

Keynote Speech: Prosecutorial Discretion Symposium

Kimberly Foxx*

Good afternoon. Thank you for that. As Ellen¹ indicated, I do have thirty-six days left in office after eight years of working on behalf of the people of Cook County, and it has been an honor and a privilege to serve. When I was asked—by my friends Rachel² and Chesa Boudin—to come and keynote this address around prosecutorial discretion, I will tell you that I, one, would never say no to them on whatever it is that they have asked me to do. But I did get a little hesitant in looking at the incredible panelists that have spoken already this morning and who will speak this afternoon, who have highlighted a number of the issues and challenges related to prosecutorial discretion, that I found myself wondering what I would add to the discourse.

I have had the privilege and the honor of serving with some of the most thoughtful, forward-thinking prosecutors from across the country who have addressed a number of these issues, like John Choi³ out of Minnesota, Sherry Boston⁴ out of Georgia, Aramis Ayala⁵, who you heard from earlier out of Florida, from whom I have had the privilege of learning from and growing in my leadership. I have had the honor and the privilege of working with folks like Ellen, Rachel, and others who have informed how I see my work. And so, when I looked at the panelists, and I heard the discussions this morning, the question was “What do I have to say?” So, I am going to say something because they put me in the book. So let me first say how I arrived here today.

I got here in the wee hours of the morning, having spent the last two days in Montgomery, Alabama at the Equal Justice Initiative (“EJI”) at the Peace and

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* Former State’s Attorney for Cook County, Illinois, Kim Foxx was the keynote speaker for the 2024 Prosecutorial Discretion Symposium organized at Berkeley Law in October 2024 by the Berkeley Journal of Criminal Law and the Criminal Law & Justice Center.

1. Introduction to Keynote Address by Ellen Yaroshefsky.

2. Rachel Marshall is the Executive Director of the Institute for Innovation in Prosecution at John Jay College.

3. John Choi was elected the chief prosecutor in Ramsey County, Minnesota in 2011.

4. Sherry Boston was first elected as the district attorney for DeKalb County, Georgia in 2016.

5. Aramis Ayala was elected State Attorney for Florida’s Ninth Judicial Circuit, where she served from 2016 to 2021.

Justice Memorial. For those of you who are unfamiliar, the Equal Justice Initiative is a project by the great Bryan Stevenson that does work in the South related to issues of criminal justice, particularly related to the death penalty and with juvenile justice.⁶ That back in 2018, Bryan, in his complete and utter brilliance, had the foresight, imagination, creativity, and the partnerships to build this incredible site in Montgomery, Alabama, to pay homage to those who had suffered at the hands of lynchings here in America.⁷ According to Bryan, it was incredibly important that we had an appreciation and acknowledgment of the history of racial violence and terrorism in our country and reconciled that with where we stand today. The motto of the Equal Justice Initiative, and particularly of the Peace and Justice Memorial, is “[f]rom enslavement to mass incarceration.”⁸

It is an exhibit, if you have not gone, that is highly worthy of your time and attention. It is worthy of your time and attention as you reflect on the issues that face our criminal legal system today. As we reflect on this issue of discretion—and not what discretion *is*—because you have heard numerous definitions of discretion already this morning—but rather the power of discretion.

Who gets to be the gatekeeper of the criminal justice system? Who decides? Who goes from being an arrestee to a defendant? Who decides how the system works? You understand what discretion is. The conversation flowed earlier today with some [panelists] wanting more [individuals] to have discretion and others wishing that we could rein in discretion in places where it is weaponized against communit[ies]. The purpose of my mentioning EJI and not *what is* discretion, but *who gets to yield* that discretion, is what I want to talk about today.

It has been a pillar of American jurisprudence, particularly criminal law, that prosecutors have prosecutorial discretion. It is our superpower. It is unlike anything else in the criminal justice system. This thing that is afforded to us that has this tremendous power to decide what, when, and how [individuals] come into our system.

