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Great Power, Greater Responsibility – The Importance of Socially Conscious Prosecutors in Combating “Tough on Crime” Policies

Ariana H. Aboulafia*

“He feeds off of darkness, lust and greed
Pride, sloth, wrath, envy and gluttony,
But I cast him out, got the light on my side,
I’ll be better off without him,
Cause I know he lies,
He’s a snake with a rattle,
Yeah, I’ve heard that buzz,
His original name was,
The Prosecutor, and he doesn’t have a case...

He doesn’t work for the county, doesn’t work for the state,
He only works for his cause,
And his cause is hate,
He doesn’t work for the people, no pro bono,
From the depths of hell, fallen angel...

He’s a rotten one, so hold your applause,
His original name was,
The Prosecutor.”

- “The Prosecutor” (The Interrupters)¹

“In contrast to what most prosecutors do, we try to treat all individuals with complete fairness.”

- Ken Starr²

* J.D. Candidate, University of Miami School of Law, 2020.

I. Introduction – Why *Not* Prosecution?

Many young people choose to go to law school without knowing exactly what they want to do when they graduate. According to the Syracuse University College of Law, “wanting to be a lawyer” is only one of the top five motivations for their students to attend law school.³ And, even those who *do* wish to become lawyers may not necessarily know which legal job would best fulfill their individual goals. Unfortunately, one of the most viable career options for law students, particularly those that are interested in public interest and social justice, is often overlooked: criminal prosecution. Many public interest-minded law students believe that prosecutors – through their participation in policies like mass incarceration, the war on drugs, and various other “tough on crime” programs – steadily target and feed off of the most vulnerable members of society. However, those very systems would most shudder in the face of a new wave of socially conscious prosecutors.

This paper will make the case for socially conscious law students to consider a career in criminal prosecution. Section I will first discuss public and law student opinion of prosecutors in general, and the potential origins of those opinions. The next section will introduce the idea of the “compassionate prosecutor,” and the impact that these individuals can potentially have – and are already having – on behalf of all those involved in the criminal justice system. The following section will discuss various methods that prosecutors use to ask for reduced sentencing, collectively referred to as “downward departures.” This paper will conclude with a reiteration of why prosecution, despite its perhaps dubious reputation, is the position within the legal field wherein socially conscious young lawyers can make the most difference. They can do this by

working “from the inside out” to reduce our nation’s contributions to “tough on crime policies” – and, because of this power, prosecution is the position where these lawyers are most needed.

II. Prosecutorial Reputation – A “Sleazy” Profession?

In an informal poll of a small group of University of Miami School of Law students and recent graduates, several noted that they would not consider becoming a prosecutor after graduation.⁴ One recent graduate noted that she was worried that the average salary of a prosecutor would not be sufficient, particularly in light of hefty law school loans. Although this is a fairly common concern for any public interest legal job,⁵ the low pay of prosecutors, specifically, was echoed by journalist Jesse Eisinger in a 2015 article for *The Harvard Law Record*.⁶ Then, there were students who took thought that prosecutors do not really “make a difference” in the way that so many law students wish to do. One rising second-year student echoed this sentiment – “I really don’t believe,” she said, “That prisons are going to solve the world’s problems. For every defendant that prosecutors lock up who is *reformed* by prison, there is someone else whose attitude won’t be changed by sitting in a prison cell, nor will that prison time prevent them from doing the same thing all over again once they get out.” This belief is backed up by recent data from the United States Sentencing Commission, which noted that within eight years of being released from federal prison, one-half (50.0%) of federal drug trafficking offenders were rearrested.⁷ Of those reoffenders, the median time to re-arrest was just over two years (25 months).⁸ With recidivism rates this high, it is easy to see why law students who wish to truly “change the world” may be hesitant to serve as prosecutors.

Finally, there were students who took an ethical issue with prosecution itself. Another rising second-year student responding to my informal poll noted that “Prosecutors rarely solve problems in our criminal justice system. Instead, they contribute to them by punishing those who have traditionally been systematically targeted and are the most vulnerable.” This idea is perhaps most harmful to the argument that prosecution is a viable career for those that are interested in social justice – after all, prosecutors undeniably play a role in many of the aforementioned systems that are perhaps inherently unjust and disproportionately affect communities of color. In short, many believe, as Abbe Smith wrote in her article for the *Georgetown Journal of Legal Ethics*, that “[p]rosecutors uphold the banishment of a generation of African American men simply by playing their role in the context of today’s criminal justice system.”⁹

