

The Prosecutors I Like: A Very Short Essay

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I. INTRODUCTION

Generally speaking, I don't like prosecutors. The longer I practice law—more than three decades now—the more it is so. Maybe this is inevitable for a career indigent defense lawyer; a certain bitterness might come with the territory. Prosecutors have enormous power and the resources to back it up,¹ while indigent defendants lack the most basic resources and have only beleaguered public defenders to back them up.² It's hardly a fair fight: prosecutors at the helm of an insatiable criminal justice system that can't seem to lock up enough black and brown people against my often-hapless clients.

Bennett (Ben) Gershman, in whose honor this symposium is organized, and who worked for many years as a prosecutor, is cut from a different cloth. He is always willing to stick his neck out to confront abuse of power, unfairness, and injustice. He has a special place in my heart because of his steadfast, unsolicited support for my long-term client Patsy Kelly Jarrett, who served twenty-eight years in prison for a crime she did not commit.³

But this got me thinking: Why is Ben so extraordinary? Why should it be extraordinary for a prosecutor or former prosecutor to be a critical thinker willing to resist and upend a bad system?

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¹ See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”); See *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter: “[The prosecutor] wields the most terrible instruments of government.”).

² See Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:55 AM), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111>; see also Eli Hager, *Louisiana Public Defenders: A Lawyer with a Pulse Will Do*, THE GUARDIAN (Sept. 8, 2016, 7:13 AM), <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis> (Loyola University law professor Stephen Singer commenting on the poor quality of indigent defense in Louisiana: “Their ‘solution’ is to put up cardboard cut-outs of defense lawyers in place of spending money on real public defenders.”).

³ See generally ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* (2008).

In previous work, I have expressed skepticism about the idea of being a “good prosecutor” in a bad system.⁴ It’s not that I don’t believe in the need for law enforcement. I believe the law must be enforced, but in a fair and just manner.⁵ It’s not that I don’t believe some people need to be punished. Though I would like to see our current prison system razed to the ground and replaced by something more humane,⁶ some people are dangerous and need to be separated from the rest of us.

My experience over the years in a variety of jurisdictions is that the most essential prosecutorial qualities—reasonableness, restraint, humility, compassion, a sense of perspective and proportion—are rarely on display. This is especially disturbing in a time of continuing mass incarceration.⁷ To the extent that some “good people” are prosecutors, they are still implicated in the caging of America.⁸

Still, I want to try to be more *positive*. To honor Ben Gershman, I want to identify some prosecutorial models and articulate what makes them models. I have also been thinking about what it means to be a good prosecutor because of a flurry of media calls about Larry Krasner, the civil rights and criminal defense attorney who is now the Philadelphia District Attorney. (Full disclosure: Krasner is a former Defender Association of Philadelphia colleague, where we overlapped for a brief time.) Krasner ran for D.A. on a platform calling for the dismantling of the prison-industrial complex and an end to mass incarceration.⁹ Several reporters have asked whether he is an exception to my negative views about prosecutors and whether I would encourage my students to work for him.

I should confess that I have taken to answering these questions by saying that, for the first time in my life, I find myself rooting for two prosecutors: Robert Mueller and Larry Krasner. I hope the former gets his man, and the latter lets a lot of men (and women) go.

⁴ See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

⁵ See JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015) (examining the epidemic of unsolved murders of African-American men in the US).

⁶ See generally Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (discussing prison abolition and urging a “prison abolitionist ethic”); see also JOAN BAEZ, *Prison Trilogy (Billy Rose)*, on *COME FROM THE SHADOWS* (A&M Records 1972) (“And we’re gonna raze, raze the prisons to the ground. Help us raze, raze the prisons to the ground.”).

⁷ Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, BUREAU OF JUST. STAT. (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> (reporting that, 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); see also *id.* (reporting that 6,613,500 people are under correctional supervision, meaning that, overall, about 1 in 38 adults are under some form of correctional supervision).

⁸ See Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, THE NEW YORKER (Jan. 30, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> (examining mass incarceration).

⁹ See Daniel Denvir, *Philadelphia Just Elected the Most Radical DA in the Country—Now What?*, THE NATION (Nov. 10, 2017), <https://www.thenation.com/article/philadelphia-just-elected-the-most-radical-da-in-the-country-now-what/>.