It is historically unfettered. It has been without question that prosecutors have this discretion. It has been this way for hundreds of years. As I walked the grounds of the EJI Memorial, I read some of the markers there about people who were in this country throughout the 19th century and early 20th century who were victims of racial violence. Many of whom were hanged from trees or shot in the head for offenses such as writing a note and sending it to a white woman,

6. *About EJI*, EQUAL JUST. INITIATIVE, <https://eji.org/about/>.

7. *EJI's New Legacy Museum: From Enslavement to Mass Incarceration*, EQUAL JUST. INITIATIVE (April 12, 2017), <https://eji.org/news/new-eji-museum-enslavement-to-mass-incarceration/>.

8. *Id.*

or for someone feeling threatened by the presence of another, or for having the audacity to call the police for help when they had been victims of crime.⁹

What happened in this era of time of racial violence was allowed to happen with impunity. So, one must ask, “How does one allow for something like this to happen with impunity?” Well, the systems that exist today of prosecution and defense and judges and jurisprudence existed then. And there were prosecutors who had the ability to bring charges and did not. There were prosecutors who had the ability to challenge a number of the laws that were on the books that allowed for racially disparate treatment of others who did not.

The power, the superpower that is discretion, was always theirs to have. There was a choice that had been made and had been weaponized to not do so. And this choice was not just made for a short period of time, like 1903 to 1923. The ability for prosecutors to wield their tremendous power of discretion to go into courts to litigate or not litigate has been there all along. As you heard a little earlier today and will continue to hear this afternoon, what is new isn’t the power of discretion.

What is new is the attempts to put limits on it. That is new. And I will tell you that it is incredible for me as someone who has been in this work as an elected official for the last 8 years to be in appreciation when I’m on the grounds in Montgomery, Alabama of this centuries old use of power that went unchecked and unfettered when there were dead bodies littered on trees, when there were people in prison for things that they ought not have been [in prison for]. That there weren’t commissions that were established and settled to say, “what should we do about the prosecutors?” Centuries.

In the last eight years, there’s been this rapid acceleration of interest and commitment to reining in the prosecutor’s discretion. A rapid acceleration.

And let me say that as I talk about what I think is behind that rapid acceleration, that I’m also not of the belief that there should be such unfettered power without checks. I don’t believe that. As much as I enjoy having the power of a prosecutor’s use of discretion, I also recognize the challenges that had been discussed earlier today about those who continue to weaponize that discretion in disparate ways that go unchecked.

What I’m suggesting to you and in my hypothesis of what has happened in the last eight years is that there was never an issue of the abuse, if you will, of this discretion when it was used punitively. When it was in terms of increasing incarceration, as conversations earlier about the rhetoric and the politics of prosecution and crime and national discourse around being tough on crime demonstrated. I did not see congressional hearings across the country with the likes of Jim Jordan and others asking prosecutors why they are locking up so many poor people or so many African Americans: “Let me ask you why,

9. *Reconstruction Era in America*, EQUAL JUST. INITIATIVE, <https://eji.org/report/reconstruction-in-america/journey-to-freedom/#chapter-1-intro>.

prosecutor, you are choosing this set of laws, in which to do enhancements here but not here.” And I will recognize that I am not that old that I might have missed it. But I have been engaged in the practice of law for at least the last twenty-six years, and I do not recall ever seeing it.

And what I have begun to realize over the course of the last several years is that it really was not the power, but who gets to wield it that enables a level of scrutiny unlike anything that we have seen in these centuries of American jurisprudence. I just want us to be honest about that.

As Ellen said, I have this stubborn habit of just saying it like I see it. I can’t help it. It is a stubborn habit to see that in the course of the last eight years, when you have prosecutors who are different from the historical prosecutors that we have seen. Just for a little bit of context. As Ellen said, when I came into office in 2016, it happened after the murder of a seventeen-year-old boy named Laquan McDonald.¹⁰

It was ten years ago this past weekend in which he was killed by Chicago police officer Jason Van Dyke. Shot sixteen times. Nine of those bullets pierced his body as he lay on the ground. Almost dead. The state’s attorney at the time, who was a two-term incumbent, had taken over thirteen months before making a charging decision in that case; most people didn’t even understand how the charges would be brought.

