecutors have the power to punish even without conviction merely by investigating a person. Being the subject of a prolonged investigation may result in public humiliation and loss of a employment and friends regardless of how the case is ultimately resolved.

For example, during the investigation of anonymous letters containing anthrax spores which killed five people and sickened 17 others in 2001, Attorney General John Ashcroft identified Dr. Steven J. Hatfield, a onetime bioterrorism

expert for the Army, as a “person of interest” and other unidentified officials linked Dr. Hatfield to the investigation. United States District Judge Reggie Walton later observed that although “[t]here is not a scintilla of evidence to suggest Dr. Hatfield had anything to do with it,” the public notoriety “destroyed his life.”<sup>9</sup> The government ultimately agreed to pay Hatfield \$2.83 million and an annuity of \$150,000.

On occasion the targets are not charged with the crime that was being investigated, but instead with lying to a federal agent or perjury in testifying before a grand jury. (Although a person has a Fifth Amendment right not to give answers that might incriminate them and thus to avoid interrogation by federal agents or testifying before a grand jury, many people nevertheless answer questions by federal agents or before grand juries.)

Upon a finding of probable cause to believe that the defendant committed a crime, the grand jury may return an indictment formally charging the defendant with that crime. In the absence of probable cause, a grand jury is to refuse to return an indictment. However, the prosecutor may present the case to another grand jury in an effort to gain an indictment.

Because of the prosecution’s exclusive access to the grand jury, its responsibility for directing the investigation, and its ability to present evidence to it including hearsay testimony, most grand juries exercise little, if any, restraint on a prosecutor’s decision to charge an individual with a crime and routinely return indictments as recommended by the prosecutor.

In most cases involving street crime, grand juries hear only brief summaries of the facts from one or two witnesses. For example, a law enforcement officer may summarize what witness have said about the case. The process can be quite perfunctory. A North Carolina grand jury handed down 276 indictments in just four hours –

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9. Eric Lichtblau, *Reporter Held in Contempt in Anthrax Case*, N.Y. TIMES, Feb. 20, 2008 at A15.

devoting an average of 52 seconds to each case – in January 2014.<sup>10</sup>

Some states have largely dispensed with the requirement of an indictment by a grand jury and allow prosecutors to formally charge defendants simply by serving them with an “accusation” setting out the charges. Most petty crimes are charged by accusation. A judicial officer makes a preliminary determination of whether there is probable cause to support the accusation and, if so, the case may proceed to trial before a jury.

### **Selective prosecution**

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court vacated the conviction of Yick Wo for violating a municipal ordinance that prohibited the construction of wooden laundries without a license. Yick Wo was among two hundred Chinese nationals who were denied permits to operate laundries in wooden buildings while 80 non-Chinese individuals were issued such permits. The Supreme Court found that it was not required to pass on the validity of the ordinances, but found that “they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States.”

In *Oyler v. Boles*, 368 U.S. 448 (1962), the petitioners argued that they had been denied equal protection because they had been prosecuted as habitual offenders when there were many other persons subject to the habitual offender laws for

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10. See Andrew Cohen, *The Grand Jury Voting on One Case Every 52 Seconds*, DAILY BEAST, Feb 5, 2014, [www.thedailybeast.com/articles/2014/02/05/the-grand-jury-voting-on-one-case-every-52-seconds.html](http://www.thedailybeast.com/articles/2014/02/05/the-grand-jury-voting-on-one-case-every-52-seconds.html); Michael Gordon, *Officer Kerrick’s indictment reveals grand jury debate*, CHARLOTTE OBSERVER, Feb. 1, 2014, [www.charlotteobserver.com/2014/02/01/4656417/officer-kerrick-indictment-reveals.html#.Uv\\_\\_jYVngrO](http://www.charlotteobserver.com/2014/02/01/4656417/officer-kerrick-indictment-reveals.html#.Uv__jYVngrO).

whom prosecutors did not seek enhanced penalties as habitual offenders. The Supreme Court rejected the challenge, stating, “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation” and to establish a violation of equal protection it must be shown that “the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* at 456.

