

GOOD PERSON, GOOD PROSECUTOR IN 2018

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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?”¹ 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 Committee²—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.”³ 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.”⁴

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,⁵ 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.⁶ More than six million people are under the supervision of the criminal justice system.⁷ Overall, about one in thirty-eight adults are under some form of correctional supervision.⁸

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.⁹ He has become the embodiment of the Progressive Prosecutor, the prosecutor to watch.

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).¹⁰ Prosecutors like to claim they are “reformers” or progressives.¹¹ 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.¹² 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.¹³

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.’”¹⁴

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

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://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.¹⁵ He believes in prison for all, especially private prison.¹⁶

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."¹⁷

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.¹⁸ 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://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.