Most people had a very limited understanding of the role of the prosecutor. There was a groundswell of energy and support in the city of Chicago and in Cook County after that murder that allowed for someone like myself to be elected in that position. And when I say someone like myself, that is a black woman elected to be the chief prosecutor in Cook County; the first.¹¹ You saw my good friend Aramis Ayala here on the panel earlier today, who was the first black person and black woman elected to be state attorney in the entire state of Florida back in 2016. She is the first black state attorney ever elected in the state of Florida.¹²

I am the first black woman elected prosecutor in the state of Illinois. There was but one other. And you also saw people elected like Larry Krasner out of Philadelphia.¹³ We had George Gascon, who was the DA in Los Angeles.¹⁴ You

10. Cheryl Corley, *The officer who killed Laquan McDonald is Free after three years. Activists are angry*, NPR (Feb. 3, 2022), <https://www.npr.org/2022/02/03/1077574977/jason-van-dyke-chicago-police-released-laquan-mcdonald>.

11. Shelby Hawkins, *Kim Foxx Reflects on Her Challenges, Legacy After 8 Years as Cook County’s Top Prosecutor*, WTTW (Nov. 14, 2024), <https://news.wttw.com/2024/11/14/kim-foxx-reflects-her-challenges-legacy-after-8-years-cook-county-s-top-prosecutor>.

12. Scott Powers, *Aramis Ayala becomes first black state attorney in Florida’s history*, FLA. POL. (Nov. 8, 2016), <https://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history/>.

13. *About Leadership*, PHILA. DIST. ATT’Y, <https://phillyda.org/about/leadership/>.

14. LA County District Attorney Jackie Lacey Concedes Defeat to Challenger George Gascón, NBC4 L.A. (Nov. 3, 2020), <https://www.nbclosangeles.com/news/politics/decision-2020/jackie-lacey-george-gascon-los-angeles-county-district-attorney-decision-2020/2453809/>.

saw Chesa Boudin, who was elected in San Francisco.¹⁵ You saw Rachel Rollins, who was elected in Boston.¹⁶ You saw Sherry Boston in DeKalb County.¹⁷ You saw what was happening was that there was an influx of new prosecutors coming to this work, talking about the role of prosecutors and a system that we as the gatekeepers were broken, and that we as gatekeepers had an absolute responsibility to acknowledge its brokenness and to work on fixing it. It was really unprecedented.

Now, it was not an individual effort. It was work like what was being done at the Institute for Innovation in Prosecution where we could come together and say, “My, my, my.”

The research and the data show that people incarcerated for low-level minor offenses have worse outcomes because of the incarceration, not because of who they are.¹⁸ We were able to have the data show that bail reform (or the lack thereof) led to worse outcomes for people who were detained during pretrial than for those who were able to sit at home and continue to work and provide for their families and aid in their defense.¹⁹ The outcomes were dramatically different of who would be found not guilty versus those who, in an effort to get out of jail, may plead guilty to crimes that they did not commit.²⁰ We had conversations in these small rooms that talked about the illegitimacy of our justice system with those for whom we serve.

There, before big conversations about AI and technology, we recognized that in a place like Chicago, which has a debate over ShotSpotter,²¹ a technology that hears apparent gunshots and notifies the police. That type of technology needs to exist because the neighborhoods most impacted by crime and violence trust our systems the least. They would rather not call the police, so we have to now put microphones on telephone towers. That group of prosecutors says,

15. Eric Westervelt, *San Francisco Elects Chesa Boudin as New District Attorney*, NPR (Nov. 20, 2018), <https://www.npr.org/2019/11/20/781358722/san-francisco-elects-chesa-boudin-as-new-district-attorney>.

16. Rachael S. Rollins Confirmed as United States Attorney for the District of Massachusetts, U.S. ATT’YS OFF. (Dec. 8, 2021), <https://www.justice.gov/usao-ma/pr/rachael-s-rollins-confirmed-united-states-attorney-district-massachusetts>.

17. *Sherry Boston’s Bio*, OFF. OF THE DEKALB CNTY. DIST. ATT’Y, https://www.dekalbda.org/about_us/sherry_boston_s_bio/index.php.

18. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL’Y INITIATIVE (Mar. 11, 2025), <https://www.prisonpolicy.org/reports/pie2025.html>.

19. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INSTITUTE OF JUST., <https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention>.

20. Nazish Dholakia, *How the Criminal Legal System Coerces People into Pleading Guilty*, VERA INSTITUTE OF JUST. (Apr. 4, 2024), <https://www.vera.org/news/how-the-criminal-legal-system-coerces-people-into-pleading-guilty>.

21. Stephanie Wade, Craig Wall, & Liz Nagy, *Chicago Police No Longer Using ShotSpotter Gunshot Detection Technology, Censor Takedown Begins*, ABC 7 CHI. (Sept. 23, 2024), <https://abc7chicago.com/post/chicago-police-longer-using-shotspotter-gunshot-detection-technology-mayor-brandon-johnson-exploring-other-options/15342988>.

“Well, obviously, there is something wrong here and things that we ought to do better.” And you started to see initiatives take shape that raised scrutiny.

Initiatives like looking at bail reform back in 2017 and realizing that it does not make sense for us to ask to hold someone in jail because they cannot afford to pay something arbitrary like \$1,000, and instead coming up with a policy utilizing our discretion to say that we would not ask for people to be held in jail for low-level nonviolent offenses simply because they could not afford their bail.²² Now you can imagine in Chicago, this novel idea was met either with applause and celebrations and ticker tape or with protests and anger and hostility. And then when you saw that and you saw other prosecutors across the country using their discretion, using research and data and analysis and historical perspective and saying, “I think we ought to do something different to get better outcomes.” All of a sudden, the interest in what we were doing became magnified. Then the pressure to push back against these reforms became even more intense.

It was not about the discretion. It was about who and how that discretion was used. And I think that is incredibly important to note.

You may know, if you know anything about me and followed my career, that I had this one case. The case was about an actor on a TV show; I used to say he was a C-list actor. I have gone down to using G-list actor now to describe him. Maybe it’s a little bitterness on my behalf, but this actor goes out and alleges that on a blistering cold night, he is the subject of a racial hate crime in the city of Chicago as he is on his way to get a tuna sandwich at 1:30 in the morning. Well, as it would turn out, that story was far-fetched.²³ If you have ever been to Chicago in January, there is no Subway sandwich ever prepared that would be worth you going outside to get, which was clue number one that something was amiss. But at our office, in this instance where we determined that this person had made a false police report and had lied to the police about this attack, we also determined that there was a solution to this case that would allow the case to be handled outside of a prison sentence. There could be community service that was offered, there could be restitution that was paid, and this person could go along with their life.

Chicago is in Cook County, which is the second-largest prosecutor’s office in the country.²⁴ We’re the second-largest county in the country. We serve about 5.4 million people.²⁵ Back in 2019, we had somewhere near 600 people who had

22. *Pretrial Fairness*, PRETRIAL FAIRNESS, <https://pretrialfairness.org/>.

23. *Jussie Smollett: Timeline of a Hoax, Jail Time, and an Overturned Conviction*, BBC (Nov. 21, 2024), <https://www.bbc.com/news/newsbeat-47317701>.

24. *About Cook County State’s Attorney’s Office*, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/>.

25. *Id.*

been murdered that year, and over 2,500 people who had been shot that year.²⁶ We had a number of people who had been victims of sexual assault and violence.

And of all of the things on our docket, a lying G-list celebrity was not our top priority. In accordance with what we are told by ABA professional standards for prosecutors,²⁷ requiring us to weigh the use of our limited resources to determine which cases we would go forward on, we prioritized violent crime and said that we can find alternative dispositions for those who do not meet that threshold. And that was in fact what was done. This person was given community service and had to pay \$10,000. And unbeknownst to me, that such a disposition would lead shock waves across Cook County, across the country, across the world. The world. You turn on your neck. Look up Jussie Smollett. Because that's the case. Jussie Smollett sets off a wave of criticisms across the board.