But, after some consideration, this essay is not about Robert Mueller. Although he has laudable qualities¹⁰—and I continue to cheer him on—he is not the sort of enlightened, progressive, anti-mass incarceration prosecutor I have in mind for this essay. He is, at bottom, a deeply conventional prosecutor.¹¹ Krasner, on the other hand, may be the real thing.

An additional motivation for being a bit more positive in this essay is my students. I have managed to stay in touch with many former clinic students as they pursue careers in criminal law. Though most are public defenders or prisoners' rights lawyers, some are prosecutors. A former student recently wrote me the kind of letter that makes me want to be more generous about prosecutors than I otherwise tend to be:

Hi Abbe,

I wanted to let you know that I've accepted a position in the criminal division at the U.S. Attorney's Office in _____. I'll start in about six weeks.

Obviously, it's not criminal defense, but I'm excited about the impact I hopefully can make Throughout the interview process, I tried to highlight why I thought my clinic and other experience doing indigent defense work made me especially well-suited to wield the discretion and make the tough choices of a federal prosecutor. And I think that helped me stand out, which is encouraging.¹²

So, let me try to address—in a short essay—what it means to be a likable, admirable, progressive prosecutor, someone who doesn't simply perpetuate a bad system.

¹⁰ Mueller is widely known for his commitment to both “law and order” and “fairness.” As longtime criminal defense lawyer Cristina Arguedas remarked about Mueller's appointment as US Attorney in San Francisco, “Normally, I wouldn't be saying, ‘Let's nominate a straight white Republican cop as a US attorney,’ but he's so superior.” Peter Slevin & Dan Eggen, *FBI Nominee Lauded for Tenacity*, WASH. POST (July 31, 2001), https://www.washingtonpost.com/archive/politics/2001/07/30/fbi-nominee-lauded-for-tenacity/e2012e09-379e-479f-8bd3-8c2aef36152a/?utm_term=.73b448eb32c8.

¹¹ See generally Elaine Shannon, *Robert Mueller: Straight Shooter with a Moving Target*, TIME (July 6, 2001), <http://content.time.com/time/nation/article/0,8599,166567,00.html> (providing biographical information about Mueller); Garrett M. Graff, *The Untold Story of Robert Mueller's Time in Combat*, WIRED (May 15, 2018, 5:30 AM), <https://www.wired.com/story/robert-mueller-vietnam/> (providing biographical information about Mueller); Slevin & Eggen, *supra* note 10 (providing biographical information about Mueller); see also GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR* (2011) (exploring the transformation of the FBI from a domestic law enforcement agency into an international intelligence agency, led by Robert Mueller, the sixth director of the FBI).

¹² Email from unnamed former student to Abbe Smith, Professor of Law, Georgetown University Law Center (May 23, 2018) (on file with author).

II. MY DISLIKE OF PROSECUTORS

Before moving to the positive, I have to stay negative for just a minute. I don't want to mislead anyone into thinking I have suddenly become a prosecutorial "Pollyanna" or am backing off the first sentence in this essay. (Frankly, I struggled hard to begin that sentence with the preface "Generally speaking.") So, let me be explicit: I don't much care for prosecutors.

I have gotten in trouble for saying this in the past. It is apparently not the kind of thing an academic is supposed to say. When I first wrote about the prosecutor's role in a time of mass incarceration almost 20 years ago,¹³ and presented the paper at a conference at Georgetown, one panelist—a former federal prosecutor turned law professor—was apoplectic. I thought she might have a heart attack at the mere suggestion that the decision to be a prosecutor raised moral and ethical questions. This was odd for a number of reasons, not the least of them being that the moral and ethical questions underlying criminal *defense* are constantly raised and even have a nickname: "The Cocktail Party Question"—"How can you defend those people?"¹⁴ It strikes me as odd that this is a paper I've become known for—that I'm somehow "brave" for daring to question or criticize prosecutors.

