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10-27-2018

### Can a Good Person be a Good Prosecutor in 2018?

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#### Recommended Citation

Abbe Smith, Bruce A. Green, David Patton, Fordham Online, Ellen Yaroshefsky, Vida Johnson, Jessica A. Roth, Angela Davis & Rebecca Roiphe, *Can a Good Person be a Good Prosecutor in 2018?*, (2018). Available at: [https://scholarship.law.ua.edu/fac\\_working\\_papers/109](https://scholarship.law.ua.edu/fac_working_papers/109)

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# **Can a Good Person be a Good Prosecutor in 2018?**

*Fordham Law Review Online*

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## FOREWORD

*Bruce A. Green\**

In 2001, Abbe Smith asked provocatively whether you can simultaneously be a good person and a good prosecutor,<sup>1</sup> and she concluded that you cannot. She observed that “prosecutors routinely validate and perpetuate [a] sorry state of affairs”<sup>2</sup> characterized by the incarceration of residents—disproportionally people of color (resulting in “[t]he virtual banishment of an entire generation of black males”)<sup>3</sup> and people with mental illnesses<sup>4</sup>—under physically debilitating prison conditions<sup>5</sup> at a rate far exceeding the incarceration rate of all other developed countries.<sup>6</sup> Professor Smith wrote: “The government has devoted an arsenal of resources to a mean-spirited and misguided criminal justice policy that has literally stolen hope for the next generation from entire communities,” and “[i]t is the role of the prosecutor . . . to carry out these policies.”<sup>7</sup> She argued that well-intentioned prosecutors cannot overcome the racially and socially unjust context in which they work because most prosecutors have too little discretion and are under institutional pressures to exercise their discretion harshly and without empathy.<sup>8</sup> While she would not end prosecutions, Professor Smith urged “those who are committed to social and racial justice” to not become prosecutors.<sup>9</sup>

The following online symposium, hosted by the *Fordham Law Review Online*, revisits Abbe Smith’s question. Even if she was right in 2001, is the answer the same seventeen years later? The problems of criminal justice in this country have in many ways gotten worse. But at the same time, one might argue, there is broader public acknowledgment of these problems, which has led to social movements such as the Innocence Movement and Black Lives Matter that have strengthened efforts for criminal justice reform. And while Professor Smith identified various prosecutors whose offices were

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

2. *Id.* at 374.

3. *Id.* at 368–72.

4. *Id.* at 367.

5. *Id.* at 366.

6. *Id.* at 363–65.

7. *Id.* at 374.

8. *Id.* at 375–96.

9. *Id.* at 400.

considered to be “progressive” even in 2001,<sup>10</sup> the contemporary movement has included successful efforts to elect prosecutors with civil rights and criminal defense backgrounds, such as Philadelphia District Attorney Larry Krasner, who campaigned against mass incarceration and promised reform.<sup>11</sup> At this moment in history, should lawyers committed to racial and social justice consider joining prosecutors’ offices—or at least the offices of progressive prosecutors such as District Attorney Krasner—in order to attempt to ameliorate the sorry state of criminal justice?

The *Fordham Law Review Online* is pleased to publish the contemporary reflections of Abbe Smith and six others who bring varied perspectives, and take different sides, regarding the question she asked in 2001. The Symposium serves as an occasion for considering the present state of the criminal justice system and of prosecutors’ role in it, and an opportunity for an interesting exchange of views.

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10. *Id.* at 398.

11. See German Lopez, *If You Care About Ending Mass Incarceration, Look at What Philadelphia Just Did*, VOX (Nov. 8, 2017, 10:30 AM), <https://www.vox.com/policy-and-politics/2017/11/8/16622438/larry-krasner-philadelphia-election-prosecutor> [<https://perma.cc/8N4D-2BJR>].

## GOOD PERSON, GOOD PROSECUTOR IN 2018

*Abbe Smith\**

Nearly twenty years ago, I wrote an essay on the ethics of prosecution in a time of mass incarceration called “Can You Be a Good Person and a Good Prosecutor?”<sup>1</sup> I am both pleased and perplexed that the essay, which caused some controversy at the time, continues to strike a chord—at least with the organizers of this online conversation. I appreciate the invitation to weigh in on whether you can be a good person and a good prosecutor in 2018.

The 2001 essay was part of a symposium organized by the *Georgetown Journal of Legal Ethics*. When I presented the piece, I immediately learned how provocative my question was. A Georgetown colleague, the late, great Sam Dash—former Philadelphia District Attorney and, more famously, Chief Counsel for the Senate Watergate Committee<sup>2</sup>—was the moderator of my panel. When he introduced me and the title of my paper, he was incredulous. “Can you be a good person and a good prosecutor?” he repeated. “Why, of course you can be! Who could say otherwise?” He caught himself when he realized I was asking a serious question about the role of the prosecutor in the current context of the American criminal justice system.

Another former prosecutor on the panel was visibly upset by the premise of my paper. She took it personally. I thought she might have a heart attack at the mere suggestion that prosecution raises moral and ethical questions.

Ironically, this reaction fits right into my description of prosecutors in that 2001 essay. Prosecutors do not like to have their authority—or morals—questioned. This strikes me as curiously thin-skinned. Defense attorneys are constantly asked a version of this same question in what is known as the “Cocktail Party Question”: “How can you represent those people?” (Meaning, how can you morally and ethically represent people who commit crime.) The question is inescapable for defenders—so much so that it is often referred to simply as “The Question.” Because it comes up so often, most of us develop a rolodex of replies, depending on our mood and the nature of the audience. Defenders do not get all worked up by this question. Instead, we

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001).

2. Dash might have sullied his legacy by working with Special Prosecutor Ken Starr on the Monica Lewinsky scandal during the Clinton administration.

grow some skin and do our best to educate people who have not given much thought to criminal defense (or prosecution, for that matter).

My answer to whether one can be a good person and a good prosecutor back in 2001 was “I hope so, but I think not.”<sup>3</sup> As I explained then, the hope was based on the respect and affection I feel for my prosecution-bound students and for the handful of prosecutors I have encountered over the course of my career who manage to be fair, open, and humble. As former prosecutor (and Supreme Court Justice) Robert H. Jackson noted: “[T]he citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”<sup>4</sup>

Unfortunately, there are not many Jacksonian prosecutors—not in 2001 or now. But my ultimate answer back then was about our cruel, insatiable, and racist criminal justice system. In my view, the decision to become a prosecutor in a time of mass incarceration—a time we will surely look back on in shame—is a moral choice. The disproportionate impact of mass incarceration on black and brown people makes the moral choice inescapable. You can choose to challenge this system either by defending individual clients from its brutality,<sup>5</sup> as defenders do, or through a more broad-based attack. But the very nature of the job prosecutors do—*locking people up*—upholds our shameful system. This hasn’t changed since 2001.

As of the latest Department of Justice data, we are still incarcerating more than two million people in this country.<sup>6</sup> More than six million people are under the supervision of the criminal justice system.<sup>7</sup> Overall, about one in thirty-eight adults are under some form of correctional supervision.<sup>8</sup>

And now comes Larry Krasner, a true reformer, perhaps the first-ever “decarceration prosecutor.” He has done some amazing things since being elected Philadelphia DA in November 2017: firing more than thirty overzealous prosecutors, eliminating requests for cash bail in most nonviolent cases, and requiring that line prosecutors provide sentencing judges with the “price tag” for the sentences they propose.<sup>9</sup> He has become the embodiment of the Progressive Prosecutor, the prosecutor to watch.

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3. Smith, *supra* note 1, at 396.

4. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 20 (1940).

5. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986) (“[T]he experience of the prisoner is, from the outset, an experience of being violently dominated . . .”).

6. DANIELLE KAEBLE & MARY COWHIHG, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 1 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/UDN2-47W5>] (reporting that, as of 2016, although the number of incarcerated persons has been declining, as of the latest count, there are 2,162,400 people incarcerated in the United States).

7. *Id.* (reporting that 6,613,500 people are under correctional supervision, which includes probation and parole).

8. *Id.*

9. Max M. Marin, *Philly’s Progressive New DA Is Testing the Limits of Change from Within*, IN THESE TIMES (June 25, 2018), <http://inthesetimes.com/article/21196/Larry-Krasner-philadelphia-bernie-sanders-district-attorney-jail/> [<https://perma.cc/6S2X-WWR6>].

But let's not get too excited.

First, I feel compelled to point out that, while Krasner was elected District Attorney, he is not exactly a dyed-in-the-wool prosecutor. He was a public defender (we overlapped for a short time at the Defender Association of Philadelphia) and then a criminal defense and civil rights lawyer in private practice, where he sued the police and worked on behalf of Black Lives Matter activists and others engaged in the struggle for social and racial justice.

Second, it is not easy to be a prosecutorial reformer. Although Krasner may be the real thing, we have heard this before. Manhattan DA Cyrus Vance Jr., Los Angeles DA Jackie Lacey, and New Orleans DA Leon Cannizzaro ran for office as aggressive reformers but continued a range of harsh prosecutorial practices, like zealously prosecuting panhandlers (especially in fancy neighborhoods).<sup>10</sup> Prosecutors like to claim they are “reformers” or progressives.<sup>11</sup> Plus, there are a host of challenges for Krasner in Philadelphia, which has the third-highest crime rate of the ten largest U.S. cities and the fourth-highest incarceration rate of any city.<sup>12</sup> Despite pressure from both activists and city officials, the local court system has expressed little interest in reforming its “automatic detainer” policy for probation and parole violators, which accounts for 50 percent of the county jail population. Krasner has so far been unsuccessful in renegotiating sentences for juvenile lifers and has had mixed success reducing the court system's reliance on cash bail.<sup>13</sup>

To Krasner's credit, he seems to understand there are limits to what he can accomplish, no matter how ambitious his reform agenda. As he told a reporter, “Ten or 15 years, they [will] all look back and go, ‘It wasn't enough, they should have gone much farther, what a bunch of half-steppin' apologists.’”<sup>14</sup>

Third, although prosecutors wield enormous power, I wonder whether a single progressive prosecutor—even one with a devoted, progressive staff—can fix a criminal justice system that has ravaged black and brown communities for decades. Moreover, should we look to *prosecutors* to dismantle a system of public and private prisons that can't seem to stop growing?

Unfortunately, it appears that the thirty-plus “bad” prosecutors Krasner got rid of have been snapped up by other nearby DA offices. This is what

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10. *Id.*

11. See, e.g., Justin Jouvenal, *Judge Appears to Be the First in Northern Virginia to Drop Cash Bonds*, WASH. POST (June 14, 2018), [https://www.washingtonpost.com/local/public-safety/a-judge-appears-to-be-the-first-in-northern-virginia-to-drop-cash-bonds/2018/06/14/848d9a4c-5ea0-11e8-b2b8-08a538d9dbd6\\_story.html](https://www.washingtonpost.com/local/public-safety/a-judge-appears-to-be-the-first-in-northern-virginia-to-drop-cash-bonds/2018/06/14/848d9a4c-5ea0-11e8-b2b8-08a538d9dbd6_story.html) [<https://perma.cc/G537-3UHW>] (noting that many prosecutors—even those who call themselves “progressive”—are reluctant to follow the lead of a few progressive prosecutors across the country with regard to bail reform).

12. See Marin, *supra* note 9.

13. *Id.*

14. *Id.*



happens when you get rid of cockroaches in New York City; they move to a neighbor's apartment.