The above opinions of prosecution as a profession hold weight even for the most honorable and truthful among individual prosecutors – they are criticisms more of the job itself than of the individuals performing those jobs. But, the more extreme opinions of prosecutors may partially derive from distasteful posts and public statements from prosecutors themselves, which serve to taint public opinions of *all* prosecutors not only as legal professionals, but as people. Take for instance, the Orange County, Florida prosecutor who was reprimanded after posting on Facebook on Mother’s Day: “Happy Mothers day (*sic*) to all the crack hoes out there. It’s never too late to tie your tubes, clean up your life and make a difference to someone out there that deserves a better life.”¹⁰ The same prosecutor had posted derogatory messages regarding Supreme Court Justice Sonya Sotomayor just weeks earlier – the post consisted of a photo of the Justice, captioned “Reason enough why no country should ever engage in the practice of Affirmative Action

again...where would she be if she didn't hit the quote lottery? Here's a hint: 'Would you like to supersize that sir?'"¹¹ Then, there was the Indiana state prosecutor who was terminated after he tweeted "use live ammunition" in response to a news report that riot police had been ordered to remove protestors from the state capital in Madison, Wisconsin,¹² as well as the Minnesota Assistant United States Attorney who wrote on Facebook that she was "keeping the streets safe from Somalis" while prosecuting a Somali immigrant for attempted murder.¹³ While some of these instances may seem almost amusing, these posts are much more than a social media faux pas¹⁴ and can actually constitute prosecutorial misconduct – which is no laughing matter.

Legally, prosecutorial misconduct is defined as any conduct "overstep[ping] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."¹⁵ Misconduct that falls under this definition can range from a prosecutor arguing with a witness, "conducting himself in a thoroughly indecorous and improper manner,"¹⁶ misstating the law to a jury,¹⁷ and suppressing evidence favorable to the accused.¹⁸ These actions not only affect public perception of the prosecutorial and legal professions, but also have very real and severe consequences for defendants. For example, in 2012, at least four attorneys at a U.S. Attorney's office either resigned or were demoted due to their "anonymous" postings on a newspaper's website during a trial of five New Orleans police officers who allegedly shot innocent people after Hurricane Katrina. The posts were a contributing factor to the presiding judge's decision to overturn the officer's conviction and order a new trial, due to what he dubbed "grotesque prosecutorial misconduct."¹⁹ Furthermore, a five-part series published in the *Chicago*

Tribune found that prosecutorial misconduct of various types led to the wrongful convictions of at least 381 people between 1963 and 1999, all of whom had their homicide verdicts overturned.²⁰

Clearly, prosecutorial misconduct can lead to both wrongful convictions and the overturning of rightful convictions, both of which have a degenerative effect on the public opinion and trust in prosecutors. Indeed, it was an analysis of the alleged prosecutorial misconduct of North Carolina prosecutor Mike Nifong (who lost his law license as a result of his decision to charge three Duke lacrosse players with rape) that led attorney Jonathan Wallace to write that he thought of prosecutors as “sleazy showmen,” “attack dogs,” and “dishonest assailants,” who have no trouble “sleep[ing] at night if they have convicted the innocent.”²¹ It is these beliefs in their totality – regardless of how they are expressed or where they come from – that led Abbe Smith to ask the provocative question that became the title of her article for the *Georgetown Journal of Legal Ethics*: can one simultaneously be a good person and a good prosecutor?²²

III. Shifting the Paradigm – The Role of The Compassionate Prosecutor

No doubt, most prosecutors who would contend that the answer to the above question is yes – of course, one can be at once a good person and an effective prosecutor. And, there are scores of prosecutors working across the country to change the negative narrative regarding prosecution into a more positive one, and not only from the perspective of convincing the public that prosecutors are more like Casey Novak²³ than Hamilton Burger.²⁴ Indeed, there are several organizations that are working to bring together socially conscious prosecutors in order to effectuate real change. Many of these groups wish to impact the lives of defendants and

communities by encouraging prosecutors to depart from “tough on crime” and incarceration-driven practices and instead focus on more preventative and rehabilitative measures.

One of these groups, “Prosecutor Impact” (PI), seeks to train prosecutors to utilize positive, sustainable interventions outside of the bounds of traditional prison sentences in order to create better outcomes for communities.²⁵ They focus on training new prosecutors to understand their role in improving community health and safety, and teach prosecutors how to address implicit biases, mental illness, and substance abuse in the criminal justice system. Furthermore, PI helps to build diversion and prevention programs while teaching prosecutors the collateral consequences of criminal convictions to reduce the frequency and intensity of prison sentences. A similar group, “Fair and Just Prosecution” (FJP), brings together newly elected local prosecutors to “promot[e] a justice system grounded in fairness, equity compassion, and fiscal responsibility.”²⁶ Members of FJP become part of a network, through which they are able to share information via research and resource materials, as well as gain access to in-person trainings and national experts.

