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Are Prosecutors Born or Made?

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Are Prosecutors Born or Made?

ABBE SMITH*

Like a lot of prosecutors, I possess a zeal that can border on the bloodthirsty . . . I put a lot of people in prison, and I had a great time doing it . . .

Now I describe myself as a recovering prosecutor—"recovering" because one never quite gets over it. I still like to point my finger at the bad guy.

Paul Butler, former prosecutor¹

I have never yet tried a case where the state's attorney did not say that it was the most cold-blooded, inexcusable, premeditated case that ever occurred. If it was a murder, there never was such a murder. If it was a robbery, there never was such a robbery . . . If it was a larceny, there never was such a larceny.

Clarence Darrow²

For reasons psychological, political, or both, being a prosecutor did not appeal to me, so criminal defense was the only way to go.

James Kunen, former public defender³

INTRODUCTION: A FEW STORIES ABOUT PROSECUTORS

The problem is there are too many examples to choose from. In more than thirty years of criminal law practice—from public defender in Philadelphia to professor running a criminal law clinic in New York, Boston, and DC—I have had countless encounters with prosecutors and countless conversations. Early in my career, the encounters and conversations were noteworthy—something to rail about back at the office, or to "dine out on" with friends. Soon enough they became commonplace, not even worthy of mention, just the way things were.

But it's important to pick a few examples and talk about them. Here's a recent one:

A student and I were appointed to represent a young man accused of trespass. I'll call him Malik. Malik had just turned nineteen, but seemed younger. He

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looked like Michael Jackson circa 1974: same baby face, same hairstyle, similar sweet smile. He had no criminal record, was in the twelfth grade, and planned to graduate high school with a real diploma, not a GED. When we asked him what he wanted to be when he grew up, he said, “a fireman.”

Malik had been taken from his mother when he was six or seven. There was evidence of abuse and neglect, probably related to his mother’s drug use. He had been in the foster care system ever since, and was now living with a foster father in Baltimore, about an hour away from D.C. Still, he regularly visited his mom in the old neighborhood. One of the things you learn in this work is that people love their mothers, no matter what. It’s a powerful tie.

Malik was arrested at the elementary school playground around the corner from his mom’s house. He was charged with trespass for being at the playground two hours after closing. When police came upon him on that warm summer evening, Malik was sitting on a bench talking to a friend. “We was coolin’ and talking about our problems,” Malik told us. When the police asked to search him, he consented. When they told him to put his hands on his head, he complied. But when they told him he was not supposed to be in the park after hours, he ran. They caught him in the school parking lot. When they asked his name and date of birth he gave a phony name and said he was born two years earlier than his real birth date, making him a juvenile.

I don’t know why the police arrested Malik instead of telling him to go home—or asking whether he had a place to go home to. Maybe they wanted to punish him for running, giving a false name, and lying about his age. Maybe they just didn’t like the look of him: a young black male hanging out. But, they didn’t arrest Malik’s friend, who didn’t look much different; they sent him home.

Police officers have enormous authority on the street, and they don’t always temper their authority with wisdom. One of my favorite depictions of the police is a New Yorker cartoon that features a police car emblazoned with the words WE’RE COPS AND YOU’RE NOT.

But, prosecutors are supposed to be more restrained and thoughtful. They are

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5. See Marc Maurer, I Was Stopped, But Not Frisked, HUFFINGTON POST Feb. 8, 2012, http://www.huffingtonpost.com/marc-mauer/i-was-stopped-but-not-fri_b_1263610.html (recounting a white, middle-aged executive director of a criminal justice reform organization being stopped by police while walking to the gym at night, and warned to be careful because he was an “easy mark”—a very different police encounter than what most young black men experience).

6. See generally James Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521 (1981) (arguing for the principled exercise of prosecutorial discretion); see also Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940), in 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 7 (1940) ("The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the
lawyers, after all—professionals “learned in the law”—not cops on a beat. They are supposed to exercise their authority with wisdom and “justice.”

One of the most important prosecutorial decisions is the charging function. This “formidable” prosecutorial power sets everything else in motion. As one former federal prosecutor put it, “The power to . . . prosecute is the power to destroy.” When prosecutors consider whether to pursue a criminal prosecution, they are supposed to ask not only whether they can prove an offense has occurred, but also whether it would be just to do so.

