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**SLATE**

## The Power of Prosecutors

I thought Bill Cosby’s conviction was a sign of things to come. I was wrong.

BY LILI LOOFBOUROW JULY 16, 2021 5:40 AM



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When news of Bill Cosby’s release came down, I was less angry than resigned. There were explanations for it, including one very good and idealistic one: a prosecutor had promised not to prosecute him, and prosecutors should keep their promises. This seems indisputable as a principle. Prosecutors, like most enforcers of the law, have a lot of power. And if they don’t keep their word, to quote my colleague Mark Joseph Stern, “prosecutors could force suspects to surrender their Fifth Amendment right against self-incrimination in exchange for an empty promise.” This would be bad on the merits and would disproportionately affect underprivileged suspects who lack the resources Cosby has to fight back. (At least, that’s the argument—the fly in the ointment is that underprivileged suspects are rarely offered prosecutorial promises of this type anyway.)

There’s value in trying to hold prosecutors to some kind of standard. But the effort sometimes seems to assume a justice system we just do not have. Prosecutors [can do all sorts of extremely shady things, and they do them with virtual impunity](#). Coercive plea bargaining allows for any amount of undocumented and invisible prosecutorial misconduct. Much of it doesn’t even count as misconduct: You can [threaten a man with a life sentence](#) if he refuses to take your five-year plea for forging an \$88 check (that went to the Supreme Court, which decided it was fine). But even things prosecutors are absolutely not

allowed to do, things that are against the law—like withholding evidence or discriminating by race when choosing juries—usually cost them nothing. There is [almost no accountability](#). Usually, the worst that happens to a bad prosecutor is that a conviction gets reversed.

Cosby's conviction was, for the movement that would become #MeToo, a symbolic success. Its reversal is no less symbolic. For years now, the majority reaction to revelations generated by the #MeToo movement has been shock paired with a certain amount of optimism: We were finally poised to correct these clear miscarriages of justice. Public will would power systemic change. That was incorrect. Public pressure *might* have factored into some legal decisions that contributed to Cosby's conviction, like allowing some of Cosby's other victims to testify at the final trial (which had been forbidden in an earlier trial, and which many experts have decried as prejudicial), or the decision to unseal the deposition from 2005 that arguably put him behind bars (and has now let him walk free).

Here is what happened in Cosby's case: As Montgomery County district attorney, Bruce Castor (the prosecutor) decided not to seek criminal charges against Cosby in 2005 when Andrea Constand reported that Cosby had sexually assaulted her. Claiming Constand wouldn't be credible enough as a witness to secure a conviction, he struck a deal instead: He got Cosby to testify in a *civil* suit by issuing a press release promising to never prosecute him. That agreement was violated when he was subsequently prosecuted and convicted in 2018, and so the Pennsylvania Supreme Court overturned the conviction at the end of June. That seems fairly cut and dried. So is this: It's probably only thanks to Castor that we have Cosby on the record admitting to acquiring drugs to give to women he wanted to have sex with.

It's worth remembering, at this juncture, that our justice system does not have "finding the truth" as an objective. It is only because the justice system malfunctioned that we know, by his own admission, that Cosby is guilty. We should never have known about the contents of that deposition, which means Cosby should not have been imprisoned, his victims should not have felt heard or vindicated, and the public should not have felt that a judicial system hostile to survivors had finally worked. It specifically and emphatically did not.

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Take Epstein's case. We all know that in 2007, then-U.S. Attorney Alexander Acosta gave Epstein a "sweetheart deal" for what even back then investigators had found to be a sizable and not particularly subtle sex trafficking operation that recruited minors. But it's worth looking a little more closely at that case because *the consensus view currently is that it was egregiously handled back when it happened*. There's some public relief that things have since changed; the system would not produce the same results today.

This is wrong. That's safe to say now that several recent investigations of everyone involved in Epstein's sweetheart deal have found nothing worth correcting. The consensus is that the system worked when it let Epstein off the hook in 2007. One might go further: The official verdict—and it has come in, even if most of us have not been watching—is that it was working then and is not working now.

Let's take the initial prosecutor on the Epstein case first, then—Palm Beach County State Attorney Barry Krischer. He was all for getting Epstein at first. Lead Detective Joe Recarey had compiled physical evidence, more than a dozen witnesses, several victim interviews on tape; the girls' names were even written down on a notepad in Epstein's home. He was building a case for second-degree felonies. But then, Krischer's attitude changed. He claimed (much like Castor) that the case wasn't viable, the victims not credible. It turned out he'd been in touch with Epstein's lawyers, after which, [according to Recarey](#), Krischer pressured him to downgrade the case to a misdemeanor or drop it altogether. Krischer became increasingly unresponsive, taking longer and longer to approve subpoenas or take their calls and emails. "I knew that it didn't really matter what the facts were in this case. It was pretty clear to me that Mr. Krischer did not want to prosecute this case," Palm Beach Police Chief Michael Reiter testified in a 2009 deposition. Investigators from the U.S. Justice Department [recently corroborated this](#), reporting that Krischer seemed "predisposed to manipulating the process in Epstein's favor" and citing as an example that when Krischer finally charged Epstein with *one* count of prostitution, he chose a 16-year-old victim instead of a 14-year-old, advising Epstein that this way he would not have to register as a sex offender. (Krischer was incorrect.)