While public defending may be a more obvious career choice for socially conscious law students and young lawyers, FJP argues that local – not federal – prosecution is actually the field wherein these individuals can have the most impact. As they note on their website, “Local prosecutors exercise tremendous control over who will come into the justice system, what charges they will face, and the trajectory of their case. Local elected prosecutors, including District Attorneys and State’s Attorneys, are on the front lines of change in our nation’s criminal justice system.”²⁷ Indeed, as the *Prison Policy Initiative* reports, the vast majority of the 2.3 million people incarcerated in the United States are in state, not federal, prisons²⁸ – as such, reform-minded local

prosecutors have immense potential to enact tangible changes. As a former federal prosecutor and the director of FJP noted in an article for the *Huffington Post*, this impact may be particularly important now, when the lead prosecutor in the nation – Attorney General Jeff Sessions – has resurrected “tough on crime” policies.²⁹ To balance out and hopefully eventually overtake those policies, it is more vital now than ever before that socially conscious lawyers become prosecutors who are willing to devote themselves to the reformation of the legal system.

One of these devoted, local prosecutors is Mark Gonzalez, the District Attorney of Nueces County, Texas who was recently dubbed “the most unlikely D.A. in America” by *Politico Magazine*.³⁰ Gonzalez, a Democratic self-described “Mexican biker lawyer covered with tattoos,” had never prosecuted a single case prior to being elected as district attorney. Instead, he was a private criminal defense attorney who focused mostly on helping low-income individuals of color, so much so that he was referred to as “Mexican Moses” – the one who could convince judges to “let his people go” – and was known for the brazen “Not Guilty” tattoo on his chest.

When Gonzalez chose to run for district attorney, his co-worker and former assistant district attorney Matt Manning asked him why he would possibly want to be a prosecutor. Gonzalez responded, “If I become DA – if *we* become DA – with a stroke of a pen, we can help thousands of people, *people like us*, who need the help. When I say people like us, I mean people of color or people of not color who don’t have the financial means or education. That’s real progress. That’s real advocacy. That’s the way to help somebody.”³¹ Almost immediately after taking office, Gonzalez began to enact his plan to change reality for those like him, the most vulnerable populations that are traditionally oppressed by the criminal justice system. He

introduced a pretrial diversion program for individuals charged with marijuana possession, whereby he began issuing \$250 fines and mandatory drug classes for those in possession of two ounces or less instead of jail or prison time. The fines are a win-win situation for both defendants and the county, as they keep nonviolent marijuana-related offenders out of jail and create revenue. Indeed, in the one year since the fines have been in place, they have brought in more than \$500,000.

Then, there's Scott Colom, a 35-year-old district attorney in northeast Mississippi was elected after a grassroots campaign and a slogan of "Tough, Smart, Fair," meaning that Colom promised to focus the time, energy, and resources of the district on violent crime (rather than nonviolent, often drug or "broken windows"³² related offenses).³³ Immediately upon taking office, he began undoing the policies of his predecessor Forrest Allgood, a notoriously harsh prosecutor who had been voted into office six times over 25 years. Allgood had chosen to indefinitely jail three alleged perpetrators who had been deemed unfit for trial by psychiatrists – including one who had been incarcerated for eleven years. But, when Colom took office, he cleared all of their charges and sent them to mental health treatment hospitals (a particularly salient move considering that, as the American Civil Liberties Union (ACLU) recently found, 84% of Americans believe that people with mental health disabilities should be in mental health programs instead of prison).³⁴ By the end of his first year as district attorney, Colom had doubled the number of defendants in an alternative sentencing program. The program encourages defendants to abstain from drugs and get a job or seek educational opportunities – if they do, their charges will eventually be dropped. Colom has also added resources to the program, in the form of a former social worker who serves as an administrator and facilitates participation in rehabilitation, GED and vocational programs.