The Larry Krasner dream is especially unlikely in the Trump era, with Jeff Sessions as the Attorney General (essentially the chief federal prosecutor) of the United States. I cannot help but think about all the former federal prosecutors, now legal academics, who proudly maintain they were nothing like those overly aggressive, disclosure-averse, conviction-obsessed state prosecutors. Sessions would be their boss now. He is not remotely interested in criminal justice reform. He believes in overcharging for all and has required all federal prosecutors to charge defendants with the most serious crime, with all the attendant punishments.<sup>15</sup> He believes in prison for all, especially private prison.<sup>16</sup>

Here is what one federal prosecutor—Ryan Patrick, the U.S. Attorney for the Southern District of Texas, and father of three small children—said about Sessions' "zero tolerance" policy for people crossing the border without papers and separating children from their parents:

"Well, it is a policy choice by the President and by the attorney general," . . . . There can be no exceptions for "an entire population of crossers just because they come in in a family unit or they have a child with them and we simply ignore them on the criminal prosecution [sic]. They're still crossing the border illegally."

"We are following the law [even though] [t]here's going to be some situations that are going to be regrettable or that break your heart or—and it is unfortunate."<sup>17</sup>

To my knowledge, not a single federal prosecutor said "no" to Sessions' zero tolerance policy, separating children from parents, or throwing the book at every defendant.

This would not be impossible to do, but for whatever reason (Culture over conscience? Ambition over core American values?), prosecutors jump in line. In the nineteenth century, law enforcement officers in Boston and Cleveland refused to collaborate in slave hunting and denied federal authorities the use of their jails. Eventually, the Fugitive Slave Act became nearly unenforceable in many parts of the North.<sup>18</sup> But it required people in positions of authority to *resist*.

15. See Memorandum from the Attorney General to All Federal Prosecutors (May 10, 2017), <https://apps.washingtonpost.com/g/documents/national/jeff-sessions-criminal-charging-policy/2432/> [<https://perma.cc/CTH4-G3T5>] (directing all federal prosecutors to charge federal defendants with the most serious provable crimes with the most serious penalties).

16. See Ryan J. Reilly & Ben Walsh, *Jeff Sessions Reverses Obama-Era Policy That Curtailed DOJ's Private Prison Use*, HUFFINGTON POST (Feb. 24, 2017, 4:39 PM), [https://www.huffingtonpost.com/entry/doj-private-prisons-sessions\\_us\\_58af529ce4b0a8a9b780669a](https://www.huffingtonpost.com/entry/doj-private-prisons-sessions_us_58af529ce4b0a8a9b780669a) [<https://perma.cc/VX9G-6SNR>].

17. Steven Lubet, *On Juneteenth, Let's Commit to Ending Separation of Parents and Children at the Border*, CNN (June 19, 2018, 8:08 AM), <https://www.cnn.com/2018/06/19/opinions/juneteenth-trump-separation-migrant-families-lubet/index.html> [<https://perma.cc/BL6A-9TAC>].

18. *Id.*

I would like to believe that good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2018. But I doubt it.

# THE PROGRESSIVE PROSECUTOR: AN IMPERATIVE FOR CRIMINAL JUSTICE REFORM

*Angela J. Davis\**

In a law review article written seventeen years ago, Professor Abbe Smith asked the question, “Can You Be a Good Person and a Good Prosecutor?”<sup>1</sup> Professor Smith ultimately answered the question in the negative. Whether or not one agreed with her conclusion at the time, today we know that the answer to the question is “Yes.”

Anyone who believes that good people cannot be good prosecutors assumes and accepts a model of prosecution based on harsh, punitive policies and practices that incarcerate as many people as possible for as long as possible. Unfortunately, that unjust model of prosecution is the norm in far too many prosecutors’ offices. It is a model, however, that we cannot afford to accept. Fortunately, it is not the only model. There are good people currently serving as prosecutors who are implementing a new model of prosecution—one that seeks to reduce the use of incarceration, eliminate racial disparities, and provide second chances. If we ever hope to fix our broken criminal justice system, we must work to replicate that model throughout the country.

The criminal justice system remains in a state of crisis. The system locks up far too many people for far too long. There are unwarranted racial disparities at every step of the process from arrest through sentencing, and the quality of justice that one receives more often than not depends upon one’s income. There are currently 2.2 million people in the nation’s prisons and jails.<sup>2</sup> More than 60 percent of the people in prison are people of color. Black men are six times as likely to be incarcerated as white men and Latino men are 2.7 times as likely.<sup>3</sup> 70 percent of people in jail have never been

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

2. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT (2018), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/57KR-XUDV>] (last visited Aug. 28, 2018).

3. *Id.*

convicted of a crime and are locked up because they cannot afford bail.<sup>4</sup> And, there are unwarranted racial disparities in the bail determination process.<sup>5</sup>

There is little doubt that prosecutors have played a major role in filling the nation's prisons and jails and exacerbating the racial disparities and other inequities in the criminal justice system.<sup>6</sup> Prosecutors are the most powerful officials in the system. They decide whether to charge an individual and what the charge or charges should be. They decide whether to offer a plea bargain and what the bargain will be. Prosecutors have almost limitless discretion in making these decisions and often make them in ways that result in race and class disparities. It is very easy for prosecutors to bring charges against an individual because they only have to meet the very low standard of probable cause—a much lower standard than the proof beyond a reasonable doubt they have to meet in order to secure a conviction at trial. Thus, many prosecutors engage in overcharging—bringing more and greater charges than they know they can prove at trial—solely to give themselves an advantage at the plea bargaining stage of the process. When one considers the fact that 95 percent of all criminal cases are resolved with a guilty plea, it is clear that prosecutors control the system and even predetermine the outcome of most criminal cases.

According to the United States Supreme Court, the prosecutor's interest in a criminal case is “not that it shall win a case, but that justice shall be done.”<sup>7</sup> But for far too many prosecutors, the goal is winning at any cost. In addition to overcharging, many prosecutors neglect their constitutional duty to disclose exculpatory information<sup>8</sup> and engage in other forms of misconduct.<sup>9</sup> And because so many of their most important decisions are made behind closed doors, it is very difficult to hold prosecutors accountable.

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4. Bryce Covert, *America is Waking Up to the Injustice of Cash Bail*, NATION (Oct. 19, 2017), <https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail/> [<https://perma.cc/HJ6F-D8XH>].

5. See Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919 (2013).

6. See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

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

8. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

9. See generally Harry Mitchell Caldwell, *Everybody Talks about Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct & a Viable Solution*, 2017 U. ILL. L. REV. 1471 (2017) (analyzing thirteen categories of prosecutorial misconduct surveyed over a 25-year time period); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018) (discussing the impact that prosecutorial misconduct during closing arguments can have on jurors and how defense attorneys can mitigate potential harm by filing a pretrial motion in limine); Mary B. McCord & Douglas Letter, *How Mistakes By State and Local Prosecutors Can Lead to Unfair Trials*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/22/how-mistakes-by-state-and-local-prosecutors-can-lead-to-unfair-trials/> [<https://perma.cc/FTF6-9R9K>] (explaining a Louisiana man's experience with prosecutorial misconduct and noting that state and local prosecutors should interpret what constitutes material evidence broadly when determining whether to disclose information to opposing counsel).

Over 90 percent of all criminal cases are prosecuted in state courts and almost all chief prosecutors on the state level are elected officials. In theory, the electoral process holds prosecutors accountable—they can be voted out of office if their constituents are not satisfied with their performance. In practice, the process is imperfect. Voters cannot effectively hold prosecutors accountable for their most important prosecution functions (charging and plea bargaining) because those functions are performed behind closed doors. Most voters pay very little attention to District Attorney races. Consequently, many prosecutors run unopposed and serve for decades.<sup>10</sup>

Despite these difficulties, it is imperative that good people become prosecutors. We must change the current model of prosecution and that change will only happen if good, progressive people run for the office of District Attorney. The chief prosecutor can change the goals and culture of a prosecution office. In fact, that change is taking place as progressive-minded people are winning District Attorney races across the country. These chief prosecutors are implementing a new model of prosecution that focuses on alternatives to incarceration and second chances, and they are making a difference.

Philadelphia District Attorney Larry Krasner was a civil rights lawyer and defense attorney before becoming that city's chief prosecutor. He ran on a platform that promised to end mass incarceration, and shortly after taking office he implemented radical changes. Krasner fired thirty-one Assistant District Attorneys and issued a memorandum to his office ordering them to decline certain charges, divert many more cases, and seek much lower sentences in cases where incarceration is appropriate.<sup>11</sup> Assistants were also ordered to justify sentencing recommendations by stating on the record the costs and benefits of the requested period of incarceration.<sup>12</sup>

Other progressive prosecutors are making significant reforms that are making a difference. Cook County State's Attorney Kim Foxx unseated embattled incumbent Anita Alvarez and has made significant progress towards bail reform, increasing transparency and making fairer charging decisions.<sup>13</sup> Houston's Kim Ogg dismissed thirty-seven prosecutors from her office, hired a progressive defense attorney as her chief of staff,<sup>14</sup> and began reforms that included declining prosecution of minor drug offenses

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10. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009).

11. Memorandum from Larry Krasner, District Attorney for Philadelphia, to Assistant District Attorneys for Philadelphia (Feb. 15, 2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html> [<https://perma.cc/RG86-E28C>] (last visited Aug. 28, 2018).

12. *Id.*

13. RECLAIM CHICAGO ET AL., IN PURSUIT OF JUSTICE FOR ALL: AN EVALUATION OF KIM FOXX'S FIRST YEAR IN OFFICE (2017), [https://www.chicagoreader.com/general/201712/Equal\\_Justice\\_for\\_All\\_-\\_A\\_Report\\_on\\_Kim\\_Foxx\\_s\\_First%20Year-ForWeb.pdf](https://www.chicagoreader.com/general/201712/Equal_Justice_for_All_-_A_Report_on_Kim_Foxx_s_First%20Year-ForWeb.pdf) [<https://perma.cc/5MR6-Q3GF>].

14. Nick Tabor, *What If Prosecutors Wanted to Keep People Out of Prison?*, N.Y. MAG. (Mar. 27, 2018, 10:17 AM), <http://nymag.com/daily/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html> [<https://perma.cc/5BET-N7CG>].

and implementing bail reform.<sup>15</sup> Progressive prosecutors are even winning in the deep South. Scott Colom unseated notorious District Attorney Forrest Allgood in Mississippi and immediately expanded diversion programs and began working on establishing a conviction integrity unit.<sup>16</sup>

Newly elected progressives are not the only prosecutors implementing progressive reforms. Milwaukee County District Attorney John Chisholm has worked to reduce racial disparities and the incarceration rate since he took office in 2007. Chisholm uses an evidence-based approach to divert a wide range of cases out of the system.<sup>17</sup> King County Prosecuting Attorney Dan Satterberg, also elected in 2007, implements numerous diversion and community-based programs, supports safe consumption sites for drug users, and is fighting to end the death penalty.<sup>18</sup> Chisholm and Satterberg have been re-elected twice.

There are other examples of newly elected and established prosecutors implementing reform measures around the country, some more expansive than others. Skeptics might argue that there are thousands of state and local District Attorneys and that these progressive prosecutors represent a small minority. However, there is reason to believe that this movement of progressive prosecutors is growing. A number of organizations and political action committees have devoted substantial resources to supporting the election of progressive prosecutors.<sup>19</sup> The ACLU's Smart Justice Campaign and Brooklyn Defender Services launched a video series to educate the public about the power of prosecutors and the importance of prosecutor elections.<sup>20</sup> The Institute for Innovation in Prosecution is working with progressive prosecutors to "consider a new paradigm of prosecution that measures

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15. Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas> [https://perma.cc/M8UL-8P6M].