Unfortunately, the United States Attorney’s Office for the District of Columbia had no problem “papering” this case and went forward with the prosecution. At the preliminary arraignment, they did not oppose Malik’s release, but asked for

citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”

8. See McNabb v. United States, 318 U.S. 332, 343 (1943) (“A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary.”).
12. See Davis, supra note 11, at 5 (“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.”); see also Bennett L. Gershman, The New Prosecutor, 53 U. Pitt. L. Rev. 393, 448 (1992) (describing prosecutors as “... the most pervasive and dominant force in criminal justice”).
14. See Green, supra note 10, at 607-08 (observing that “doing justice” as to whether to prosecute a factually guilty person or defer prosecution means seeking a “‘just,’ and not necessarily the most harsh, result”).
and obtained an order that Malik "stay away" from the playground, report weekly to the local pretrial services agency, and drug test weekly as a condition. All this, even though Malik was currently living in Baltimore, had no money of his own, and was in high school. Our attempt to modify these conditions was slapped down.

A few weeks after arraignment, we had a "status hearing" at which defendants either plead guilty or obtain a trial date. We spoke to the prosecutor assigned to Malik's case prior to the hearing. We proposed that he "nolle pros" the case, or, in the alternative, defer prosecution by placing the case on the "stet docket" so that Malik could earn a dismissal if he stayed out of trouble for a few months. The prosecutor looked like we were asking him to drop a first-degree murder case: "No," he said. We then asked him to reconsider the conditions of Malik's pretrial release—the weekly in-person reporting and drug testing, which, together with court appearances, was causing Malik to miss school and was a financial burden. "No," he said again.

We tried to reason with him. Malik was essentially a kid, still in high school. Surely the prosecutor—who looked to be in his late twenties or early thirties—could relate to a teen getting into a little mischief. Plus, this was trespass of a public playground. I mentioned my own teenage son. Of all the places he might hang out I'd pick a playground any time, I said.

None of this had any impact. The prosecutor insisted that Malik had broken the law and there was sufficient evidence to prosecute the case. He was especially unmoved by our attempt to get him to relate to Malik. "Your client ran from the police and lied to them," he said. We didn't understand why this was a deal breaker. "Didn't you ever do anything wrong as a kid and try to talk your way out of it?" we asked. "I would never lie to the police," he declared.

The court went along with the prosecutor and refused to change the conditions of release. We got a trial date.

On the day of trial, there was a new prosecutor, a woman in her late twenties. We tried again for a nolle pros or stet. We pointed out that this would be a jury trial, and some DC jurors might be annoyed to have their time taken up with such a silly case. She said, "No." When we pressed, she reluctantly agreed to talk to a supervisor. But he said no, too. So did another supervisor who came to observe

15. "Nolle pros" is short for nolle prosequi—a Latin phrase that means a case will not be prosecuted. "Stet docket" refers to an inactive docket maintained by the state's attorney's office.
16. See BUTLER, supra note 2, at 121 (arguing that to prosecute "simply because someone is 'guilty' of the charge is to be an active participant in a system that defines too many activities as crimes, enforces its laws selectively, and incarcerates far too many of its citizens").
the trial.

So we went forward. We litigated pretrial motions, selected a jury, made opening statements, called and examined witnesses. The defense theory was that Malik did not know the playground was closed: the gates were unlocked, there was no sign with hours of operation at the entrance Malik used, and no one had told him to leave. Malik looked especially handsome in a borrowed shirt and tie. To make a long story short, the Government dismissed the case right before closing arguments—before the judge granted a motion for acquittal. The Government’s own witnesses had provided evidence that supported the defense.

During the trial, one juror—an older white woman—tried to pass a note to the judge that read: “This is the worst waste of taxpayer time and money I have ever seen.” After trial we met with the jury, along with the prosecutor. Juror after juror questioned why the case had been brought. One juror—a middle-aged African American engineer who worked for the CIA—asked the prosecutor, “Why would you take a young man on the verge of adulthood and put him through a criminal trial for being on a playground? Why not give this disadvantaged young man the services he needs?” When the prosecutor pointed out that Malik had run from and lied to the police, no one cared. Some rolled their eyes. One pointed out that this is what children do. Another pointed out that Malik had good reason to run: if he was kicked out of foster care at age nineteen he would literally have nowhere to go. Another said he probably lied about his name and age because he was scared of going to an adult jail. When the prosecutor claimed she had a “duty” to prosecute, jurors were disgusted.18

Here’s one from a few years ago:

In the course of representing a woman who served nearly three decades in a New York prison for a murder she did not commit,19 I contacted a high-ranking lawyer in the criminal division of the New York State Attorney General’s Office—a woman who happened to be married to a college classmate of mine. The case was a one-witness identification case—the sort of case that gives thoughtful people in the criminal justice system pause.20 Eyewitness misidentification is the single greatest cause of wrongful convictions in the United States, playing a role in more than seventy-five percent of convictions overturned through DNA testing.21

18. One more thing that seems worthy of note: the prosecutor’s mother attended the trial. She said she made a special trip because she had never seen her daughter try a case before. We couldn’t help but wonder how the prosecutor explained this particular prosecution to her mother. Was she proud of it? Was it a good example of why she had become a prosecutor?