This all sounds pretty bad. But is it bad enough for the system to correct anything? Unfortunately, the Department of Justice investigators had no jurisdiction over Krischer, so their observations were toothless. The Florida

Department of Law Enforcement, which did have jurisdiction over him, investigated his role. That investigation, which concluded in May 2021, “[found no evidence](#)” that Krischer had done anything illegal or inappropriate or even untoward.

The Florida Department of Law Enforcement also investigated the circumstances of Epstein’s unusually cushy accommodations during the 13 months he spent in jail starting in 2008. These included the freedom to leave for up to 16 hours a day seven days a week and special private accommodations to protect him from extortionists or “associates of his victims” who “might want to harm him.” While conceding that it “appears that Epstein received differential treatment” while in the custody of the Palm Beach Sheriff’s Office, they found nothing worth correcting. Noting that Epstein had a television for his own use and freedom to wander around the management area whenever he felt like leaving his *unlocked cell*, the FDLE said this was permitted because—to quote the Miami Herald’s Julie Brown—“under the terms of Epstein’s federal plea agreement he was to receive ‘benefits, privileges and rights of all other inmates.’ ” So that was all right. So, apparently, was the fact that Epstein hired PBSO deputies as private security details and made them wear suits while they worked for him. His attorney paid the Palm Beach Sheriff’s Office \$128,136 for this. But the FDLE found no proof of “undue financial influence.”

In other words, for all that this phase of the Epstein affair has been called a miscarriage of justice, it was not. The justice system has been checked, the individual actors investigated, and the verdict is that everything worked well enough that no corrections are called for.

Back in 2006, Police Chief Michael Reiter, frustrated by Krischer’s bizarre disinclination to prosecute Epstein, took the case—hoping for a better outcome—to another prosecutor: U.S. Attorney Alexander Acosta. We know how that turned out, but here’s what I want to emphasize: While the conventional wisdom is that Acosta acted egregiously, our judicial system has once again found nothing to correct. Sure, investigators from the Justice Department thought Acosta used “poor judgement” and found his decision to finalize the plea deal when the investigation was far from finished puzzling—Acosta never even bothered to look at Epstein’s computers. But the DOJ’s recent report “found no evidence that federal prosecutors violated any professional codes or criminal laws.” Poor judgment is something prosecutors are allowed to have.

Acosta’s plea deal for Epstein—the one everyone has decried as outrageous and unjust—famously included immunity for four named co-conspirators and any potential unnamed co-conspirators. Which is why, even though his victims have tried to get justice for the people who victimized them, it has not worked. A judge

[upheld the plea deal in 2019](#), finding that Florida prosecutors—like Krischer! Who pressured police to drop the charges altogether!—did not act in “bad faith” while negotiating it.

There was a silver lining, though. The judge ruled that Acosta did in fact do *one* thing wrong: He broke the law by failing to notify the survivors of Epstein’s plea deal. They were legally entitled to this according to something called the [Crime Victims’ Rights Act](#), which includes the right to “timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused,” the right not to be excluded from any such proceeding, the right to confer with the prosecutor, and the right to be informed of any plea deal.

In 2020, the decision to uphold the plea deal was appealed. A federal appeals court [upheld it again](#) in 2020 (though it did call the deal a “national disgrace”). But the court went further: It reversed the earlier finding that Acosta had broken the law by not notifying the victims. This ruling—in a 2–1 decision—determined that Acosta had actually done nothing wrong. The survivors in fact had *no* right to be notified of the plea deal. They had no right to be present at Epstein’s hearing. They had no right to confer with the prosecutors. But what about the Crime Victims’ Rights Act, one might reasonably ask? The court claimed, curiously, that it did not apply: “Because the government never filed charges or commenced criminal proceedings against Epstein, the CVRA was never triggered.” Its argument is that because the survivors’ case was mishandled by the government—by the very prosecutors who failed to confer with the victims—the former have been deprived of the Crime Victims’ Rights Act’s protections.

The dissent was written by the only woman on the panel, Judge Frank Hull. She wrote that “the majority’s new blanket restriction eviscerates crime victims’ CVRA rights and makes the Epstein case a poster-child for an entirely different justice system for crime victims of wealthy defendants.”

What Hull notes there is that if this decision stands, the treatment Epstein received—and the way his victims were treated—isn’t an aberration. It’s exemplary. There were no mistakes worth correcting, and there’s no reason anything would work out differently today.

What the legal system’s failure to find anything wrong with the Epstein plea deal shows is that when unethical prosecutors decide to treat wealthy offenders favorably, that’s OK. There is no remedy for that. What prosecutors did to the minors Epstein and his co-conspirators victimized isn’t legible as a legal injury. What they did to Cosby is.

That is a strange result, but I suspect Cosby's release is only a first step. Since the court found no evidence that Epstein's prosecutors acted in "bad faith," Alexander Acosta's plea deal with Epstein remains in effect, and his co-conspirators and potential unnamed co-conspirators remain immune. Based on that decision, I confess I'm finding it hard to understand why Ghislaine Maxwell isn't a free woman. Prosecutors must keep their promises, after all. [Her attorney agrees](#): "The Cosby court did the right thing by keeping prosecutors honest. We just ask for the same for Ms. Maxwell."