

A DEFENDER’S TAKE ON “GOOD” PROSECUTORS

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When Professor Abbe Smith wrote “Can You Be a Good Person and a Good Prosecutor” in 2001 (and answered it mostly in the negative),¹ 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.² 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.³

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,⁴ insanely harsh sentencing laws,⁵ 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.⁶ With only around 3 percent of convictions arising from trials⁷ and a plea-bargaining system that hands a mind-boggling amount of unchecked power to prosecutors,⁸ the results have been perfectly predictable. America is the runaway leader among industrialized countries in incarceration rates.⁹ 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.¹⁰ Depending on the year and location, black men have a roughly one in three or four lifetime chance of going to prison.¹¹ The prospect of prison has become a routine part of life in many poor communities of color.¹² 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.¹³ More than half of all state prisoners (58 percent) and nearly two thirds (63 percent) of sentenced jail inmates meet the criteria

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 [<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://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.¹⁴ 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.¹⁵ To this movement, I say: God Bless. If Americans can elect cop-suing civil rights attorneys and former public defenders (Krasner is both)¹⁶ 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;¹⁷ count me a fan.

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://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.”¹⁸ 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.

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