16. Tabor, *supra* note 14.

17. Jeffery Toobin, *The Milwaukee Experiment*, NEW YORKER (May 11, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [https://perma.cc/4Z2H-XY9D].

18. David Gutman, *Safe Heroin Injection Sites Get OK from King County Health Board*, SEATTLE TIMES (Jan. 19, 2017, 11:16 PM), <https://www.seattletimes.com/seattle-news/health/safe-injection-sites-get-ok-from-king-county-health-board/> [https://perma.cc/8KRL-JWH9]; Josh Kerns, *King County's Quietly Successful Program to Combat Addiction and Change Lives*, KIRO RADIO (Apr. 14, 2016, 6:19 AM), <http://mynorthwest.com/257543/king-countys-quietly-successful-program-combat-addiction-change-lives/> [https://perma.cc/VK8K-UVPJ].

19. Jon Schuppe, *Criminal Justice Reformers Aim Big by Targeting Local DA Races*, NBC NEWS (Feb. 14, 2018, 4:43 AM), <https://www.nbcnews.com/news/us-news/criminal-justice-reformers-aim-big-targeting-local-da-races-n847436> [https://perma.cc/KTD5-ZD6W]; REAL JUSTICE, <https://realjusticepac.org/> [https://perma.cc/XP4M-XHKR] (last visited Aug. 28, 2018).

20. *The Power of Prosecutors*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/power-prosecutors> [https://perma.cc/SM39-KNJX] (last visited Aug. 28, 2018).

success, not by conviction rates or plea conditions, but based on community-centered standards of safety, equity, and wellness.”<sup>21</sup>

We have a long way to go before we eliminate mass incarceration and racial disparities in our criminal justice system. Diversion programs that only include low-level misdemeanors will not get us there, but bold directives like those implemented by District Attorney Larry Krasner are an important start, and we have to start somewhere. The election of progressive prosecutors willing to use their power and discretion to effect change is essential to bringing fairness and racial equity to our criminal justice system, and that will only happen if good people become prosecutors.

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21. *Mission*, NAT'L NETWORK FOR SAFE COMMUNITIES, <https://nnscommunities.org/our-work/iip> [<https://perma.cc/QW3U-VFS6>] (last visited Aug. 28, 2018).

## PROSECUTORS WHO POLICE THE POLICE ARE GOOD PEOPLE

Vida B. Johnson\*

In 2001 Professor Abbe Smith asked if a person could be both a good prosecutor and a good person.<sup>1</sup> Her answer was, essentially, “no.” My answer in 2018 is that only a prosecutor who focuses on the powerful, and particularly who is willing to prosecute police who do wrong, can be good.

Underlying this question, and Professor Smith’s answer, is that the criminal justice system is deeply flawed and unfair. We incarcerate more people per capita than any other nation.<sup>2</sup> People of color are prosecuted at extraordinarily disproportionate rates.<sup>3</sup> Our system punishes mental illness and drug addiction rather than treat those health problems.<sup>4</sup> Prisons do not rehabilitate—they serve only to warehouse. The system is cruel and it only exacerbates the underlying problems of income inequality, racism, drug addiction, and mental illness that contribute to street-level crime. Meanwhile, crimes committed by the most powerful among us, including wealthy people and corporations, go largely ignored.

As suggested by Professor Smith’s answer, a prosecutor who is a good person would act to end those inequities and cruelties. Such a prosecutor would exercise her discretion to help stop criminalizing poverty, mental

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\* Professor from Practice, Georgetown University Law Center. Many thanks to Alexandra Douglas, Abbe Smith, and Jon Anderson.

1. Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

2. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/E5LU-PSUN>].

3. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 98–100 (2010); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 61–64 (2017); ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* xiv–xv (2017); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/DZ4H-LSX5>] (stating that prosecutorial charging decisions contribute to racial disparity in state prison populations).

4. JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, *INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12*, at 1 (2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> [<https://perma.cc/M8NJ-M9B5>] (finding that “37 [percent] of prisoners and 44 [percent] of jail inmates had been told in the past by a mental health professional that they had a mental disorder”).



illness, and addiction. Such a prosecutor would actively ensure that racial disparities in criminal prosecutions—from charging decisions through sentencing allocutions—were eliminated. Such a prosecutor would focus her attention on the wealthy and the powerful, whose crimes are often hidden but tend to have broad impacts across society.

That long list of reforms by a prosecutor seeking to be a good person would not, however, be enough. Within the criminal justice system itself, and on the streets of every city and town, police officers wield extraordinary powers—powers that mean the difference between life and death for some citizens, and for others can lead to the loss of freedom, property, or dignity. But some police officers, just like other members of the public,<sup>5</sup> violate the law.<sup>6</sup> Some officers steal,<sup>7</sup> some pimp,<sup>8</sup> some assault their domestic partners,<sup>9</sup> and some kill civilian citizens.<sup>10</sup> Because it is the role of the police to uphold the law and because of the enormous amount of power they wield, it is deeply troubling when police are the ones who commit crimes or otherwise violate the law. Not prosecuting marijuana possession, not seeking the death penalty, and not asking for money bonds in non-violent offenses are laudable prosecutorial reforms that should be the norm. But truly brave, good prosecutors (and people) try to reform police departments too. The system cannot be reformed, and will not be viewed as fair, unless officers are held accountable by prosecutors.

Because of their extraordinary powers and responsibilities, wrongful action by the police can have a more powerful impact than the same action committed by an ordinary citizen. For example, just like other citizens, police sometimes lie at work. But when the police lie, it is often a crime. If the officer frames a person for a crime he did not commit, the officer has committed obstruction of justice by wrongfully bringing the weight of the government against an innocent citizen. If an officer lies under oath, he has committed perjury and interfered with the truth-seeking process of a trial or other judicial proceeding.<sup>11</sup> Unfortunately, the problem of police officer untruthfulness is disturbingly widespread. In fact, there is even a special term

5. Most police officers, like most people, are law abiding.

6. For a discussion of a number of instances of illegal behavior by police officers, see Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 264–86 (2017) and Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1142 (2013).

7. See Johnson, *supra* note 6, at 268–86.

8. See Justin Jouvenal, *Former D.C. Police Officer Indicted on Charges of Trafficking Teens for Sex*, WASH. POST (Aug. 9, 2017), [https://www.washingtonpost.com/local/public-safety/former-dc-police-officer-indicted-on-charges-of-sex-trafficking-teens/2017/08/09/5ed241e0-7d41-11e7-9d08-b79f191668ed\\_story.html?https://perma.cc/97CA-537E](https://www.washingtonpost.com/local/public-safety/former-dc-police-officer-indicted-on-charges-of-sex-trafficking-teens/2017/08/09/5ed241e0-7d41-11e7-9d08-b79f191668ed_story.html?https://perma.cc/97CA-537E).

9. See Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 B.Y.U. L. REV. 1183, 1184–85 (2015).

10. See Johnson, *supra* note 6, at 268–86.

11. See, e.g., Christina Carrega, *NYPD Officer Cuffed for Lying About Seeing Gun in Suspect's Apartment Under Oath*, N.Y. DAILY NEWS (Mar. 27, 2018, 2:10 PM), <http://www.nydailynews.com/new-york/nyc-crime/nypd-cuffed-lying-gun-suspect-home-oath-article-1.3899225> [<https://perma.cc/956V-LJZ9>].

for it—“testilying”<sup>12</sup>—and commissions have literally been set up to address it.<sup>13</sup> This form of police corruption is not new. Scandals like the Ramparts scandal in Los Angeles and Tulia case in Texas took place in the 1990s<sup>14</sup> and have been followed by large-scale scandals in Philadelphia,<sup>15</sup> New Jersey,<sup>16</sup> and Dallas<sup>17</sup> that are much more recent. Police officer dishonesty has resulted in approximately a thousand provable wrongful convictions,<sup>18</sup> and has likely been the cause of hundreds of thousands more.<sup>19</sup>

Though not as widespread as police dishonesty and corruption, unjustified or excessive police violence can have an even more devastating impact, and its prevalence has been increasingly exposed as video cameras—including smartphones with video capability, dashboard cameras, and body-worn cameras—become virtually omnipresent.<sup>20</sup> Some police officers have also been part of white supremacist terror groups.<sup>21</sup>

Rampant perjury, corruption, brutality, and explicit racism amongst police has gone largely ignored by prosecutors. This has led to a policing crisis in America. With credibility problems, charges of explicit racism,<sup>22</sup> and the killing of almost one thousand civilians a year,<sup>23</sup> there is deep distrust of this

12. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

13. *Id.*

14. In the Ramparts case 156 people saw their convictions overturned or their cases dismissed. *See* Covey, *supra* note 6, at 1137–38. In the Tulia case thirty-five people were convicted and forty-seven people were charged based on the word of a single officer. *See id.* at 1139–41.

15. Chris Palmer, Samantha Melamed & Mark Fazlollah, *Philly Paying Millions to Resolve Allegations of Police Misconduct*, INQUIRER (Nov. 26, 2017, 8:50 AM), <http://www.philly.com/philly/news/crime/philly-settling-cases-narcotics-police-officers-20171126.html> [https://perma.cc/3GZM-S9D3].

16. Tom Davis, *At Least 12 New Jersey Cops Face Federal Corruption Charges, Reports Say*, NEWARK PATCH (Dec. 27, 2016, 9:58 AM), <https://patch.com/new-jersey/newarknj/least-12-new-jersey-cops-face-federal-corruption-charges-reports-say> [https://perma.cc/5YNC-NUWX].

17. Thomas Korosec, *Dallas Police Hammered for Fake Drug Scandal*, HOUS. CHRON. (Oct. 21, 2004, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Dallas-police-hammered-for-fake-drug-scandal-1486478.php> [https://perma.cc/2PE6-ND6K].

18. *See* Covey, *supra* note 6, at 1142; *see also* % Exonerations by Contributing Factor, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [https://perma.cc/XCK9-M723] (last visited Sept. 28, 2018).

19. The figure from the National Registry of Exonerations only accounts for cases where a person was “later cleared of all the charges based on new evidence of innocence” and not wrongful convictions that have not been overturned. *Id.*

20. *See* Farhad Manjoo & Mike Isaac, *Phone Cameras and Apps Help Speed Calls for Police Reform*, N.Y. TIMES (Apr. 8, 2015), <https://www.nytimes.com/2015/04/09/technology/phone-cameras-and-apps-help-speed-calls-for-police-reform.html> [https://perma.cc/3SU9-FP3K].

21. Alice Speri, *The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement*, INTERCEPT (Jan. 31, 2017, 7:10 AM), <https://theintercept.com/2017/01/31/the-fbi-has-quietly-investigated-white-supremacist-infiltration-of-law-enforcement/> [https://perma.cc/RTE3-KUMT].

22. *Id.*

23. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017> [https://perma.cc/2GCB-95MA] (last visited Sept. 28, 2018) (stating

powerful group of people. A 2015 poll by Reuters found that 31 percent of Americans believe that police routinely lie.<sup>24</sup> Distrust by the public in institutions that exist to protect them is a threat to the stability of the nation. The failure to police the police undermines the community's trust in law enforcement and other criminal justice institutions, especially in light of the vigor with which prosecutors prosecute the most vulnerable in our society.

