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CAN A GOOD PERSON BE A GOOD PROSECUTOR?

*Ellen Yaroshefsky**

Most people who become prosecutors are honest and ethical public servants who take that job for varied reasons including protecting the community, assisting victims of crime, gaining trial experience, or enhancing future employment prospects and long-term political goals. Earnest and hard-working, these prosecutors bristle at the very question of whether a good person can be a good prosecutor. The question though is not about a good person and their motives or ethical compass, but about the role: What does it mean to be a good prosecutor especially in the era of mass incarceration?

First, it depends upon whether we ask the question about the chief prosecutor or a line assistant. The chief prosecutor needs to lead an office away from the traditional case processing approach toward the “minister of justice” role.¹ They are not just handling cases but must adopt a broader perspective.

The chief prosecutor must begin with the understanding that our criminal justice system is deeply flawed and that the good prosecutor must work towards its repair. Mass incarceration—the nearly tripling of people in prison since the 1970s—has received significant attention, but it is not well known that this was driven, in great measure, by prosecutors and harsh charging and sentencing decisions in the era of the “war on drugs.”

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1. The Model Rules of Professional Conduct note that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2013). ABA Standards for the Prosecution Function reflects the importance of the prosecutor’s role in criminal justice reform: “It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(d) (AM. BAR ASS’N 2013). The contours of the minister of justice role are not well defined but it embraces the notion of seeking reform of the criminal justice system rather than mere case processing. See Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 154–55 (2011) (discussing the unique role of the prosecutor and advocating for explicit ethical guidelines).

Prosecutorial aggressiveness led to increased prison terms and disparate treatment by race and class.²

A good prosecutor must acknowledge her role in creating mass incarceration, develop a deep understanding of the history and effects of racial discrimination, and implement remedial policies. She should adopt the lawyer's version of the Hippocratic Oath: do no harm. No harm to defendants as well as to victims.

This begins with language. The person involved in criminal activity should not just be labeled a "defendant," but should be viewed with respect. Victims and those charged with crime often come from the same community and the prosecutor's role in community protection may involve programs to assist both of them in various ways. Adversarial justice is often inappropriate. The person sent to prison will likely return to his community and needs support.

In many jurisdictions, the criminal justice system has lost the trust of the community.³ The good elected prosecutor works to establish trust and understands the importance of an effective non-punitive system for young people involved in crime. Thus, not every person suspected of crime should be arrested and not every arrestee should be prosecuted. Alternatives may be more effective. The minister of justice needs to work with police, schools, and community leaders to substitute schooling, treatment, and other programs for arrests. For those charged with crimes, it does not well-serve the person, their families, most victims of crime or the larger community, to charge the highest level of crime or to keep them in jail during the pendency of a case. It is also contrary to a justice role for the prosecutor to fail to provide the defense with effective mechanisms to implement the client's Sixth Amendment right to counsel or to request a severe sentence and then assume no responsibility for that defendant beyond conviction other than to ensure that it is upheld in post-conviction proceedings.

In many ways, the prosecutor is the last link in broken systems of social and economic rights. Consequently, the good district attorney must work toward effective practices where only a small percentage of people are removed from society. And for those imprisoned on a short- or long-term basis, the minister of justice must develop systems that help improve, rather than harden and worsen the person convicted of a crime. The prosecutor is in control of the criminal legal system and must assume responsibility for all aspects of that system from youth programs to alternatives to jail and to prison reentry programs.

2. See generally JOHN P. PFAFF, LOCKED IN (2017).

3. Some criminal justice policy makers and attorneys have stopped calling this a criminal justice system and instead call it a criminal legal system. See Sen. Cory Booker, *Our Criminal Legal System: Justice Doesn't Have to Be Missing from the Equation*, HUFFINGTON POST (Apr. 15, 2015), https://www.huffingtonpost.com/cory-booker/our-criminal-legal-system_b_7071792.html [<https://perma.cc/PQM9-72LS>]; Alex Karakatsanis, *Criminalization of Poverty*, C.R. CORPS <http://www.civilrightscorps.org/work/criminalization-of-poverty> [<https://perma.cc/MJ3U-C53Z>] (last visited Sept. 28, 2018).

Necessary platforms for a good chief prosecutor include:

1. Acknowledge race and class as an underpinning of criminal justice and seek to reduce stark disparity in arrests, prosecutions, and sentences.
2. Engage the office in an extensive examination of the role of race and class in disparate charging and sentencing discretionary decision making.
3. Establish extensive data systems to document discretionary decision-making results in alternatives to prosecution, arrests, pleas, trials, dispositions, and sentences.
4. Develop programs and policies to keep young people out of courts. Entry into a court system itself is a punishment that leads to a “school to prison pipeline.”
5. Work with the police and other stakeholders to reduce arrests and reduce the number of people “put through the system.”
6. Implement a policy of presumptive release on the person’s own recognizance or a signed bond by family or community members. Bail should be an alternative system, not a norm. Do not request cash bail.
7. Establish plea bargaining guidelines with explicit decarceration goals.
8. Provide early and full discovery to the defense in all cases.
9. Develop effective sentencing policies that consider disparate impact by race and class and support decarceration.
10. Develop and implement effective training, supervision, and feedback systems for the office and ensure careful study of the effect of those systems.
11. Work closely with defenders to support defense funding. Perhaps the most effective way to help those arrested is to support funding for indigent defense.
12. Be transparent about policies, implementation, and results. The public needs to be made aware of prosecutorial systems, programs, and data about discretionary decision-making. This could serve to demonstrate that decarceration works.
13. Establish conviction integrity units for robust examination of cases that require sufficient personnel whose mind-set is potential innocence, not those whose goal is primarily to uphold convictions.
14. Work with other stakeholders to improve all societal systems that include education, child care, employment, housing, and wage stability.

The good ministers of justice cannot implement effective reform without personnel change. Thus, supervisors who have become rigidly identified with a version of “law and order” mentality cannot remain in the good prosecutor’s office. The chief prosecutor needs supervisors and line personnel who adopt her vision. She must carefully grant discretion to the new line prosecutors to permit them to make decisions in selected cases that increase decarceration. Evidence-based information should allow that line prosecutor to dismiss cases or lower a bail request or reduce the sentencing recommendation. Particularly young lawyers of color who may have more experience in the community served should know that they are afforded discretion to seek alternatives to criminal dispositions where warranted.

Effective reform of the criminal legal system requires immense sustained effort. The many newly elected prosecutors who espouse such changes outlined above should be applauded. They are good prosecutors. We should continue to elect prosecutors with such vision toward repair. But they cannot achieve effective reform alone. The U.S. needs systemic social, economic, and educational reform that requires leadership by and support of federal, state, and local officials. All stakeholders must work in coordination.

And the young line prosecutor? Many of us train young people to work in such offices and to develop a strong ethical compass. Can they be good prosecutors? Can they work effectively toward implementation of the minister of justice vision? Yes, if they work in the offices of an effective minister of justice. But, in the typical case processing office, it is questionable. They may believe that they are a good prosecutor until—against fact-based judgments—they are overruled by a superior and told to advocate for high bail, a criminal conviction, or a lengthy sentence. Following orders may be necessary to maintain employment, but it does harm if that young prosecutor knows that it does short- and long-term damage to the individual charged and ultimately to the community. Perhaps this can be excused in a limited number of cases and one can be a “good enough” prosecutor in a flawed system. Overall, he may be doing more good than harm and certainly better than his predecessors. But once that prosecutor is engaged in consistent case processing with known damaging results to individuals, he is no longer “good enough.” He cannot be yet another cog in the case processing office and claim the mantle of the minister of justice.