Defending Against The Defenders Why I Can Be A Good Prosecutor And A Good Person

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Sarah M. Hart

A. Introduction: My Personal Problems

I want to be a prosecutor. But people keep telling me that prosecutors are bad people. Apparently, it is impossible to be a good person and a prosecutor at the same time. And that is an opinion is held by more than just your average village idiot. It is real intellectuals and professionals, whom I look up to and respect that hold this view. Professors in law school, authors of the books and articles I read, practitioners I see in court, and even my parents. What’s a girl to do?

To a certain extent I expect the ivory tower of academia to engage in a certain amount of lofty judgment, based on no time in the trenches. As John Suthers put it “[At] the University of Colorado Law School… I would read or hear virtually nothing that encouraged me to become a prosecutor… Prosecutors were portrayed, in their best light, as a necessary evil prone to overzealousness.”\(^1\) Some professors, then, I might be able to excuse as too far removed from reality. And in “the people’s republic of Boulder”\(^2\) I also would not expect to find the “hang ‘em” attitude prevalent among small-town ranchers in Montana. Local newspapers and politics, then, can be dismissed as preaching to a self-selected choir. And my parents aren’t lawyers, so what should they know? To my knowledge, they have never witnessed a criminal act, let alone a trial, and so they are not well placed to judge the functioning of society’s underbelly.

The trouble lies with the professors and scholars that I cannot dismiss as being too

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2. I saw that on a bumper sticker in the Table Mesa Park-n-Ride.
removed, too politically indoctrinated, or too naive. These are people I respect, people who have been in the foxholes, have done the research, and gained the wisdom and perspective that is worth admiring. Why do these people hate prosecutors? I cannot easily dismiss them as wrong. Every other opinion they reach I tend to agree with. I learn from them how to cognize things that would otherwise elude me. I look to them for explanations of phenomenon I otherwise would not understand. And yet, they find my chosen profession repugnant. Why? Is it possible they’re right in everything else but wrong in this? How could they be wrong? What don’t they know? What don’t they see? Or is it something I’m missing? Am I really a bad person? Can I convince them, and along the way myself, that I am right in thinking that I can be both a good person and a prosecutor?

A large part of the beef against prosecutors is that they are, to certain extent “the Man.” Prosecutors work for the government. And, since the whole is only the sum of its parts, prosecutors are the government. But, unlike most other government bureaucrats, they pull back the curtain and actually call themselves “the government.” Every day, in every case, in every courtroom, against every perceived innocent, a prosecutor must stand up and say “the government takes the position that…. ” This means that a prosecutor takes the weight of the government on her shoulders in a much more literal way than anyone else in the courtroom does. Maybe more than anyone else in the government does. Therefore, everyone’s anger against their government can be focused on that one person who is plainly stating her position on the government’s side. In her, the citizenry can see all their government’s bumbling ineptitude or overreaching arrogance.

Most importantly, if there are problems with the system – if someone believes the way justice wasn’t done or the way punishment is metered out is not fair – the government is the one
to blame. So why not focus your anger on the one person in the room who has chosen to voluntarily align herself with that unjust government? Certainly, if she has chosen to represent the government, she must tow the party line. She must believe that the system is perfect and worth preserving. How else could she stand there and call herself the government? She must believe in that broken, unjust system. And if she does not, then she is a liar, which is worse than a pedagogue.

That leaves me in an awkward position. Either I am a liar, or I believe in what some call an unjust system. I therefore must defend the entire system if I am to defend my choice to be a prosecutor. And I am not stupid, indoctrinated, or naïve enough to think that there is nothing wrong with the present system. A valuable defense of my choice, then, requires me to both acknowledge the problems and overcome them. That’s a rather tall order. There’s a lot wrong with the criminal justice system in this country. And people have a lot of very reasonable criticisms (along with a lot of unreasonable ones, and very few suggestions of how to practically improve matters, but that’s beside the point). For me to argue that there are no problems, that the system is perfect, or even fine the way is, takes a level of denial of which I am not capable. I have to admit there are problems. I know enough to see the gaping holes in the logic, the statistics that prove incompetence, and the violence of punishment. I cannot argue that those evils are not present. That is an indefensible position.

But if I admit there is a problem, or more than one, than how can I align myself with such a flawed system? Do I need to solve the government’s problems, or explain them away, before I can accept a government position? Does the system need to be perfect, or at least justifiable, in order for me to take its name? If so, how am I, a lawyer with training wheels, supposed to solve some of society’s biggest problems?
The bottom line is that I can’t solve the criminal justice system. I can’t make it perfect overnight. I can’t even conceive of all the possible solutions. And that’s not my humility speaking. I know the problems are bigger than I am, no matter what my class rank. So the question becomes: are they too big for me to even wrestle with? Is the system so broken, and the government so deplorable, that I should not align myself with it? Should I pick a different side? Should I pick a different arena? Is there any justice to be found at all? And if there is no justice in the criminal justice system, should I even try to find it? Should I even become a lawyer?

I once met a professor who was preaching the book of revelations – the end of the world, the end of justice, the end of the law. He believed, at least for the purpose of discussion, that the law was not worth protecting or preserving. I asked him “Can you be a lawyer if you don’t believe in the law?” He said that was a very good question. But it’s more than that. This is not just a question that makes for a good intellectual debate. It is a question that stands to define my life. My answer will determine whether the $150,000 I just spent on law school was worth it. It will determine whether I choose to make my life a lie.

So, do I think you can be a lawyer without believing in the law? No. I don’t think you can. Or at least, I don’t think you should. I think it would be dishonest, like a Catholic bishop who doesn’t believe in god. When people look to you as the priests of an order, they expect sincerity. They expect that even if you don’t know the way to salvation, you believe that it exists and are doing your best to attain it. When people come to a lawyer, they do so because they need salvation. If you don’t believe that is possible, you are misleading them if you try to show them the way toward it. For me at least, I can’t preach what I don’t believe, and I have to practice what I preach. I cannot choose to enter a profession if I don’t believe it’s worth entering. I can’t be a lawyer if I don’t believe in the law. I’m not in this for the money, or the fame. I know, it’s hard
to believe, but it’s true. I really did come to law school because I wanted to do the right thing. At the time, I thought that meant being a prosecutor. Now I’m not so sure.

If I know the system has problems, and I’m not capable of fixing them, does that mean I no longer believe in the law? Because, if I can’t do something I don’t believe in, and if I don’t believe in the law, then by my own admission I can’t be a lawyer. And the truth is, if both of those things are true, I don’t want to be a lawyer. I have two problems then: 1) Do I believe in the law, and 2) Do I want to be a lawyer. I have just explained that the outcome of the second problem depends on the answer to the first. If I believe in the law, then I want to be a lawyer. If I don’t believe in the law, I don’t want to be a lawyer. I will not live a lie. While that may seem absolutist to some, it is one of those rare truths that I have come to know and accept about myself. There’s no point fighting it, it’s just the way I am. I don’t do things I don’t believe in. Period. It’s not worth talking about.

My stubbornness makes life easier in at least one respect, because it means that I really only have to answer one question: Do I believe in the law? And for me, that question is a lot narrower than some. I have no interest in civil law. None. I came to law school to be a criminal lawyer, and participate in the criminal justice system. Again, that stubbornness makes life a little simpler, as “the law” in my case is whittled down to a galaxy, rather than a universe. For me, the question is, do I believe in the criminal law? That question can take various forms: Do I believe in the criminal justice system? Do I believe in goals underlying our current criminal code? What about the practical effect on criminal law on society? Do I believe in punishments as they are metered out by that system? Do I believe that those who are being punished deserve what they get? In other words, the questions can be very broad, or very specific – based on grandiose principles or practical outcomes. Whether you take a global or local view of things, though, the
bottom line is whether or not the sum total is something I can live with. Do the ends justify the means, does the benefit outweigh the cost, and does the good outweigh the bad? When I ask myself whether or not I believe in the law, that’s what I mean: Do I believe in the criminal justice system that we have today?