With story after story and body camera footage showing police officers committing every manner of misdeed, from shooting unarmed civilians who question their authority,<sup>25</sup> to planting drugs on unsuspecting motorists,<sup>26</sup> to being a white supremacist,<sup>27</sup> the people need someone who can address the gross abuses of power. The only institution in our criminal justice system with more power than police is the prosecutor's office. At this moment in time prosecutors are the only institutional players with the power to check the power of police.

Despite the clear need for fair and firm treatment of officers who violate the law, most prosecutors go soft on police officers when they commit crimes, even while justifying the inequities in our criminal justice system by claiming to be hard on crime.<sup>28</sup> The unfairly lenient treatment of police stems from the prosecutors' inherent bias in favor of the police: prosecutors need the police to make their cases by investigating crimes and testifying during trial. Some officers even lie in order to help prosecutors make their cases.<sup>29</sup> Acknowledging the problems with police officer testimony undermines confidence in the integrity of the entire criminal justice system, which includes the prosecutors' office. Investigating and prosecuting other forms of misconduct undermine officers' credibility—individually or generally—and thus undermine the strength of the prosecutors' cases. As a result, most

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that 987 people were shot and killed by police in 2017); *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/X4FM-7SWN>] (last visited Sept. 28, 2018) (stating that 963 people were shot and killed by police in 2016); *995 People Shot Dead by Police in 2015*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> [<https://perma.cc/C2FQ-G7YP>] (last visited Sept. 28, 2018).

24. Bill Schneider, *Column-One Third of Americans Believe Police Lie Routinely*, REUTERS (Jan. 15, 2015, 7:05 AM), <http://in.reuters.com/article/2015/01/15/usa-police-idINL1N0UU01J20150115> [<https://perma.cc/GCS2-D8RX>].

25. See *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> [<https://perma.cc/R4YT-DMHC>] (last updated Apr. 19, 2018).

26. See, e.g., Jacey Fortin, *Baltimore Police Officer Charged with Fabricating Evidence in Drug Case*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/baltimore-officer-video-drugs.html?login=email&auth=login-email> [<https://perma.cc/LM2M-V5F4>].

27. See *supra* note 21 and accompanying text.

28. See generally Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305 (2001); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315 (2005).

29. Chemerinsky, *supra* note 28, at 310.

prosecutors avoid exposing problems in police departments,<sup>30</sup> only compounding the mistrust in our criminal justice system.

Some have argued that prosecutors should not be in charge of investigating and prosecuting the police because of their bias and reliance on police officers to make their cases.<sup>31</sup> These reformers argue for an entirely separate entity responsible for investigating and prosecuting police officers when they are accused of wrongdoing.<sup>32</sup> While there is a great deal of merit in this view, such entities do not currently exist, and the responsibility remains with the prosecutors. Progressive prosecutors should not shirk that responsibility, but instead appoint special separate units that investigate and prosecute police officers when they violate the law or intentionally lie under oath.

There are a few prosecutors who are now trying to address some of the most serious systemic problems with our criminal justice system. They were not appointed, but rather elected on promises of reform. The most well-known of them is Philadelphia's Larry Krasner. Krasner has been described as "the most progressive DA in the country."<sup>33</sup> He has dismissed thirty-one staff members—one can assume that that he believed them to be over-zealous or unethical<sup>34</sup>—and has reformed the bail system, including ending cash bail for low level offenses, such as marijuana possession.<sup>35</sup> Philadelphia now has approximately 33 percent fewer people in their jails than in 2015.<sup>36</sup> He has also announced a policy of not pursuing very low-level offenses.<sup>37</sup> In

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30. *Id.* at 312–13.

31. See generally Joshua A. Deahl, *Police Killings Call for a New Kind of Prosecutor*, BLOOMBERG (Dec. 4, 2014, 4:55 PM), <https://www.bloomberg.com/view/articles/2014-12-04/police-killings-call-for-new-kind-of-prosecutor>; Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

32. See, e.g., Levine, *supra* note 31, at 1494–95.

33. Chris Palmer, *6 Months in, Philly DA Larry Krasner Cementing National Stature Among Reform Advocates*, INQUIRER (June 12, 2018, 1:05 PM), <http://www.philly.com/philly/news/crime/philly-district-attorney-larry-krasner-national-stature-reform-advocates-satana-deberry-real-justice-pac-george-soros-20180612.html> [<https://perma.cc/73L5-NJWA>].

34. See Chris Palmer, Julie Shaw & Mensah M. Dean, *Krasner Dismisses 31 From Philly DA's Office in Dramatic First-Week Shakeup*, INQUIRER (Jan. 5, 2018, 7:51 PM), <http://www.philly.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html> [<https://perma.cc/WSY4-AQ9J>].

35. See David Chang & Alicia Victoria Lozano, *Can Philadelphia District Attorney Larry Krasner's Radical Approach Protect the City?*, NBC 10 PHILA. (June 23, 2018, 4:52 PM), <https://www.nbcphiladelphia.com/news/local/Larry-Krasner-Philadelphia-District-Attorney-Social-Reform-Crime-Prisons-First-100-Days-479479463.html> [<https://perma.cc/KP42-4DHJ>]; Chris Palmer, *Philly DA Larry Krasner Won't Seek Cash Bail in Certain Crimes*, INQUIRER (Feb. 21, 2018, 6:26 PM), <http://www.philly.com/philly/news/crime/philadelphia-larry-krasner-cash-bail-reform-20180221.html> [<https://perma.cc/RXH5-ZMRE>].

36. Tom Jackman, *Justice Reforms Take Hold, the Inmate Population Plummet, and Philadelphia Closes a Notorious Jail*, WASH. POST (Apr. 23, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/23/justice-reforms-take-hold-the-inmate-population-plummet-and-philadelphia-closes-a-notorious-jail/> [<https://perma.cc/CQJ7-9X8D>].

37. Ryan Sit, *Philly DA Drops Dozens of Marijuana Criminal Charges, Joins Other Big Cities in Decriminalization*, NEWSWEEK (Feb. 16, 2018, 10:48 AM), <https://www.newsweek.com/marijuana-charges-dropped-philadelphia-pennsylvania-district-attorney-809172> [<https://perma.cc/AFY5-9EAY>].

addition to his fair-minded approach, his background sets him apart from other prosecutors. He was elected after a career in which he sued police,<sup>38</sup> winning the race despite opposition from the police union.<sup>39</sup> While he is still new to the job, his background suggests he will not turn a blind eye to police misconduct. In fact, Krasner has started developing a list of police officers with a history of lying, racial bias, or brutality.<sup>40</sup>

Larry Krasner is not the only recently-elected District Attorney focused on criminal justice reform. Other prosecutors from Mississippi to Orlando have also been hailed for a host of progressive changes in their jurisdiction.<sup>41</sup> Kim Ogg, the Houston District Attorney, is also making a name for herself by changing the culture of prosecution. She made police accountability a central focus of her campaign for District Attorney and unsurprisingly was opposed by the police union.<sup>42</sup> Stephanie Morales, the commonwealth attorney in Portsmouth, Virginia, is one of a few prosecutors who won a conviction against a white police officer who killed an unarmed black man and was then re-elected.<sup>43</sup> Morales ran for election and re-election on a progressive criminal justice platform—winning both times.<sup>44</sup> And in Ferguson, Missouri, the head prosecutor who failed to pursue charges against a police officer for the killing of Mike Brown was voted out of office in the next election.<sup>45</sup> He had been the prosecutor there for seven terms.<sup>46</sup> The winner of the election, a black man, campaigned in part on a promise to assign special prosecutors to investigate police misconduct.<sup>47</sup>

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38. See Alan Feuer, *He Sued Police 75 Times. Democrats Want Him as Philadelphia's Top Prosecutor*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html> [<https://perma.cc/HDF5-NZ2Y>].

39. See Abraham Gutman, *The Two Big Reasons the Police Union Wants Larry Krasner to Lose*, PHILA. MAG. (Nov. 3, 2017, 9:00 AM), <https://www.phillymag.com/news/2017/11/03/krasner-mcnesby-police-union/> [<https://perma.cc/ZV8Z-ZUVC>]; Alan Pyke, *Philadelphia Voters Defy Police Union, Trumpian Mindset in Picking Their New District Attorney*, THINKPROGRESS (Nov. 8, 2017, 3:04 PM), <https://thinkprogress.org/larry-krasner-wins-philadelphia-da-9225f573793a/> [<https://perma.cc/2FDZ-AQZT>].

40. Mark Fazlollah & Chris Palmer, *Philly DA Larry Krasner Seeking to Develop Comprehensive List of Tainted Cops*, INQUIRER (June 4, 2018, 3:50 PM), <http://www.philly.com/philly/news/crime/philly-da-larry-krasner-seeking-to-develop-comprehensive-list-of-tainted-cops-20180604.html> [<https://perma.cc/5X5S-6LDS>].

41. Frances Robles, *5 Prosecutors with a Fresh Approach*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/change-minded-prosecutors.html> [<https://perma.cc/6NKT-Q89Y>].

42. Brian Rogers, *Houston District Attorney Proud of First Year in Office*, HOUS. CHRON. (Dec. 29, 2017, 6:05 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-district-attorney-proud-of-first-year-in-12462622.php> [<https://perma.cc/A9BF-TEH7>].

43. Maryam Saleh, *Prosecutor Who Convicted White Police Officer for Killing Black Teen is Re-Elected in Contentious Race*, INTERCEPT (Nov. 7, 2017, 8:58 PM), <https://theintercept.com/2017/11/07/prosecutor-who-convicted-white-police-officer-for-killing-black-teen-is-re-elected-in-contentious-race/> [<https://perma.cc/9J7T-UG2J>].

44. *Id.*

45. Jim Sulter, *Ferguson Councilman Wesley Bell Ousts Longtime Prosecutor Bob McCulloch*, TIME (Aug. 8, 2018), <http://time.com/5360745/bell-mcculloch-st-louis-ferguson-primary/> [<https://perma.cc/AV2D-C4SH>].

46. *Id.*

47. *Id.*

While a number of things have changed since Professor Smith penned her groundbreaking piece—incarceration rates are lower,<sup>48</sup> marijuana is now legal in a number of places,<sup>49</sup> and there is less support for the death penalty<sup>50</sup>—much has stayed the same. While it is great that there are a handful of reform-minded prosecutors on the scene, the policing crisis in this country persists. To truly be a good person and a good prosecutor, a prosecutor must hold police officers accountable.

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48. John Gramlich, *America's Incarceration Rate Is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> [<https://perma.cc/HK5Q-KZKJ>].

49. *States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> [<https://perma.cc/8SLL-3DEM>] (last visited Sept. 28, 2018).

50. Mark Berman, *For the First Time in 50 Almost Years, Less Than Half of Americans Support the Death Penalty*, WASH. POST (Sept. 30, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/09/30/states-arent-using-the-death-penalty-as-much-now-americans-are-abandoning-it-too/?utm\\_term=.8020bfce61e7](https://www.washingtonpost.com/news/post-nation/wp/2016/09/30/states-arent-using-the-death-penalty-as-much-now-americans-are-abandoning-it-too/?utm_term=.8020bfce61e7) [<https://perma.cc/A3GD-GW2H>].