The Court placed a even heavier burden of proof on a vocal opponent of the draft who was one of 13 people prosecuted for failure to register for it out of an estimated 674,000 people who did not register. *Wayte v. United States*, 470 U.S. 598 (1985).

In rejecting Wayte’s claim that he had been selected for prosecution because of his exercise of his free speech rights and holding that he was not even entitled to discovery of relevant documents from the government, the Court held that courts are to defer to decisions to prosecute because of the separation of powers doctrine, the possibility of compromising law enforcement operations by revealing the facts regarding investigations, and the Court’s conclusion that “the decision to prosecute is particularly ill suited to judicial review.” *Id.* at 607. The Court also stated:

“‘[D]iscriminatory purpose’ . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” \* \*

\* In the present case, petitioner has not shown that the Government prosecuted him because of his protest activities. Absent such a showing, his claim of selective prosecution fails.

*Id.* at 610. The Court held that, in the absence of contrary evidence, courts are to presume that prosecutions are undertaken in good faith and in a nondiscriminatory manner.

Justices Brennan and Marshall dissented, expressing the view that Wayte was entitled to discovery because the district court “did not abuse

its discretion in determining that he had made a nonfrivolous showing of selective prosecution.”

The Court refused to allow discovery regarding prosecutorial practices and racial disparities with regard to cases involving powdered and crack cocaine in *United States v. Armstrong*, 517 U.S. 456 (1996), holding that Armstrong had not made a sufficient showing of discriminatory effect and discriminatory intent. The Court reaffirmed its holding in the capital context in *United States v. Bass*, 536 U.S. 862 (2002), reversing a decision of the Sixth Circuit that would have allowed discovery of information regarding the federal government’s charging practices in capital cases. The Court also rejected a selective prosecution challenge in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which was based upon studies showing racial disparities in the infliction of the death penalty in Georgia.

#### **Duties regarding pretrial publicity**

Prosecutor have an ethical duty to “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose.”<sup>11</sup> As is apparent from media coverage of highly publicized cases, these rules are seldom followed. In theory, prosecutors are also subject to the Rules of Professional Responsibility of the bar of the state in which they practice, but state bars seldom enforce the rules against prosecutors.

Prosecutors commonly engaged in questionable practices that may be prejudicial to the accused. For example, at one time, people accused of

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11. American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 (f) (2002 ed.). *See also* Rule 3.6 (a), which prohibits, with limited exceptions, all lawyers from making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

crimes who were not a danger to the community were allowed to report to police stations and turn themselves in and have their fingerprints taken in private. That no longer occurs in most instances. A *Wall Street Journal* editorial described and commented on how Rudolph Giuliani, when U.S. Attorney for the Southern District of New York, orchestrated arrests for insider trading against two Kidder, Peabody executives in February of 1987:

Giuliani had his agents burst into Kidder, Peabody, throw Richard Wigton up against the wall and handcuff him. He arranged to bust Timothy Tabor so late in the day that he had to spend a night in jail before he could post bond. Mr. Giuliani didn't think Mr. Wigton was going to pull a knife or Mr. Tabor would flee the county. He lusted after the headlines, and hoped strong-arm tactics would coerce settlements. This is not the kind of prosecutorial zeal we need when the underlying law is far from clear.

The charges against Wigton and Tabor were subsequently dropped.

Giuliani's pioneering use of this tactic led to what is now a routine practice in cases involving prominent defendants in high profile cases – the humiliating “perp walk” in which the accused are paraded before the media in handcuffs. This form of pretrial punishment by public shaming is hard to square with the presumption of innocence.

The practice was questioned after its use in the case of former International Monetary Fund chief Dominique Strauss-Kahn, who was accused of the sexual assault on a maid at a hotel where he had been staying. New York City Mayor Michael Bloomberg commented after the arrest, “If you don't want to do the perp walk, don't do the crime.” However, after questions were raised about the strength of the case against Strauss-Kahn, Bloomberg told *The New York Times*, “We have done perp walks for the benefit of newspapers and television for a long time. I've always thought that the perp walks were outrageous.” The pictures of Strauss-Kahn prompted outrage in his home country, France,

where the press is prohibited from publishing photos of defendants in handcuffs unless the person is convicted.