20. See Green, supra note 10, at 637-42 (discussing the case of Jeffrey Blake, a man who was wrongly convicted of murder based on the testimony of a single eyewitness).

The Attorney General's Office had represented the State of New York at federal habeas proceedings, in which my client had initially prevailed, only to have that decision overturned. I figured the AG's office would have its own file and maybe some concerns about the reliability of the single eyewitness. The Attorney General was one of the most progressive in the country and my friend's wife seemed to share her boss's views.

The wife took my call, listened to what I had to say, and agreed to review the file. She made no promises, but said she'd call back. She did— with a depressing response. She said there was nothing helpful in the file and her office had "no doubt" about my client's guilt.

No doubt? Oh, for God's sake, I thought to myself. It must be nice to have no doubt, none whatsoever. Meanwhile, I doubted my tiniest judgments. I feel doubt reading a menu; I often regret whatever I order. But this prosecutor had no doubt about a one-witness identification case.

One more story:
A postgraduate fellow and I were in the middle of a child sex abuse trial when the prosecutor made a Brady disclosure. She had just learned that the child complainant, who had yet to testify, had made two previous accusations of sexual abuse that were determined to be "unfounded." I thanked the prosecutor for sharing this information and asked for a continuance to investigate the information. The prosecutor objected. Before the trial judge could rule—a judge known for siding with the Government who was apparently not about to break that pattern—I asked for a brief recess in the hope of persuading the prosecutor.

We went out to the hall. I tried not to sound self-righteous. I thanked the prosecutor again for the disclosure, noting that she had done the right thing under the Due Process Clause of the U.S. Constitution and ethical rules. But, I explained that I now had my own ethical obligation: to investigate what she had disclosed. I said I needed no more than a day or two, and would act

22. See supra note 10, at 638 n.133 ("Perhaps this should not have been surprising. When—as has occurred increasingly often with the advent of DNA evidence—exculpatory evidence is discovered sometime after a criminal conviction, prosecution witnesses recant, or the prosecution's proof is otherwise thrown into doubt, the typical prosecutorial response is denial: denial of the possibility that the new proof is legitimate, and denial of the possibility that the convicted defendant is in fact innocent.").


24. See id.

25. See Model Rules R. 3.8(d) ("The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .").

26. See Model Rules R. 1.1; 1.3 (2012) (requiring competence and diligence); ABA STANDARDS, Standard 4-4.1 ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").
expeditiously. I acknowledged that the “unfounded” findings might have more to do with problems of proof than the complainant’s credibility—that it was entirely possible the girl was a tragic victim of repeated abuse. But it was also possible that she was a troubled child who made up stories. I had a professional obligation to find out.

The prosecutor replied, “Well, it is my professional obligation to represent the People of the United States of America.”

I couldn’t help myself, the words tumbled out. “You must be exhausted,” I said.

I. SMUGNESS, SELF-IMPORTANCE, AND LACK OF IMAGINATION

These stories illustrate something disturbing about how many prosecutors think. The stories are not terribly remarkable—in some ways they are a dime a dozen. They involve prosecutors who are junior and senior, male and female, black and white. They may even involve prosecutors who spent time in a criminal law clinic in law school—either the kind of program I run or a prosecution clinic that seeks to develop thoughtful and enlightened prosecutors. 27

Each story features what can only be called a certain smugness. These prosecutors could not be surer of themselves or their cause, or more dismissive of a contrary point of view. It is hard to break through the complacency, certainty, and self-satisfaction. I understand this might be posturing: arrogance often masks feelings of inexperience or insecurity, and having all that power must be a burden. But it’s hard to feel compassionate in the face of so much smugness.