## A DEFENDER’S TAKE ON “GOOD” PROSECUTORS

*David E. Patton\**

When Professor Abbe Smith wrote “Can You Be a Good Person and a Good Prosecutor” in 2001 (and answered it mostly in the negative),<sup>1</sup> she began a conversation that would result in me, a public defender, having to repeatedly answer the question from earnest law students and young lawyers. I haven’t yet forgiven Professor Smith. My first impulse when I’m asked the question is to hand out her home phone number. My second impulse is to answer: “Why are you asking *me*?” I’m a defense lawyer. Worse still, I am a public defender. I’m not, shall we say, naturally drawn to answering questions about who should become a prosecutor. Nor am I naturally drawn to “good people.”

But here we are seventeen years later and the question is still on the table—perhaps more so than ever with the election of several “progressive prosecutors” in notable jurisdictions.<sup>2</sup> I will start by saying that I would like to practice in a criminal justice system where the question of whether a “good person” can be a “good prosecutor” is a silly, even offensive, question. The fact that in this day and age it is instead a legitimate question fraught with moral significance speaks volumes about the system itself.<sup>3</sup>

And indeed, the problems with the criminal justice system are shocking in their breadth, including widespread overpolicing and overprosecution of racial minorities and the poor,<sup>4</sup> insanely harsh sentencing laws,<sup>5</sup> and a

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001).

2. See, e.g., Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <http://prospect.org/article/new-reformer-das> [https://perma.cc/G4V5-PAL2] (discussing the elections of Larry Krasner in Philadelphia, Kim Foxx in Chicago, and Kim Ogg in Houston, among others).

3. For an extended discussion of the topic, see generally PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2010).

4. See generally ANGELA J. DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (2017); David E. Patton, *Policing the Poor and the Two Faces of the Justice Department*, 44 FORDHAM URB. L.J. 1431, 1436–39 (2017) (discussing the reports of the Civil Rights Division of the Department of Justice on policing and prosecution in Baltimore, Ferguson, and Chicago).

5. See, e.g., WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 32, 294 (2011) (discussing the rise of mandatory minimums and excessively harsh sentences, among

disgracefully underfunded indigent defense system.<sup>6</sup> With only around 3 percent of convictions arising from trials<sup>7</sup> and a plea-bargaining system that hands a mind-boggling amount of unchecked power to prosecutors,<sup>8</sup> the results have been perfectly predictable. America is the runaway leader among industrialized countries in incarceration rates.<sup>9</sup> Pick your favorite statistic to illustrate the point. With only 5 percent of the world's population, America houses 25 percent of the world's prisoners.<sup>10</sup> Depending on the year and location, black men have a roughly one in three or four lifetime chance of going to prison.<sup>11</sup> The prospect of prison has become a routine part of life in many poor communities of color.<sup>12</sup> More than a third of all prison inmates (37 percent) and almost half of all jail inmates (44 percent) have a significant mental health disorder.<sup>13</sup> More than half of all state prisoners (58 percent) and nearly two thirds (63 percent) of sentenced jail inmates meet the criteria

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other things, that contributed to the increase in prison population); *Criminal Justice Facts, SENTENCING PROJECT*, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/X76G-Y2TM>] (last visited Sept. 28, 2018) (reviewing the roughly 500 percent increase in prison and jail populations over the past forty years).

6. See, e.g., Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, A.B.A. J. (Jan. 2017), [http://www.abajournal.com/magazine/article/the\\_gideon\\_revolution](http://www.abajournal.com/magazine/article/the_gideon_revolution) [<https://perma.cc/XF54-LNKH>]; Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html) [<https://perma.cc/CGW4-6Y6T>]; Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW (Nov. 21, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads> [<https://perma.cc/953W-2KE6>] (cataloguing selected underfunded offices).

7. See, e.g., Benjamin Weiser, *Trial by Jury, a Hallowed American Right, is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/25ZH-GCUA>].

8. See, e.g., David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2588–90 (2013).

9. See, e.g., Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/YTG4-QA8M>].

10. See, e.g., *id.*

11. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [<https://perma.cc/GX6N-N9DC>] (estimating the odds of a black man going to prison at one in three “if current trends continue”).

Because the prison population has declined slightly since 2013 and because there is significant local variation and a lack of precise data collection, I have qualified the number above.

12. *Id.* (stating that chance of lifetime imprisonment is one in three for black men and one in six for Latino men as compared to one in seventeen for white men); see also, MICHELLE ALEXANDER, *THE NEW JIM CROW* 98 (2010); Emily von Hoffmann, *How Incarceration Infects a Community*, ATLANTIC (Mar. 6, 2015), <https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967> [<https://perma.cc/DX6Z-RA66>].

13. JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, at 3 tbl.1 (2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> [<https://perma.cc/EYV9-DQMR>].



for drug dependence or abuse.<sup>14</sup> Our penchant for turning poverty and what should rightly be public health issues into occasions for putting people in cages seems to know few limits. And prisons themselves tend to be incubators of future crime, rather than places of “correction” and rehabilitation.

Against that backdrop, how should anyone interested in the criminal justice system think about whether to participate in it as a prosecutor? The answer depends in large part on that person’s view of the criminal justice system. For anyone who believes that our current criminal justice system gets things about right, the question of whether to become a prosecutor is not so thorny. I do not set the bar terribly high for “about right.” No system is perfect. Mistakes get made. And reasonable people can differ about where to strike the right balance between order and liberty or redemption and punishment. But despite this low bar, I find it hard to imagine anyone could look at our criminal justice system and think that we have it “about right.”

The more difficult question is this: Should I become a prosecutor if I think the system is horribly broken? Will I be in a better position to help fix it as a prosecutor as opposed to say a public defender, an impact litigator, or a policy advocate? After all, if one of the big problems with the system is that we have prosecutors with an enormous amount of authority abusing that authority, should I not instead put the authority to good use? For this group, I think the moral aspect of the question is indeed fraught (leaving aside whether people in this camp will actually have a personal affinity for the work). For them, in the age of Larry Krasner and the “progressive prosecutor” moment we seem to be having, Professor Smith’s question is hotter than ever.

Indeed, many of those concerned about mass incarceration and stark racial disparities have turned their focus and energy toward electing head prosecutors who promise reform.<sup>15</sup> To this movement, I say: God Bless. If Americans can elect cop-suing civil rights attorneys and former public defenders (Krasner is both)<sup>16</sup> to every head prosecutor job in the land, we will all be better for it. By all accounts, Krasner has begun advancing truly meaningful change in Philadelphia;<sup>17</sup> count me a fan.

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14. JENNIFER BRONSON ET AL., BUREAU JUSTICE STATISTICS, DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009, at 3 tbl.1 (2017), <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf> [<https://perma.cc/W95B-WV83>].

15. See, e.g., Daniel Marans, *Black Activist Starts Group That Aims to Elect Progressive Prosecutors*, HUFFINGTON POST (Feb. 15, 2018, 1:35 PM), [https://www.huffingtonpost.com/entry/black-activist-elect-progressive-prosecutors\\_us\\_5a85b64ee4b0058d55670e4f](https://www.huffingtonpost.com/entry/black-activist-elect-progressive-prosecutors_us_5a85b64ee4b0058d55670e4f) [<https://perma.cc/DT5A-4BEK>]; Paige St. John & Abbie Vansickle, *Here’s Why George Soros, Liberal Groups Are Spending Big to Help Decide Who’s Your Next D.A.*, L.A. TIMES (May 23, 2018, 7:00 AM), <http://www.latimes.com/local/california/la-me-prosecutor-campaign-20180523-story.html> [<https://perma.cc/7YBB-2AG8>].

16. See Alan Feuer, *He Sued Police 75 Times. Democrats Want Him as Philadelphia’s Top Prosecutor*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html> [<https://perma.cc/U66H-D3KW>].

17. See, e.g., Teresa Mathew, *Bail Reform Takes Flight in Philly*, CITYLAB (Feb. 2, 2018), <https://www.citylab.com/equity/2018/02/bail-reform-takes-flight-in-philly/552212/> [<https://perma.cc/HEA6-6JMR>].

But I think a bit of caution is in order for those in the reformist camp thinking about entering professional life as a prosecutor. First, most young lawyers are not entering prosecutor offices as the chief. Keep in mind: Krasner did not come up through the ranks as a prosecutor, and it is hard to imagine he would be as bold in his work now if he had. Nor are young lawyers likely to join offices with true reformists at the top, such that their daily work would look very different from that of the past generation of prosecutors. In most places with “progressives” at the top, reform may be nibbling around the edges, but it is not fundamentally changing the way business is done.

Second, I do not believe that mass incarceration was brought to us by “bad people” in prosecutor uniforms. Rather, it was brought to us by perfectly ordinary people. People who, by and large, have always thought that they were “doing justice” or who generally felt that they were serving their communities and simply getting good experience as young trial lawyers before going into politics or getting better-paying jobs elsewhere. Perhaps by process of self-selection, prosecutors tend to have more of a judgmental bent than the population at large, but that hardly qualifies as a national crisis. The crisis, to my mind, is not that we have the wrong people in positions of such enormous power. It is that we have anybody in positions of such enormous power. (To be sure, the fact that many of them happen to be twenty-nine years old and dogmatic does not help).

When I say most prosecutors are ordinary people, a short list of salient attributes includes: (1) some susceptibility to a host of cognitive biases; (2) some amount of ego; (3) some amount of ambition; (4) some amount of righteous indignation; and (5) some susceptibility to groupthink and office culture. In other words, prosecutors are human beings. Sadly, this is a problem given the modern structure of prosecution in America.

Prosecutors are given a dual role in the American criminal justice system. On the one hand they are “ministers of justice,” and on the other hand, they are adversarial lawyers. With respect to the former, prosecutors are told that they win when justice is done—no matter the outcome of the case. With respect to the latter, they are told that they win when they win.

In their role as ministers of justice, prosecutors have enormous power: to charge or not charge; to choose from a large menu of possible offenses; and to plea bargain away, or not, certain charges—which will often then determine the sentence. Those incredibly important, highly discretionary, and almost entirely unregulated decisions are not made in a vacuum, sealed off from their role as adversarial lawyers. Prosecutors do not approach cases from an unbiased neutral role; they spend their time learning about cases primarily from law enforcement agents and complaining witnesses. To the extent that they receive a contrary view, it typically comes from the defense lawyer—an adversary whose story they understandably view with some amount of skepticism. As a result, prosecutors routinely make “ministerial” decisions from a very slanted viewpoint. I do not use the term “slanted” in a pejorative sense. Rather, I use it in a descriptive sense: they receive their information in a one-sided fashion. This would not be quite so problematic

if there were meaningful constraints on their authority. Sadly, there are virtually none.

In their role as adversaries, prosecutors are predisposed to push the law and the facts in their favor. In their daily practice, they routinely argue for fewer Fourth, Fifth, Sixth, and Eighth Amendment protections for criminal defendants. They routinely defend disturbing conduct of police officers. They routinely advocate for evidentiary rulings that are favorable to the State. And they routinely argue on the side of severity in sentencing.

In deciding whether these are things a “good person” should do (however one might define that terrible term), one must decide whether the activities I have just described are desirable activities. Yes, a person in the role of prosecutor who is concerned about mass incarceration and racial justice will be in a position to ameliorate some of the more harmful aspects of those activities in individual cases. But most prosecutors’ daily activities still push the system in a harmful direction—no matter the individual politics of the prosecutor involved. I have seen far too many prosecutors who fancy themselves “progressives” make decisions that were thoroughly inconsistent with any progressive notion of social justice. I do not think that they do so out of some “bad” illegitimate motive (most of the time); rather, I think that they do it because of their professional role, a one-sided view that convinces them that they are doing the right thing.

