

Note: This op-ed appeared in Massachusetts Lawyers Weekly on April 10, 2020
<https://masslawyersweekly.com/2020/04/09/a-district-attorney-for-all-of-us/>

A District Attorney for All of Us?

By R. Michael Cassidy, Professor and Dean's Distinguished Scholar, Boston College Law School

Since being sworn into office in January, 2019, Suffolk County District Attorney Rachael Rollins has received pushback from police unions, other prosecutors, and several judges for her progressive, social justice agenda. That agenda includes declining to prosecute fifteen low-level offenses, treating defendants with mental health issues more leniently than those without, taking immigration consequences of convictions into account in revising prior guilty pleas, and, most recently, joining with CPCS in arguing unsuccessfully before the Supreme Judicial Court that some inmates convicted of serious crimes should be released from prison as an emergency measure to combat the spread of Covid-19.

Some of this pushback is misplaced. In a Boston Globe editorial published on May 28, 2019, Cape and Islands District Attorney Michael O'Keefe argued that certain newly elected District Attorneys—backed by the ACLU and the “left wing” George Soros foundation—are behaving more like social workers than real crime fighters. In this day and age, to suggest facetiously that “social justice” issues are not appropriate for a district attorney to consider returns us to the binary “tough on crime” and “soft on crime” rhetoric of the 1990s. We know how that experiment turned out—expensive, ineffective and socially corrosive mass incarceration. Rollins should be lauded rather than ridiculed for trying new approaches.

But there are more subtle grounds to criticize some of Rollins' initiatives. Her response to criticism often takes the form “the people of Suffolk County elected me to do exactly what I am doing.” This is precisely what she said in September, 2019, after appealing a Boston Municipal Court judge's refusal to dismiss charges against protesters at the so-called “Straight Pride” Parade.

Two aspects of this “electoral” justification for Rollins' reform movement are worthy of further scrutiny.

First, how does Rollins know exactly who voted for her in November, 2018, and what their motives were? It certainly is appropriate for an elected official to make a good faith effort to fulfill campaign promises—providing societal circumstances have not changed since those commitments were made. But stating that “this is what the voters elected me to do” suggests that Rollins is capable of dissecting the complex motives of voters. Even more troubling, it implies that she only listens to those Suffolk County residents who voted for her, rather than all members of the community. That is the equivalent of Donald Trump acting as if he is the President of only thirty states. Rollins' constituents include not only the everyday citizens, community

activists, academics, and defense attorneys who helped her get elected, but also the victims, police officers, and public safety officials on Beacon Hill who may disagree with her.

Second, when a District Attorney stands up to address a Court, she does so as a representative of the Commonwealth, not of the county. Rule 3.8 of the Massachusetts Rules of Professional Conduct and its commentary recognize that prosecutors have a special responsibility to serve as “ministers of justice,” striving not simply to win convictions, but to assure that justice is done for all of our citizens in court. In exercising prosecutorial discretion, Rollins is a state actor representing the interests of the entire Commonwealth, not just the interests of Suffolk County residents. General Laws c. 12 § 27, and the Supreme Judicial Court’s 1921 SJC decision in *Attorney General v Tufts* make that point abundantly clear. District-wide election is simply the means that we in Massachusetts have chosen to select *state* prosecutors.

Other laws of the Commonwealth drive home the point that in criminal cases the district attorney represents the Commonwealth, not the county. The District Attorneys are subject to control by all three branches of the Commonwealth’s government. The Executive branch, through the Attorney General, can assume control of any criminal prosecution brought by a District Attorney; the DAs receive their funding from the state legislature; and, the Supreme Judicial Court has the power to remove an elected District Attorney, as it did twice in the 1920s.

Serving as a District Attorney is a difficult job. In making important decisions about diversion, charging, plea bargaining, and sentencing, she must consider a host of factors, including society’s demand for retribution, concerns for public safety, the deterrent value of the criminal law, the administrative and resource burdens placed on law enforcement and the courts, jail capacity, and the disparate impact that enforcement and non-enforcement may have on traditionally marginalized and vulnerable groups. Reasonable people can and will disagree on how to weigh those considerations, which sometimes are in tension with each other. But when Rollins does that balancing, she must remember that she does so as a state actor, not as a county actor.

As she pursues her decarceration agenda, I hope that the District Attorney will refine her rhetoric—whether it is in court, in public policy debates before the legislature, or in public statements explaining her actions—to reflect this broader responsibility. After all, we do not want “justice” to be determined by which end of Commonwealth Avenue a criminal defendant is arrested on.

R. Michael Cassidy

[The author is Professor of Law and Dean’s Distinguished Scholar at Boston College Law School. A former state prosecutor, he served as Chief of the Criminal Bureau in the Massachusetts Attorney General’s Office from 1993-1996. Cassidy is the author of the book *Prosecutorial Ethics*.]