### **Prosecutorial immunity**

Prosecutors have long been absolutely immune from suits against them for any their actions during prosecution of a case. Judge Learned Hand once described a prosecutor's immunity for their actions during prosecution of a case as “a balance” of “evils.” The competing interests were discussed by members of the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). The majority expressed the rationale for such broad immunity as follows:

\* \* \* A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a [suit for damages] often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay

jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

*Imbler*, 424 U.S. at 424-26. The Court recognized “this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty,” but held that “the alternative of qualifying a prosecutor’s immunity would disserve the broader public interest.” *Id.* at 427. The Court pointed out that other post trial procedures, while not ideal, such as remedial powers of the trial judge, appellate review, state and federal post conviction collateral remedies, and criminal charges, provided some recourse for the wronged defendant. *Id.* at 427, 429.

Justice White, joined by Justices Brennan and Marshall, concurred in the judgment, but expressed the view that the Court extended to a prosecutor “an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process.” *Id.* at 433. He agreed that prosecutors were entitled to absolute immunity for suits for malicious prosecution, for defamatory remarks made during and relevant to a judicial proceeding, and for presenting testimony they knew or should have known was false.

But he disagreed that prosecutors had absolute immunity from suits for suppressing or withholding information from the court. “Denial of immunity for unconstitutional withholding of evidence would encourage such disclosure,” Justice White wrote. “A prosecutor seeking to protect himself from liability for failure to

disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. Indeed, it will help it.” *Id.* at 443. Thus, he argued prosecutors should not receive absolute immunity from suits for committing violations of pre-existing constitutional disclosure requirements, if they were committed those violations in bad faith.

In *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), a prosecutor presented false testimony from a jailhouse informant known to have received reduced sentences for testifying and did not share this information with defense council. Goldstein sued former district attorneys and the chief deputy district attorney arguing that they violated their constitutional obligation to provide his attorney with impeachment-related information regarding the informant because the County District Attorney and the Chief Deputy District Attorney failed to train, supervise, and provide an information system of informants for the prosecutors under them. While agreeing that these were administrative procedures, the Court, in an opinion by Justice Breyer found that prosecutors were still absolutely immune because the administrative obligations are the kind that is itself directly connected with the conduct of a trial and required “legal knowledge and the exercise of related discretion.” *Id.* at 344.

The Supreme Court reversed, 5-4, a verdict of \$15 million awarded to John Thompson based on the suppression of exculpatory evidence that almost resulted in his execution. Thompson argued that Harry Connick, the District Attorney of New Orleans, failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused nondisclosure in Thompson’s case as well as many others. In an opinion by Justice Thomas, the Court concluded that Connick was not required to provide such training because he could rely upon the legal education of his prosecutors, continuing education after graduation such as on-the-job training from more experienced prosecutors, and the ethical obligations of all lawyers. *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

## THE LAST FACE YOU'LL EVER SEE: The Private Life of the American Death Penalty

By IVAN SOLOTAROFF (HarperCollins 2001)

\* \* \*

Jim Williams is a meticulous, ambitious prosecutor who came up through what he calls the “breeder factory” of the New Orleans DA’s office. He has prosecuted one-eighth of Angola’s current death row, a figure he glories in. New Orleans, a mile across the Mississippi, has posted the highest murder rate per capita every second or third year since *Gregg* came down, but the New Orleans DA, Williams’s former boss Harry Connick Sr., has secured only one death penalty conviction in those years, despite a phrase that made him famous down here: “We need the death penalty to show life is precious.”