As I watch the head “progressive prosecutors” do their work, the thing I will look for most is not discrete policy positions such as refusal to prosecute marijuana possession or bring capital charges. I will look to see if they affirmatively press legal arguments that would expand Fourth, Fifth, Sixth, and Eight Amendment rights. I will look to see if they establish lasting structures to address police misconduct in everyday cases. And I will look to see how hard they press legislatures to enact laws that accomplish all of those things by binding them and their successors.

The foundation of American democracy is that it does not rely on “good people” for good governance. A robust system of checks and balances assumes that all sorts of ordinary failings in most people make them untrustworthy of enormous power without some restraint from another group of people in a different role. Unfortunately, the line that separates a healthy and necessary amount of prosecutorial authority from a dangerous and oppressive amount was crossed long ago. I am encouraged that we seem to be taking some steps in the right direction, but the journey will be a long one, and I do not think we are likely to get there from the advocacy of prosecutors.

Seventeen years ago, Professor Smith wrote, “We live in an extraordinarily harsh and punitive time, a time we will look back on in shame.”<sup>18</sup> That time is still our time. A generation from now, when people fairly ask who did what to fight against and change it, will the young prosecutors of today come to mind? Time will tell. Count me a skeptic. I would be thrilled to be proven wrong.

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18. See Smith, *supra* note 1, at 396.

## REVISITING ABBE SMITH'S QUESTION, "CAN A GOOD PERSON BE A GOOD PROSECUTOR?" IN THE AGE OF KRASNER AND SESSIONS

*Rebecca Roiphe\**

In an article published over fifteen years ago, Georgetown Law Professor Abbe Smith argued that one cannot be a good person and a good prosecutor.<sup>1</sup> In other words, if you are concerned with social justice, it would be self-defeating to work in a prosecutor's office. With Attorney General Jeff Sessions at the helm, the federal criminal justice system has changed since Smith wrote this article, in many ways for the worse. At the same time, in response to a powerful grass roots movement, the reformist approach to criminal justice has gained some ground. Elected prosecutors, like Larry Krasner, have won office with broad and even radical agendas. His campaign promises were not platitudes designed to earn a liberal vote. He has radically reformed his office by refusing to prosecute marijuana possession, diverting more cases from prosecution to social programs, and adjusting charging, plea bargaining, and sentencing practices in ways designed to reduce mass incarceration.<sup>2</sup> More prosecutors' offices have opened conviction integrity units to look into evidence of potentially wrongful convictions.<sup>3</sup>

Meanwhile, special prosecutor Robert Mueller labors on in the Russia probe. Workmanlike and professional, Mueller seems to ignore the political pressure from the President and his lawyers. Mueller serves as a reminder of how important prosecutorial independence is. Reined in by DOJ policies and the traditions and norms of the office, Mueller has proceeded so far unaffected by the carnival-like atmosphere around him. Mueller is not a

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

2. See Maura Ewing, *Philadelphia's New Top Prosecutor is Rolling Out Wild Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018), <https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html> [<https://perma.cc/54AS-XZL2>].

3. As of the end of 2017, there were thirty-three conviction integrity units. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/7KTM-8JAK>] (last visited Sept. 28, 2018).

knight in shining armor. He, and others like him, can only exist if prosecutors are protected from the political branches and trusted—at least somewhat—to exercise their discretion well.

In this oddly polarized context, this essay revisits Abbe Smith's question and concludes that not only can one be a good person and a good prosecutor, but individuals devoted to social justice and concerned about flaws in the criminal justice system should seriously consider a career in prosecution. The radically different views towards criminal justice shared by prosecutors and the public offer an opportunity for change, in a volatile atmosphere in which commitment from within is a promising route to reform.

The argument that a good person cannot be a good prosecutor rests on several assumptions. First, it assumes that the criminal justice system is broken. Beyond flawed, the endeavor is corrupt and irredeemable. A prosecutor who takes part in a system like this, even one with the best intentions, is inevitably complicit.<sup>4</sup> Even if she manages to reduce the amount of evil at the margins, she is ultimately a part of the problem. Her daily work involves adding more people to an overcrowded and broken jail system and contributing to the disproportionate number of imprisoned African American men.

While wrongful convictions, mass incarceration, inhumane prison conditions, and disproportionate and cruel effects on African American and other minority communities plague the criminal justice system, it is not, in my mind, beyond repair. Krasner and Mueller are proof. Not all District Attorneys share Krasner's commitment to change but the language of reform is now prevalent.<sup>5</sup> Not all prosecutors are as devoted to professional norms as Mueller but he is a product of this system too. There is good evidence that public opinion is swinging towards reform as well.<sup>6</sup> District Attorneys are elected officials who may at least potentially be swayed by this new tide. Line prosecutors around the country have that currency to draw on. Of course, if a young prosecutor finds herself in a different office, one whose policies resemble Sessions' more than Krasner's, it will be harder but not impossible to pursue social justice.

A second premise at the heart of Smith's argument is that line prosecutors are controlled by their supervisors.<sup>7</sup> Even if they were inclined to be lenient in charging or generous in turning over discovery to the defense, they would be prevented from doing so. The office cultures that caused the problem will

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4. David Luban makes this argument about the Trump administration, arguing that anyone who works within it is complicit in its evils. David Luban, *The Case Against Serving in the Trump Administration*, SLATE (Nov. 15, 2016), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/11/career\\_civil\\_servants\\_should\\_not\\_serve\\_in\\_the\\_trump\\_administration.html](http://www.slate.com/articles/news_and_politics/politics/2016/11/career_civil_servants_should_not_serve_in_the_trump_administration.html) [https://perma.cc/ZQ55-XMN6].

5. See generally Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

6. See Lydia Wheeler, *Poll: ¾ of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018), <http://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [https://perma.cc/4295-PUDG].

7. Smith, *supra* note 1, at 385–86.

swallow up these young recruits. This seems counterintuitive and also runs against the literature on workplace culture. The culture of a particular office is rarely created solely by the head of the office. Units within and individuals at all levels of the hierarchy have power to amend and alter the message that comes from the top.<sup>8</sup>

In the federal system, for instance, a series of Attorneys General have issued memoranda directing line prosecutors to charge the highest crime that they can prove.<sup>9</sup> Federal prosecutors have, however, worked around this rule.<sup>10</sup> Many Assistant United States Attorneys charge what they think is the appropriate crime, either defying the edict or rationalizing that they were not sure that they had enough evidence to prove the most severe charge. Of course, prosecutors will have supervisors and those supervisors may well undermine a prosecutor's attempt to use the position to protect defendants' rights or avoid lengthy unjust sentences, but prosecutors' offices are not generally equipped to control all prosecutorial decisions. Choices about discovery, what evidence to present, legal arguments to make, and what sentence to recommend are often, out of necessity, left to the individual line prosecutor. A prosecutor committed to a broad and complex understanding of what it means to do justice has significant power to implement that vision.

Prosecutors enjoy vast discretion. By exercising this power virtually unchecked, prosecutors have created or at least perpetuated the ills that plague criminal justice in this country. Many critics have advocated for greater controls. They argue for internal structural changes within prosecutors' offices,<sup>11</sup> more judicial or legislative checks,<sup>12</sup> a better funded criminal defense bar,<sup>13</sup> and transparency and more popular involvement in criminal trials.<sup>14</sup> Many of these suggestions are both wise and necessary. Our form of government was based on the idea that unchecked power is dangerous, and prosecutors have grown too powerful. That said, it is both unrealistic and undesirable to strip prosecutors of discretion entirely. Discretion is both inevitable and fundamental to our justice system. The independence it creates allows prosecutors, who are most familiar with the facts and trained in the law, to protect liberty and serve as an important check

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8. See Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 515–35 (2017).

9. See Alan Vinegrad, *DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT. REP. 3 (2017).

10. *Id.* at 6.

11. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 319–41 (2013).

12. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 61–62 (1998); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Margaret Z. Jones, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 53–54; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981).

13. John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html> [<https://perma.cc/DK26-9K57>].

14. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 955–59 (2006).

on political power.<sup>15</sup> It allows them to develop practices with some internal consistency. In short, it allows them to adopt a professional, even-handed approach that lends Mueller the credibility to combat allegations of political bias. Even if this were not the case prosecutors who are close to the facts, are well situated to exercise discretion. There is no institution or actor that would be in a better position to make these decisions.

Discretion is not only a necessary evil, it can also be transformed into a force for maintaining democratic institutions and even progressive change.<sup>16</sup> In an office run by a District Attorney like Larry Krasner, it is not hard to see how prosecutors can use their discretion to repair some of the worst problems.<sup>17</sup> But even in offices with a greater philosophical commitment to law and order, individual prosecutors exercise discretion in their cases.

Abbe Smith's argument rests on a third premise. She argues that because prosecutors do not empathize with any individual, their moral sense is hobbled. Empathy is complicated. It can be a wonderful thing that causes individuals to do good in the world. Every defendant deserves one person who identifies with him, who sees him as something more than his worst act. That said, empathy is not the only value and in its extreme, it can get in the way of a broad view of criminal justice that can lead to substantial reform. For instance, a defense attorney's devotion to her client will lead her invariably to do what is best for that individual regardless of the impact on others. A defense attorney representing a witness who wishes to cooperate with the government, for instance, will have to help her client do so even if it unfairly affects the defendant. Often the client's interest will correspond with the defense lawyer's broader ideological goals but at times it will not. Empathy, as well as professional norms, will lead the defense lawyer to ignore or at least disregard the impact the representation has on those other individuals. At its extreme, it can lead to a kind of identification that blinks reality and causes defense lawyers to believe their clients in the face of obvious facts. Prosecutors often use the derogatory term "true believers" to describe this sort of defense attorney.

Empathy is not inconsistent with the prosecutor's job, as Smith concedes, but a prosecutor's duty to all community members will inevitably limit any empathic moment. The prosecutor is charged with looking out for all the individuals affected by a given case: the defendant, the victim, future victims, and the community. Abstract principles like the rule of law, personal responsibility, and fairness similarly ought to factor into prosecutors'

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15. See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, ALA. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126856](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126856) [<https://perma.cc/NJ74-K7TP>].

16. Green & Roiphe, *supra* note 8.

17. Mark Fazlollah et al., *Philadelphia's DA Keeps Secret List of Suspect Police*, INQUIRER (Feb. 13, 2018), <http://www.philly.com/philly/news/philadelphia-police-misconduct-list-larry-krasner-seth-williams-meek-mill-20180213.html> [<https://perma.cc/WSY9-RZWN>]; Brian X. McCrone, *Marijuana Cases Dropped En Masse by Philadelphia DA*, NBC 10 PHILA. (Feb. 15, 2018), <https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html> [<https://perma.cc/KGS6-3DSZ>].

decisions in every case. This broad responsibility to do justice runs the risk of leaving the prosecutor with an arrogant faith in his own assessment of what is right, or an unwillingness to view things from a different or more nuanced perspective. As many scholars have shown, prosecutors more often empathize with police officers, investigators, or victims with whom they work regularly than with a defendant.<sup>18</sup> This, however, is a distortion of the prosecutor's role, an all-too-common risk, but not an inevitable part of the job.

