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The “Smart on Crime” Prosecutor

ROGER A. FAIRFAX, JR.*

INTRODUCTION

“Smart on Crime” criminal justice reforms have emerged in recent years as shrinking government budgets and exploding incarceration rates have prompted scrutiny of the efficiency and efficacy of existing criminal justice approaches. Policymakers across the country have sought out new strategies designed to prevent crime and recidivism, enhance community safety, reduce our reliance on incarceration, and save taxpayer dollars. As a result, law enforcement, courts, and correctional agencies have been implementing innovative approaches in areas such as diversion, problem-solving courts, alternatives to incarceration, and ex-offender re-entry. However, the role of prosecutors and prosecutorial agencies in this story is often overlooked. This essay, written for the *Georgetown Journal of Legal Ethics* Symposium on the Conscience and Culture of Prosecution, highlights the emergence of the “smart on crime” reform movement and argues that prosecutors should endeavor to serve as engines of criminal justice reform.

I. “SMART ON CRIME” CRIMINAL JUSTICE REFORM

The economic challenges of the past several years have placed tremendous pressure on governments to determine how to allocate a shrinking pool of resources.¹ With many competing budgetary priorities, the substantial expense of criminal justice has drawn the scrutiny of policymakers seeking ways to increase government efficiency and to save costs.² Following a five hundred percent increase in prison population over the past several decades, the United States now has the highest rate of incarceration in the world, with over two million imprisoned: approximately 1 out of every 131 Americans.³ Aside from the human impact of our reliance on incarceration on individuals, families, and communi-

* Professor of Law, George Washington University Law School. A.B., Harvard; M.A., University of London; J.D., Harvard Law School. I would like to thank Professor Angela J. Davis, Anna Offit, and the other symposium participants and organizers. Also, I am grateful for the research assistance of Maryam Bellyan and Sam Gilbert. This Essay is dedicated to the memory of the Honorable Eugene N. Hamilton (1933-2011), former Chief Judge of the Superior Court for the District of Columbia. © 2012, Roger A. Fairfax, Jr.

1. See, e.g., Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL FORUM 265, 275-76; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 418-19 (2009).

2. See *id.*

3. See Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C. R. & ECON. DEV. 153, 155-56 (2010).

ties,⁴ mass incarceration has a tremendous fiscal cost.

As Professor Mary Fan describes:

The bill for incarceration has swelled dramatically as incarceration surged 240 percent between 1980 and 2008. The nation spent \$75 billion on corrections in 2008—the majority of the money on incarceration. The \$68 billion total spent on prisons was a 336 percent increase from the amount two and a half decades ago. Prisons have become the nation's second fastest-growing general fund expenditure. To house just one prisoner in 2005, taxpayers spent an average of \$23,876 a year. These steep costs are unsustainable in a deep recession and halting recovery when at least forty-two states and the District of Columbia are struggling with at least \$103 billion in budget shortfalls.⁵

In response, policymakers are taking a fresh look at how we operate the criminal justice system and whether we are receiving a sufficient return on our significant investment in incarceration-focused criminal justice strategies.⁶ What has emerged from these circumstances is what is often characterized as the “smart on crime” movement. As the author has written elsewhere:

In recent years, a newly-packaged approach to criminal justice reform—‘smart on crime’—has gained traction in policy circles. The ‘smart on crime’ philosophy emphasizes: (1) fairness and accuracy in the administration of criminal justice; (2) recidivism-reducing alternatives to incarceration and traditional sanctions; (3) effective pre-emptive mechanisms for preventing criminal behavior; (4) the transition of formerly incarcerated individuals to law-abiding and productive lives; and (5) evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies.⁷

High-profile criminal justice experts and think tanks have shone the spotlight

4. See Michelle Alexander, Op-Ed., *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011; James Forman, Jr., *Harm's Way: Understanding Race and Punishment*, BOS. REV., Jan./Feb. 2011; Mary D. Fan, *The Political Climate Surrounding Alternatives to Incarceration*, 38 HUM. RTS. 6, 6 (Summer 2011); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

5. Mary D. Fan, *The Political Climate Surrounding Alternatives to Incarceration*, 38 HUM. RTS. 6 (Summer 2011).

6. See, e.g., Vincent Schiraldi, *Getting Smart on Crime; Many States Are Questioning the Wisdom of Hard-Line Prison Policies*, TIMES UNION, Dec. 7, 2003, at B1; see also David Keene & Randy Hicks, *Another View*, ATLANTA J.-CONST., Mar. 18, 2012, at A21 (“In an attempt to avoid the ‘soft on crime’ label, policymakers have failed to enact ‘smart on crime’ policies, but necessity breeds innovation. As budget shortfalls grow, even law-and-order states have begun to look toward reform.”). This is not to suggest that fiscal woes are the only impetus for the reevaluation of criminal justice strategies. In addition to the human impact of mass incarceration, declining crime rates and a strong track record for some of the reforms associated with the “smart on crime” approach have prompted policymakers to engage. See, e.g., Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27, 27-28 (Spring 2011).