The best way to answer that question, as far as I can tell, is to look closely at some of the best criticisms leveled against the system, and its soldiers – the criminal law and prosecutors. Two of the best written criticism I have found come from Abbe Smith, a very well respected defense attorney, law professor, and legal ethics scholar. In the spirit of full disclosure, she is also the best friend of my favorite law professor, and my greatest legal mentor, Monroe Freedman. It is partially Professor Freedman’s respect for professor Smith that raises my estimation of her. They have worked closely together in the field of legal ethics (they’ve published a book and several articles together, taught together at Georgetown, and traveled together to lecture across the country) and that leads me to believe that, at least to a certain extent, Professor Freedman values and adopts Professor Smith’s views on the subject of prosecutors. If my greatest mentor, and the most imposing legal mind I’ve encountered, can align himself with someone who believes that I cannot be a good person and a good prosecutor at the same time, then that is a criticism I have to take seriously. My first job then, will be to look at Abbe Smith’s opinion on prosecutors, and see if I can overcome it – or if it shakes my faith.

The second best critic of prosecutors that I have yet to encounter is Paul Butler. His status as a worthy opponent comes not from my own reverence for him, as it does in the case of Professor Smith (via Professor Freedman), but from his popularity as a writer and a speaker. I heard him give his “hip hop theory of justice” lecture at CU last fall and I read his book of the

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3 Professor Freedman taught my first year contracts course at Hofstra University School of Law, and has remained a close friend, inspiration, and guide since then, despite my transfer out West.
same name. I have heard him interviewed on various NPR shows, I have seen the internet chatter, and I have heard the lawyerly-equivalent of the water-cooler talk about him. Perhaps it is because he is loud, perhaps because of the color of his skin, or perhaps because of his particular story, people gravitate towards him and adopt his pop theory on the subject of prosecutors. He has therefore become a conduit for public opinion. If you are criticizing criminal justice and prosecutors, Paul Butler’s name and Paul Butler’s theories will come up. That means that I have to deal with his critiques if I am to maintain any widely defensible position. If the popular opposition adopts Paul Butler as their mouthpiece, I will not be able to adequately deal with the popular opinion of prosecutors and criminal justice without dealing with Paul Butler and his “hip hop theory of justice.”

I am sure there are more critiques of prosecutors out there, and I know that there are lots more critiques of the criminal justice system. I could never address them all in one paper, so this will necessarily be a limited approach. But these two critiques are the ones that are the most pressing for me at the moment, and the ones that best encompass the arguments I regularly encounter against my chosen profession. In addition, they both are very good examples of the system and the prosecutor being attacked simultaneously, so that I cannot defend one without defending the other. For these reasons, I must discuss each and either confirm or deny their

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I’m trying to keep the disdain out of my voice, but it’s difficult. I mean, after all, who am I, a servile third-year law student at some school in Colorado, to thumb my nose at the work of a Harvard Law graduate, Georgetown Law Professor, and published author? Well, clearly, I like to think that I’m smarter than he is. Anyone who bases their legal critique of an entire life-or-death system on a bunch of song lyrics is not worth my concern. But that opinion has absolutely no basis except in my own ego. I know that. And although I am not a racist, I have a knee-jerk response to race-based theories of any kind that borders on exasperation. But that’s a whole different kettle of grenades. What I think about Paul Butler as a person or a theorist is irrelevant to a certain extent, because he is popular. He has become a force to be reckoned with, through his popularity. Whether or not I think that popularity is justified is neither here nor anywhere. I will still have to face the fact that he and his opinions are widely read, widely discussed, and widely believed in legal and non-legal circles right now. That must mean his views speak to the people on the street, for some reason, and they have adopted him as their spokesperson. And, whether I like it or not, I will have to deal with that popular opinion.
findings; that it is impossible for me to be both a good person and a good prosecutor – it is impossible for good people to believe in the criminal justice system.

B. My View of the World

i. A Story

I have seen evil. I know that there are people on this earth who are animals. Vicious parasites with no drop of human feeling. I have looked in the eyes of a man who did not look back, but through me. His eyes ate at me. It felt like if I kept looking long enough, he would drain the humanity right out of me and suck it away into his black abyss. I sound dramatic, but it wasn’t. It was terrifying. Knowing that men – people – beings – like that are out there in the world terrifies me. It makes me believe in public safety. It makes me believe that we need people to stand up to that evil, and lock it away forever.

The “man” I am talking about is named Robert Williams. In 2007, he attacked a girl named Sarah. My name. She was 23 at the time. A year younger than me. Her parents were grown-up hippies who lived in Vermont and never locked their doors. Carbon copies of my parents. Her younger sister looked up to her. Like mine. Sarah went to Columbia University. I went to Columbia University. She lived near the Appletree market. I did my grocery shopping there. Sarah didn’t want to judge anyone or offend anyone. I didn’t either. But one night Sarah Brown, unlike Sarah Hart, was followed home by Robert Williams.

He was lurking in her elevator, followed her off onto her floor, and pushed into her apartment when she opened the door. He then spent the next 19 hours torturing her. He forced her to give him oral sex, and cut off her hair when it got in the way. He raped her, anally and vaginally, multiple times. He forced her to take the entire contents of her medical cabinet – a bottle of tylonol, nighquill, dayquill, benadryll, alieve… everything he could find. All of it. At
once. Then he forced her to drink an entire six-pack of beer she had in her fridge. All at once,
right after the pills. That sent her kidneys into failure. He tied her up with electrical cords, and
hung her, by her armpits, in her hall closet for several hours. He went out to use her ATM card,
and offer some guys he met on the street to “come party with the white chick” he had upstairs.
The ropes cut into her and tore her skin and muscles. She had no idea how long she hung there. He
did that several times. Then, worried that she could identify him, he boiled water, poured the
boiling water on her face, and followed that with bleach in her eyes. He slit her eyelids with a
kitchen knife after that. When she finally lost consciousness, he tied her to her futon couch with
more electrical cords and set the futon on fire.5

The smoke woke Sarah up. Despite everything she had been through, she managed to use
the fire to melt the electrical cords around her wrists and free herself. She couldn’t feel or use her
hands, because of the damage from hanging in the closet, so she didn’t feel how hot the door
handle was from the fire. She made it out of the apartment alive. When I got to her, she was in
the burn unit at Weill Cornell Medical Center. She was being treated for kidney failure, third
degree burns on 83% of her body, and every potential side effect of a sexual assault – STDs,
HIV, and pregnancy. Her eyelids were stitched together in an effort to save them, and her eyes
were patched. We had to put on protective suits, masks, and hair covers just to be allowed in the
room. Her little sister was holding her hand. Her parents were outside the door. Silent. The
assistant Manhattan district attorney I worked for had to interview her. I just had to listen. It was
my job to absorb everything and commit it to memory, in case she died – something the police
called “likely.” In that case, I would have to be her voice, and relate what she told us in that

5 People often accuse me of making this up. The entire record is available through the New York Supreme Court.
For news reports, see e.g. http://www.nydailynews.com/news/ny_crime/2008/06/24/2008-06-24_robert_williams_found_guilty_on_44_count.html or
http://www.nytimes.com/2008/06/06/nyregion/06rape.html
hospital room. I was the witness. Just in case.  

ii. Bad Versus Evil

At the time I was an Investigative Analyst (one small step above paralegal), working for the government. I was not the district attorney, or even the assistant district attorney on the case. I was not even one year out of undergrad, where I had majored in religion and theatre. I had taken the job in the Sex Crimes Unit at the Manhattan DA’s office because I knew I wanted to help people, and I thought they might do that – that’s literally all I knew when I signed up. I had to google “district attorney” before my job interview. I had no idea how the criminal justice system worked, or if it worked. The small town I came from didn’t have criminals, or if it did, I never heard about them. People left the keys in their cars in the driveway. I studied “the problem of evil” in college, but I had never seen it. Things like this were not only unheard of, but I actually did not have room in my worldview for anything even close. Robert Williams introduced me to pure evil. Not in a dramatic, horror movie sense, but in the real, terrifying, reality. I could not understand him. I could not quantify him, or study him, or explain him. It was simply impossible for me to understand how one human being could do that to another. For pleasure. No matter how many theories of evil I had studied in my comparative religion courses, he didn’t fit in my brain.

