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Perspectives

How Do We Know If Prosecutors Are Doing A Good Job?

By **Jeffrey Bellin** | March 31, 2019, 8:02 PM EDT

Prosecutors are all over the news. For the past two years, pundits speculated about the Mueller investigation, deconstructing every move made by Special Counsel Robert Mueller's team of elite prosecutors. Sen. Kamala Harris, D-Calif., a leading contender in the 2020 presidential race, regularly draws on her career as a prosecutor — the foundation for her catchy campaign slogan, "For the People." At the state and local level, a wave of self-proclaimed "progressive prosecutors" routinely grab headlines with their promise to reform a flawed criminal justice system from the inside.



Jeffrey Bellin

Plenty of the attention is negative, however. Mueller has been criticized both for conducting a "witch hunt" and letting the president off the hook; criminal justice activists seek to derail Harris' presidential bid as payback for perceived failings in her tenure as a state prosecutor. Progressive prosecutors field regular attacks from law enforcement, crime victims and former allies.

Why all the negativity? Sometimes prosecutors get criticized because they deserve it. Other times, the criticism comes from the fact that the American criminal justice system is flawed and complex, and prosecutors are its most misunderstood component. Even among experts, there is little agreement about how we should evaluate prosecutor performance.

The traditional view is that prosecutors are dull public servants, with little role in making policy. Their job is to enforce the law. Mueller is an example of an old-school, "enforce the law" prosecutor. If he talked to the media (old-school prosecutors don't), he would dismiss all the fuss, saying that his team focused on its assigned task, pausing only to address any law-breaking it uncovered along the way. For those on the other side of the political aisle, Jeff Sessions is the model. While progressive prosecutors rush to dismiss marijuana cases, Sessions, our former attorney general, wanted to federally prosecute marijuana offenses even in states that decriminalized the drug.

But the prosecutors-enforce-the-law narrative has always been too simplistic. Prosecutors have broad discretion to decide which cases to accept, and how to handle the ones they take. And unique to this country, the prosecutors that matter most are elected at the local level. Elections inevitably introduce a policymaking tilt to the prosecutor role. Prosecutors might not like to admit that they make policy, but they do — even if just by quietly deciding which cases to prioritize, and which to drop.

That's the hook for "progressive prosecutors." They don't hide their discretion; they celebrate it. Why not use all that discretion, they argue, to undo the severity of their by-the-book predecessors who facilitated the rise of mass incarceration? Voters in cities from Chicago to Philadelphia to Houston agree.

Awash in all this discretion, prosecutors get little guidance. *Berger v. United States*, a 1935 [U.S. Supreme Court](#) opinion regularly invoked by both prosecutors and their critics, instructs prosecutors to ensure "that justice shall be done." The [American Bar Association](#) adopts this formulation in its Model Rules of Professional Conduct, urging prosecutors to act as "ministers of justice." The largest association of state prosecutors, the [National District Attorneys Association](#), similarly describes the prosecutor as "an independent administrator of justice." Beyond that, any consensus about the prosecutorial role fades away.

Few can object to "justice" — coincidentally, Merriam-Webster's 2018 word of the year. But in the murky landscapes of the criminal law, what constitutes "justice" is often hotly contested. Consider, for example, the backlash over Chicago prosecutor Kim Foxx's recent decision to dismiss criminal charges against "Empire" actor Jussie Smollett. What does "justice" require in that case? And even the most progressive of prosecutors recognize that their freedom to do justice is tempered by a duty to follow the law. Everyone agrees on the generalities. Disagreement erupts around the hard questions, like: How does the prosecutor's obligation to do justice apply when it is the law itself that seems unjust? Maybe the answer seems obvious - the prosecutor should ignore the law - but then think about the same question in reference to a law you support (and a prosecutor you don't).

If all that wasn't complicated enough, there is one more ingredient to assessing prosecutor performance. Prosecutors work in a criminal justice ecosystem populated by lots of actors — legislators, police, judges, governors — who also wield considerable power, all seeking to impose their own brand of justice. That means that sometimes what looks like a prosecutor's failure to do justice actually reflects choices made by someone else.

You can start to see why, now that we are noticing prosecutors, there's lots to fight about. Prosecutors' important choices are governed by a standard ("do justice") that has stumped philosophers for centuries. And when you dig into the facts of any particular scenario, the answers often get harder, not easier.

The bottom line is an unpopular one in this era of hot takes and breathless races to judgment. To fairly evaluate Mueller, Harris, the exciting new wave of progressive prosecutors, and the thousands of federal, state and local prosecutor across the country, you need to come up with something that the rest of us have yet to puzzle out — a clear standard for judging prosecutors. Until we can give prosecutors more precise guidance than "do justice," our disappointment with their performance may be as much our fault as theirs.

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