

## THE NECESSITY OF THE GOOD PERSON PROSECUTOR

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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”).