Alternative sentencing is perhaps one of the most promising resources that a compassionate, socially-conscious future or current prosecutor (like Scott Colom) can use. Generally, alternative sentencing can encompass any sentence that does not include prison time, most often a combination of the following: a suspended sentence, probation, a fine, restitution, community service, and deferred adjudication/pretrial diversion.³⁵ A suspended sentence refers to an instance where a judge either refrains from handing down a sentence, or decides on a sentence but refrains from carrying it out, either unconditionally or when the defendant satisfies particular conditions. Probation would mean that the defendant is released back into the community, without all of the freedoms of the average citizen (conditions of probation can often include the use of electronic monitoring and even home detention, at least for a certain period of time).³⁶ Restitution is similar to a fine in that it constitutes the payment of monies, but restitution goes directly back to a victim rather than to the state or federal government. Finally, deferred adjudication/pretrial diversion (the specific type of alternative sentencing favored by Scott Colom) generally consists of a judge requiring a defendant to complete certain programs – once they do, the prosecutor or the court will dismiss the charges. Alternative sentencing, however, is not ideal for every defendant and is not always used in an effective³⁷ or fair manner; indeed, a recent publication from the United States Sentencing Commission noted that alternative sentences, perhaps expectedly, were more often imposed for white offenders than black and Hispanic offenders.³⁸

Aside from potential racial biases, there are other reasons why alternative sentencing is used infrequently, particularly within federal practice. The same publication from the United States Sentencing Commission noted that alternative sentences are rarely imposed for federal offenders,

partially because many of those offenders are ineligible for alternative sentences by statute or due to their status as undocumented individuals.³⁹ For example, a sentence of probation only may not be imposed if (1) the offense of conviction expressly precludes probation as a sentence (which many federal drug trafficking offenses do); (2) the offense of conviction is a Class A or Class B felony; or (3) the defendant is sentenced at the same time to imprisonment for the same or a different offense.⁴⁰ Generally speaking, alternative sentences are imposed more often for individuals convicted of less serious crime, and may be particularly useful for nonviolent, first time drug offenders. However, rates of alternative sentencing are steadily declining (and have been for the past ten years). In 2014, for example, only 13.0% of federal offenders were given some type of alternative sentence out of the 24.6% of offenders that were eligible for those alternative sentences.⁴¹ The United States Sentencing Commission noted that one explanation for this decline could be the increasing popularity in prosecutors utilizing downward departures to decrease an individual's sentence. This could perhaps be a result of the culture of many prosecutors' offices, wherein it is more acceptable to ask for a prison sentence (no matter how slight) rather than an alternative one. An influx of mindful, principled prosecutors can change this culture, and achieve lower sentences for various defendants either via alternative sentencing or other methods within prosecutorial discretion.

IV. Breaking the Chains of Mandatory Minimums – The Role of Downward Departures

Alternative sentencing may not always be pragmatic, but there are several other mechanisms which prosecutors can use to reduce sentences (and thus, reduce participation in mass incarceration and other “tough on crime” policies). Downward departures, whereby defendants can qualify for a sentence that is below the mandatory minimum, can take a few different forms. Within federal practice (which, for simplicity’s sake, the majority of this section will focus on) and particularly when prosecuting federal drug crimes, downward departures usually come in the form of one of two substantial assistance motions (called Rule 35 or 5K motions) or qualification for the “safety valve” provision for nonviolent, first-time drug offenders. However, to understand these motions and the roles that they can play in social justice-driven prosecution, it is necessary to first understand generally how sentencing works in the United States.

In the criminal justice system, a sentence is imposed after a defendant is either found guilty via bench trial, jury trial or a guilty plea. Sentences vary based on several different factors, determined by 18 U.S.C. 3553(a). This statute states that in general, sentences imposed must be “sufficient, but not greater than necessary,” to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.⁴² In addition to considering these elements, it is necessary for a court to consider the nature and circumstances of the offense itself, the “history and characteristics of the defendant,” the kinds of sentences available, the sentencing range/guidelines created by the United States Sentencing Commission,

any applicable policy statements, the need to avoid sentence disparities among defendants with similar criminal history records who have been found guilty of similar conduct, and to provide restitution to victims of the offense. With so many factors to consider, it is clear that sentencing was designed to be decided on an *ad hoc* basis and can be confusing, at least in theory; however, in federal practice, the majority of sentences wind up falling within guideline ranges created by the United States Sentencing Commission. These guideline ranges take into account an individual's criminal history as well as the nature of their offense (including whether violence or a weapon was used, and other limited factors) and assigns an offense "level" to each defendant. Depending on that individual's offense level, they would be assigned a sentencing guideline range – which increase as with the individual's criminal history and as the seriousness of the offense increases, and can vary from a range of 0-6 months to a range of 360 months to life.⁴³