7. See Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 610 (Summer 2011).

on the need for "smart on crime criminal" justice reform.⁸ National bar groups such as the American Bar Association have joined in efforts to promote evidence-based approaches that enhance public safety and save taxpayer resources.⁹

Much of the activity around "smart on crime" policies has been bipartisan, with public officials on both sides of the aisle and advocates across the political spectrum taking an interest in changing approaches to criminal justice.¹⁰ This broad-based advocacy has begun to influence public policy. "Justice Reinvestment" initiatives in a number of states have led to re-assessments of existing criminal justice policies.¹¹ Elected officials have begun to push back on traditional notions of how criminal justice should be designed,¹² and states have been actively exploring ways to make criminal justice more efficient and cost-effective.¹³

On the national level, there has been a bipartisan push for a commission to examine the criminal justice system and make recommendations for evidence-based, "smart on crime" reforms. Senator Jim Webb of Virginia has led an effort to create the National Criminal Justice Commission ("the Commission"), which would bring together a broad range of criminal justice experts to "review

8. See, e.g., Statement of Charles J. Ogletree, Jr., Testimony Before U.S. Senate Judiciary Committee, June 11, 2009; Nancy Gertner, Editorial, *Be Tough and Smart on Crime*, BOSTON GLOBE, Feb. 22, 2012, at 11; The Pew Center on the States, Public Safety Performance Project, available at http://www.pewcenteronthestates.org/initiatives.org/initiatives_detail.aspx?initiativeID=31336 (last visited June 11, 2012); Vera Institute of Justice, Reallocation Justice Resources: A Review of State 2011 Sentencing Trends (2012), available at <http://www.vera.org/?q=pubs/reallocation-justice-resources-review-state-2011-sentencing-trends> (last visited June 11, 2012).

9. See American Bar Association, State Implementation Project—Save States Money While Improving the Criminal Justice System, available at <http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/statepolicyproject.aspx> (last visited June 11, 2012); Press Release, American Bar Association, *ABA Commission Cites Over-Reliance on Incarceration, Calls for New "Smart on Crime" Approach* (June 23, 2004), <http://www.abanow.org/2004/06/aba-commission-cites-over-reliance-on-incarceration-calls-for-new-smart-on-crime-approach/>.

10. See, e.g., Mike Holtzclaw, *Sheriff Touts New Methods to Deal With Nonviolent Criminals*, DAILY PRESS, Feb. 29, 2012, at A8 (describing a recent bipartisan congressional briefing entitled, "Reduce Crime, Reduce Costs, and Improve Lives and Communities Through Evidence-based Prevention"); Keene, *supra* note 6, at A21.

11. See, e.g., Vera Institute of Justice, Justice Reinvestment Initiative, available at <http://www.vera.org/project/justice-reinvestment-initiative> (last visited June 11, 2012); Council of State Governments Justice Center, Summit Report—The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending, available at <http://justicereinvestment.org/summit/report> (last visited June 11, 2012).

12. See, e.g., Carrie Teegardin & Bill Rankin, *Crime Solutions Go Beyond Prison*, ATLANTA J.-CONST., Feb. 26, 2012, at A1 (quoting Georgia Governor Nathan Deal as stating "[T]he smart on crime approach saves tax dollars, improves our rehabilitation rate and keeps Georgians safe in their communities"); Editorial, *Patrick Offers a Fairer, Smarter Approach to 'Three Strikes' Law*, BOSTON GLOBE, Jan. 29, 2012, at 8 (describing Massachusetts Governor Deval Patrick's insistence that the state legislature make changes to overly punitive criminal justice legislation as "stress[ing] the importance of being tough and smart on crime").