The National District Attorneys Association issued a statement saying how inappropriate it was that this office allowed for that type of diversion to be given.²⁸ Now I need you to understand, and you know this, and you've heard this earlier today. You'll hear it for the rest of the day. Every day, there are discretionary decisions that are being made by prosecutors in thousands of cases across the country. Discretionary decisions that are being made before they even come to us.

I should tell you, just a few months before the hoax story of Jussie Smollett, there was a young white woman who was out in Grant Park. One of our major parks in the city of Chicago, who alleged that she had been stabbed and robbed by a black man who attacked her and then fled. It later turned out that that was a fabricated story. She had gone to the hospital. The nurses had spoken with her, and the story was in fact not true. What was determined was that this young woman may have had some issues around her mental health and there was a decision by the police not to refer that case to the prosecutor's office.

I am not suggesting that that wasn't the right call to make. A police officer using their discretion to say that someone should be deflected from the system—those decisions are being made every single day, in every jurisdiction, in every community, without being checked. But what was checked was when I made the decision, or my office made the decision. And what ultimately happened was that there was such an outcry that Mr. Smollett's case was reopened, not by our

26. Toni Preckwinkle, Tanya S. Anthony & Ponni Arunkumar, *Cook County Medical Examiner Annual Report 2019*, COOK CNTY., https://www.cookcountyil.gov/sites/g/files/yllwepo161/files/2019_ccmeo_annual_report_0.pdf.

27. Prosecution Function, Standard 3-1.2 Functions and Duties of the Prosecutor (A.B.A. 4th Ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/#:~:text=The%20prosecutor%20serves%20the%20public,criminal%20charges%20in%20appropriate%20circumstances.

28. Press Release, Nat'l Dist. Att'ys Ass'n, National District Attorneys Association Statement on Prosecutorial Best Practices in High Profile Cases (Mar. 27, 2019), <https://ndaa.org/wp-content/uploads/NDAA-Press-Release-on-Prosecutorial-Best-Practices-in-High-Profile-Cases.pdf>.

office, but someone petitioned to have a special prosecutor assigned to reinvestigate the case.²⁹

And then also to determine if I had done something wrong in the exercise of my prosecutorial discretion. I will pause for a minute because I was in Montgomery yesterday. I paused with tears in my eyes as I looked and read some of the horrific stories of harms that have happened in communities that went with impunity. And then I had to think and remember that for almost 15 months, I was under an investigation by a special prosecutor with subpoena and grand jury powers, who subpoenaed my phone, went through every picture on my phone, interviewed people in my office to determine whether I had done something because of the way I exercised my discretion. This had not happened in the history of that office.

By the way, the special prosecutor, Dan Webb, a former US attorney for the Northern District of Illinois who led the inquest into how I made my decision, ultimately determined that I had done nothing wrong. But he leveled what was the new [abuse of prosecutorial discretion] standard that we haven't talked about today. And I leave it to our professors who do this work because I had never seen it, that I, Kim Foxx, had engaged in abuse of prosecutorial discretion.

There is no standard of abuse of prosecutorial discretion. Some things that we should talk about are how do we keep things in check, how do we have accountability, how do we have transparency and insight. But there is no legal standard for abuse of prosecutorial discretion. It was made up. And that was 2019 for the last five years. I have had to try to go back in public narratives that that's not a thing. And it was mentioned earlier, when do we start the playbook of prosecutors doing things that we don't like. And therefore, we will do extra judicious methods to try to do something to them and it works.

I spent a year with lawyers and people going into a grand jury and being tied up. Oh, by the way, I forgot to mention, it happened to coincide with the election in 2020. They spent a year investigating leading up to the election. I ended up winning and winning handily. But the playbook was set such that we could then see in other places, like in Philadelphia with Larry Krasner impeachment proceedings that would go up and tie Larry up in court or before hearings. Or what we saw in the fascist behavior of Ron DeSantis in the removals of Andrew Warren and the removal of Monique Worrell.

Or what we're seeing in Georgia related to panels being assembled to be able to look and scrutinize the work of prosecutors who are not acting in their minds in fidelity to the law. All of this has happened—I said the last eight years—I am sorry, the last five.