The rhetoric on either side of this debate is the enemy of effective reform. Prosecutors who have total faith in their ability to assess and pursue the public interest resist all limits on their power and are prone to disregard facts that conflict with their initial assumption about an individual's guilt. Defense attorneys, who are skeptical of prosecutors' ability to do any good, advocate for greater checks on prosecutorial power but will, inevitably, be left with prosecutors who exercise some discretion. Unless they acknowledge that discretion can be used for good they will be stuck in an unjust system and continue to drive all individuals committed to social justice from prosecutors' offices.

Turning back to our current criminal justice field occupied by Attorney General Jeff Sessions, District Attorney Larry Krasner, and Special Prosecutor Robert Mueller, it seems to me that this is a unique moment for prosecutors to move their offices incrementally towards reform. Whatever position a prosecutor occupies along this spectrum, she cannot avoid a dialogue about criminal justice that includes the voices of Black Lives Matter, the Innocence Movement, and others. We need people inside prosecutors' offices who will engage in this conversation in a meaningful way and help reform their offices to pursue a more just kind of prosecution with a more nuanced understanding of crime, race, poverty, and the criminal justice system.

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18. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1104–05 (2014).



## THE NECESSITY OF THE GOOD PERSON PROSECUTOR

*Jessica A. Roth\**

In a 2001 essay, Professor Abbe Smith asked the question whether a good person—i.e., a person who is committed to social justice—can be a good prosecutor.<sup>1</sup> Although she acknowledged some hope that the answer to her question could be “yes,” Professor Smith concluded that the answer then was “no”—in part because she saw individual prosecutors generally as having very little discretion to “temper the harsh reality of the criminal justice system.”<sup>2</sup> In this *Online* Symposium revisiting Professor Smith’s question seventeen years later, my answer to her question is “yes”—a good person *can* be a good prosecutor.

Every day, there is much important work that we need prosecutors to do. There are investigations to be conducted and reports to be written bringing public attention to civil rights violations<sup>3</sup> and other matters of public concern.<sup>4</sup> There are crimes committed that require prosecution—e.g., crimes of violence, terrorism, financial frauds, civil rights violations, and public corruption. Someone needs to handle these cases. But such cases do not present themselves fully formed and all prosecutions touch on numerous important values. Thus, we need good people to ensure that investigations,

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1. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 362 (2001).

2. *Id.* at 363.

3. *See, e.g.*, N.Y. OFFICE OF THE ATT’Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 16–17 (2013) (analyzing racial disparities in dispositions for cases originating with the New York City Police Department’s stop-and-frisk policy); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15–42, 62–79 (2015) (detailing the Department of Justice’s investigation of the Ferguson, Missouri Police Department’s practices, including its disproportionate impact on African Americans).

4. *See, e.g.*, Michelle Boorstein & Gary Gately, *More Than 300 Accused Priests Listed in Pennsylvania Report on Catholic Church Sex Abuse*, WASH. POST (Aug. 14, 2018), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/14/pennsylvania-grand-jury-report-on-sex-abuse-in-catholic-church-will-list-hundreds-of-accused-predator-priests> [<https://perma.cc/Q5T4-R6HA>] (describing the grand jury report that followed an eighteen-month investigation led by Pennsylvania Attorney General Josh Shapiro).

pleas, trials, and sentencings are conducted in a manner that respects people's rights and who consider the broader context of their work. To my mind, it is critical that people who recognize nuance, understand the complexity of their role, and approach their work with humility be prosecutors. The idea that only people who do not care deeply about social justice should become prosecutors is terrifying.

Of course, the foregoing assumes that individual "good" prosecutors will have the authority to act in a way that is consistent with their values. In offices where the prosecutor's own values align with those of the people in charge, this is more easily accomplished. But prosecutors working in other offices can also promote social justice by conducting their own work to the highest ethical standards and exercising their discretion wisely. For example, there often is room for individual prosecutors, and units within an office, to prioritize certain kinds of cases, to err on the side of disclosure of law enforcement error and evidence useful to the defense, to sometimes seek less than the harshest possible charges, and even to decline to charge for valid reasons. I think this is a larger space, and suspect that it is more widely utilized, than may be apparent to those observing prosecutors from the outside. In many instances, these may be cases that never get to a defense attorney. It may not be easy for individual prosecutors, especially when they are new, to exercise such authority even if they recognize that they have it<sup>5</sup> or for them to challenge established practices.<sup>6</sup> But that is an additional reason for more good people to become prosecutors, so that they can support one another, remind one another of their pre-commitments, and help build bridges between prosecutors, the defense bar, and other communities.

Prosecutors also hold the potential to reshape the criminal justice system. In many ways, the context today resembles that at the turn of the millennium when Professor Smith wrote her essay. For example, the incarceration rate within the United States is still strikingly high, especially when compared to those in other countries.<sup>7</sup> The conditions of confinement still are harsh and law enforcement still disproportionately impacts people of color, especially African American communities.<sup>8</sup> Our sentencing laws, especially for drug

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5. See Smith, *supra* note 1, at 384 (describing many prosecutors' fear of acquiring the reputation of "a sucker" (emphasis omitted)); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1099 (2014) (describing how, with experience, many prosecutors acquire a sense of self-confidence that "frees the prosecutor to take risks, such as declining or dismissing charges, or seeking a conviction or sentence less than the maximum available under the law").

6. See Smith, *supra* note 1, at 396 ("It is especially difficult for prosecutors with ideals and ambition to resist the pressure to adapt, conform, and be part of the team.").

7. *Highest to Lowest-Prison Population Rate*, WORLD PRISON BRIEF [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [<https://perma.cc/HX82-M997>] (last visited Sept. 28, 2018) (listing the United States as first).

8. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 8 tbl.6 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/8L6R-WGEX>] (reporting that in 2016 the rate of incarceration for African American adults was approximately 5.9 times greater than that of whites and the rate for Hispanic adults was 3.1 times that of whites).

crimes, remain very punitive, with judges often having little discretion to avoid the imposition of lengthy mandatory minimum sentences.

And yet, we are experiencing a moment when significant change seems possible. In 2016, the incarceration rate in the United States was lower than at any time since 1996<sup>9</sup> and the number of adults held in correctional facilities or under supervision dropped for the ninth consecutive year.<sup>10</sup> There are numerous possible factors behind these trends, including decreasing crime rates.<sup>11</sup> But there is also an increased recognition, across the political spectrum,<sup>12</sup> of the enormous social and economic costs of the prior regime and a consequent willingness to explore other approaches, including lower sentences and diversionary programs that dispense with incarceration entirely.<sup>13</sup> Increasingly, policy makers have also focused attention on racial disparities in policing and criminal justice processing.<sup>14</sup>

In this environment, prosecutors have a unique opportunity to steer policy. For example, prosecutors, including then-U.S. Attorney General Eric Holder and the District Attorneys of several major counties, have adopted charging policies to mitigate the severity of drug laws when legislators were not yet willing to do so, often citing the racially disparate impacts of those laws.<sup>15</sup>

9. DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/F8NV-K7HK>].

10. *Id.* at 3.

11. Ames C. Grawert, Adureh Onyekwere & Cameron Kimble, *Crime and Murder in 2018: A Preliminary Analysis*, BRENNAN CTR. FOR JUST. (Sept. 20, 2018), [https://www.brennancenter.org/sites/default/files/publications/2018\\_09\\_CrimeAnalysisV6.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_09_CrimeAnalysisV6.pdf) [<https://perma.cc/7JSU-H2EB>].

12. See Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, in *THE NEW CRIMINAL JUSTICE THINKING* 1, 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

13. See RAM SUBRAMANIAN & RUTH DELANEY, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 8 (2014) (reporting that since 2000, twenty-nine states have enacted measures to “roll back mandatory sentences”). Even the U.S. Congress has reduced some penalties. For example, the Fair Sentencing Act of 2010 increased the drug quantity required to trigger certain mandatory minimum penalties and repealed the mandatory minimum penalty for mere possession of crack cocaine. See U.S. SENTENCING COMMISSION, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2017). Massachusetts recently joined the trend when its Republican Governor signed a sweeping criminal justice reform law that, among other things, eliminated certain mandatory minimum penalties for drug offenses. See Steve LeBlanc, *Gov. Baker Signs Sweeping Criminal Justice Overhaul Bill*, ASSOCIATED PRESS (Apr. 13, 2018), <https://www.apnews.com/1d3059187cdb406e8fdbdce6579089c1> [<https://perma.cc/5XC8-CAJN>]; see also Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 203–04 (2018) (describing the rise of diversionary programs in state and federal courts).

14. See, e.g., Corinne Ramey, *New Jersey Requires Racial-Impact Statements for Crime-Law Changes*, WALL ST. J. (Jan. 16, 2018), <https://www.wsj.com/articles/new-jersey-requires-racial-impact-statements-for-crime-law-changes-1516133956> [<https://perma.cc/G29K-ZPGV>] (describing new law that would require state workers to prepare “so-called racial-impact statements for policy changes that affect pretrial detention, sentencing and parole,” making New Jersey one of a handful of states requiring such analyses); see also *supra* note 3 and accompanying text.

15. See, e.g., Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He’ll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/>

District Attorneys like Philadelphia's Larry Krasner have won office pledging such reform, beating out incumbents who supported a more traditional law-and-order platform.<sup>16</sup> Prosecutors around the country have set up conviction integrity units to reexamine old convictions.<sup>17</sup> Since 2004, over thirty District Attorney's offices have established such units to investigate claims of innocence.<sup>18</sup>

To be sure, change is not always linear. For example, Attorney General Sessions has reversed the charging policies put into place by Attorney

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nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html [https://perma.cc/CZ77-A7PU] (describing announcement by then-Brooklyn District Attorney Kenneth P. Thompson that his office would no longer prosecute most low-level marijuana cases); Meagan Flynn, *DA Ogg, Police Leaders Announce Landmark Marijuana Diversion Program*, HOUS. PRESS (Feb. 16, 2017, 9:12 AM), <https://www.houstonpress.com/news/da-ogg-police-leaders-announce-landmark-marijuana-diversion-program-9206751> [https://perma.cc/FMU5-S3FU] (describing announcement by Harris County, Texas District Attorney Kim Ogg that she would no longer prosecute small marijuana possession cases); *District Attorney Vance to End the Prosecution of Marijuana Possession and Smoking Cases*, MANHATTAN DISTRICT ATT'Y'S OFF. (May 15, 2018), <https://www.manhattanda.org/district-attorney-vance-to-end-the-prosecution-of-marijuana-possession-and-smoking-cases> [https://perma.cc/WL7W-J6CK]; James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEP'T JUST. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/P87U-CA6Q]; David W. Ogden, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEP'T JUST. (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [https://perma.cc/3NRN-5SLF] (setting forth DOJ policy under President Barack Obama of generally not pursuing marijuana possession and sale offenses in states where such conduct was legalized); Jim Salter, *St. Louis to End Prosecution of Low-Level Marijuana Crimes*, ASSOCIATED PRESS (June 13, 2018), <https://apnews.com/6f09ce3e02c7498d90a97dcd14282517> [https://perma.cc/K7BW-YBYW] (describing decision by St. Louis Circuit Attorney Kim Gardner not to pursue cases involving possession of small amounts of marijuana and decision by Philadelphia District Attorney Larry Krasner that his office would no longer prosecute such cases); see also Memorandum from Eric H. Holder, Jr., Attorney General to All Federal Prosecutors (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [https://perma.cc/Q72J-DA89]; Memorandum from the Attorney General to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf> [https://perma.cc/X6WC-MMWZ] (setting forth DOJ policy under President Barack Obama that prosecutors should decline to charge drug quantities necessary to trigger a mandatory minimum sentence in cases involving non-violent, low-level drug traffickers lacking significant criminal history).