When an offense only carries with it a sentence guideline, it is possible for a judge to go either above or below that guideline if he or she so chooses. For a district judge, however, sentencing either above or below the guideline does carry with it a certain risk of being overturned by an appellate court (although quantifying that risk is difficult). However, certain offenses carry with them statutory mandatory minimums, meaning that whenever a defendant has pled guilty or been found guilty of those offenses, judges must impose a particular sentence *at minimum*, and only has the discretion to go above (and not below) that sentence. For example, the Anti-Drug Abuse Act of 1986 requires a minimum mandatory sentence of five years for drug offenses that involve five grams of crack, 500 grams of cocaine, 1 kilogram of heroin, 40 grams of a substance with a detectable amount of fentanyl, five grams of methamphetamine (which, the Criminal Justice

Policy Foundation notes, is only a five-day supply for a heavy user), or 100 kilograms of marijuana.⁴⁴ The same law also requires a minimum sentence of ten years for drug offenses that involve 50 grams of crack, 5 kilograms of cocaine, 1 kilogram of heroin, 400 grams of a substance with a detectable amount of fentanyl, 50 grams of methamphetamine, or 1000 kilograms of marijuana, and is largely still in effect (although the crack versus powder cocaine disparity was reduced via the Fair Sentencing Act of 2010).⁴⁵ And, because last year Attorney General Jeff Sessions instructed the nation's 2,300 federal prosecutors to pursue the most serious charge(s) in all but exceptional cases, it is likely that more low-level, nonviolent drug offenders are at risk of being impacted by these mandatory minimum sentences now than ever before.⁴⁶

Mandatory minimum sentences provide a dangerous tool for many prosecutors to both threaten and impose unfairly long sentences upon low-level drug offenders. However, by utilizing downward departures, socially conscious prosecutors can break the chains of mandatory minimums and ensure that sentencing is a reasonable⁴⁷ and individualized process handed down by an unbiased judge rather than partisan politicians. One way for a prosecutor to remove a mandatory minimum sentence is via the filing of one of two substantial assistance motions. One such motion, (often referred to as a 5K motion due to its origins from §5K1.1 of the United States Sentencing guidelines), is made during sentencing and seeks to reward individuals who have provided the government with substantial assistance in the investigation or prosecution of another person.⁴⁸ A similar motion can be made under the Federal Rules of Criminal Procedure Rule 35(b), which allows the government to request that an individual's sentence be reduced due to substantial assistance *after* sentencing.⁴⁹ While the motions are substantively similar, their difference lies both

in their timing and in their effectiveness in reducing defendants' sentences. 5K motions result in significantly lower average sentences than Rule 35 motions – a 2016 report by the United States Sentencing Commission, in fact, noted that a 5K resulted in an average sentence of 52 months, whereas a Rule 35 motion resulted in an average sentence of 83 months.⁵⁰ This benefit disparity is true regardless of whether the reductions are compared to each other in terms of ultimate sentence length or the percentage of reduction from the original sentence.⁵¹ This difference could be one reason why 5K motions are significantly more common than Rule 35 motions.

Both 5K motions and Rule 35 motions require *substantial assistance* – and, while the meaning of that phrase exactly is unclear (and, indeed, may vary from district to district within the United States) it is not likely that every low-level or nonviolent, and first-time drug offender will have the intel necessary to substantially assist the government in prosecuting someone else. Therefore, in these circumstances prosecutors can also decide if these individuals qualify for an alternate method of downward departure, called “safety valve.”⁵² Under 18 U.S.C. § 3553(f), courts may impose a sentence without any regard to the statutory minimum if the defendant: does not have more than one criminal history point; did not use violence, threats, or a firearm during the offense; was not an organizer or leader of others in the offense; was not engaged in a continuing criminal enterprise; and provides the government with “all information and evidence” concerning the offense.⁵³ Unlike 5K and Rule 35 motions, which require the defendant to provide information to the government that facilitates their prosecution of someone else, the safety valve rewards one for simply *trying* to help – the statute states, “the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not

preclude a determination by the court that the defendant has complied with this requirement.”⁵⁴ And, while it is up to the court to grant safety valve, it is up to the prosecutor to state that a defendant has cooperated with the government. As such, safety valve is yet another viable method for socially conscious prosecutors to exercise discretion in reducing defendants’ sentences and therefore reducing their – and more importantly, our nation’s – contributions to and reliance on unfair systems like mass incarceration and, in particular, the war on drugs (as it can only be applied to nonviolent, first-time drug offenders).⁵⁵

It is worth noting that prosecutors (unlike public defenders) carry agency and have discretion in not only sentencing, but almost every step of the criminal justice process⁵⁶ (even if it is not always absolute).⁵⁷ A prosecutor can decide, for example, whether or not to prosecute someone for a crime, while a public defender can merely ask the prosecutor to drop the charges. It is then, the prosecutor’s decision to choose to do that – or not. Prosecutors can also choose which charges to file, and what to offer defendants in plea agreements (which the vast majority of individuals take, considering that 94% at the state level and 97% at the federal level of felony convictions come as a result of plea bargains).⁵⁸ Finally, prosecutors can choose whether to ask for an alternative sentence in some instances, or file any one of the various downward departure motions previously discussed to remove mandatory minimums and reduce sentences for offenders.