Williams’s corner office, overlooking the New Orleans skyline from the fifth floor of St. Francisville’s municipal building, is adorned with execution tchotchkes and mementos. On the wall above his desk are clippings: a *Hustler* cartoon of two guards carrying a floral wreath to a man awaiting electrocution, with a banner reading “Fuck You”; an underground magazine article chronicling prison rape in detail; a clipping of a *New York Times* story about a Cantonese woman who was tried and executed the same day her husband was murdered. “That,” says Williams, pointing, “is deterrence. In a nearby parish, there was a capital conviction that took only one calendar day – voir dire through penalty phase – but the guy will be sitting on death row for years regardless. That is failed deterrence.”

Stays and abeyances are the bane of Williams’s life. “If anything makes me mad about these abolitionist appellate lawyers,” he says, waving a dismissive hand northward at the window behind him, perhaps at the offices of the Loyola Death Penalty Resource across the river, perhaps at the entire country beyond, “it’s how they keep these guys alive for eleven years, average, at huge expense, then talk about how all that time on the

Row constitutes cruel and unusual. The manipulation of the law doesn’t bother me. It’s the moralizing the pungency they argue the position with.”

Williams speaks about capital punishment only in an affectless, persuasive voice. He’s a handsome, well-put-together man. If his clothes weren’t quite so starched and fitted, and his grooming and manicure not so humorlessly exact, you’d be tempted to call him a dandy, but it would be a mistake. It’s a presentation born of ambition rather than vanity where everything from the silk socks to the off-tone collar speaks of success and a desire for more. The look is not atypical of a southern lawyer, and Williams is hardly the only DA down here who’ll speak unambiguously of executions. Put that polish and fervor together, however, and Williams can seem quite cold-blooded at times.

Or perhaps it’s just the decor. Ten minutes after entering the office, I’m still noticing lurid details. On the wall opposite his desk is a white plastic syringe inexpertly mounted on black cardboard, with stenciled letters spelling out Ultimate Prick Award. The award is issued with each death penalty conviction in St. Francisville. “That’s my first,” he says. A larger syringe next to it, which has a big, painful-looking needle, is a gift from a friend. On the couch are two- by three-foot blowups used in prosecutions: One is a brightly colored “Abuse Chart,” in which “Mitigating Factors” like “Intrauterine Drug Addiction,” “Head Wounds,” and “Sodomy Suffered as a Child” are color-coded and linked to the statistical probability of producing a murderer. Another is a jailhouse letter from Joel Durham, a young man Williams recently prosecuted for capital murder committed as a minor; Durham shot an assistant manager during a crack-crazed holdup of a McDonald’s in the suburb of Metairie. The letter, presumably, was shown to the jury to prove that Durham was old enough and smart enough to be executed; the misspelled words, however, run about equal to those he got right, and the diction often makes the sense quite difficult to follow. Durham was given only a life sentence.

The decision, which was landmark because of Durham's age, was a painful loss for Williams. "Leo Kern, the guy Joel shot through the heart with his automatic weapon, had one ambition in life: to own his own McDonald's franchise. When this guy took vacation" – Williams's voice cracks with practiced passion – "he traveled to see the original franchise. I was trying to do Joel a favor," he says, the passion disappearing. "Pretty kid like him? That 'choir-boy smile' may have saved him with the jury, but it sure ain't gonna help him out up in Angola."

"You keep close tabs on your men," I say.

"You don't know the half."

Williams walks me over to a tiny replica of Angola's electric chair his bookshelf. Pasted to its seat and arms are tiny cutouts of the faces of the men he's condemned. I notice he has one guy on there twice. "That's Saul Johnson." He smiles "I got him for two separate capital murders, so they started calling him Electra-Saul – at least till the chair became cruel and unusual. They're all still on the row."

\* \* \* "If I get you condemned, it's personal. It didn't happen because of some trick in the law, some exigency, some pressure that had been loaded up in the community or the media to make me prosecute you for a death sentence. It happened because I meant it to, and I want you to know it, in the worst way. When you finally go off, if you ever do, I'm going to be sitting right across that window while you're lying on the gurney. I want to be the last face you'll ever see."