It’s also hard to have a meaningful conversation. Good defense lawyers use all of our powers of persuasion to try to break through—reason, emotion, humor, pathos. Mostly we do what we can to charm and cajole prosecutors to our way of thinking. I sometimes feel that I am a professional cajoler, or worse, a professional supplicant. I confess that, occasionally, I grovel. 28

27. See Stacy Caplow, “Tacking Too Close to the Wind”: The Challenge to Prosecution Clinics to Set Our Students on a Straight Course, 74 Miss. L.J. 919, 939-52 (2005) (discussing whether a prosecution clinic can “make a difference” and how to do it); Fred Klein, A View from Inside the Ropes: A Prosecutor’s Viewpoint on Disclosing Exculpatory Evidence, 38 Hofstra L. Rev. 867, 877-78 (2010) (arguing that the best way to teach future prosecutors to promote justice is through a prosecution externship course that focuses on ethics and values); Ellen Yaroshefsky, Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion, 19 Temp. Pol. & Civ. Rts. L. Rev. 343, 357 (2010) (urging law clinics to teach about “the emotional factors that drive decision making” and “affect . . . perceptions, choices, and decisions”).

The stories also reveal self-importance, lack of imagination, and cowardice.

The first story has it all. I cannot begin to understand what those prosecutors—and several were involved in the decision to prosecute Malik—were thinking. There is a complete failure of imagination: of life in an urban environment; the role school playgrounds play there, what it is like to be an impoverished urban teen, where kids might congregate when there isn’t a Chipotle or Starbucks down the block, the difference between trivial and more serious law breaking, and how a juror might regard the case. Every prosecutor involved in the case had an alarmingly narrow view of the law of trespass, the rules and practices of pretrial release, and their own ethical obligations. And there is something cowardly—as well as lacking in critical judgment—to “let a jury decide” instead of making the decision oneself.

29. See Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 GEO. J. LEGAL ETHICS 355, 376-80 (2001) (hereinafter Good Person, Good Prosecutor) (arguing that self-importance is an outgrowth of the prosecutor’s duty to seek justice). But see R. Michael Cassidy, What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice”, 82 NOTRE DAME L. REV. 635, 696 (2006) (“As elastic and amorphous as the ‘seek justice’ obligation may seem, it can be a source of professional inspiration and satisfaction for virtuous prosecutors who take it seriously.”).

30. See BUTLER, supra note 2, at 121 (referring to “empathic imagination” of the pain and suffering our punitive criminal justice system causes); see Smith, Good Person, Good Prosecutor, supra note 30, at 380-84 (discussing prosecutors’ “narrowness,” “cynicism,” and inability to imagine a point of view other than the one they hold).

31. But see Cassidy, supra note 30, at 648 (discussing courage as a key prosecutorial virtue—one “that enables an individual to do what is good notwithstanding harm, danger or risk to themselves”); see also Anthony Alfieri, Prosecuting Race, 48 DUKE L.J. 1157, 1242-45 (discussing “moral character”); see Bruce Green, The Role of Personal Values in Professional Decisionmaking, 11 GEO. J. LEGAL ETHICS 19, 59-60 (1997) (urging the exercise of “moral judgment”).

32. At least a half dozen prosecutors helped prosecute Malik: the prosecutor who “papered” the case, preliminary arraignment prosecutor, status hearing prosecutor, trial prosecutor, and two supervisors who were consulted at our urging.

33. The prosecutor was obviously incorrect when she claimed she had no choice but to prosecute Malik. See ABA STANDARDS, supra note 10, Standard 3-1.2 (b) (“The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.”).

34. See Bennett L. Gershman, The Prosecutor’s Duty to Truth, 14 GEO. J. LEGAL ETHICS 309, 350 (2001) (discussing the “moral courage” to decline prosecution); Green, supra note 10, at 643 (“[l]t may take a certain amount of inner strength (or strength of character) for an individual prosecutor to decide not to bring criminal charges or to dismiss criminal charges”); see also David Luban, Fred Zacharias’s Skeptical Moralism, 48 SAN DIEGO L. REV. 303, 316-17 (2011) (noting that legal ethics scholar Fred Zacharias thought it unethical for a prosecutor with doubts to “let the jury decide”).