V. Conclusion – Why Prosecution?

At this point in time, Americans overwhelmingly support widespread and systematic criminal justice reform. The same strand of recent polls by the ACLU cited above (wherein 41%

of respondents identified as conservative, 31% as liberal, and 23% as moderate) found that 91% of overall respondents stated that the criminal justice system had problems that needed fixing.⁵⁹ The polls further found that 71% of respondents believed the prison population should be reduced – a result which included 87% of Democrats, 67% of Independents, and 57% of Republicans, including 52% of those who voted for President Donald Trump.⁶⁰ Furthermore, a separate poll conducted by the ACLU found that approximately nine out of ten likely voters surveyed stated that it was important for their prosecutor to prioritize alternatives to incarceration – including 83% of Republicans polled.⁶¹ Finally, 88% of respondents said they were more likely to support a prosecutor who actively works to reduce racial bias in the criminal justice system. These statistics show that the very communities that prosecutors are hired to protect are asking for prosecutorial reform and will vote for candidates who provide this over ideologues that adhere to bygone “tough on crime” policies. In order to do that, though, voters need these socially conscious young lawyers to become prosecutors in the first place.

Prosecution offers many benefits attractive to young lawyers: stability, governmental benefits, and substantial trial experience which can be transformative for one’s legal career.⁶² And, absent some sort of extreme, revolutionary overhaul of the criminal justice system, there are always going to be prosecutors. Is it not prudent, then, to ensure to the greatest extent possible that every prosecutor (on the local and federal level) is a socially conscious one? Indeed, it is not only logical, but most *effective*, for those yearning for social reform to fill those prosecutorial spots – roles within the legal system that carry an immense amount of power, discretion, and responsibility – with individuals that will use their positions to change the criminal justice system by reducing

our nation's reliance on "tough on crime" policies. Change from within the prosecutor's office has already begun to occur in several places; just ask prosecutors like Mark Gonzalez, Scott Colom, or Denver District Attorney Beth McCann, who ensured that every member of her staff had a copy of "The New Jim Crow: Mass Incarceration in the Age of Colorblindness" in order to promote an understanding of racial bias in our sociopolitical and legal systems.⁶³ And, scores of young, liberal-leaning,⁶⁴ and public interest minded law students are graduating each year, and are thus faced with a unique opportunity to ride this wave of change and use it to benefit those that are most often marginalized (or, at best, overlooked) by the criminal justice system. The only question is, will they – will *you* – take advantage of it?

ENDNOTES

¹ THE INTERRUPTORS, *THE PROSECUTOR* (Hellcat Records 2016), (lyrics available at

<http://www.metrolyrics.com/the-prosecutor-lyrics-the-interrupters.html>)

² *Prosecutor Quotes*, BRAINY QUOTE, <https://www.brainyquote.com/topics/prosecutors>.

³ *Five Reasons Why Students Go to Law School*, SYRACUSE UNIVERSITY COLLEGE OF LAW (Sep. 22, 2016),

http://law.syr.edu/news_events/orange_blog/five-reasons-why-students-go-to-law-school1

⁴ This poll was completed informally by the author, in July 2018, and reached various University of Miami School of Law current students and recent graduates.

⁵ For additional information about the issue of lack of pay within the public interest legal field *see* Lewis A.

Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 833 (1995) (“The greater the income gap between the for-profit and not-for-profit sectors, the more likely it is that graduates will chose the former.”)

⁶ Jesse Eisinger, *Corporate Prosecutors and Their Invisible Chains*, THE HARVARD LAW RECORD (Oct. 29, 2015),

<http://hlrecord.org/2015/10/corporate-prosecutors-and-their-invisible-chains/>.

⁷ *Recidivism Among Federal Drug Trafficking Offenders*, UNITED STATES SENTENCING COMMISSION (Feb. 21,

2017), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-drug-trafficking-offenders>

⁸ *Id.*

⁹ Abbe Smith, *Can You Be A Good Person And A Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 374 (2001).

