

PROSECUTORS WHO POLICE THE POLICE ARE GOOD PEOPLE

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In 2001 Professor Abbe Smith asked if a person could be both a good prosecutor and a good person.¹ 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.² People of color are prosecuted at extraordinarily disproportionate rates.³ Our system punishes mental illness and drug addiction rather than treat those health problems.⁴ 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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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 BERZOFKY, 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,⁵ violate the law.⁶ Some officers steal,⁷ some pimp,⁸ some assault their domestic partners,⁹ and some kill civilian citizens.¹⁰ 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.¹¹ 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.

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”¹²—and commissions have literally been set up to address it.¹³ 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 1990s¹⁴ and have been followed by large-scale scandals in Philadelphia,¹⁵ New Jersey,¹⁶ and Dallas¹⁷ that are much more recent. Police officer dishonesty has resulted in approximately a thousand provable wrongful convictions,¹⁸ and has likely been the cause of hundreds of thousands more.¹⁹

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.²⁰ Some police officers have also been part of white supremacist terror groups.²¹

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,²² and the killing of almost one thousand civilians a year,²³ 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.²⁴ 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,²⁵ to planting drugs on unsuspecting motorists,²⁶ to being a white supremacist,²⁷ 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.²⁸ 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.²⁹ 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

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®ion=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,³⁰ 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.³¹ These reformers argue for an entirely separate entity responsible for investigating and prosecuting police officers when they are accused of wrongdoing.³² 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."³³ He has dismissed thirty-one staff members—one can assume that that he believed them to be over-zealous or unethical³⁴—and has reformed the bail system, including ending cash bail for low level offenses, such as marijuana possession.³⁵ Philadelphia now has approximately 33 percent fewer people in their jails than in 2015.³⁶ He has also announced a policy of not pursuing very low-level offenses.³⁷ In

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,³⁸ winning the race despite opposition from the police union.³⁹ 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.⁴⁰

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.⁴¹ 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.⁴² 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.⁴³ Morales ran for election and re-election on a progressive criminal justice platform—winning both times.⁴⁴ 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.⁴⁵ He had been the prosecutor there for seven terms.⁴⁶ The winner of the election, a black man, campaigned in part on a promise to assign special prosecutors to investigate police misconduct.⁴⁷

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,⁴⁸ marijuana is now legal in a number of places,⁴⁹ and there is less support for the death penalty⁵⁰—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.

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://perma.cc/A3GD-GW2H>].