35. For an example of a prosecutor who proceeded to a hearing—when ordered to do so by his superiors—but essentially “threw” the case by helping the defense, see Benjamin Weiser, Doubting Case, a Prosecutor Helped the Defense, N.Y. TIMES, June 23, 2008, http://www.nytimes.com/2008/06/23/myregion/23da.html?pagewanted=all (accounting prosecutor Daniel L. Bibb’s efforts to correct a wrongful conviction in the 1990 “Palladium” murder case). For competing views of the prosecutor’s conduct, see David Luban, The Conscience of a Prosecutor, 45 VAL. U. L. REV. 1 (2010) (praising the prosecutor for his principled concern about the wrongful conviction of two innocent men); see Stephen Gillers, 2011 Michael Franck Award
The second story reveals the smugness that comes with seniority. The high-ranking prosecutor did not refuse to review a case, but did so in a constricted way. She lacked the imagination to see beyond the case file and consider the fallibility of the criminal justice system and the possibility of innocence notwithstanding a jury verdict or appellate court ruling. Her cowardice was in failing to acknowledge that things are not always as they seem: some defendants found guilty turn out not to be.

The prosecutor in the third story might have been motivated by a desire to protect a child victim from the rough and tumble of the adversarial process, along with other institutional pressures. But how could she not see that her disclosure imposed a duty on defense counsel, or that investigation is how adversarial fact-finding works? Her blithe, self-congratulatory "I've done my part and now I'll oppose anything the defense seeks to do with it" is gallingly familiar. But her reaction to my entreaty for time to investigate—that she represents the People of the United States of America—is a truly memorable example of self-importance.

As I was writing this paper I began to feel anxious. Maybe I am being too harsh. Maybe I have a distorted perspective. Every ten years or so, I am called...
upon to write about prosecutors’ ethics,\textsuperscript{41} to sometimes fierce reaction.\textsuperscript{42}

Let me be clear. Of course, not all prosecutors are smug, self-important, or lacking in imagination. Over the years, I have been privileged to work with some very fine prosecutors: humble, modest, fair, open-minded, and compassionate, as well as excellent trial lawyers.\textsuperscript{43} The best of them understand that they are operating in an imperfect system.\textsuperscript{44} Even better are those who understand the context in which crime occurs and the gravity of criminal punishment.\textsuperscript{45} As one former federal prosecutor recalled:

As a prosecutor, if memory serves, I did not exult in the feelings of rightness and power because the defendants reminded me of people I knew and none were monsters. We were dealing with human beings who are imperfect and to some extent themselves victims—of themselves if not others—and who were suffering. To me, as exciting as the cops-and-robbers part may have been, the whole enterprise was tinged with sadness.\textsuperscript{46}

Still, I believe prosecutors bear some responsibility for mass incarceration, an obscene condition of American life that we will one day look back on in shame.\textsuperscript{47}

\textsuperscript{41} See generally Smith, Good Person, Good Prosecutor, supra note 30 (examining the morality of prosecution in a time of mass incarceration). Ultimately, I answer the question posed in the title: “I hope so, but I think not.” Id. at 396.

\textsuperscript{42} See, e.g., Cassidy, supra note 30, at 695-96 (“I must respectfully disagree [with the author’s 2001 article Can You Be a Good Person and a Good Prosecutor?]—not only because I know many good people who are also good prosecutors, but also because I know from firsthand experience that it is possible to resist many of the temptations brought upon prosecutors to cut corners, including pressure from the police, the public, and a daunting workload.”); Klein, supra note 28, at 871 (“Although the vast majority of prosecutors undoubtedly perform their work with dedication and adherence to the rules, the conduct of a small minority has served to tarnish the profession at least in the eyes of some.”); see also BUTLER, supra note 2, at 103 (suggesting the author’s article was about prosecutorial “character,” and stating that he disagreed that prosecutors are “‘bad people’”).

\textsuperscript{43} One of the best examples is a prosecutor who provided open-file discovery in a homicide in the Superior Court for the District of Columbia. He did not have to do so; the rules of criminal procedure in the District mirror the very restrictive federal rules for discovery. Compare Fed. R. Crim. P. 16(a)(2) with D.C. Sup. Ct. R. Crim. P. 16(a)(2). He did so because he believed it was the fair thing to do. See Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 Geo. Mason L. Rev. 257 (2008) (arguing for open-file discovery in criminal cases); see also Editorial, Justice and Open Files, N.Y. Times, Feb. 26, 2012, available at http://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html (urging open file discovery in both federal and state criminal cases as the only way to ensure that favorable evidence will be disclosed to criminal defendants in compliance with 

\textsuperscript{44} See BUTLER, supra note 2, at 101 (“When I stopped being a prosecutor I told my friends it was because I didn’t go to law school to put poor people in prison.”); Lenese C. Herbert, Et in Arcadia Ego: A Perspective on Black Prosecutors’ Loyalty Within the American Criminal Justice System, 49 How. L.J. 495, 502 (2006) (recounting a former prosecutor acknowledging that the criminal justice system “most often diserves Blacks”).