I looked at his background and there was no explanation there. He was not sexually abused as a child, he was not the child of a drug addict, his father even had the moral compass to turn his own son in, once he realized what he had done. So, the parents were clearly not to blame. I looked at his neighborhood where he grew up – it was the same neighborhood where

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6 This is my example, and you’ll see in the coming pages that I will make a lot of it. I’ll draw conclusions and extrapolate, and it is nothing more than my own experience that leads me to these conclusions. And, as I’ve already said, those experiences might not be worth much to anyone. But if Paul Butler can draw so much from his arrest for a fight over a parking space, I think Sarah Brown’s story can illicit just as many conclusions.
Sarah Brown had lived – rough, but not tragic. A friend of mine from boarding school had come from that neighborhood – gotten himself a full scholarship and was now a medical student at Columbia. Maybe Robert Williams didn’t know any better, or he didn’t know what kind of trouble he’d be in. But no, he had been in prison before, once for attempted murder, and once for murder.\(^7\) I even tried to blame mental illness, but then he passed all his many psych evaluations prior to trial. He defied every explanation. I could not justify his twisted state, no matter how hard I tried. So I was left with only the facts: he was evil for no discernable reason. He just was that way, because he enjoyed it.

Evil like that terrifies me because I don’t know how to fix it. If I could blame parents, or environment, or drugs, then a solution would present itself: teach and support the parents, change the environment, treat the drug addiction. But without a discernable cause, there is no discernable solution. If people really can do those unspeakable things just because they want to, even when they know it’s wrong, and even when they know it will result in the severest punishment, then what can we do to stop them? If it’s not a mental illness, I can’t treat it. If it’s not a social problem, I can’t work to change it. If it’s not a matter of deterrence, than I can’t scare them into compliance. If it just is – without explanation – than I can only isolate it. The only choice I have is to become Pandora. Lock the darkest and most terrifying senseless evil in a box and bury it where I hope no human will ever have to find it again.

The base line then, as far as I’m concerned, is public safety. Not the kind of public safety that justifies any government action with that name, but public safety in the purest sense. We have to keep people who enjoy the destruction, torture, and mutilation of our species from doing what they want. The Robert Williamses must not be allowed to find Sarah Browns. There is no

\(^7\) Why he was out on the street again, given his criminal history, is a subject for another day. But there were no special circumstances at work – no pardons or acquittals or early probation. He had served the time he had been given, that’s all.
place for unfettered evil in our society. There just isn’t. This is not a debatable evil, like alcohol or television. It is a clear, unmasked, terror that literally stalks mankind and kills it. When that kind of direct threat to personal, bodily safety appears, we must eliminate it. Lock it up, or kill it, or exile it… I’m not sure how.⁸ But I am sure there is no question that evil like that cannot be set loose to do its worst. We must prevent it from happening, and from spreading.

Unfortunately, Robert Williams is not unique. He was my first encounter with that sort of blunt-force horror, but he was not my last. If I had to count, there were probably six others that I would put in the category with Robert Williams. People who looked through me. People who did things I could never have imagined, and for no reason I could find (and trust me, I looked hard). And I’m not counting all your run-of-the-mill child molesters, wife beaters, acquaintance rapes, and sex traffickers. And I was only at the DA’s office for a little over two years. And that office was only one of five in a 300 mile radius.⁹ Granted, New York City is probably not indicative of what goes on in the rest of the country. I’d like to hope that a concentration of 71,201 people per square mile might change the game a little bit. But no matter what the numbers, the fact remains that there is something out there that no amount of good will can control.

I am not talking about what I just called the run-of-the-mill criminals. As far as I’m concerned, those are more the opportunity-minded offenders, whose activity can be more easily traced to mental disease, poverty, inadequate education, or lack of a family structure. I would call those folks bad, but not evil. I am not the first person to make a distinction between bad and evil.¹⁰ Nietzsche wrote extensively about it, and noted that “although the two words “bad” and

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⁸ I don’t want to discuss the death penalty. To be honest, I’m not sure what I think about it. I have to leave that question to society to sort out.
⁹ http://en.wikipedia.org/wiki/New_York_City
“evil” both seem opposite to the same idea of “good,” how different they are!”\textsuperscript{11} There is also a difference in our basic definitions of the words. “Bad” is defined by Merriam Webster as “failing to reach an acceptable standard” and “morally objectionable,” while “evil” is defined as “morally reprehensible.”\textsuperscript{12} In other words, “bad” is something that we don’t like, or we don’t agree with, but “evil” is something worthy of judgment.\textsuperscript{13} That means that “evil” requires a moral response, where as “bad” just requires disapproval. Evil must be punished, because it violates some deeper sense of right and wrong than just the social norm of a given day. That is why it can be recognized by everyone, equally, regardless of their time, place, or culture. Someone in Pakistan would find Robert Williams’ actions just as worthy of punishment (although perhaps a different kind of punishment) as someone in Whales would find it. No society, and no humanity, can tolerate that kind of behavior. It is non-negotiable.

The distinction, for me, also lies in the explainability of the action, the fact that I can, in some part of my brain, recognize how a form of bad behavior could come from another human being. It’s not alien evil beyond imagining. And don’t get me wrong, those people have done some truly horrifying things too, and they need to be controlled, but not locked away or buried forever. There’s a healthy discussion about how to punish bad people – is treatment or incarceration better? What about community support? Do we just need to fix the underlying social problems? That sort of bad is approachable, maybe even fixable if we have enough resources and information. But to me – and I believe to anyone who met him – Robert Williams is in a different category. No amount of money, education, parental love and attention, treatment, or incarceration was going to change him. What he did was unimaginable and it was not human.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{11} Friedrich Nietzsche, ON THE GENEALOGY OF MORALS, First Essay: Good and Evil, Good and Bad, 11 (Ian Johnston ed.)
\item\textsuperscript{12} Merriam Webster Dictionary at http://www.merriam-webster.com/.
\item\textsuperscript{13} Id. The definition of “reprehend” is “censure” and definition of censure is “judgment involving condemnation.”
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Punishment for him was not and is not debatable. We can’t talk about the best way to heal him, because it can’t be done. And the thought of releasing him back out in the world, free to do more unspeakable evil, is beyond what I think any rational or emotional person could condone.

I don’t have research or data to back this assertion up – to tell you the psychological, physiological, or anthropological distinctions between bad and evil. Maybe that makes my point suspect. But I know in my gut, in that primal fight-or-flight part of my mammalian heritage still holding on deep inside me, that there is a difference. And I would be willing to bet almost anything – including my life – that any other human being faced with Robert Williams would be feeling the same thing in his or her heart.\(^\text{14}\)

At Robert Williams sentencing, the question was never when or if he could get back out into the world. The defense attorney argued for permanent incarceration in a hospital, rather than a prison. And I am sure that if the death penalty were an option (it’s not in New York) then the defense attorney would have been arguing for life in prison rather than death. Either way, Everyone in the room, including all the most sympathetic advocates for those who are accused of crimes, agreed that Robert Williams could never be free again. It wasn’t just “the law” that required that result, despite some people’s feelings to the contrary, it was the actual consensus of everyone involved. Even his own father.\(^\text{15}\) That is the best example I can give of the universal gut response to evil. If Robert Williams had done something that was just bad, people would have been fighting about his guilt, justifications, treatment options, disproportionate sentence, and racism. But nobody talked about that.