"Have you considered moving to the appellate level yourself?"

"No, I like trying cases. I love it. The professional satisfaction is what you get from the victim's family, but emotionally, I have to say I love the battle itself. I'm a soldier."

"Jim's the fighter pilot," his colleague Ronnie Boddenheimer corrects Williams when he joins us. "I'm the soldier. I'm the doughboy."

\* \* \* "We're fighting a war here," he says. "There's moments of glory, but it's uphill all the way. For a country that's seventy, eighty percent pro-penalty, you wouldn't believe how hard it is to get your award."

\* \* \*

"You tell these people on voir dire you're going all the way," says Boddenheimer, shaking his head. "They smile. *Sure, sure, yeah, yeah.* They don't know how hard it is – at this point in history – to send a man to death. You don't want to bring race into it, but it's a fact of life. After *Gregg*, you could never get and would never want an all-white jury, but even if the murder was black on black, and most of them are, they still think it's white man's justice. But you gotta go racial neutral, or you're going to lose your award on appeal."

"Gender neutral, too," says Williams.

"Sometimes age neutral. You gotta *use* your dismissals. Never keep a teacher."

"No students."

"Never keep a social worker."

"Law students, especially."

"Unless he's studying neo-Nazi Techniques 101."

"We had one that made the jury was a Nazi. Remember?"

"Sure do. My choice for foreman."

"I have never cut a postal worker."

"Me neither."

"Psychiatrists, though . . ."

"Forget it. I believe they should be ousted from the jury pool altogether. Don't you?"

“You know I do.”

\* \* \*

During a pause, I ask about Antonio James. Williams was still working for the New Orleans DA’s office at the time of James’s two murder convictions and remembers his jury coming out after the first. “The prosecutor let him have twelve women,” he remembers. “Fatal mistake.”

“So to speak,” says Boddenheimer.

“They were smiling, too. When they’re smiling you never get it. But he got it later. [James’s death sentence came at a second trial.] Bye-bye, Antonio.”

“Those days are gone,” says Boddenheimer. “Man, I’ll tell you. That chair was deterrence on four legs. Everyone knew what it did. Their eyeballs’d pop, they’d shit themselves. They’d roast and smoke and pee and burn some more. Don’t let anyone tell you different, that chair was painful, that chair was hell, and people knew it. It was a deterrence, and now it’s gone.”

“Cheated Ronnie more than anyone,” Williams says leadingly.

“What do you mean?” I bite.

Boddenheimer appraises me for a half second. “Sometimes at retrial hearings, you get to stand next to the defendant,” he explains “Well, I’d shoulder up” – Boddenheimer leans in sideways, pursing his lips up toward me. His face colors, his upper lip puffs, and a slow whispering noise of electricity comes from deep in his throat. “Bzzzzzzzz.”

Jim laughs.

“Man, they’d bug. Eyes popping. Siting in their Sunday suits.”

“I think caning should be brought back,” says Williams. “Publicly. And I think executions should be televised.”

“Pay-per-view,” Boddenheimer says. “If you’re worried about ratings, get Howard Stern to pull the switch.”

“I don’t know how comfortable I’d feel making a circus out of it.”

“Then I’ll do it myself,” says Boddenheimer.

“You’d have no problem pulling it?” I ask.

“I’d pull the switch and eat spaghetti,” he says, then leans into me again. “Bzzzzzzzz,” he says.

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**Since the book was published:** Saul Johnson’s two convictions for murder were reversed because of Williams’ references in closing argument to Johnson’s failure to testify. *State v. Johnson*, 541 So.2d 818 (La. 1989). Johnson was convicted of second degree murder on retrial and sentenced of life imprisonment without possibility of parole.

Joel Durham, although sentenced to life imprisonment, was killed at the Louisiana State Penitentiary at Angola.

Williams was involved in the prosecution of John Thompson, who was later exonerated afer exculpatory evidence not disclosed by prosecutors came to light. *Connick v. Thompson*, 131 S.Ct. 1350 (2011), is included in the materials that follow.