\textsuperscript{45} See BUTLER, supra note 2, at 102 (“The day to day work of the prosecutor is geared toward punishing people whose lives are already messed up.”).

\textsuperscript{46} Email exchange with a former prosecutor who wishes to remain anonymous (Feb. 11, 2012) (on file with author).

\textsuperscript{47} See generally Adam Gopnik, The Caging of America: Why do we lock up so many people?, The New Yorker, Jan. 30, 2012, at 72 (examining the unprecedented rise in incarceration in the US). As writer Adam
Prosecutors may not be responsible for the laws that have ratcheted up punishment, but they enforce them, often with little compunction. There would not be two million plus people in jail or prison—a figure that threatens our identity as a free society, and a racially just one—but for prosecutors routinely asking for jail sentences. As Professor David Luban puts it, “[T]he prosecutor is the gatekeeper of the system, the one who decides which cases go from the paddy wagon to the courtroom”—and, I would add, too often to the jail house.

In an effort to explore how other defenders feel—and because it turned out to be the most fun research I had ever done—I surveyed approximately fifty current and former public defenders. I asked them to estimate the percentage of prosecutors they have encountered in their careers whom they would not describe as smug, self-important, or lacking in imagination. I also invited them to share any thoughts the question stirred up.

The responses were fabulous. They were also vindicating. Apparently I’m not

Gopnik notes: “Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact...”, id. at 72.

48. See Butler, supra note 2, at 101-21 (noting that “locking people up” is part of the prosecutor job description, and arguing that prosecutors are “part of the problem”); Smith, Good Person, Good Prosecutor, supra note 30, at 363-75 (arguing that prosecutors play a key role in an overly punitive and racially biased criminal justice system).

49. As of the latest count, there are nearly 2.3 million people in prisons and jails in the United States. See U.S. Department of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 2009, available at http://bjs.ojp.usdoj.gov/content/glance/corr2tab.cfm (reporting that as of December, 2010, there are 760,400 people in jail and 1,524,513 in prison in the United States). Moreover, there are currently 7.2 million people under the supervision of the criminal justice system in the U.S.—either in jail or prison or on probation or parole. See id. We currently lock up more people than any other country on earth by far. See David Cole, Can Our Shameful Prisons be Reformed?, N.Y. Review of Books, Nov. 19, 2009, available at http://www.nybooks.com/articles/archives/2009/nov/19/can-our-shameful-prisons-be-reformed/?pagination=false (noting that the per capita rate of incarceration in the US is six times greater than Canada’s, eight times greater than France’s, and twelve times greater than Japan’s—and we have a 40 percent lead on our closest competitors, Russia and Belarus).

50. See Butler, supra note 2, at 26 (arguing that “the biggest threat to freedom in the United States comes not from some foreign or terrorist threat but rather from our dysfunctional criminal justice system” and calling the “two million Americans in prison ... the most urgent challenge to democratic values since the civil rights era”); see also Gopnik, supra note 48, at 73 (noting that there are now more people under the control of the criminal justice system in the U.S. than were in the Gulag Archipelago under Stalin at its height).

51. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) (arguing that mass incarceration, with its disproportionate impact on black men, is a form of institutionalized racism); see also Gopnik, supra note 48, at 73 (noting that there are more black men in the grip of the criminal justice system than were in slavery in the mid-nineteenth century).

52. Luban, supra note 36, at 22.

53. Professor Luban is more forgiving of the prosecutor’s role in mass incarceration than I am. See id (“Obviously, prosecutors are not responsible for mass incarceration—they deal with criminal cases retail, not wholesale, and legislators’ addiction to ratcheting up punishments is not the prosecutor’s fault.”).