For that reason, I have begun to recognize the differences between those people who have

\(^{14}\) For the record, even Williams’ public defender had to be threatened with contempt of court before and during trial, after he repeatedly tried to withdraw from the representation. Why contempt? Because they couldn’t find anyone else who wanted to do it.

\(^{15}\) Robert Williams’ father called the police, after he saw the crime stoppers sketch of the perpetrator, to tip them off that it was his son they were looking for.
“seen it” and those who haven’t. I believe that, whether subconsciously or not, this is where all the trench and fox hole analogies come from in the criminal justice lingo. Seeing that kind of evil, face to face on the streets, changes a person in the same way that seeing the evils of war changes a person. In facing it, you must confront death, mutilation, inhumanity, and the terror that the arbitrary nature of it all could mean that you are next. When you confront it, you come to understand on a gut level that there is evil in the world, manifested in the worst of our species, and it has to be stopped. It’s not debatable, it’s not fixable, it is just terrifyingly present. That is just a bottom line truth about the way the world works.

People who have experienced that gut response to evil approach the criminal justice system differently than academics, social scientists, or casual observers. They are on both sides of the line, don’t get me wrong – they can just as easily be a defense attorney or a prosecutor. But the job as they see it is different. It’s about dealing with that evil. It is not about putting black people in prison, or punishing drug users, or even winning against an advocate. The job involves finding the evil, separating it from the plain-old bad, and making sure that it really is what we think it is. For that reason, the defense attorney is crucial – to make sure we’re not mistaking evil for bad, or casting the net too wide. But the prosecutor is just as crucial as the defense attorney. The prosecutor must work to separate the bad from the evil, and treat each of them accordingly. Bad can be dealt with through an appropriate combination of retribution, rehabilitation, and separation. And then, if the evil really is there, it is the prosecutor who must prove it beyond a

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16 Of course, what is deemed appropriate is a matter for debate. I think Paul Butler’s main critique lies here – in whether punishment for bad is appropriate. That is a crucial debate to have, and what is appropriate can vary based on the case, the location, the political climate, the resources available… the list goes on and on. I’ll talk about this more later, but I think this is a truly valuable debate, and what is “appropriate” should vary based on the best knowledge we have available at any given time. But, I think this is a different question. Whether or not we deem any given punishment, imposed by the prosecutor according to the guidelines she has been given by society, to be appropriate is a different question than whether the prosecutor is a good person doing a good service for society. But more on that later.
reasonable doubt. That means that, if the prosecutor doesn’t do her job perfectly, and overcome any reservations presented by the defense attorney, the judge, or the jury (our artificial stand ins for society at large), than that evil is released right back out into the world.

So, if you accept my premise that there is some evil in the world that can only be contained and not put right, then someone has to do that job. Someone has to put Robert Williams away. Actually, not just someone, but a lot of people. If it takes a village to raise a child it also takes one to contain a predator. There is a chain of command for this sort of thing: cops, detectives, DAs, judges, and correction officers. They all work together to overcome this evil. So if I have seen that evil, if I know in my soul that it exists, do I want to work to contain it? And, if I want to be a part of the chain of custody, where could I fit?

So now you’ve heard my view of the world. That’s why I think prosecutors can be good people. Let’s see how it holds up to the two most troublesome critiques I can find.

C. This is not a New Criticism

People have always had a certain repugnance for those on the front line of social enforcement. Prosecutors are just the modern incarnation of the medieval executioners that Maistre described as being loathed so thoroughly by their own society. Both prosecutors and executioners do the unspeakable, dirty work that is both abhorrent and necessary for society. Maistre described his executioners thus:

Who is this inexplicable being, who, when there are so many agreeable, lucrative, honest and even honorable professions to choose among, in which man can exercise his skill or his powers, has chosen that of torturing or killing his own kind? This head, this heart, are they made like our own? Is there not something in them that is peculiar, and alien to our nature….

Maistre therefore described the executioner in three ways 1) by his job description, 2) by the

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social disgust that he is afforded and, 3) the necessity of the job he performs for society.

Under the Maistre’s first descriptive factor, the job description, the ancient executioner and the modern prosecutor share many similarities. First, consider how Maistre describes the job of the executioner, and the effect that job has on his life:

The gloomy signal is given; an abject servitor of justice knocks on his door to tell him that he is wanted; he goes… He has finished. His heart is beating, but it is with joy: he congratulates himself, he says in his heart ‘Nobody quarters as well as I.’ He steps down. He holds out his bloodstained hand, the justice throws him – from a distance – a few pieces of gold, which he catches through a double row of human beings standing back in horror. He sits down to table, and he eats. Then he goes to bed and sleeps. And on the next day, when he wakes, he thinks of something totally different from what he did the day before.18

Next, consider the way John Suthers, a lifetime prosecutor in Colorado, describes the job of a modern prosecutor.19 The police call the district or United States attorney when a crime has been committed. The prosecutor screens the case, decides on an appropriate fate (usually via plea bargain), and then executes that fate, sending the condemned to prison or some other form of punishment. The prosecutor gets paid a small amount (vastly disproportionate to other lawyers) but she takes great pride in her work. Suthers describes his version of that pride:

[B]oth Corbett and Glenn were convicted of multiple counts of murder and sentenced to death… I experienced the immense satisfaction that prosecutors feel when they are successful in holding a defendant responsible for a reprehensible crime.20

Thus, we can see the similarity in both the job description and the pride that is taken when that grizzly job is done well.

As to Maistre’s second descriptive factor, the disgust of the general public, both prosecutors and executioners fit the bill. People are just as disgusted by the modern prosecutor as

18 Id.
20 Id. at 14.
they were of the ancient executioner. Maistre describes the general consensus of the executioner to be a social pariah:

Consider what he is in the opinion of mankind, and try to conceive, if you can, how he can manage to ignore or defy this opinion. Hardly has he been assigned to his proper dwelling place… when others remove their homes elsewhere whence they can no longer see him. In the midst… of this vacuum… he lives alone…. He is not a criminal. Nevertheless no tongue dares declare that he is virtuous, that he is an honest man, that he is estimable. No moral praise seems appropriate to him…. 21

This description certainly seems like something that either Paul Butler or Abbe Smith would say about prosecutors today. Certainly both of them believe that “no moral praise seems appropriate to” the prosecutor, and they have even gone so far as to morally reprimand anyone who takes up that job. The social disgust surrounding both rolls indicates their similar place in the minds of humanity.