13. See, e.g., Keene, *supra* note 6, at A21 (describing the work of the bipartisan Special Council on Criminal Justice Reform for Georgians).

the system from top to bottom.”¹⁴ As stated in the legislation creating the Commission:

The Commission shall undertake a comprehensive review of the criminal justice system, make findings related to Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation’s criminal justice system.¹⁵

Although the law creating the Commission narrowly missed passage in the Senate in the fall of 2011,¹⁶ the broad support for the effort speaks to the intense interest in “smart on crime” reform,¹⁷ which certainly is “a refreshing break from the all-too-common and unproductive soft on crime and tough on crime binary.”¹⁸

II. WHY PROSECUTORS SHOULD BE ENGINES OF “SMART ON CRIME” REFORM

Some of the “smart on crime” rhetoric relating to alternatives to traditional criminal justice processing and punishment might seem at odds with the traditional vision of a prosecutor’s duty to see that justice is served when an individual runs afoul of the law. Although prosecutors have plenary charging discretion in a given case,¹⁹ they also clearly have the duty, first and foremost, to enforce the law.²⁰ Nevertheless, prosecutors also have a duty to be fair and to serve the ends of justice rather than merely seek victory. Indeed, as the Supreme

14. Editorial, *Reviewing Criminal Justice*, N.Y. TIMES, Mar. 30, 2009, at A0; see also National Criminal Justice Commission Act of 2011, S. 306, 112th Cong. (2011).

15. National Criminal Justice Commission Act of 2011, S. 306, 112th Cong. (2011).

16. See Rabiah Alicia Burks, *Webb Not Giving Up on Criminal Justice Act*, ABANow, Nov. 2, 2011, <http://www.abanow.org/2011/11/sen-webb-not-giving-up-on-criminal-justice-act/>.

17. See Mary D. Fan, *The Political Climate Surrounding Alternatives to Incarceration*, 38 HUM. RTS. 6 (Summer 2011); Vanita Gupta, *From Incredible to Inevitable—How the Politics of Criminal Justice Reform May Be Shifting*, HUFF. POST (Aug. 4, 2010), http://www.huffingtonpost.com/vanita-gupta/from-incredible-to-inevit_b_670782.html.

18. Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J. L. ECON. & POL’Y 597, 611 (2011). See, e.g., Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making*, 38 FORDHAM URB. L.J. 775 (2011); Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. CIV. RTS. & ECON. DEV. 153, 158-59 (2010); see also Kyle O’Dowd, et. al, *Notes From the Defense Bar: Fighting for Reform on Three Fronts During the Obama Administration*, 23 FED. SENT. REP. 121, 121-22 (2010); David Keene & Randy Hicks, *Another View*, ATLANTA J.-CONST., Mar. 18, 2012, at A21 (“The criminal justice debate is often divided into two camps: ‘Tough on Crime’ and ‘Soft on Crime’. What we need is ‘Smart on Crime’—policies that distinguish between nonviolent, low-risk offenders and violent, career criminals.”).

19. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001).

20. See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011).

Court famously stated in the 1935 case of *Berger v. United States*, the prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.²¹

That said, does the prosecutor have the responsibility to go beyond seeking justice in individual cases and to promote criminal justice policies that serve broader societal ends? There is an emerging approach to prosecution in which prosecutors envision a much more extensive role for themselves in the criminal justice system. Brooklyn District Attorney Charles Hynes describes the trend:

By the early 1990s, the view of prosecutors as simple case processors was evolving. Prosecutors began to look beyond their essentially reactive approach to crime and to recognize that, with contacts both inside and outside the courtroom, they were uniquely positioned to forge partnerships and linkages, act as agents of change in the criminal justice system, and promote a paradigm shift in how to address crime. They adopted crime prevention as a key component of their mission.²²

This expanded vision of the prosecutorial role has led prosecutors to ask how efficiently the criminal justice system is performing and whether prosecutorial agencies, like other criminal justice actors, can help bring about reforms that enhance public safety, wisely allocate limited resources, and reduce crime and recidivism. This robust view of prosecutorial engagement in criminal justice reform is grounded not only in fairness, but also in efficiency concerns. Prosecutors do not operate in a vacuum. Every decision they make has an impact elsewhere in the system. For example, charging decisions determine the amount of resources law enforcement agencies must devote to various types of offenses, set parameters on judges' sentencing discretion, and can even influence whether correctional facilities exceed capacity.²³

The “smart on crime” philosophy trumpets the need to *rationalize* criminal justice expenditures by examining whether they provide a sufficient return on investment. Does imprisoning low-level offenders reduce the crime rate? Do investments in re-entry programs for those finishing terms of incarceration enhance public safety? Is it more cost-effective to promote treatment and rehabilitation rather than rely heavily on incarceration for dealing with non-violent drug offenders? These types of questions are central to the “smart on crime” conversation and require the input and consideration of *all* criminal

21. *Berger v. United States*, 295 U.S. 78, 88 (1935).