55. I acknowledge that, from a social science point of view, my survey is worthless. I conducted the survey by email. The defenders I wrote to are very busy people, so I worded the question—suggestively, I realize—to get their attention and let them know I only wanted a moment of their time. The subject line of the email was:
the only criminal lawyer who finds prosecutors difficult to deal with. The vast majority of responses were between two and fifteen percent.56 A few were more generous—offering twenty or thirty percent.57 More than one said a mere one percent.58 Two people—one has practiced in Maryland, Massachusetts, Pennsylvania, New York, Alabama, and Georgia, and the other in DC, Georgia, and Louisiana—came up with only a single prosecutor.59 Another—a New York public defender—said, "[T]here are only 3 prosecutors in 29 years that fall outside the 'smug, self-important and lacking any imagination' category. And I'm being generous."60 Several people gave different percentages for each of the qualities—how like a defender to resist directions and find the loophole!61

As to why so many prosecutors seem to have these unattractive qualities, responses were all over the map. Some believe prosecutors get better with age and experience, others think they get worse. Some think the culture of prosecutors’ offices is what makes prosecutors the way they are; others think people are predisposed to being prosecutors. Descriptions of the particular predisposition also varied. Some point to “moral absolutism”—the view that certain things are wrong, no matter the context. Others point to the binary belief that there are “good guys and bad guys.”63 Some focused on a desire for power.64 Others talked about a tendency to see things in black and white, or in narrow, reductive, mechanical terms.65 One put it bluntly: “[Y]ou typically have to be a small-minded asshole to think sending poor drug addicts to prison is a good solution to complicated societal problems.”66

One defender said the prosecutors who don’t fit this unflattering mold “rarely last more than a few years, and are often not the most popular in the office and usually leave disgusted with their office culture.”67 A defender with a similar

"Informal and very quick survey on "prosecutorial culture."
The exact wording of my question (which was the same for everyone) was,

Can you take a second and give me an estimate of the percentage of prosecutors you have encountered in your career as an indigent criminal lawyer whom you would NOT describe as smug, self-important, or lacking in imagination? I’m curious about just how small the percentage might be. Any thoughts as to why would be appreciated, but are not necessary.

See Survey, Informal and very quick survey on "prosecutorial culture," (February 2012) (on file with author) [hereinafter Informal Survey].
56. See id.
57. Id.
58. Id.
59. Id.
60. Id.
61. See id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
view added: "The prosecutors who are not smug, self-important or lacking in imagination are the ones you have to look out for! Judges listen when they talk. God help you when you have a bad crime and a reasonable DA." 68

One defender admitted that he might be getting more self-important and smug as time goes on. 69 Another pointed out that lawyers in general are self-important. 70 A defender who is married to a prosecutor maintains that his wife does not have these dreaded qualities, but also pointed out that she is a federal prosecutor who usually does not prosecute indigent defendants. 71

II. NATURE VERSUS NURTURE: BORN THAT WAY?

So what is the answer? Are prosecutors born or made? Is there a "prosecutor personality type," or do people become the type after a process of acculturation? What is a prosecutor personality? What makes that personality such a good fit—or not a good fit, from my perspective—for the work of criminal prosecution?

Of course, the same could be asked of defenders, too—and has. As the director of a criminal clinic for more than two decades, I often contemplate whether there are "natural defenders" and "natural prosecutors." When asked, I generally answer, not very helpfully, "Yes and no." Yes, because there are some who are recognizably one or the other. 72 No, because there are many more in the middle who could probably prosecute or defend, depending on the circumstances. In my view, these are the ones who make the best prosecutors—at least at the outset.

Here's what I think about the prosecutor personality: There are students who immediately strike me as prosecutor-types. They are more conventional, judgmental, and professionally ambitious 73 than my defender-type students, and often more uncomfortable representing people who "do bad things." 74 They seem surer of themselves and their own worldview. They don't have much interest in discussions about the moral complexity of crime. They believe that people "make choices." They prefer representing clients in court to working with them in the community. They are happy to let go of a client when the case is over and move

68. Id.
69. Id.
70. Id.
71. Id.
72. See SMITH, supra note 20, at 127 (recounting the story of "Bookman," who thought in law school that he might become a prosecutor only to be told by his teachers in the criminal defense clinic that he was a defender in his "blood"); see also Barbara Babcock, Defending the Guilty, 32 CLEV. ST. L. REV. 175, 175 (1984) (Noting that defenders have a "'Well, it's not for everybody. Criminal defense work takes a peculiar mind-set, heart-set, soul-set.'").
73. In a conventional sort of way—they want to one day be judges, hold elective office, or otherwise be a player.
on to the next.

They can be superb defenders. Some of my best clinic students have gone on to become prosecutors. These students often understand and embrace the central ethical mandates in criminal defense—zealously pursuing the client’s interest and maintaining client confidences. 75 When faced with a hard case in class discussion or their clinical work—for example, the bounds of zeal on behalf of a guilty, dangerous client—they understand that it is proper to defend a client right up to the line, so long as the line is not crossed. 76 They may not choose to represent such a client in their careers, but they accept the need for zealous advocacy, especially on behalf of an indigent accused.