Finally, Maistre’s third descriptive factor, necessity, applies equally to the modern prosecutor and the ancient executioner. In other words, the prosecutor is just as necessary as the executioner for society. As Maistre explains of the executioner:

He is a law unto himself… And yet all greatness, all power, all subordination rest on the executioner. He is the terror and the bond of human association. Remove this mysterious agent from the world, and in an instant order yields to chaos; thrones fall, society disappears… 22

Justice George Sutherland, in Berger v. United States, described the necessity of prosecutors in much the same way, discussing their role as the representatives of the sovereign:

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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold arm of which is that guilt shall not escape or

21 Isaiah Berlin, Joseph de Maistre and the Origins of Fascism 116-117.
22 Id.
innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones…. 23

In this justice’s opinion, then, a modern prosecutor is every bit as necessary for society as Maistre thought the ancient executioner was. Our legal system cannot function without such a figure. Indeed, John Suthers came to the same conclusion in his book defending prosecutors, stating:

No one in the United States can be branded a criminal or lose their personal liberty unless a prosecutor determines that to be a just consequence, and serious criminals will not be held accountable if a prosecutor is not sufficiently zealous. 24

Now, it is true that the prosecutor does not actually do the “killing,” in the way that Maistre’s executioner did. The prosecutor doesn’t hold the needle, or the jail keys, like the executioner held the axe. But the prosecutor does, in a way, hold the modern equivalent: the power to make a plea bargain. Because “Nationwide, well over 90 percent of criminal cases don’t proceed to trial,” the prosecutor is usually the one determining punishment, and not the judge or the jury. 25

In fact, urban courts would typically have trials in only 2 to 6 percent of cases” and “A small percentage of cases are completely dismissed” by a prosecutor. 26

While the plea bargain brings the prosecutor closer to the roll of the executioner in one respect, it also illuminates another difference between the two. The ancient executioner did not have discretion, like the modern prosecutor does. Although, many (including Paul Butler) argue that the discretion of the modern prosecutor is actually not as great as many people think it is. Instead, the prosecutor must act on behalf of her clients (either the United States or the local electorate), fulfilling their wishes, or under their supervision. John Suthers describes this

24 Suthers at 1.
25 Id. at 82.
26 Id.
phenomenon for the United States Attorney:

More and more of U.S. attorney discretion has become subject to the scrutiny of “Main Justice.” By original design of Congress, U.S. attorneys are supposed to exercise a high degree of discretion independent of centralized federal power. But the Department of Justice is now routinely imposing various prosecution and crime-prevention initiatives on U.S. attorneys’ offices that leave little room for the exercise of discretion.\textsuperscript{27}

His critique, however, is not limited to the United States Attorney’s Office. In Suthers’ opinion, the same pressure applies to local district attorneys who are elected, and therefore must be subject to the whims of the electorate, limiting their discretion:

“Most of the heads of public prosecution offices in the United States are elected…. It’s my consistent observation that elected prosecutors tend to generally reflect the law enforcement philosophy of the constituents who elect them.”\textsuperscript{28}

According to these accounts of the current state of affairs in prosecution offices, modern prosecutors are not that different from the ancient executioners. While they still have the power to create plea bargains with individual defendants, their overall goals, sentencing practices, and choices are highly monitored and directed. In this way, while they may get to choose the particular axe they use, when they swing, is determined for them. For this reason, the prosecutor and the executioner are actually virtually identical.

Despite the subtle differences, which are small given the temporal and cultural separation between the two, prosecutors are the modern equivalent of Maistre’s executioner. Prosecutors have a filthy job, in the “trenches” and “foxholes” of the criminal justice system, they are abhorred (or at least misunderstood) by society, and yet they perform an essential function without which society would collapse. But in a way, prosecutors are also a kind of priest – they are the ones who perform exorcisms in our society. They find the evil among us and they remove

\textsuperscript{27} Id. at 117.
\textsuperscript{28} Id. at 69.
it so that the rest of us can thrive. We can fight about how they should or shouldn’t punish the in-
betweens – the people who are just bad and not evil – but that debate will never end. A
prosecutor must be aware of it, must pay attention to the consensus in society and bow to that
consensus in the questionable cases (which, granted, are most of them). But at the base of it all, a
prosecutors most fundamental job is to protect society from evil – the kind of evil that no one
debates about. The kind of evil that is destructive in the most fundamental sense.

D. Paul Butler

Unlike Maistre, Paul Butler is the most recent and pop-culture friendly of the
prosecutor’s critics. He does, however, strike many of the same chords that Maistre did. The
major difference is in the context – Paul Butler’s critiques are very limited to the specific,
modern problems he sees in the criminal justice system, namely the racial inequality and high
incarceration rates in the American criminal justice system. That is the subject of his book, *Let’s
Get Free: A Hip-Hop Theory of Justice*, in which he devotes a chapter to prosecutors – the
executioners of the problematic system.

i. His Arguments

As far as Butler is concerned, all the justifications for prosecutorial conduct can be
eviscerated fairly easily. In his book, he attempts to debunk the three main claims made by his
students who think “they can do the most good as an assistant district attorney.” 29 Those three
claims are: 1) “prosecutors have a lot of power,” which enables them to do a lot of good, if their
heart is in the right place, 2) “prosecutors help victims,” and 3) “we don’t want prosecutors’
offices to be too hard core – or too white.”

Butler attempts to discredit the first claim, that prosecutors have power, by using his own

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experience as a “baby prosecutor” at the U.S. Attorney’s Office in Washington DC, where he practiced for all of three years. He states that, “here’s the bottom line: rather than having ‘power,’ line prosecutors have delegated authority that is subject to several layers of review.”

To dispute the second claim, that prosecutors help victims, Butler states unequivocally that “[i]f you are a typical prosecutor, you will spend most of your time locking up poor people… Prosecutors help victims… That’s the goal, anyway… It’s not, however, what most prosecutors spend most of their time doing.” As for the third claim, Butler summarily dismisses one part of it, stating “[a]s a practical matter I do not think that all-white prosecution offices are likely in cities that have a substantial minority population.” The other part of the third claim, that prosecution offices will become too “hard core” if “liberals… refuse to work as prosecutors,” Butler attacks through analogy:

Here’s a metaphor that is extreme but I hope revealing: I understand the argument that, back in the day, slave driving would have been an acceptable job for abolitionists… Progressive slave drivers could brandish the whip more sparingly, and perhaps on occasion cast a blind eye while an especially deserving slave escaped… When good people work in unjust regimes – Vichy France under the control of the Nazis, for instance – they must engage in a difficult calculus of the costs and benefits of their participation. It is difficult to contain injustice when one participates in it.

Butler has therefore, in his opinion, successfully discharged all of the most relevant and convincing arguments presented by good people who want to become prosecutors.

To this, Butler adds a brief discussion of “what happens to progressive prosecutors.” He argues that even the good people who “go into prosecution with a progressive agenda get...
derailed for three reasons: the adversarial system, law-and-order culture, and the politics of crime.” 36 This, he explains, means that even those who become prosecutors with the “right” (i.e. liberal) intentions, will be overcome by a competitive desire to win their cases, a culture that revolves around punishment, and a political climate that is forever trying to be “tough on crime.” 37 Butler argues that no prosecutor can overcome these societal pressures. He states that “the line prosecutor who goes against the ‘get tough’ ethos too forcefully not only risks losing her job but also risks causing her boss to lose his.” 38

Thus, for Butler, even people who become prosecutors with the best of intentions will be forced to give up and become bad people, who participate in an unjust system of oppression. Butler sums his theory on prosecutors up by stating that, in his opinion, “[t]hose who work inside can tinker with the punishment regime, but they probably cannot overhaul it.” 39 This reveals a lot about his ultimate goals, which he then articulates more specifically: “Let’s say that we have two goals. First, we seek to reduce incarceration substantially... Our second object is a major reduction in racial disparity in incarceration.” 40

ii. My Response

By revealing his two major goals – lowering incarceration rates and reducing racial disparity – Paul Butler illustrates much more than he intends to about his position on prosecutors. His entire “calculus,” as he calls it, of whether a good person can be a prosecutor, is based on these two premises being not only given, but also accepted as the “highest,” “best,” and “most good” of any moral objective. 41 For Butler, the definition of a “good person” is someone who

36 Id. at 114.
37 Id. at 114-120.
38 Id. at 118.
39 Id. at 120.
40 Id. at 121.
41 Id. at
holds these ideals as the most important. In his view, the “good people” who are trying to be “good prosecutors” are the ones who would work, above all else, toward racial equality and reduced punishments in the criminal justice system. He discusses no other goals that could be held by “good people,” and therefore does not admit to any other way that a person might be “good.”

