

THE PROGRESSIVE PROSECUTOR: AN IMPERATIVE FOR CRIMINAL JUSTICE REFORM

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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?”¹ 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.² 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.³ 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.⁴ And, there are unwarranted racial disparities in the bail determination process.⁵

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.⁶ 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.”⁷ 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 information⁸ and engage in other forms of misconduct.⁹ And because so many of their most important decisions are made behind closed doors, it is very difficult to hold prosecutors accountable.

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.¹⁰

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.¹¹ Assistants were also ordered to justify sentencing recommendations by stating on the record the costs and benefits of the requested period of incarceration.¹²

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.¹³ Houston's Kim Ogg dismissed thirty-seven prosecutors from her office, hired a progressive defense attorney as her chief of staff,¹⁴ and began reforms that included declining prosecution of minor drug offenses

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://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.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ The Institute for Innovation in Prosecution is working with progressive prosecutors to "consider a new paradigm of prosecution that measures

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.”²¹

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.

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