29. Diana Pathieu & Leah Hope, *Jussie Smollett Case Dan Webb Appointed Special Prosecutor in 'Empire' Actor's Case*, ABC 7 CHI. (Aug. 23, 2019), <https://abc7chicago.com/jussie-smollett-update-chicago-news/5487605/>.

All of it in an effort to undermine democracy. Allow me one moment. When I was elected in 2016, I told you it was in the wake of the murder of Laquan McDonald. And it energized a community who were the end users of the criminal justice system, as victims, as communities impacted by violence, as relatives of those who had been accused. They got up and they voted about what they wanted to see.

And what they wanted to see was something different. Cook County, as I said, is huge. I have the city of Chicago and I have the surrounding suburbs and the tensions in the politics. And I know we're gonna talk about the politics of this in more depth later. But as I heard the conversations about Willie Horton, there have been long political decisions made when people run for offices, including this one, about which constituency for whom I will appeal.³⁰

In the criminal justice space, that constituency has always been those who have been frightened of those who are most impacted by the system. I am just going to say it. If I live in a suburban area and I never have to live and walk and work in Lawndale, which is one of our neighborhoods most impacted by crime, my view of what "just" looks like is impacted. My view of whether I believe in reformation, transformation, reconciliation, or rehabilitation is very different than if I believe in punitiveness. And so for many of us who run for these roles, who know the voters that we are trying to attract, we appeal and capitulate to that side.

That's why Willie Horton, some, gosh, almost forty years later, still resonates. There is a constituency for whom fear overrides data. "I do not feel safe." This might sound new to you, or it might sound like the Donald Trump ad that aired yesterday with my face on it. Yeah. It's that serious.

It does not change. But I ran on a platform that centered the communities most impacted by violence, most impacted by the justice system. And that community, in two elections, overwhelmingly voted for me. Why does that matter? It is not about hubris or ego for me.

It is about now moving to say that we do not trust the people who voted for that because this is different from what we want. And that's why you will create a panel in Georgia that will allow for those who are nowhere near the city of Atlanta to determine what the people in Atlanta should have, contrary to what their district attorney may want.³¹ It is why Ron DeSantis can go and pluck Monique Worrell out of Orlando.³² By the way, Monique, a black woman,

30. Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html>.

31. *Judge refuses to block Georgia's prosecutor oversight panel*, WRDW (Jul. 25, 2024), <https://www.wrdw.com/2024/07/25/judge-refuses-block-georgias-prosecutor-oversight-panel/>.

32. Press Release, Exec. Off. of the Governor, Governor Ron DeSantis Suspends State Attorney Monique Worrell For Neglect of Duty and Incompetence (Aug. 9, 2023), <https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-suspends-state-attorney-monique-worrell-neglect-duty-and>.

replaced Aramis Ayala. Remember the first? She replaced [Ayala] and Ron DeSantis took her away.

That is not just about discretion. It is about who the people are who were empowered to say that this is what we want, and a perversion of our democracy premised on our use of discretion to be able to disempower those who are most impacted by the system. That's what's happening, ladies and gentlemen. It's happening in places where I don't trust that this person is going to be as punitive and tough on crime in this case and therefore, I want to have a mechanism in place that will allow for the attorney general to come in and take over that case.

There are now provisions, recall efforts. A recall effort after Chesa is in office but a year in the middle of COVID that now does what Dan Webb did for me, which was tie you up. You are more busy fighting to keep your job than to do your job. And then it was successful. And then there's a recall effort against George Gascon.³³

And not only was there a recall effort against George Gascon almost immediately, then there is the pressure, and then there is the language about it that clouds the ability for him to do his work. Or Pamela Price in Alameda County.³⁴ These stories, these people, these contemporaries of mine when I came in as an idealistic younger person in 2016 wanting to do the good work and center our community. And now watching what feels like a battlefield and prosecutors being picked off by an agenda that is premised on how we use our discretion. It is mind boggling how fast and how coordinated.

