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REVISITING ABBE SMITH'S QUESTION, "CAN A GOOD PERSON BE A GOOD PROSECUTOR?" IN THE AGE OF KRASNER AND SESSIONS

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In an article published over fifteen years ago, Georgetown Law Professor Abbe Smith argued that one cannot be a good person and a good prosecutor.[1] In other words, if you are concerned with social justice, it would be self-defeating to work in a prosecutor's office. With Attorney General Jeff Sessions at the helm, the federal criminal justice system has changed since Smith wrote this article, in many ways for the worse. At the same time, in response to a powerful grass roots movement, the reformist approach to criminal justice has gained some ground. Elected prosecutors, like Larry Krasner, have won office with broad and even radical agendas. His campaign promises were not platitudes designed to earn a liberal vote. He has radically reformed his office by refusing to prosecute marijuana possession, diverting more cases from prosecution to social programs, and adjusting charging, plea bargaining, and sentencing practices in ways designed to reduce mass incarceration.[2] More prosecutors' offices have opened conviction integrity units to look into evidence of potentially wrongful convictions.[3]

Meanwhile, special prosecutor Robert Mueller labors on in the Russia probe. Workmanlike and professional, Mueller seems to ignore the political pressure from the President and his lawyers. Mueller serves as a reminder of how important prosecutorial independence is. Reined in by DOJ policies and the traditions and norms of the office, Mueller has proceeded so far unaffected by the carnival-like atmosphere around him. Mueller is not a

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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. *See* Maura Ewing, *Philadelphia's New Top Prosecutor is Rolling Out Wild Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018), https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html [https://perma.cc/54AS-XZL2].

3. As of the end of 2017, there were thirty-three conviction integrity units. *Conviction Integrity Units,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx [https://perma.cc/7KTM-8JAK] (last visited Sept. 28, 2018).

knight in shining armor. He, and others like him, can only exist if prosecutors are protected from the political branches and trusted—at least somewhat—to exercise their discretion well.

In this oddly polarized context, this essay revisits Abbe Smith's question and concludes that not only can one be a good person and a good prosecutor, but individuals devoted to social justice and concerned about flaws in the criminal justice system should seriously consider a career in prosecution. The radically different views towards criminal justice shared by prosecutors and the public offer an opportunity for change, in a volatile atmosphere in which commitment from within is a promising route to reform.

The argument that a good person cannot be a good prosecutor rests on several assumptions. First, it assumes that the criminal justice system is broken. Beyond flawed, the endeavor is corrupt and irredeemable. A prosecutor who takes part in a system like this, even one with the best intentions, is inevitably complicit.[4] Even if she manages to reduce the amount of evil at the margins, she is ultimately a part of the problem. Her daily work involves adding more people to an overcrowded and broken jail system and contributing to the disproportionate number of imprisoned African American men.

While wrongful convictions, mass incarceration, inhumane prison conditions, and disproportionate and cruel effects on African American and other minority communities plague the criminal justice system, it is not, in my mind, beyond repair. Krasner and Mueller are proof. Not all District Attorneys share Krasner's commitment to change but the language of reform is now prevalent.[5] Not all prosecutors are as devoted to professional norms as Mueller but he is a product of this system too. There is good evidence that public opinion is swinging towards reform as well.[6] District Attorneys are elected officials who may at least potentially be swayed by this new tide. Line prosecutors around the country have that currency to draw on. Of course, if a young prosecutor finds herself in a different office, one whose policies resemble Sessions' more than Krasner's, it will be harder but not impossible to pursue social justice.

A second premise at the heart of Smith's argument is that line prosecutors are controlled by their supervisors.[7] Even if they were inclined to be lenient in charging or generous in turning over discovery to the defense, they would be prevented from doing so. The office cultures that caused the problem will

4. David Luban makes this argument about the Trump administration, arguing that anyone who works within it is complicit in its evils. David Luban, *The Case Against Serving in the Trump Administration*, SLATE (Nov. 15, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/11/career civil servants_should_not_serve_in_the_trump_administration.html [https://perma.cc/ZQ55-XMN6].

5. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV 51 (2016).

6. *See* Lydia Wheeler, *Poll: ¾ of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018), http://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform [https://perma.cc/4295-PUDG].

7. Smith, *supra* note 1, at 385–86.

swallow up these young recruits. This seems counterintuitive and also runs against the literature on workplace culture. The culture of a particular office is rarely created solely by the head of the office. Units within and individuals at all levels of the hierarchy have power to amend and alter the message that comes from the top.[8]

In the federal system, for instance, a series of Attorneys General have issued memoranda directing line prosecutors to charge the highest crime that they can prove.[9] Federal prosecutors have, however, worked around this rule.[10] Many Assistant United States Attorneys charge what they think is the appropriate crime, either defying the edict or rationalizing that they were not sure that they had enough evidence to prove the most severe charge. Of course, prosecutors will have supervisors and those supervisors may well undermine a prosecutor's attempt to use the position to protect defendants' rights or avoid lengthy unjust sentences, but prosecutors' offices are not generally equipped to control all prosecutorial decisions. Choices about discovery, what evidence to present, legal arguments to make, and what sentence to recommend are often, out of necessity, left to the individual line prosecutor. A prosecutor committed to a broad and complex understanding of what it means to do justice has significant power to implement that vision.