Ronnie Boddenheimer became a judge, was convicted of taking bribes, and was sentenced to prison. The convictions or sentences of all of the defendants sent to death row by Williams were eventually reversed. None are currently under death sentence. Jim Williams is no longer a prosecutor; he is now a defense lawyer.

# PROSECUTORIAL DISCRETION

## Prosecution of Capital Cases in Harris County, Texas

At the end of 2013, 119 people sentenced to death in Houston, Harris County, Texas had been executed, more executions than any state except Texas as a whole, which had executed over 500 people by the end of 2013. Only two other states, Virginia (110) and Oklahoma (108), executed over 100 people between the resumption of capital punishment in 1976 and the end of 2013. Only five others have executed over fifty people during that period: Florida (81), Missouri (70), Alabama (56), Georgia (53) and Ohio (52).

The high number of death sentences and executions from Harris County is largely attributable to the aggressive pursuit of death sentences by Johnny Holmes and Chuck Rosenthal, who were the district attorneys for the county in the period from *Furman* to February, 2008, and the poor quality of defense lawyers assigned to defend those facing the death penalty. During Holmes eight-year term from 1992 until 2000, Harris County sent 111 defendants to death row.

The pace continued under Rosenthal who left office in 2008 after disclosure in a civil suit of e-mails which included messages he sent to assistant prosecutors to work in his re-election campaign, romantic notes he had sent to his executive assistant, and messages he had sent or received from friends or acquaintances that contained text and/or photographs demeaning to women or African-Americans. Rosenthal sent an e-mail that “repeated a comedian’s joke comparing Bill Clinton to a black man, because the former president plays the saxophone, receives a government check, smoked marijuana and “had his way with ugly white women.”<sup>1</sup>

Other e-mails found on Rosenthal’s work computer included an attachment of a photo of an African-American man lying on the ground, apparently asleep, with a bucket of Kentucky Fried Chicken and watermelon rinds strewn around him. The caption under the image reads “Fatal Overdose.”<sup>2</sup>

The e-mails raised questions about the extent to which Rosenthal’s racial attitudes may have influenced his decisions, including those regarding capital cases.

Rosenthal resigned on February 15, 2008, stating in his letter of reassignment, “Although I have enjoyed excellent medical and pharmacological treatment, I have come to learn that the particular combination of drugs prescribed for me in the past has caused some impairment in my judgment.”

District Judge and former police officer Patricia R. Lykos, a Republican, was elected District Attorney of Harris County in November, 2008 and assumed office on January 1, 2009, the first woman to hold the office since it was created. She sought the death penalty much less often than her predecessors. Only two people were sentenced to death in Harris County in 2009 and 2010 and three in 2011. Of six capital cases that were reversed and sent back to Harris County for resentencing, Lykos agreed to plea bargains for life imprisonment without parole in three and obtained the death penalty in the other three.

Lykos also had a different approach with regard to race, telling reporters two of her prosecutors were “incompetent and negligent” after a judge ordered them to pick a more racially diverse jury. The comment apparently infuriated most of the 240 assistant district attorneys in the office.

Mike Anderson, who said he was recruited out of law school by former District Attorney Johnny

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1. Miriam Rozen, [Houston Group Calls for DA’s Resignation in Wake of Controversial E-Mails](#), TEX. LAWYER, Jan. 28, 2008.

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2. *Id.*

Holmes and worked in the office for 17 years before becoming a criminal district court judge, challenged Lykos in 2012, criticizing her for not being more aggressive in capital cases, for not seeking an execution date for Duane Buck – sentenced to death at a trial where an expert testified he was more likely to be dangerous because he was black – after his habeas corpus appeal had been denied by the Supreme Court, her decision to prosecuting drug offenders for trace amounts (one-hundredth of a gram or less) of crack cocaine as misdemeanors instead of felonies, and her establishment of diversion programs for the mentally ill and people charged for the first time with driving while intoxicated.