I know it was mentioned earlier, Project 2025, and I'm not getting political. It is just that the Heritage Foundation loves me. I am their poster child person. I do not know what they are going to do in thirty-seven days. But as funny as it is, it's not.

It is a threat to our democracy to selectively choose how to diminish the use of prosecutorial discretion for those who believe that we should use our discretion to right harms that have occurred before, in ways that utilize data, research, and evidence. In the dumb-ifying of our democracy, in the efforts to stop us from reading books and knowing our history, or standing on sacred ground, and witnessing what this country has done, and asking ourselves as gatekeepers of the justice system, how do we prevent it from happening again? There is a playbook that has been established to stop us from doing so. That's very real. And I would say it's very scary.

But we do not have time to be scared. We do not have time to lament about how we got here. What we must do in the protection of prosecutorial discretion

33. Daniel Arkin, *L.A. County District Attorney, One of the Most Progressive in the Country, Loses Reelection*, NBC NEWS (Nov. 6, 2024), <https://www.nbcnews.com/politics/2024-election/la-district-attorney-progressive-loses-re-election-gascon-rcna175906>.

34. Kiley Russell, *Alameda County District Attorney Pamela Price accepts recall results*, NBC BAY AREA (Nov. 18, 2024), <https://www.nbcbayarea.com/news/local/east-bay/alameda-county-district-attorney-pamela-price-recall-results/3713155/>.

is acknowledge as was said earlier that there are those who use that discretion as weapons to cause additional harm. There are those who use that discretion in an effort to make the plane feel equal, fair, and just. And there is no real mechanism by which we have a say other than our elections for those who are at the state level.

Or I would also push back a little on our panel earlier that even at the federal [level], you get an Eric Holder³⁵ when you have Barack Obama or a Loretta Lynch³⁶. Or y'all might forget, we had Jeff Sessions³⁷ for a hot second. Do you remember Jeff Sessions? So, the elections actually do matter. There is no installation, isolation from the politics and the discretion and the policy.

And I think for so many of us, we have been entrenched in our righteousness around doing right, divorced from the politics of it all. And that is not to say that I am talking about party affiliation or the like, but we have to have honest conversations about the system that we have, which involves elected prosecutors or prosecutors appointed by those who have been elected. And the tax on our democracy and the tax on who gets to use their discretion are not going to be won by individual prosecutors. We know that as I look at the battlefield of my friends who have been left behind. This battle is won by you, by the electorate, who must be educated about what this is, why programming like this matters, what discretion is.

[We have to be] [e]ducated about how discretion is used in every aspect of our legal system, whether it is immigration, whether it is resentencing, or whether it is charging. That you, the electorate, can ill afford to just let it be about personality or people or "I don't like what happened in that individual case." It is about asking how we protect that for which we hold value. It is you, the electorate, who determines who gets to go down to your state capitals and pass a bill based off a single incident that will now upend the system, rather than being rooted in facts and evidence.

And so, what I say to you as I leave the podium and my position is that I do so with a lot of reflection, and on some days a lot of survivor's remorse. The responsibility for maintaining our democracy, for ensuring that those in positions of power do not abuse their powers in ways that further alienate and discriminate against communities, doesn't lie with me. It lies with you. And for the students who are choosing careers in the law, for those of you who support them or those who do this work who believe that these elections, whether they are presidential or off-presidential years, are just fodder for social media. We are at an inflection point. And the acceleration that we've seen in the last five years only gives me

35. OFF. OF THE DEPUTY ATT'Y GEN., Holder, Eric H., Jr. Historical Biography, <https://www.justice.gov/dag/bio/deputy-attorney-general-eric-h-holder-jr>.

36. OFF. OF THE DEPUTY ATT'Y GEN., Lynch, Loretta E. Historical Biography, <https://www.justice.gov/ag/bio/attorney-general-loretta-e-lynch>.

37. OFF. OF THE DEPUTY ATT'Y GEN., Sessions, Jeff Historical Biography, <https://www.justice.gov/ag/bio/attorney-general-jeff-sessions>.

great pause as to what more is to come if you and all of us do not collectively stand up and use our individual discretion to say that we can and we must protect our democracy. Thank you very much.