What do I mean when I say I don't (generally) like prosecutors? I confess this is both personal and professional. There's a prosecutor personality type—which admittedly is a generalization—that I don't care for. My rendition of this particular personality is inspired by that scene in Woody Allen's "Annie Hall" when Woody Allen/Alvy Singer's first grade classmates stand up and say who they will be when they grow up—the head of a profitable trust company, the president of a plumbing company, a heroin and methadone addict, and a tallis salesman.¹⁵

I think the first grader headed for a career as a prosecutor is the one who raises his or her hand to tell the teacher, "Abbe is chewing gum." Meanwhile, the would-be criminal defense lawyer gets in trouble for talking too much in class. (Or, as my friend Catherine told her mother about an early report card: "I got a D in something that starts with C and means behavior.")

But my dislike is mostly professional. It is based on innumerable encounters with prosecutors who throw their institutional weight around for no good reason. This happens in many settings, but especially in charging decisions, plea negotiation, and sentencing.¹⁶ They go for the most serious charge they can prove, or the charge

¹³ See Smith, *supra* note 4.

¹⁴ See generally HOW CAN YOU REPRESENT THOSE PEOPLE (ABBE SMITH & MONROE H. FREEDMAN, eds.) (2013) (a collection of essays addressing the Cocktail Party Question).

¹⁵ ANNIE HALL (United Artists 1977).

¹⁶ See Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401 (2017) (arguing for limits on certain coercive prosecutorial tactics in plea bargaining); Bennett Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327 (2014) (discussing how US prosecutors use vast charging and sentencing power to coerce defendants to plead guilty and cooperate).

that carries the most punishment, not the one that makes most sense under the circumstances.¹⁷ The notion of proportionality—that punishment should fit the particular crime, not the provable charge—is seldom considered. Of course, there are other problems as well, including not abiding by discovery and *Brady* obligations,¹⁸ a persistent and peculiar lack of skepticism about police testimony and so-called forensic evidence, and intransigence in the face of evidence of innocence, especially post-conviction.¹⁹

By and large, prosecutors are condescending and contemptuous. They are unable to see the good in a criminal defendant and relish the opportunity to dress defendants down. Maybe this is out of insecurity. There seems to be an imperative that prosecutors appear sure of themselves, no matter how unsure they actually are.

Former federal prosecutor turned law professor, Bruce Green, wasn't like this. He says he always felt sad on the morning of a sentencing.²⁰ He did not enjoy seeing a fellow human groveling and in disgrace. I wish more prosecutors felt this way. A sentencing hearing is sad. The violent weight of the law is about to come down on an individual.²¹ It's not that I want prosecutors to be depressed every single day of their working life, but the meting out of a sentence is a serious reckoning for a wrongdoer in a moment of great vulnerability.

I've tried to keep an open mind about prosecutors—partly because of letters from former students like the one I shared earlier—but to no avail. Like Charlie Brown believing *this* time Lucy will hold the football for him to kick, I give new prosecutors I encounter the benefit of the doubt. But inevitably, like Lucy, they grab the ball away.

III. LARRY KRASNER: RADICAL RENEGADE PROSECUTOR IN A RETROGRADE TIME

And now comes Larry Krasner, a true reformer, perhaps the first-ever “decarceration” prosecutor.²² He has done some amazing things since being elected

¹⁷ Memorandum on Crim. Charging Pol'y from Att'y Gen. Jeff Sessions to all Fed. Prosecutors (May 10, 2017) <https://apps.washingtonpost.com/g/documents/national/jeff-sessions-criminal-charging-policy/2432/> (directing all federal prosecutors to charge federal defendants with the most serious provable crimes with the most serious penalties).

¹⁸ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecution must turn over all evidence that might exonerate the defendant to the defense).

¹⁹ See generally Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015).

²⁰ Professor Green has shared this experience in many conversations with the author.

²¹ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (examining law's violence); *id.* at 1608 (“The experience of the prisoner is, from the outset, an experience of being violently dominated . . .”).

²² See *Philadelphia DA Wants to Dismantle Mass Incarceration From the Inside Out*, WBUR (updated Apr. 18, 2018, 2:55 PM), <http://www.wbur.org/hereandnow/2018/04/18/philadelphia-da-larry-krasner-incarceration> (reporting on Krasner's commitment to ending mass incarceration); See also Chris Palmer, *In latest Edict, Philly DA Larry Krasner Tells Prosecutors to Seek Lighter Sentences, Estimate Costs of Incarceration*, Philly.com (updated Mar. 15, 2018, 5:13 PM), <http://www.philly.com/philly/news/crime/philadelphia-district->

Philadelphia DA in November 2017: firing more than 30 overzealous prosecutors; eliminating requests for cash bail in most nonviolent cases; ordering line prosecutors to seek lighter sentences and provide sentencing judges with the price tag for the sentences they propose.²³ He's become the embodiment of the "Progressive Prosecutor", the prosecutor to watch.

