



## Prosecutors are mainly to blame for the criminal justice crisis

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In a speech last week at the National Biennial Conference of the Grand Lodge Fraternal Order of Police, Attorney General William Barr lamented the emergence of “anti-law enforcement DAs” who “refus[e] to enforce broad swathes of the criminal law.” Barr cited in particular their refusal “to prosecute cases of resisting police,” which Barrs sees as symptomatic of an “anti-police narrative [that] is fanning disrespect for the law.”

Barr’s speech paints a grim picture of “predators in our society.” He says that “violence, lawlessness, and predation lie just below the surface,” but it’s worth asking who is really responsible for this predation.

If Barr is genuinely worried about respect for the rule of law, he ought indeed to turn his attention to prosecutors, but not the reform-minded prosecutors he damns. Insulated from accountability and empowered with extraordinarily broad discretion, prosecutors are among the greatest dangers to the rule of law and the most socially destructive forces in American life today.

If American defendants are innocent until proven guilty as a matter of law, they are nonetheless too often treated as guilty until proven innocent as a matter of fact. Likewise, if the American system is an adversarial jury system in theory, it is in fact a mere “administrative process [that] operates within the shell of the due process model”— a process in which prosecutors wield tremendous power and discretion.

In a country that massively over-criminalizes non-criminal activities, a genuine adversarial system — like the one demanded by the Constitution — simply becomes too burdensome. In its place grew up a mockery of justice.

The actions of prosecutors, who operate in what “Locked In” author John Pfaff calls “an invisible middle space,” don’t receive the attention given those of police officers or politicians, insulating them from public or democratic scrutiny and thus for responsibility for their actions.

And prosecutors enjoy some of the broadest possible protections for actions undertaken in their job. Absolute prosecutorial immunity means that even their worst crimes go unpunished, that

incredibly prosecutors face no civil or criminal repercussions whatsoever for egregious intentional acts that have put innocent people in prison for years.

Following the Supreme Court's 1976 ruling in *Imbler v. Pachtman*, the country's courts have applied the policy of absolute prosecutorial immunity broadly, holding that even acts like falsifying or withholding evidence and bribing or coercing witnesses are protected activities insofar as they "involve decisions of judgment affecting the course of a prosecution."

The practical effect of such a warped system of incentives is a justice system that actively serves injustice, one that is rotten and racist to its core, ushering millions of people into prison in perfunctory administrative proceedings that frequently victimize the innocent.

Last year was a record-breaking year for both prison years served by innocent defendants later exonerated (a total of 1,639 years, averaging 10.9 years per exoneree) and the role of official misconduct in cases that produced exonerations (at least 107 of exonerated cases involved proven misconduct).

And black Americans are far more likely to be wrongfully convicted, making up nearly half of those convicted and subsequently exonerated over the past 30 years. Prosecutors and police seem to be able to put black people in jail for virtually anything or nothing here in the "Land of the Free."

This brings us back to Barr's speech. Given what we know about the character of resisting arrest charges, it is worth noting that Barr was especially disturbed by prosecutors who refuse to pursue these.

Police officers are far more likely to state that a defendant resisted arrest when that defendant is black; following the tragic death of Eric Garner, one study of New York arrests found that black defendants in misdemeanor drug possession cases are 85.4 percent more likely to be charged with resisting arrest than white defendants.

Further, as Pfaff observes, a situation in which resisting arrest is the one and only charge often points to police abuse of power, where the officer is aggressing against the arrestee, not the other way around.

As we've noted, at the center of this corrupt system, which places the burden of proof on the defendant rather than the government, is the decay of the adversarial system designed to meaningfully and rigorously test the government's claims. As a National Association of Criminal Defense Lawyers report demonstrates, trials in criminal cases are a dying breed on the verge of extinction, an ever greater number of criminal defendants pleading guilty to avoid what has come to be called the "trial penalty."

The trial penalty is the difference between the penalty prosecutors offer defendants who plead guilty at some point before trial and the sentence defendants receive after a trial.

The Cato Institute's Timothy Lynch, a criminal justice expert, argues that this practice of plea bargaining, however pervasive, is unconstitutional and therefore indefensible, that the government uses its devastating power to "retaliate against individuals who wish to exercise their right to a trial by jury."

It is no exaggeration to say that the plea bargain has completely obliterated the constitutional right to a trial in criminal cases, with almost all felony convictions resulting from plea bargains (a staggering 97 percent in federal criminal proceedings).

In this system, dominated as it is by the sway of the plea bargain, prosecutors act as judge, jury, and executioner. Judges in criminal cases are no longer impartial custodians of justice and the rule of law, but administrative flunkies who serve the unscrutinized ends of prosecutors and police. Wielding the overwhelming power vested in their offices and subject to heightened ethical obligations particular to their role, prosecutors should be held to a higher standard than the rest of the population, not a much lower one.

We might think that these officers of the court, whom we explicitly expect to have comparatively better judgment and a more cultivated ethical consciousness, would operate within a stricter framework of incentives.

Arguably their intentional misdeeds are, given these special circumstances, rendered even more serious and should thus carry more severe penalties; they are, after all, carried out in the name of justice and, indeed, in the name of the state. Instead, prosecutors are allowed to operate with near impunity, to ruin lives with, in most cases, not even a cursory nod in the direction of justice and due process.

Judged by its results (and we have only those by which to judge it), the American criminal justice system seems to be committed to maximizing the number of imprisoned, not to accomplish justice or anything remotely approximating it.

In a sane system, an even half-just system, most of what prosecutors do today would be regarded as criminal conduct. Given that he is the country's top law enforcement official, Barr's comments and his general insensitivity to the criminal justice crisis in the United States, though not at all surprising, are what's really disturbing.

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