22. Charles J. Hynes, *The Evolving Prosecutor: Broadening the Vision, Expanding the Role*, 24 CRIM. JUST. 1, 40 (Fall 2009).

23. See, e.g., Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011).

justice actors, including prosecutors.²⁴

Although much of the “smart on crime” rhetoric has come from criminal justice policymaking and criminal justice administration circles,²⁵ prosecutors have been playing an increasingly prominent role. Indeed, Eric Holder, the Attorney General of the United States has made the “smart on crime” approach the centerpiece of the Justice Department’s policy agenda. As Attorney General Holder stated at the 2009 Annual Meeting of the American Bar Association:

There is no doubt that we must be ‘tough on crime.’ But we must also commit ourselves to being ‘smart on crime.’ . . . Getting smart on crime requires talking openly which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society.²⁶

As heartening as it is to have the nation’s chief prosecutor promote “smart on crime” strategies so forcefully, perhaps more impressive is the trend of local, *elected* prosecutors making the case for the shift from tough on crime to “smart

24. To be sure, the reform discussion extends beyond cost-benefit analyses. Professor Michelle Alexander, who has written forcefully about mass incarceration and its nexus to racial politics, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); see also James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. (forthcoming 2012), expresses concern that too much of the “smart on crime” effort has focused on the *financial* toll of mass incarceration, rather than its human rights and racial justice toll. Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011 (“Yes, some prison downsizing is likely to occur in the months and years to come. But we ought not fool ourselves: we will not end mass incarceration without a recommitment to the movement-building work that was begun in the 1950s and 1960s and left unfinished. A human rights nightmare is occurring on our watch. If we fail to rise to the challenge, and push past the politics of momentary interest convergence, future generations will judge us harshly.”); see also Mary D. Fan, *The Political Climate Surrounding Alternatives to Incarceration*, 38 HUM. RTS. 6, 21-22 (Summer 2011). These types of concerns might also animate a prosecutor’s decision to entertain and promote evidence-based, “smart on crime” innovations designed to enhance both the quality and equality of justice produced by our system.

25. See, e.g., Mike Holtzclaw, *Sheriff Touts New Methods to Deal With Nonviolent Criminals*, DAILY PRESS, Feb. 29, 2012, at A8 (quoting Sheriff Gabe Morgan of Newport News, Virginia) (“Some people think [promoting alternatives to incarceration for non-violent offenders is] being soft on crime . . . No, it’s not. It’s being smart on crime. It’s a matter of trying to find a way to achieve effective public safety.”).

26. Hon. Eric Holder, U.S. Attorney General, *Address at the 2009 American Bar Association Convention* (Aug. 3, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>; see also Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27, 30 (Spring 2011); Charles M. Blow, Op-Ed., *Getting Smart on Crime*, N.Y. TIMES, Aug. 14, 2009, at A19. As part of its “smart on crime” efforts, the Justice Department has assembled a number of “working groups” to examine various aspects of criminal justice. See, e.g., Lanny A. Breuer, *The Attorney General’s Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT. REP. 110 (2010).

on crime” policies.²⁷ Most of the nation’s prosecutors at the state and local levels are elected.²⁸ These prosecutors—who have to face an electorate conditioned to hear tough on crime rhetoric from their elected officials—would seem to have little incentive to endorse “smart on crime” policies.

Nevertheless, a number of prominent locally elected chief prosecutors have been vocal in their support for “smart on crime” strategies. For example, California Attorney General Kamala Harris, during her tenure as District Attorney in San Francisco, authored a book entitled “Smart on Crime: A Career Prosecutor’s Plan to Make Us Safer.”²⁹ In the book, Harris first sets out to challenge many of the misconceptions about the problem of crime in America. Harris addresses the persistent myth that criminal justice spending is a zero sum game—that governments can either invest in crime prevention and recidivism reduction *or* fund the apprehension and punishment of offenders, but not both.³⁰ Harris also explains how “smart on crime” strategies operate in common criminal justice contexts, such as reentry, community partnerships, and measuring results of innovative policies.³¹ Harris concludes with a compelling argument for “smart on crime” approaches:

Progress in addressing some of our seemingly most intractable crime problems is well within our grasp. We can be buoyed by the hope and commitment of smart and dedicated law enforcement professionals, academics, community partners, and elected leaders who are rejecting our old, unsuccessful approaches and rhetoric, having realized that if we truly want to be tough, we must be much smarter in our modern war on crime.³²

Other local prosecutors have endorsed the “smart on crime” approach as well. Brooklyn District Attorney Charles Hynes has long been a champion for “smart on crime” prosecutorial strategies.³³ Dallas County District Attorney Craig Watkins has received a great deal of media attention because of his work to identify cases of wrongful convictions within the jurisdiction. He has created within his office a “Conviction Integrity Unit” which reviews past cases in

27. Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas—District Attorney Embraces Innocence Project and ‘Smart on Crime’ Approach*, WASH. POST., Mar. 5, 2007 (recounting district attorney’s electoral campaign in which “he promised to be ‘smart on crime,’ not just tough on crime”).

28. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 10-11 (2007).

29. See KAMALA D. HARRIS, *SMART ON CRIME: A CAREER PROSECUTOR’S PLAN TO MAKE US SAFER* (2009).

30. See *id.* at 118-122.

31. See *id.* at 123-199.

32. See *id.* at 199. Kamala Harris was elected Attorney General of California in 2010 in a close election. See Jack Leonard & Seema Mehta, *Steve Cooley Concedes Race for Attorney General to Kamala Harris*, L.A. TIMES, Nov. 25, 2010 (noting that Kamala Harris had “cast herself as ‘smart on crime’ and called for new approaches aimed at reducing recidivism and prison overcrowding”); see also Cathleen Decker, *The Time May Be Right for Kamala Harris*, L.A. TIMES, Dec. 19, 2010, <http://articles.latimes.com/2010/dec/19/local/la-me-theweek-20101219>; Phil Willon, *Kamala Harris is a Different Kind of Prosecutor*, L.A. TIMES, Oct. 20, 2010, <http://articles.latimes.com/2010/oct/20/local/la-me-harris-20101015>.

33. See Hynes, *supra* note 22, at 40.

which the veracity of convictions is in doubt due to “prosecutorial misconduct, instances of mistaken eyewitness identification, and instances of pure incompetence by those charged with handling the cases.”³⁴ Watkins sees conviction integrity as part and parcel of a broader “smart on crime” approach.³⁵

To be sure, scholars have made the valid observation that prosecutorial elections do not necessarily require prosecutors to cater to the desires of the electorate to the extent other politicians must.³⁶ However, elected prosecutors, like all elected officials, undoubtedly feel pressure—either from voters or special interest groups—to be seen as tough on crime.³⁷ It can be hoped that, as other public officials continue to recognize the criminal justice system’s drain on budgetary constraints and tout the need for “smart on crime” reform, more elected prosecutors will publicly endorse and help implement such policies.³⁸

CONCLUSION

Prosecutors, because of the authority they wield in the criminal justice system, are in a unique position to advocate for “smart on crime” reform. In areas such as diversion, restorative justice, problem-solving courts, alternatives to incarceration, and re-entry, prosecutors have the ability to engage evidence-based approaches to address the causes and effects of mass incarceration. Prosecutors should use this influence to promote and develop new and innovative strategies for pursuing the central goals of “smart on crime” reform: ensuring and enhancing public safety, reducing crime and recidivism, and increasing fairness in the administration of criminal justice—while at the same time preserving scarce resources for other important societal investments. Indeed, nothing would be more in keeping with the “conscience and culture of prosecutors” than the pursuit of these worthy aims.

34. Statement of Craig Watkins, Testimony Before U.S. Senate Judiciary Committee, Mar. 21, 2012; *see also* Terri Moore, *Prosecutors Reinvestigate Questionable Evidence; Dallas Establishes “Conviction Integrity Unit,”* 26 CRIM. JUST. 4 (Fall 2011).

35. *See id.*; Moreno, *supra* note 27. Watkins recently was honored for his “smart on crime” prosecutorial work by the American Bar Association, which bestowed upon him the prestigious Norm Maleng Minister of Justice Award. *See* ABA Criminal Justice Section, Norm Maleng Minister of Justice Award, *available at* <http://www.abanet.org/crimjust/ministerofjusticeaward.doc> (last visited June 11, 2012).

36. *See, e.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 10-11 (2007); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581, 583 (2009); *see also* Fairfax, Jr., *supra* note 20, at 1269.

37. *See, e.g.*, Moreno, *supra* note 27 (quoting Dallas district attorney) (“People say I’ll coddle these criminals. But it’s not about coddling criminals; it’s about being smart.”).

38. *See, e.g.*, Jack Leonard, *D.A. Candidates Take a Nuanced View on Crime-Fighting*, L.A. TIMES, June 3, 2012; Erik Eckholm, *‘Smart on Crime’ Mantra of Philadelphia Prosecutor*, N.Y. TIMES, June 19, 2010.