I admit that I feel kind of excited about Krasner. I am not alone in this.²⁴ A handful of my former students and colleagues at the Defender Association of Philadelphia have joined his staff. My very favorite criminal court judge is one of Krasner's deputies.²⁵ A former defender colleague is the other.²⁶ My hope is that Krasner becomes a national leader with the chops to usher in an era of meaningful criminal justice reform and change prosecutorial culture.

This is a tall order.

First, I feel compelled to point out that Krasner's influence as a national figure in prosecutorial reform might be limited by the fact that he is far from a dyed-in-the-wool prosecutor. As a civil rights lawyer, he was mostly focused on suing the police²⁷ and working on behalf of social and racial justice activists like those involved in the Black Lives Matter movement.²⁸

Second, it isn't easy to be a prosecutorial reformer, no matter one's background. Krasner is *different*, but we've heard this before. Manhattan DA Cyrus Vance Jr., Los Angeles DA Jackie Lacey, and New Orleans DA Leon Cannizzaro all ran for office as aggressive reformers, but continued a range of harsh prosecutorial practices, like zealously prosecuting panhandlers (especially in fancy

attorney-larry-krasner-plea-deals-shorter-sentences-cost-of-mass-incarceration-20180315.html (Krasner announcing policies to reduce the number of people behind bars).

²³ 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/>.

²⁴ See Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, THE INTERCEPT (Mar. 20, 2018, 3:59 PM), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/>.

²⁵ Max Mitchell, *Krasner Names Ex-Judge Temin as First Assistant*, LAW.COM (Jan. 11, 2018, 10:36 AM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/01/11/krasner-names-ex-judge-temin-as-first-assistant/?sreturn=20180702165553> (reporting that Larry Krasner appointed former Common Pleas Court Judge Carolyn Engel Temin as his first assistant and noting that Temin had been both a public defender and a prosecutor before being elected to the bench in 1983).

²⁶ Joe Trinacria, *DA Larry Krasner Appoints Second Second-in-Command*, PHILADELPHIA MAGAZINE (Feb. 28, 2018), <https://www.phillymag.com/news/2018/02/28/krasner-first-assistants/> (reporting Krasner's appointment of Robert L. Listenbee, longtime public defender and chief of the juvenile defense unit at the Defender Association of Philadelphia, who was also chief of the Justice Department's Office of Juvenile Justice and Delinquency Prevention during the Obama administration, as his second First Assistant District Attorney).

²⁷ See Harrison Jacobs, *The Most Progressive Candidate in a Generation Sued Police 75 Times—Now, He's Poised to Run Law Enforcement in One of the US's Biggest Cities*, BUSINESS INSIDER (Nov. 5, 2017, 10:38 AM), <http://www.businessinsider.com/who-is-larry-krasner-district-attorney-philadelphia-progressive-democrat-2017-11>.

²⁸ See *Meet Larry: A True Reformer for Philadelphia*, KRASNER FOR DISTRICT ATTORNEY, <https://krasnerforda.com/meet-larry#> (last visited Aug. 8, 2018).

neighborhoods).²⁹ Dallas DA Craig Watkins, avowed reformer and the first black chief prosecutor in Texas, now has a cloud over his head.³⁰ Prosecutors like to claim they are reformers or progressives—at least in certain parts of the country.³¹

Like Krasner, Cook County State’s Attorney, Kimberly Foxx, is someone to watch.³² The first African-American woman to lead the second largest prosecutor’s office in the country, she ran on a reformist platform, vowing to make a variety of changes. Foxx has done some great things, including overturning convictions in over 20 cases, many involving police misconduct.³³ But, her office has not fully embraced bail reform, has done little to protect immigrants from the collateral consequences of prosecution, and has not reduced the volume of petty drug cases.³⁴ This is not all Foxx’s fault. She faces resistance both inside and outside her office: an established office culture that resists doing things differently, county budget cuts, hostility from some judges, and hostility from the Fraternal Order of Police.³⁵

There are a host of challenges for Krasner, too. Philadelphia has the third highest crime rate of the ten largest US cities and the fourth highest incarceration

²⁹ See Marin, *supra* note 23; See also Josie Duffy Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> (discussing the ways in which several so-called progressive prosecutors are not progressive at all).