As to the greater goal of public safety, which I would argue is among the most common “claims” used to justify a prosecutorial career (it is certainly why I want to be a prosecutor), Butler spares two sentences: “If the punishment response had a substantial benefit to public safety, complicity might be warranted. It does not.”\textsuperscript{42} He cites no authority for this declaration, and he does not elaborate. However, if we accept his challenge, then we only need to prove that a punishment response, provided by prosecutors, offered some substantial benefit to society in order for Butler to grant that some participation in the system might be acceptable. As far as I am concerned, even one Robert Williams in the world necessitates society’s ability to make a punishment response. And I believe that preventing another Sarah Brown, by prosecuting Robert Williams and sending him to prison forever, provides a substantial benefit to society. In my experience, the prosecutor in that case did more than “create[] a level of suffering for the prisoners, their families, and their communities – that should be intolerable in a civil society.”\textsuperscript{43}

It is true that the prosecutor in that case made Robert Williams suffer. But it is also true that she vindicated the suffering of Sarah Brown. But as far as Butler is concerned, her aspiration to keep Sarah Brown (and everyone else) safe from Robert Williams does not make her a good person. Instead, the fact that she made Robert Williams suffer, by going to prison, makes her a bad person. Under Butler’s analysis, this is true even though Robert Williams own father turned

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 121.
him in, and the prosecutor without a doubt made Robert Williams’ community safer. She is still a bad person. This is especially true because Robert Williams is black, and will therefore contribute to the racial disparity in American prisons. But as far as I’m concerned, and I would venture to bet that for Sarah Brown as well, his skin color was not an issue. It was what he did that mattered. And the fact that the prosecutor made Sarah Brown and the community safer makes the prosecutor a good person.

It is true that Butler has a point, and the data to back it up, about racial disparity and incarceration rates in America. His entire book is devoted to proving that point. But proving that our punishment system has problems (which, I agree, need to be addressed), is not the same thing as proving that our system is entirely unethical, with no redeeming qualities. Racial equality and lower incarceration rates are important goals, but they are certainly not the only goals that a “good” person can have when he or she becomes a prosecutor. Because of Butler’s limited view about “good” and “bad,” he can also have only a limited critique of prosecutors. Since he refuses to acknowledge that anyone who is not working exclusively to repair racial equality or sentence reduction could be a “good” person, he necessarily ignores a number of crucial arguments that people use to prove that “good” people can do “good” work as a prosecutor – the Sarah Brown example is only one of many examples.

Butler candidly admits that his experience, and therefore his critiques, are limited to the “urban prosecutor [who] spends about half of her times on drug cases.”44 His arguments do not even apply, therefore, to prosecutors in the 27 states that are not on a coastline.45 Or to the thousands of prosecutors (like those with whom I worked in the Sex Crimes Unit) in the U.S.

44 Id. at 109.
who do not work on drug crimes. Additionally, his analysis and conclusions about incarceration rates and racial disparity depend on his unsupported assumption that a drug offense is a “crime that, at least for users, has no victim.” This seems a leap to me, especially for someone who is concerned about the poor and minority communities. In Montana (a state which Butler effectively ignores) over half of the children in the foster care system are there because of their parents’ meth abuse. Those children would argue that drug use is not a victimless crime.

Finally, Butler makes his assertions about prosecutors, and supports those assertions, in one chapter of his book, which occupies twenty pages. It is also interesting that Paul Butler spent the same amount of time in a prosecutor’s office as I have. And yet, the thought of me being invited to give my insights as part of a panel on prosecution is laughable. If I were to turn in a paper that looked like that chapter of his book (to any regular law school class), every law school professor would question my source of authority. I would most likely fail the class. And yet, Paul Butler’s book, and the accusations it contains, have been heralded as a “must read” by Harvard Law Professors and generally accepted by pop-culture as a worthy explanation for why good people cannot be prosecutors. Needless to say, I find his assertions unfounded, incredibly limited, and basically non-responsive to my reason for being a prosecutor.

46 I attempted to find the actual number of prosecutors in the U.S. but was unsuccessful. It could be millions for all I know, when you consider all the state, county, and federal levels, as well as AG’s offices, and congressional investigators.
47 Butler at 109.
48 I am not alone in this view, although it is a minority opinion. See e.g., Hon. Charles P. Kocoras, RACE-BASED JURY NULLIFICATION: REBUTTAL, 30 JMARLR 929 (1997).
50 With about 350 words per page. Id. at 101-121.
51 The best I can tell (he doesn’t make the point openly) Butler spent about three years at the DC USAO, the later few months of which he spent fending off an arrest for assault. Id. at 3. I spent over two years at the Manhattan DA’s Office in Manhattan, and a year at the USAO in Montana and Colorado (none of which was spent fending off an arrest, but I am a white girl).
52 Id. at back cover.
E. Abbe Smith

Abbe Smith presents a much more difficult critique than Paul Butler in many ways, although a lot of their substantive problems with prosecutors are the same. Beyond the limited power or discretion, the desire to “win” cases, and the political and cultural pressures, Smith adds two additional points to Butler’s arguments. Also, unlike Butler, Smith makes it clear that she is not “advocating the end of law enforcement, the abolition of prosecutors, or the dismantling of the adversary system,” which is what Butler appears to be doing.

i. Her Arguments

The two main points that Smith discusses are 1) the difficulty of being a whistleblower, when prosecutors witness injustice, and 2) the moral righteousness that can develop as a result of “doing justice” every day.

Smith frankly discusses the basic injustices that a prosecutor can witness on a daily basis, and how hard it would be for a prosecutor to either expose or correct those injustices. Her main concern is police perjury: “there is no good justification for prosecutor tolerance of police perjury. It may be that in order to be a prosecutor you must be willing to call lying cops to the stand. Any prosecutor who disputes this is either naïve or dishonest.” Smith also explains the troubling paradox for a prosecutor who wants to address this issue: “The prosecutor who

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53 (perhaps because her resume is so much more respectable and her writing is so much more professional)

54 I would like to accuse Butler of stealing all of Smith’s material, since she wrote it all first, but he cites to her on a regular basis so I can’t. Instead, I will just say that he certainly reiterates it, and adds very little that is new or different, other than the story of his arrest, the color of his skin, an updated data set, and a bunch of hip-hop lyrics at the start of every chapter. Therefore, most of the arguments made in the previous section should really be credited to Smith and not Butler. But, for brevity’s sake, I will not repeat them here. I will only discuss Smith’s arguments that Butler ignores.

55 Abbe Smith, “Can You Be a Good Person and a Good Prosecutor?” Georgetown Journal of Legal Ethics 13 (2001). This seems especially true when you look at Butler’s position on race-based jury nullification, which would effectively let a black man, who unquestionably committed a crime, go unpunished based on nothing other than his skin color. See Butler, Ch. 4, Jury Duty: Power to the People, 57-78.

56 Smith, at 7-8, 10-12.

57 Id. at 11.
becomes known for questioning police officers’ honesty, or worse, for dismissing cases or seeking sanctions against lying cops is not going to get a lot of police cooperation on his or her cases.”58 Thus, in Smith’s opinion, a prosecutor is stuck between a rock and a hard place – either unable to do her job or forced to accept perjured testimony.