Prosecutors enjoy vast discretion. By exercising this power virtually unchecked, prosecutors have created or at least perpetuated the ills that plague criminal justice in this country. Many critics have advocated for greater controls. They argue for internal structural changes within prosecutors' offices,[11] more judicial or legislative checks,[12] a better funded criminal defense bar,[13] and transparency and more popular involvement in criminal trials.[14] Many of these suggestions are both wise and necessary. Our form of government was based on the idea that unchecked power is dangerous, and prosecutors have grown too powerful. That said, it is both unrealistic and undesirable to strip prosecutors of discretion entirely. Discretion is both inevitable and fundamental to our justice system. The independence it creates allows prosecutors, who are most familiar with the facts and trained in the law, to protect liberty and serve as an important check

8. *See* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 515–35 (2017).

9. *See* Alan Vinegrad, *DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT. REP. 3 (2017).

10. *Id.* at 6.

11. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 319–41 (2013).

12. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 61–62 (1998); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002), Margaret Z. Jones, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 53–54; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L, REV. 1521, 1566 (1981).

13. John Pfaff, *A Mockery of Justice for the Poor,* N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html [https://perma.cc/DK26-9K57].

14. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 955–59 (2006).

on political power.[15] It allows them to develop practices with some internal consistency. In short, it allows them to adopt a professional, even-handed approach that lends Mueller the credibility to combat allegations of political bias. Even if this were not the case prosecutors who are close to the facts, are well situated to exercise discretion. There is no institution or actor that would be in a better position to make these decisions.

Discretion is not only a necessary evil, it can also be transformed into a force for maintaining democratic institutions and even progressive change.[16] In an office run by a District Attorney like Larry Krasner, it is not hard to see how prosecutors can use their discretion to repair some of the worst problems.[17] But even in offices with a greater philosophical commitment to law and order, individual prosecutors exercise discretion in their cases.

Abbe Smith's argument rests on a third premise. She argues that because prosecutors do not empathize with any individual, their moral sense is hobbled. Empathy is complicated. It can be a wonderful thing that causes individuals to do good in the world. Every defendant deserves one person who identifies with him, who sees him as something more than his worst act. That said, empathy is not the only value and in its extreme, it can get in the way of a broad view of criminal justice that can lead to substantial reform. For instance, a defense attorney's devotion to her client will lead her invariably to do what is best for that individual regardless of the impact on others. A defense attorney representing a witness who wishes to cooperate with the government, for instance, will have to help her client do so even if it unfairly affects the defendant. Often the client's interest will correspond with the defense lawyer's broader ideological goals but at times it will not. Empathy, as well as professional norms, will lead the defense lawyer to ignore or at least disregard the impact the representation has on those other individuals. At its extreme, it can lead to a kind of identification that blinks reality and causes defense lawyers to believe their clients in the face of obvious facts. Prosecutors often use the derogatory term "true believers" to describe this sort of defense attorney.

Empathy is not inconsistent with the prosecutor's job, as Smith concedes, but a prosecutor's duty to all community members will inevitably limit any empathic moment. The prosecutor is charged with looking out for all the individuals affected by a given case: the defendant, the victim, future victims, and the community. Abstract principles like the rule of law, personal responsibility, and fairness similarly ought to factor into prosecutors'

15. *See* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, ALA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126856 [https://perma.cc/NJ74-K7TP].

16. Green & Roiphe, *supra* note 8.

17. Mark Fazlollah et al., *Philadelphia's DA Keeps Secret List of Suspect Police*, INQUIRER (Feb. 13, 2018), http://www.philly.com/philly/news/philadelphia-police-misconduct-list-larry-krasner-seth-williams-meek-mill-20180213.html [https://perma.cc/WSY9-RZWN]; Brian X. McCrone, *Marijuana Cases Dropped En Masse by Philadelphia DA*, NBC 10 PHILA. (Feb. 15, 2018), https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html [https://perma.cc/KGS6-3DSZ].

decisions in every case. This broad responsibility to do justice runs the risk of leaving the prosecutor with an arrogant faith in his own assessment of what is right, or an unwillingness to view things from a different or more nuanced perspective. As many scholars have shown, prosecutors more often empathize with police officers, investigators, or victims with whom they work regularly than with a defendant.[18] This, however, is a distortion of the prosecutor's role, an all-too-common risk, but not an inevitable part of the job.

The rhetoric on either side of this debate is the enemy of effective reform. Prosecutors who have total faith in their ability to assess and pursue the public interest resist all limits on their power and are prone to disregard facts that conflict with their initial assumption about an individual's guilt. Defense attorneys, who are skeptical of prosecutors' ability to do any good, advocate for greater checks on prosecutorial power but will, inevitably, be left with prosecutors who exercise some discretion. Unless they acknowledge that discretion can be used for good they will be stuck in an unjust system and continue to drive all individuals committed to social justice from prosecutors' offices.

Turning back to our current criminal justice field occupied by Attorney General Jeff Sessions, District Attorney Larry Krasner, and Special Prosecutor Robert Mueller, it seems to me that this is a unique moment for prosecutors to move their offices incrementally towards reform. Whatever position a prosecutor occupies along this spectrum, she cannot avoid a dialogue about criminal justice that includes the voices of Black Lives Matter, the Innocence Movement, and others. We need people inside prosecutors' offices who will engage in this conversation in a meaningful way and help reform their offices to pursue a more just kind of prosecution with a more nuanced understanding of crime, race, poverty, and the criminal justice system.

18. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1104–05 (2014).