³⁰ See Eric Celeste, *The Two Sides of Craig Watkins*, D MAGAZINE (Oct. 2013), <https://www.dmagazine.com/publications/d-magazine/2013/october/the-two-sides-of-district-attorney-craig-watkins/> (noting that Watkins has backpedaled on the death penalty, fired good prosecutors for political reasons, and engaged in foolish and/or corrupt conduct, such as having his law license suspended for nonpayment of dues, driving a county car into the side of his house, and buying a \$3000 tuxedo with campaign funds).

³¹ See, e.g., Justin Jouvenal, *A 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?utm_term=.38d1176d76ce.

³² There are others, as well: San Francisco DA George Gascon; Brooklyn DA Eric Gonzales; Portsmouth, Virginia Commonwealth’s Attorney Stephanie Morales; Mark Gonzalez, Nueces County, Texas DA; Patricia Cummings, former head of the Dallas County DA’s Conviction Integrity Unit, and now chief of the Philadelphia DA’s Conviction Review Unit. In August 2018, African-American criminal defense lawyer Wesley Bell unseated longtime St. Louis County prosecutor Robert McCulloch, the prosecutor who declined to charge police officer Darren Wilson in the shooting of unarmed black teen Michael Brown. Bell ran on a platform of expanding diversionary programs, reforming cash bail, and treating people in the criminal justice system fairly. See Farah Stockman, *In Ferguson, Four Years After Riots, a Primary Victory ‘Gives Us Hope,’* N.Y. TIMES, Aug. 9, 2018, at A12 (reporting about Bell’s win in the Democratic primary for St. Louis County Prosecutor and noting there is no Republican candidate in the November general election). The *New York Times* calls Bell’s win “part of a broader movement to elect a new breed of prosecutor—candidates who will run on promises to make the criminal justice system more fair to the poor; rather than typical tough-on-crime pledges.” *Id.*

³³ See Megan Crepeau, *After Momentous Week, Prosecutor Kim Foxx Says ‘We Have to Right Wrongs,’* CHI. TRIBUNE (Nov. 20, 2017, 6:50 AM), <http://www.chicagotribune.com/news/local/breaking/ct-met-kim-foxx-wrongful-convictions-20171117-story.html>.

³⁴ See Maya Dukmasova, *Kim Foxx Gets a Report Card*, CHI. READER (Dec. 7, 2017, 4:27 PM), <https://www.chicagoreader.com/Bleader/archives/2017/12/07/kim-foxx-gets-a-report-card> (reporting on Cook County State’s Attorney Kim Foxx’s progress on several reform issues based on a report by Reclaim Chicago, the People’s Lobby, and the Chicago Appleseed Fund for Justice).

³⁵ *Id.*

rate of any city.³⁶ 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 fifty percent of the county jail population.³⁷ And Krasner has, so far, been unsuccessful in renegotiating sentences for juvenile lifers and he has had mixed success in reducing the court system’s reliance on cash bail.³⁸

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 said to 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.’”³⁹

Third, although prosecutors wield enormous power, it seems unlikely that a single progressive prosecutor—even one with a revamped staff—can fix a criminal justice system that has ravaged black and brown communities for decades. Moreover, should we look to *prosecutors* to dismantle our ever-growing system of public and private jails and prisons?⁴⁰

Unfortunately, it appears the 30-plus “bad” prosecutors Krasner got rid of in Philadelphia have been snapped up by other nearby DA offices.⁴¹ This is what happens when you get rid of cockroaches in New York City; they move to a neighbor’s apartment.