With strong law enforcement support, Anderson won 63 percent of the vote in the Republican primary. Anderson won the November election and was sworn in as the new District Attorney in January, 2013. However, he died of cancer in August 31, 2013.<sup>3</sup>

A similar change in the exercise of prosecutorial discretion with regard to seeking the death penalty occurred in Maricopa County, Arizona. Prosecutors there sought the death penalty in an average of one case per year in the 1980s, and an average of nine cases per year in the 1990s. Andrew Thomas took office as County Attorney in 2005. He asked for death sentences more than 120 times before resigning to run for Attorney General in 2010,<sup>4</sup> overwhelming the court system which did not have enough judges, prosecutors and qualified defense attorneys to handle so many capital cases. Maricopa County had four times the number of pending death penalty cases as Los Angeles or Houston on a per capita basis.

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3. Gov. Rick Perry appointed Anderson's widow, Devon Anderson, to replace him. She had spent more than 12 years prosecuting cases as an assistant Harris County district attorney before being elected a district judge in 2004. She had been defeated in her bid for reelection to the bench in 2008.

4. Michael Kiefer, *Death-penalty-case backlog spurs hastening of process*, ARIZONA REPUBLIC, Oct. 11, 2009.

Thomas lost the Republican nomination for Attorney General by 887 votes. He was disbarred in 2012 because of malicious criminal and civil charges he brought against political opponents.

## Prosecution of Capital Cases in New York

When the New York legislature was considering adoption of the death penalty law in 1995, New York District Attorney Robert Morgenthau urged it not to in an op-ed in the *New York Times*, saying:

Promoted by members of both political parties in response to an angry populace, capital punishment is a mirage that distracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives. Even proponents have been forced to concede that more than a century's experience has not produced credible evidence that executions deter crime. That's why many district attorneys throughout New York State and America oppose it – privately. Fear of political repercussions keeps them from saying so publicly.<sup>5</sup>

The legislature nevertheless enacted a death penalty law, but Morgenthau never sought death during the law's existence – from its adoption in 1995 until it was declared unconstitutional by the New York Court of Appeals in 2004. Nor did Bronx District Attorney Robert Johnson, who announced that he would not seek death.

The death penalty was an issue in Morgenthau's bid for re-election in 2005. His campaign produced television advertisements criticizing his opponent in the Democratic primary, a prosecutor who had stated that in one

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5. Robert M. Morgenthau, [What Prosecutors Won't Tell You](#), N. Y. TIMES, Feb. 7, 1995.

case, she would have been willing to give a lethal injection herself. The advertisement said she was “Wrong on the Death Penalty, Wrong for Manhattan.” Morgenthau won the election and served until he retired on December 31, 2009, at age 90, and joined the firm of Wachtell, Rosen & Katz as of counsel.

## **A Minority Practice**

Prosecutors like Johnny Holmes and Chuck Rosenthal in Houston who seek the death penalty at every opportunity and others like Robert Morgenthau and Robert Johnson who never seek it are at each end of the spectrum with regard to seeking the death penalty. And there are many at different places on the spectrum that seek it with varying degrees of frequency. As a result, prosecutors in Houston may seek death in cases that prosecutors in Dallas would not. Philadelphia is responsible for over 100 death sentences, while Pittsburgh has far fewer. However, relatively few jurisdictions employ capital punishment regularly and those jurisdictions are primarily in the South.

Eighty-five percent of the counties in the United States have not had a single case resulting in an execution in over 45 years.<sup>6</sup> Only two percent of the counties in the country have been responsible for the majority of cases leading to executions since 1976. Over 80 percent of the executions in 2013 were carried out in the South, a percentage that has remained fairly constant since the resumption of capital punishment after the Supreme Court’s decisions upholding some death penalty statutes in 1976.

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6. See James Liebman & Peter Clark, [\*Minority Practice, Majority's Burden: The Death Penalty Today\*](#), 9 OHIO ST. J. CRIM. LAW 255 (2012); Death Penalty Information Center, [THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL](#) (2013).