Additionally, Smith points out those prosecutors must witness, on a fairly regular basis, the ineptitude of defense counsel:

Surely, prosecutors have an ethical obligation to do something — and not just take advantage — when they encounter a plainly ineffective defense lawyer. There are instances of incompetent, drunk, hung-over, and sleeping lawyers representing the indigent accused in every courthouse in the country, but there is never any mention of the other institutional actors who are present doing anything about it. The prosecutor clearly knows what is going on … why don't they at least approach the bench and make a record of the incompetence they observe?59

As Smith points out, every criminal defendant has a constitutional right to a fair trial, and competent representation, so it is in the prosecutor’s best interest to insure that she doesn’t have to retry the case.60 But, that constitutional requirement also “doesn’t require that defense counsel be good,”61 and the danger of a trial being overturned is very slim. There is also the problem that, “[m]ost defendants are probably guilty anyway,” which means that, as long as the prosecutor is otherwise “ethical” there is no harm done when that defendant receives incompetent counsel.62

As Smith explains, however, guilty or not, “this is the sort of thing that strikes at the heart of our system of justice, raising questions about its legitimacy.”63 If a conviction cannot be obtained fair and square, then it should not be obtained at all.

Beyond the difficulties of discovering and correcting legal injustices, Smith also

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58 Id.
59 Id. at 11.
60 Id.
61 Id.
62 Id.
63 Id.
comments on prosecutors’ tendency to take the “do justice” portion of their job description a little too much to heart. She explains that “too often prosecutors believe that because it is their job to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they and only they know what justice is.” For Smith, this morally-righteous attitude can translate into a tendency to judge everyone, and a loss of empathy for a defendant’s particular situation. Because they do not represent individual clients, but rather a concept – “the government” or “the people” – they lose the defense attorney’s ability to see the human in the criminal. Prosecutors can thus care more “for what happened over why it happened, for the trees over the forest.”

ii. My Responses

What Smith says about police perjury and defense attorney ineptitude troubles me. I would like to be one of those prosecutors who would go up to the bench and make a record of the injustice I am witnessing, but I also don’t want to lose my job, or have my other cases compromised. I think the solution lies in training – not just of prosecutors, but of police officers as well, and in office culture.

I was lucky enough to work for several years in an office run by what Smith calls “unorthodox, independent-minded, or ‘progressive’ prosecutors… Manhattan District Attorney Robert Morgenthau.” In that office, there was a constant pressure, not just in name, but in actual practice, to discover and punish police misconduct. Additionally, every prosecutor I

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64 Id. at 7-8.
65 Id. at 7.
66 Id. at 8.
67 Id.
68 Id.
69 Id. at 12. I think the fact that my understanding of prosecutors’ offices, and my desire to become a prosecutor, started in such an office, can perhaps not be overstated. Apparently, my experience is not the standard. But, because of it, I have formed my convictions and practices a certain way, and I believe that progressive prosecution is possible.
observed in that office really worked to discover the truth, not what was best for her case. I saw many cases outright dismissed because a prosecutor found what she thought was exculpatory evidence. Conviction rates were not tracked by anyone, supervisor or otherwise, and promotions were not based on how many cases an individual had won. In fact, I once asked my boss how many cases she had tried and won in her career (about 8 years at that point) and she couldn’t tell me. I think that, if a culture like that one were promoted in every prosecution office, then there would be no adverse consequences to taking the kind of actions Smith describes. But such an atmosphere can never be created if prosecution offices are not filled with progressive individuals.

Similarly, if police agencies worked, not to make arrests or gain convictions, but to seek truth and promote integrity, there would not be any backlash from police if a question of misconduct arose. It is possible to promote an environment where transparency and inquisition is encouraged (without compromising the public safety function), and where a check or double check of a police officer’s work or testimony was not considered an insult, but a regular part of doing business. The Special Victims Squad of NYPD detectives was one such agency with which I worked. Those detectives expected their testimony to be questioned, and encouraged their fellow detectives (there were maybe 15 of them in the squad), their supervisors, and the prosecutors, to question their findings or methods. Those detectives notified a prosecutor as soon as they could after catching a case, to make sure that all their moves were both legally sanctioned and double checked for accuracy. Procedures for safeguarding evidence were strictly enforced, and more than once I witnessed a detective explaining not only to the prosecutor, but also to a judge, how a certain piece of evidence might have been compromised. The atmosphere in that

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70 I can’t obviously speak to the entire NYPD, but that particular squad was exceptional.
squad was one of friendly cooperation, and truth seeking, rather than bad-guy-catching.\textsuperscript{71} So, needless to say, I think it is possible to foster an environment where there is also not a backlash from police when a prosecutor seeks to prevent perjured testimony or discover misconduct.

I also think the fact that “[m]ost of the defendants are probably guilty anyway”\textsuperscript{72} should not be overlooked. This is a very big problem for prosecutors. I watched a defendant, who had a history of abusing young girls, go free because of New York’s very strict laws on the inadmissibility of prior crimes, even in sex abuse cases. Every day we judge people by their prior actions – it’s how we know whether to trust someone with a key to our house, or give them a babysitting job – but we cannot allow the jury to do the same. I know that if the jury in this case had been aware that the defendant had been convicted of doing the same thing to four other girls prior to that incident, they would have trusted his charming demeanor a little less.\textsuperscript{73}

Be that as it may, the point is that prosecutors really worry about someone who is dangerous getting off on a technicality, despite their obvious guilt, and going on to hurt somebody else. In the case of real innocence, or even questionable innocence, this is obviously not a problem, and an acquittal is appropriate. And I will even concede that it is absolutely necessary to the basic functioning of the system that the prosecution be put to its burden of proof, and forced to make their case, even in the face of obvious guilt. But a dangerous person, free to make another victim, in the face of what everyone (including the defense attorney) agrees is obvious guilt is something else. It is a prosecutor’s worst nightmare.

This is what makes prosecutors wary of defense attorneys, rules of evidence, and their own fallibility. And, as much as I hate to admit it, I believe this is where prosecutorial

\textsuperscript{71} I think the particular nature of sex crimes may have attributed to this. They may have been burned one too many times by cases that appeared one way and turned out another to trust too much in anything.

\textsuperscript{72} Smith, at 11.

\textsuperscript{73} This was especially frustrating when I came to Colorado and realized that, in state court here, the information would have been admissible – which made me feel that the acquittal was based only on an accident of geography.
misconduct can begin – in the earnest, and well-meaning desire to prevent another casualty. I don’t say this to condone the behavior, but just to explain. Let me repeat – I DO NOT CONDONE THE DESIRE TO GET A CONVICTION AT ALL COSTS. But I do understand how it could come from a place of good moral intentions, however misapplied. I think the conversation would be improved if we could come clean about this, and critiques could admit that not all of the potential missteps of a prosecutor come from a moral void, or a malicious intent. It shouldn’t excuse anything, but it might help us correct the underlying problem – the ten, dangerous, guilty men that go free to prevent the one innocent man from going to prison.

At the risk of being misunderstood, let me again be clear: I am not advocating for the opposite – that ten innocent men be imprisoned so that one guilty one does not go free. I am just suggesting that perhaps addressing prosecutors’ fears about the ten dangerous men going free might be a more productive way of preventing well-intentioned prosecutors from falling off the wagon and allowing miscarriages of justice. A prosecutor is much more likely to stand up to defense attorney ineptitude, police perjury, or any other perceived inequality in the system if she believes the defendant is innocent, than if she believes he is truly guilty. I agree with Smith that a prosecutor should stand up regardless, because the government must always be held to the highest standards, but I think it is much more likely that a prosecutor would actually do so if it would end in the “just” result – an acquittal for the right reasons (i.e. actual or even questionable innocence).