¹⁰ Joe Kemp, ‘Happy Mother’s Day to All the Crack Hoes Out There’: Florida Prosecutor Sparks Outrage Over

Rude Facebook Rants, NEW YORK POST (May 22, 2014), <http://www.nydailynews.com/news/national/florida-prosecutor-sparks-outrage-rude-facebook-rants-article-1.1801757>

¹¹ *Id.*

¹² CNN Wire Staff, *Indiana State Prosecutor Fired Over Remarks About Wisconsin Protests* CNN (Feb. 21, 2011),

<http://cnn.com/2011/US/02/23indiana.ammo.tweet/>

¹³ *Minnesota v. Usee*, 800 N.W.2d 192, 200 (Minn. Ct. App. 2011).

¹⁴ See generally Jan L. Jacobowitz, *Lawyers Beware: You Are What You Post – The Case for Integrating Cultural Competence, Legal Ethics and Social Media*, 17 SMU SCI. & TECH. L. REV. 541 (2014) (discussing the effects of social media on the legal profession and legal ethics).

¹⁵ *Berger v. United States*, 295 U.S. 78, 84 (1935).

¹⁶ *Id.* at 85.

¹⁷ *Caldwell v. Mississippi*, 472 U.S. 320, 332-33 (1985).

¹⁸ *Brady v. Maryland*, 473 U.S. 83, 87-88 (1963).

¹⁹ Martha Neil, *Judge Cites ‘Grotesque Prosecutorial Misconduct,’ Reverses Cop Convictions in Danziger Bridge Case*, A.B.A. J. (Sept. 10, 2014, 3:55 PM),

http://www.abajournal.com/news/article/ex_prosecutor_blames_pressures_of_job_for_blog_posts_he_resigned_over_says/.

²⁰ See Ken Armstrong & Maurice Possley, *Trial & Error*, CHICAGO TRIBUNE (Jan. 10-14, 1999),

<http://www.chicagotribune.com/chi-020103trial-gallery-storygallery.html>

²¹ Jonathan Wallace, *Why I Hate Prosecutors*, ETHICAL SPECTACLE (Oct. 2007)

<http://www.spectacle.org/1007/prosecutor.html>

²² See Smith, *supra* note 9.

²³ Casey Novak is one of many Assistant District Attorneys in “Law & Order: Special Victims Unit.” Her character (portrayed by Diane Neal) was the Assistant District Attorney from Seasons 5-9. For additional information on “Law & Order: Special Victims Unit” and its various Assistant District Attorneys, see Natalie Abrams & Nick Romano, *All the ADAs of Law & Order: SVU, Ranked*, ENTERTAINMENT WEEKLY. (Feb. 8, 2018),

<http://ew.com/tv/law-order-svu-adas/>.

²⁴ Hamilton Burger was the often overwhelmed, flummoxed, and incompetent prosecutor in CBS-TV’s longest-running television series, “Perry Mason.” His character, portrayed by William Talman, lost cases to Perry Mason consistently from 1957-1966. In that time, he defeated Mason only twice (in episodes 1-38 and 7-4). For additional

information on “Perry Mason” and its effect on the portrayal of lawyers in television, *see* Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 249 (1987).

²⁵ *The (PI) Vision*, PROSECUTOR IMPACT, <https://prosecutorimpact.com/the-pi-vision/> (last visited Oct. 9, 2018)

²⁶ *Our Work and Vision*, FAIR AND JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> (last visited Oct. 9, 2018).

²⁷ *Id.*

²⁸ Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

²⁹ Miriam Aroni Krinski & Dan Satterberg, *Prosecutive Winds of Change*, HUFFINGTON POST (June 7, 2017, 12:24 PM) https://www.huffingtonpost.com/entry/prosecutive-winds-of-change_us_593825dae4b00610547e5799.

³⁰ Timothy Bella, *The Most Unlikely D.A. In America*, POLITICO MAG. (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322>.

³¹ *Id.*

³² *See generally Broken Windows Policing*, GEORGE MASON UNIVERSITY CENTER FOR EVIDENCE BASED CRIME POLICY, <https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> (discussing the broken windows theory and its related policing and prosecution).

³³ Nick Tabor, *What If Prosecutors Wanted To Keep People Out Of Prison?* N.Y. MAG. – DAILY INTELLIGENCER (Mar. 27, 2018), <http://nymag.com/daily/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html>

³⁴ *91% of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AMERICAN CIVIL LIBERTIES UNION (Nov. 16, 2017), <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>.

³⁵ *Alternative Sentences*, FINDLAW, <https://criminal.findlaw.com/criminal-procedure/alternative-sentences.html> (last accessed Oct. 9, 2018).