The Larry Krasner dream is especially important, if improbable, during the Trump era, with Jeff Sessions the Attorney General of the United States. I can’t help thinking about all the former federal prosecutors, now legal academics, who proudly maintain they weren’t anything like conviction-obsessed state prosecutors. They insist they were always reform-minded. Sessions would be their boss now, and he is not remotely interested in criminal justice reform. He believes in overcharging for all and prison for all⁴² with no misgivings whatsoever about private prisons.⁴³ He believes the system should come down especially hard on immigrants.⁴⁴

³⁶ See Marin, *supra* note 23.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Collier Meyerson, *Prosecutors Keep Their Jobs by Putting People in Jail. Can They Be Leaders in the Fight for Criminal-Justice Reform?*, THE NATION (Nov. 14, 2017), <https://www.thenation.com/article/prosecutors-keep-their-jobs-by-putting-people-in-jail-can-they-be-leaders-in-the-fight-for-criminal-justice-reform/>.

⁴¹ The author learned this from numerous lawyers practicing in Pennsylvania.

⁴² See Sessions, *supra* note 17.

⁴³ 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.

⁴⁴ See David Shortell, *Sessions Reiterates Support for Hardline Immigration Policy as Criticism Continues*, CNN POLITICS (June 25, 2018), <https://www.cnn.com/2018/06/25/politics/sessions-zero-tolerance->

Here is what one federal prosecutor—Ryan Patrick, the United States 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 for 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 . . . [I]t is unfortunate.⁴⁵

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. These are federal prosecutors, the cream of the prosecutor crop. They tend to be more accomplished and prestigiously educated than their state counterparts. It would not be impossible to resist cruel and regressive policies, but no current prosecutor seems to be able to. In the 19th 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.⁴⁶ But, it required people in positions of authority to *resist*. It required imagination and guts.

IV. ARTICULATING THE QUALITIES AND OBJECTIVES OF A TRULY PROGRESSIVE, REFORM-ORIENTED, DECARCERATION PROSECUTOR

Notwithstanding the challenges and doubts, Larry Krasner, Kim Foxx, and others⁴⁷ offer a helpful blueprint for progressive prosecution in a time of mass incarceration. Progressive prosecutors recognize that a criminal conviction, in and of itself, is a devastating event with profound, life-altering consequences—and not all misbehavior needs to result in a criminal record. Progressive prosecutors recognize the humanity in criminal defendants, no matter the crime, and understand that the lowest moment in a person’s life is just that, a low point.⁴⁸

immigration/index.html (reporting that Attorney General Jeff Sessions defended the administration’s “zero tolerance” immigration policy in a speech as criticism over the separation of parents and children mounted).

⁴⁵ Steven Lubet, *On Juneteenth, Let’s Commit to Ending Separation of Parents and Children at the Border*, CNN (updated June 19, 2018, 8:08 AM), <https://www.cnn.com/2018/06/19/opinions/juneteenth-trump-separation-migrant-families-lubet/index.html>.

⁴⁶ *Id.*

⁴⁷ See Jouvenal, *supra* note 31.

⁴⁸ See Dave Davies, *Larry Krasner: The ‘Un-Prosecutor’ Candidate*, WHY NEWSWORKS (Mar. 22, 2017), <https://krasnerforda.com/the-latest/2017/3/22/newsworks-interview> (Krasner noting that he has spent at

Foxx tells the lawyers in her office not to focus on narrow legal questions or whether they can prove a charge, but instead on “the right outcome” in a particular case.⁴⁹ Krasner is more ambitious. He wants to change the prosecutorial culture that regards criminal justice as “sport,” requiring prosecutors to bring every case they can, seek the most serious charge, and obtain the longest sentence.⁵⁰ The point, Krasner says, “is that you can make charging decisions differently and avoid doing as much damage [to] the city’s poor and the public treasury as the current system does.”⁵¹

Though it is nearly impossible to articulate what I mean by this, the idea of “character” is also an essential quality. Humility is key. A thoughtful, progressive prosecutor understands that he or she is entrusted with an enormous amount of power—who will go to jail and who will not—in the face of enormous complexity. Criminal cases are seldom clear-cut, no matter how simple they may appear. Poverty and disadvantage are complicated. No prosecutor, no matter how seasoned or smart, is infallible. Prosecutors are mere mortals, like the rest of us.

A progressive prosecutor has to be able to withstand the pressure of law enforcement culture—from police unions, individual police officers, other conventional prosecutors, and some judges—in order to achieve real reform. Prosecution, like criminal defense, is not a popularity contest.