In response to Smith’s accusation that prosecutors can make their justice-finding roll into an excuse for moral or self-righteousness, I also believe that she has a point, but not an insurmountable one. It may be apparent from my earlier discussion that sometimes prosecutors can begin to feel this way, not intentionally, but because they feel – as veterans do – that they
have seen something others haven’t. They cannot, however, say that defense attorneys have not seen that same evil. Defense attorneys have, in fact, not only seen that evil, but had to defend it – a feat for which I truly admire them. Without that kind of courage our system would collapse. And Smith does successfully point out that defense attorneys are often more empathetic, and more able to articulate “[i]ndividual circumstances, the forces that cause an event to happen, and the broad context of the matter…”

This is precisely why peaceful, cooperative communication is key. Prosecutors and defense attorneys cannot simply stand on either side of a Berlin wall and hurl insults and accusations at each other. A prosecutor must be able not only to hear those extenuating factors that a defense attorney is adept at finding, but actually adjust herself and her case accordingly. I think the best way to do this would be for prosecutors and defense attorneys to switch sides as often as possible.

This is why it was absolutely astounding to me, when I came to Colorado, to hear the head of the Colorado State Public Defenders, Doug Wilson, say that he would not even consider interviewing anyone who had prosecutorial experience on their resume for a position in his office. Having worked in several prosecutors’ offices, and also having spent a year defending indigent clients in CU’s Criminal Defense Clinic, I can unequivocally say that being a defender will make me a better prosecutor, and I believe the opposite is true as well. Just having an open dialogue with my fellow students, some of whom wanted to be prosecutors and some of whom were die-hard defenders, made us all more aware of the other’s position. And I even had one friend tell me that she fully expected to call me, once she became a public defender, to “run

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72Id. at 8.
73Again, I am not the only one to advocate this position. Professor Pizzi, who teaches criminal procedure, has consistently held that the English system, which permits this side-swapping, is much preferable to our own.
74Doug Wilson stated this to our Criminal Procedure class when he came to guest lecture – Spring 2010.
things by you so you can tell me if I’m being unreasonable.”77

Such open communication and understanding has to be the best policy for everyone involved. As Smith points out, the trees can be lost for the forest, and I would venture to say that the forest can also be lost for the trees. It is imperative that old-fashioned policies that draw lines in the sand between “kinds” of people be abandoned in favor of fluidity and exchange. This is the only way to prevent a prosecutor from becoming morally righteous – if she is forced to not only see the validity of the other side’s position, but actually advocate for it. If I ran the world, such exchange programs would be mandatory. Every prosecution office would be forced to take CLE’s from the public defender and vise versa. In addition to preventing moral stagnation, this would also create a mutual responsibility for providing a just result. If we all considered ourselves equally and collectively responsible for “doing justice” then no one would have a monopoly on it. I think this is not only imperative, but inevitable in an age where over 90 percent of cases never go to trial, and thus never face a truly adversarial test.78 This is also the model envisioned by drug courts, and other integrated, result-based systems that have sprung up over the last few years.

With all of this in mind, I think it is obvious that, while Smith’s arguments against prosecutors are certainly more troubling than those that Butler presents, they are also not insurmountable. Her critiques of prosecutors are largely based on a situation that I believe is already changing, and which could only be improved by adopting the policies I suggest.

F. Conclusion

When you look at both Abbe Smith, Paul Butler, and even Maistre’s executioner to some

77 Melissa Seagers, a fellow law student and friend.
78 Suthers, at 82.
extent, the main critique that people have of prosecutors is that they participate in, and thus perpetuate what the critics see as an unjust regime. For Paul Butler and Abbe Smith the present regime is unjust because it has systematically failed to improve the lives of the poor minorities in America:

> We live in an extraordinarily harsh and punitive time, a time we will look back on in shame. The rate of incarceration in this country, the growing length of prison terms, the conditions of confinement, and the frequency with which we put people to death have created a moral crisis. Although, arguably, all those who work in the criminal justice system have something to do with its perpetuation and legitimacy, prosecutors are the chief legal enforcers of the current regime. 79

The failure of the system is what creates the fundamental problem. If the system were perfect, no one would have a problem with the prosecutors for participating in it. But because the system is flawed, the prosecutor must also be flawed.

Therefore, as Smith counsels “those with an interest in prosecution should think hard about prosecuting under current conditions and appreciate the moral implications of such a choice.” 80 The moral implications Smith refers to do not rise directly from the job of a prosecutor per se, but from the job of a prosecutor in this system which she believes is flawed. For Butler, the answer is the same, “working as a prosecutor… makes one complicit with mass incarceration and racial disparities.” 81

The question for these critics, therefore, is not really “can you be a good person and a good prosecutor?” 82 but rather “can you effect the ‘right kind’ of social change as a prosecutor?” For them, the fact that the system is flawed is a proven conclusion, and given that conclusion, and the fact that a prosecutor does not have the appropriate power or tools to fix it, one should

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79 Smith, at 12.
80 Id. at
81 Butler, at 120.
82 The title of Smith’s essay.
not become a prosecutor. In order to except their criticisms, then, I must be willing to accept 1) that the system is flawed, 2) that the flaws can and should be fixed, 3) that there is no way to fix the flaws, or even positively affect them, from inside that system (as a prosecutor), and 4) there are no other redeeming reasons to be a prosecutor.

While there are certainly people who would take issue with the first two premises, I am willing to accept that they are true. Both Butler and Smith have provided sufficient evidence to convince me of the problems that exist. It should be clear from my deeper analysis of their arguments above, however, that I am not convinced that there is no way to even address the problems from inside the system, as a prosecutor. And, again, I am not the only person who hold this view:

Law students who are interested in public interest careers and who know of Freedman’s background in civil liberties and indigent criminal defense, sometimes express surprise when he urges them to consider becoming prosecutors. In fact, however, Freedman believes you can do more good as a conscientious prosecutor than as a zealous criminal defense lawyer. A defense lawyer, for example, may be able to expose unlawful law enforcement and prosecutorial abuses; a prosecutor of “honor, temperament, and professionalism,” however, can prevent it from ever happening.\(^83\)

Because I believe, even over the objections of the critics, that I am not only capable of preventing misconduct, but also of improving the system as a whole – by changing office and law enforcement dynamics, exposing inequality and ineptitude where I find it, and promoting understanding and communication between prosecutors and defense attorneys – I do not accept the third premise.

Additionally, I do not accept the fourth premise. As the story of Sarah Brown, and my reaction to it, should have showed, I truly believe that there is evil in the world that is worth combating. I hold it to be self evident that all men deserve to be safe. Until we can achieve basic,

\(^{83}\) Monroe Freedman and Abbe Smith, UNDERSTANDING LAWYERS ETHICS (4th ed.) 320 (quoting Irving Younger, Memoir of a Prosecutor).
bodily safety from that kind of evil, I think it is worth my time to try and protect people from it. That is a point that I see missing from all of the analysis of all of these critics. They simply cannot admit to the validity of the most basic purpose of a prosecutor.

Doesn’t punishing Robert Williams’ evil count for anything? Can’t the desire to help Sarah Brown make me a good person? I really believe that those most basic instincts, and their most basic function in society – public safety, can be a good reason to be a good prosecutor. It is true, I will have to work in flawed system, but every system is flawed. We have never, as humans, been able to perfect the art of punishment. We are always trying to make it better, to use a finer and fairer instrument to discern guilt from innocence, and match the punishment to the crime. But we are imperfect creatures, and so it’s a lot to ask for us to make a perfect criminal justice system. But that doesn’t mean that we should stop trying, just because we haven’t gotten it right yet. And I think there is a good reason to keep trying – because some people do need to be punished. Some people do need to be separated from society. Otherwise society will cease to function. None of us will be safe and all sorts of chaos will ensue.

No one has convinced me yet that there is something wrong with the basic concept of maintaining public safety. And therefore no one has convinced me that being a prosecutor will make me a bad person. It is true, it will take a lot of work, and moral control, and probably a certain amount of rebellion, to be a prosecutor in a flawed system without succumbing to its flaws. But I really think I can do it. I really think I can be a good person and a good prosecutor.