³⁶ *Alternative Sentencing in the Federal Criminal Justice System*, UNITED STATES SENTENCING COMMISSION (May 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

³⁷ *See Alternative Sentencing*, N.Y. TIMES ARCHIVE (Jan. 20, 1997), <https://www.nytimes.com/1997/01/20/opinion/alternative-sentencing.html> (analyzing “shaming” alternative sentencing and its questionable effectiveness in deterring future crimes).

³⁸ *Alternative Sentencing in the Federal Criminal Justice System*, UNITED STATES SENTENCING COMMISSION (May 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See generally* 18 U.S.C. § 3553

⁴³ For additional information on sentencing guidelines and ranges, *see United States Sentencing Commission Guidelines Manual, 2016*, UNITED STATES SENTENCING COMMISSION, available at <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>.

⁴⁴ *Mandatory Minimums and Sentencing Reform*, CRIMINAL JUSTICE POLICY FOUNDATION, <https://www.cjpf.org/mandatory-minimums/> (last accessed Oct. 9, 2018).

⁴⁵ *Fair Sentencing Act*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> (last accessed Oct. 9, 2018).

⁴⁶ Office of the Attorney General, Memorandum on Department Charging and Sentencing Policy (May 10, 2017) (available at <https://www.justice.gov/opa/press-release/file/965896/download>) (“[I]t is a core principal that prosecutors should charge and pursue the most serious, readily provable offense.”)

⁴⁷ For additional information, and case studies illustrating the unreasonable nature of mandatory minimum sentences in many drug cases, see Andrea Jones, *The Nation's Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <https://www.rollingstone.com/politics/politics-news/the-nations-shame-the-injustice-of-mandatory-minimums-46729/>.

⁴⁸ *Study Reveals Differences in Substantial Assistance Reductions*, UNITED STATES COURTS (Mar. 31, 2016), <http://www.uscourts.gov/news/2016/03/31/study-reveals-differences-substantial-assistance-reductions>.

⁴⁹ FED. R. CRIM. P. 35(b).

⁵⁰ UNITED STATES COURTS, *supra* note 48.

⁵¹ *Id.*

⁵² “Safety Valves,” *Families Against Mandatory Minimums*. <https://famm.org/our-work/u-s-congress/safety-valves/>

⁵³ 18 U.S.C. § 3553(f).

⁵⁴ *Id.*

⁵⁵ For additional information and case law illustrating the importance of prosecutors filing 5K motions and other motions for downward departure, see Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV., 1246-1284 (2000).

⁵⁶ For additional information on prosecutorial discretion, see *Prosecutorial Discretion Law and Legal Definition*, U.S. LEGAL.COM, <https://definitions.uslegal.com/p/prosecutorial-discretion/> (“Prosecutorial discretion refers to the fact that under American law, government prosecuting attorneys have nearly absolute powers.”)

⁵⁷ For a discussion of the limits of prosecutorial discretion see Smith, *supra* note 9 at 386 (“There are some cases in which prosecutors, no matter how experienced, often have no discretion at all. Cases alleging assault on a police officer are a prime example. High profile cases are another. However, sometimes prosecutors abdicate – or at best share – their discretionary authority even in ordinary cases.”) (citations omitted).

⁵⁸ Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sep. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

⁵⁹ AMERICAN CIVIL LIBERTIES UNION, *supra* note 34.

⁶⁰ *Id.*

⁶¹ Taylor Pendergrass, *Tough-on-Crime Prosecutors Are Out of Step With Public Views*, AMERICAN CIVIL LIBERTIES UNION (Dec. 12, 2017), <https://www.aclu.org/blog/smart-justice/tough-crime-prosecutors-are-out-step-public-views>

⁶² For a deeper analysis of the importance of trial experience for young lawyers, see Emily Lonergan, *The Value of Trial Experience to a Young Lawyer*, MARQUETTE UNIV. L. SCH. FACULTY BLOG (June 18, 2013), <https://law.marquette.edu/facultyblog/2013/06/18/the-value-of-trial-experience-to-a-young-lawyer/>.

⁶³ Krinsky & Satterberg, *supra* note 29.

⁶⁴ For additional information on the liberal, Democratic leanings of millennial voters see Jonathan Chait, *New Survey Shows Young People Are Staying Liberal and Conservatives Are Dying Off*, N.Y. MAG. (Mar. 1, 2018), <http://nymag.com/daily/intelligencer/2018/03/new-survey-young-staying-liberal-conservatives-dying-off.html> (“[Y]ounger voters are wildly more liberal than older ones. The youngest voters have nearly five times as many voters with liberal views than with conservative views.”)