16. See Holly Otterbein, "Completely Unelectable" *Progressive Larry Krasner Wins DA's Race*, PHILA. MAG. (Nov. 7, 2017, 9:25 PM), <https://www.phillymag.com/news/2017/11/07/larry-krasner-wins-district-attorney-general-election> [https://perma.cc/AUM9-FTNN].

17. Eli Hager, *The DAs Who Want to Set the Guilty Free*, MARSHALL PROJECT (Mar. 20, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/03/20/the-das-who-want-to-set-the-guilty-free> [https://perma.cc/9KGB-ALSY].

18. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 app. tbl.A (2018).

General Holder.<sup>19</sup> But still, a model of the “reform-minded” prosecutor<sup>20</sup> has emerged on the national stage, with chief prosecutors “pledging a more balanced approach to criminal justice—more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.”<sup>21</sup> People trained in the offices run by these prosecutors have the potential to transform criminal justice by going on to lead their own offices and others around the country, including by running for elected office themselves. They can influence their peers and legislators by their example, by participating in established and new professional associations,<sup>22</sup> and by helping shape public opinion.<sup>23</sup> They also may attract a new and more diverse generation of prosecutors which will greatly enrich the quality of prosecutorial offices.

Of course, not every socially conscious lawyer who wants to be involved in criminal justice will choose to be a prosecutor. Some will prefer to work in criminal defense. Both are valid choices. Ideally, lawyers will spend time in both defense and prosecution over the course of their careers to gain the perspective that each experience imparts. Good people can be good defense lawyers and good people can be good prosecutors. We need them all.

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19. See Memorandum from the Attorney General to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/2BTZ-NRYS>] (instructing prosecutors to “charge and pursue the most serious, readily provable offense” and rescinding any prior inconsistent policy).

20. David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017).

21. *Id.*

22. For example, the new non-profit organization Fair and Just Prosecution provides support and resources to “a network of [prosecutorial] leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.” *About FJP/Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision> [<https://perma.cc/L7CU-2389>] (last visited Aug. 20, 2018). The Institute for Innovation in Prosecution at John Jay College, founded in 2015, provides prosecutors with training, advice, and research to promote “a new paradigm of prosecution that measures success, not by conviction rates or plea conditions, but based on community-centered standards of safety, equity, and wellness.” *Institute for Innovation in Prosecution*, NAT’L NETWORK FOR SAFE COMMUNITIES JOHN JAY C., <https://nnscommunities.org/our-work/iip> [<https://perma.cc/R3ZA-MGGQ>] (last visited Aug. 20, 2018).

23. See, e.g., Eric Gonzalez & Miriam Krinsky, *How a New Generation of Prosecutors is Driving Criminal Justice Reform Outside of Congress*, HILL (Feb. 26, 2018, 3:40 PM), <http://thehill.com/blogs/congress-blog/judicial/375656-how-a-new-generation-of-prosecutors-is-driving-criminal-justice> [<https://perma.cc/H36W-QAUE>] (explaining the role that prosecutors can play in promoting profound criminal justice reform while also keeping communities safe); Dan Satterberg, *King County’s Prosecuting Attorney: “We Don’t Need the Death Penalty”*, SEATTLE TIMES (Jan. 19, 2018, 3:01 PM), <https://www.seattletimes.com/opinion/king-countys-prosecuting-attorney-we-dont-need-the-death-penalty/> [<https://perma.cc/N4U9-FGGB>] (Op-Ed by King County Prosecuting Attorney Dan Satterberg reporting that “the death penalty law in our state is broken and cannot be fixed”).

## CAN A GOOD PERSON BE A GOOD PROSECUTOR?

*Ellen Yaroshefsky\**

Most people who become prosecutors are honest and ethical public servants who take that job for varied reasons including protecting the community, assisting victims of crime, gaining trial experience, or enhancing future employment prospects and long-term political goals. Earnest and hard-working, these prosecutors bristle at the very question of whether a good person can be a good prosecutor. The question though is not about a good person and their motives or ethical compass, but about the role: What does it mean to be a good prosecutor especially in the era of mass incarceration?

First, it depends upon whether we ask the question about the chief prosecutor or a line assistant. The chief prosecutor needs to lead an office away from the traditional case processing approach toward the “minister of justice” role.<sup>1</sup> They are not just handling cases but must adopt a broader perspective.

The chief prosecutor must begin with the understanding that our criminal justice system is deeply flawed and that the good prosecutor must work towards its repair. Mass incarceration—the nearly tripling of people in prison since the 1970s—has received significant attention, but it is not well known that this was driven, in great measure, by prosecutors and harsh charging and sentencing decisions in the era of the “war on drugs.”

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1. The Model Rules of Professional Conduct note that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2013). ABA Standards for the Prosecution Function reflects the importance of the prosecutor’s role in criminal justice reform: “It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(d) (AM. BAR ASS’N 2013). The contours of the minister of justice role are not well defined but it embraces the notion of seeking reform of the criminal justice system rather than mere case processing. See Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 154–55 (2011) (discussing the unique role of the prosecutor and advocating for explicit ethical guidelines).

Prosecutorial aggressiveness led to increased prison terms and disparate treatment by race and class.<sup>2</sup>

A good prosecutor must acknowledge her role in creating mass incarceration, develop a deep understanding of the history and effects of racial discrimination, and implement remedial policies. She should adopt the lawyer's version of the Hippocratic Oath: do no harm. No harm to defendants as well as to victims.

This begins with language. The person involved in criminal activity should not just be labeled a "defendant," but should be viewed with respect. Victims and those charged with crime often come from the same community and the prosecutor's role in community protection may involve programs to assist both of them in various ways. Adversarial justice is often inappropriate. The person sent to prison will likely return to his community and needs support.

In many jurisdictions, the criminal justice system has lost the trust of the community.<sup>3</sup> The good elected prosecutor works to establish trust and understands the importance of an effective non-punitive system for young people involved in crime. Thus, not every person suspected of crime should be arrested and not every arrestee should be prosecuted. Alternatives may be more effective. The minister of justice needs to work with police, schools, and community leaders to substitute schooling, treatment, and other programs for arrests. For those charged with crimes, it does not well-serve the person, their families, most victims of crime or the larger community, to charge the highest level of crime or to keep them in jail during the pendency of a case. It is also contrary to a justice role for the prosecutor to fail to provide the defense with effective mechanisms to implement the client's Sixth Amendment right to counsel or to request a severe sentence and then assume no responsibility for that defendant beyond conviction other than to ensure that it is upheld in post-conviction proceedings.

In many ways, the prosecutor is the last link in broken systems of social and economic rights. Consequently, the good district attorney must work toward effective practices where only a small percentage of people are removed from society. And for those imprisoned on a short- or long-term basis, the minister of justice must develop systems that help improve, rather than harden and worsen the person convicted of a crime. The prosecutor is in control of the criminal legal system and must assume responsibility for all aspects of that system from youth programs to alternatives to jail and to prison reentry programs.

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2. See generally JOHN P. PFAFF, LOCKED IN (2017).

3. Some criminal justice policy makers and attorneys have stopped calling this a criminal justice system and instead call it a criminal legal system. See Sen. Cory Booker, *Our Criminal Legal System: Justice Doesn't Have to Be Missing from the Equation*, HUFFINGTON POST (Apr. 15, 2015), [https://www.huffingtonpost.com/cory-booker/our-criminal-legal-system\\_b\\_7071792.html](https://www.huffingtonpost.com/cory-booker/our-criminal-legal-system_b_7071792.html) [<https://perma.cc/PQM9-72LS>]; Alex Karakatsanis, *Criminalization of Poverty*, C.R. CORPS <http://www.civilrightscorps.org/work/criminalization-of-poverty> [<https://perma.cc/MJ3U-C53Z>] (last visited Sept. 28, 2018).

Necessary platforms for a good chief prosecutor include:

1. Acknowledge race and class as an underpinning of criminal justice and seek to reduce stark disparity in arrests, prosecutions, and sentences.
2. Engage the office in an extensive examination of the role of race and class in disparate charging and sentencing discretionary decision making.
3. Establish extensive data systems to document discretionary decision-making results in alternatives to prosecution, arrests, pleas, trials, dispositions, and sentences.
4. Develop programs and policies to keep young people out of courts. Entry into a court system itself is a punishment that leads to a “school to prison pipeline.”
5. Work with the police and other stakeholders to reduce arrests and reduce the number of people “put through the system.”
6. Implement a policy of presumptive release on the person’s own recognizance or a signed bond by family or community members. Bail should be an alternative system, not a norm. Do not request cash bail.
7. Establish plea bargaining guidelines with explicit decarceration goals.
8. Provide early and full discovery to the defense in all cases.
9. Develop effective sentencing policies that consider disparate impact by race and class and support decarceration.
10. Develop and implement effective training, supervision, and feedback systems for the office and ensure careful study of the effect of those systems.
11. Work closely with defenders to support defense funding. Perhaps the most effective way to help those arrested is to support funding for indigent defense.
12. Be transparent about policies, implementation, and results. The public needs to be made aware of prosecutorial systems, programs, and data about discretionary decision-making. This could serve to demonstrate that decarceration works.
13. Establish conviction integrity units for robust examination of cases that require sufficient personnel whose mind-set is potential innocence, not those whose goal is primarily to uphold convictions.
14. Work with other stakeholders to improve all societal systems that include education, child care, employment, housing, and wage stability.

The good ministers of justice cannot implement effective reform without personnel change. Thus, supervisors who have become rigidly identified with a version of “law and order” mentality cannot remain in the good prosecutor’s office. The chief prosecutor needs supervisors and line personnel who adopt her vision. She must carefully grant discretion to the new line prosecutors to permit them to make decisions in selected cases that increase decarceration. Evidence-based information should allow that line prosecutor to dismiss cases or lower a bail request or reduce the sentencing recommendation. Particularly young lawyers of color who may have more experience in the community served should know that they are afforded discretion to seek alternatives to criminal dispositions where warranted.



Effective reform of the criminal legal system requires immense sustained effort. The many newly elected prosecutors who espouse such changes outlined above should be applauded. They are good prosecutors. We should continue to elect prosecutors with such vision toward repair. But they cannot achieve effective reform alone. The U.S. needs systemic social, economic, and educational reform that requires leadership by and support of federal, state, and local officials. All stakeholders must work in coordination.

And the young line prosecutor? Many of us train young people to work in such offices and to develop a strong ethical compass. Can they be good prosecutors? Can they work effectively toward implementation of the minister of justice vision? Yes, if they work in the offices of an effective minister of justice. But, in the typical case processing office, it is questionable. They may believe that they are a good prosecutor until—against fact-based judgments—they are overruled by a superior and told to advocate for high bail, a criminal conviction, or a lengthy sentence. Following orders may be necessary to maintain employment, but it does harm if that young prosecutor knows that it does short- and long-term damage to the individual charged and ultimately to the community. Perhaps this can be excused in a limited number of cases and one can be a “good enough” prosecutor in a flawed system. Overall, he may be doing more good than harm and certainly better than his predecessors. But once that prosecutor is engaged in consistent case processing with known damaging results to individuals, he is no longer “good enough.” He cannot be yet another cog in the case processing office and claim the mantle of the minister of justice.