Progressive prosecutors have a compelling criminal justice reform narrative that needs to be told often and well. This is the way to beat back the prevailing narrative of incarceration as the answer to every social problem. It has been nearly two hundred years since French diplomat and historian, Alexis de Tocqueville, toured American penitentiaries and exalted our enlightened approach to criminal punishment. “In no country is criminal justice administered with more mildness than in the United States,” he wrote in *Democracy in America*.⁵² Now, far from serving as a model, the United States is a shameful, cautionary tale.

The hallmarks of progressive reform have been oft-stated⁵³: refusing to seek the death penalty; abolishing or significantly limiting reliance on bail; instituting appropriately liberal disclosure and *Brady* practices; declining criminal charges in minor cases and/or employing restorative justice techniques in appropriate cases; promoting treatment and rehabilitation over punishment alone; providing training

least a year of his life meeting with criminal defendants in jail, giving him a better understanding than most prosecutors).

⁴⁹ Crepeau, *supra* note 33.

⁵⁰ Davies, *supra* note 48 (Krasner stating that when he’s DA, prosecutors will decline to prosecute more cases and handle others differently).

⁵¹ *Id.*

⁵² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835), available at <http://www.gutenberg.org/files/816/816-h/816-h.htm>.

⁵³ See generally David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017) (offering suggestions for progressive prosecutors); see also Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> (discussing the election of progressive prosecutors in various parts of the country).

on implicit bias and being transparent about race-related decision-making; instituting hiring and promotion standards that emphasize fairness, restraint, compassion, and humility over winning at all costs; instituting a rigorous and independent conviction integrity unit; and adjusting practices to avoid putting noncitizens at risk of deportation.

Larry Krasner and other progressive prosecutors committed to making a significant change in our criminal justice system are prosecutors I “like.” More and more of these prosecutors might be coming.⁵⁴ But they will need to do more than tattoo the words “Not Guilty” across their chest to get the job done.⁵⁵ Time will tell whether these are real change agents or not.

V. CONCLUSION

The prosecutors I like include the chief of the child abuse unit in Philadelphia who thought twice about a questionable shaken baby syndrome case and decided to reinvestigate the case rather than offer a misdemeanor as the line prosecutor had proposed; the federal prosecutor in DC who joined my motion for modification of an outrageously harsh sentence imposed by an irrational judge on a young man who had committed a serious crime, but was not irredeemable; the line prosecutor in Boston who believed in “open file discovery” even though his office did not; and the many prosecutors in various jurisdictions against whom I have tried cases who are excellent trial lawyers and yet straightforward and fair. I am not so hostile that I cannot acknowledge these more ordinary, yet honorable, prosecutors.

Nonetheless, the reason this is a short essay is because, in my experience, even these kinds of “good prosecutors” are not the norm.

Again, my hope is that Larry Krasner becomes a national leader. To my prosecution-minded students, I say, *By all means go to Philly*. Use what you have learned in a criminal defense clinic to be a kinder, more humane prosecutor. Not everyone has the “peculiar mind-set, heart-set, soul-set” to be a defender.⁵⁶ We need prosecutors of conscience who understand the enormous power they wield and will use their power wisely.

⁵⁴ *Prosecutors Step into the Spotlight of Justice Reform*, VERA INSTITUTE OF JUSTICE (2017), <https://www.vera.org/state-of-justice-reform/2017/the-state-of-prosecution> (discussing the “small but significant cohort of reform-minded prosecutors” in jurisdictions around the country who have promised to reduce incarceration, reform bail practices, and institute other reforms, and who are working with progressive think tanks such as the Institute for Innovation in Prosecution at John Jay College of Criminal Justice and Fair and Justice Prosecution).

⁵⁵ See Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322> (reporting about Mark Gonzalez, chief prosecutor of Nueces County, Texas, who was a criminal defense lawyer and motorcycle club member before successfully running for DA, and has a Not Guilty tattoo inked across his chest).

⁵⁶ Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983–1984).

Still, I remain unsure about whether prosecution can truly be *progressive* over the long haul—and whether prosecutors can bring real, fundamental, progressive change to the criminal justice system. I would like to believe that well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2019. Let's wait and see.