I confess that I am delighted when, as a result of his or her time in the clinic, an initially prosecution-bound student has a change of heart and decides to not be a prosecutor or, better, become a defender. Both have happened. It is especially gratifying when the student is a gifted young trial lawyer—one less for the other side.

There are prosecution-oriented students who approach a career in criminal prosecution with a thoughtful and critical perspective, a capacity for empathy—for the accused as well as the alleged victim—and a deep sense of humility. I can’t help but respect these students and wish them well. Most of these are the folks “in the middle”—the students who could defend or prosecute, and who seemed to truly enjoy representing the accused. I acknowledge that I would rather have these students in a position of power than someone else.

If only I believed they could hold on to their good intentions—and their humanity. I would like to believe it, but their clinic experience will inevitably fade. 78 And the pressure to conform—to a prosecution culture that rewards winning above all else 79 and diminishes the humanity of those accused 80 —is

75. See Model Rules R. 1.3 cmt. 1 (“A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf’’); R. 1.6 cmt. 2 (“A fundamental principle in the client-lawyer relationship is that . . . the lawyer must not reveal information relating to the representation’’); see also Abbe Smith, The Difference in Criminal Defense and the Difference it Makes, 11 Wash. U. J. L. & Pol’y 83, 89 (2003) (referring to zealous advocacy and the maintenance of client confidence and trust as paramount in criminal defense ethics).


77. See generally Freedman & Smith, supra note 12, at 67-126 (discussing zealous representation as the "pervasive ethic").

78. See Smith, Good Person, Good Prosecutor, supra note 30, at 397 n.248 (“My concern is that even the most poignant powerful experiences fade with time and the adoption of a different professional role.”).

79. See Butler, supra note 2, at 116 (“What prosecutors have in common with most lawyers is that they are competitive and ambitious. We all like to win. For prosecutors, that means getting tough sentences and defeating defendants’ claims that the police violated their constitutional rights. Getting promoted, and maintaining the professional regard of your peers, requires keeping your eye on the prize. Shortly after 5 p.m., when the courthouse closed for the day, we prosecutors would wheel our litigation bags back to the office. Colleagues who were off the trial calendar that week were waiting for us: ‘Did your verdict come in?’ I might answer, in the dramatic staccato of a sports announcer describing a touchdown, ‘Big! Fat! Guilty!’ Then there would be
intense. In other words, it's tough to be a progressive prosecutor—if such a thing is possible at all.81

A word about "character."82

There may be a point at which prosecutorial personality and culture implicate character. Some high profile prosecutorial decisions come to mind: the racially tinged prosecution of six black high school students in LaSalle Parish, Louisiana (the Jena Six) for attempted second degree murder arising out of a playground brawl;83 the prosecution of seventeen-year-old Genarlow Wilson for having consensual oral sex with a fifteen-year-old girl;84 the prosecution of two adult men for having private consensual sex that became the landmark United States Supreme Court case decriminalizing homosexuality, Lawrence v. Texas.85 I think the prosecutors who pressed these cases might lack moral character—or a proper sense of perspective and restraint.

But I am not calling all prosecutors—simply because they choose to become prosecutors—"bad people."86 That is an overstatement. It is also a conversation

whoops and high fives. If I could add ‘jury deliberated for less than thirty minutes,’ I felt especially studly.”); see generally Kenneth Bressler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEo. J. LEGAL ETHICS 537 (1996) (prosecutor acknowledging the prevalence of prosecutorial score-keeping and arguing that it is unprofessional); John Kaplan, The Prosecutorial Discretion—A Comment, 60 NW. U. L. Rev. 174, 180 (1965) (depicting prosecutors in plea bargaining as singularly concerned with high rates of conviction); Tracey L. Meares, Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. Rev. 851, 882 (1995) (noting a "prosecutorial culture centered on winning"); Medwed, The Zeal Deal, supra note 38, at 134 (criticizing the emphasis of prosecutors on convictions). But see Julie Reynolds, How To Become a Prosecutor, WASHINGTON LAWYER, Jan. 2007, http://www.dcbar.org/for_lawyers/resources/publications/Washington_lawyer/January_2007/prosecutor.cfm (last visited Apr. 22, 2012) (reporting that former and current prosecutors "agree that the measure of one’s aptitude is not a win-loss record or the number of people receiving lengthy prison sentences" but "how well a prosecutor furthers the cause of justice—a goal not necessarily synonymous with a high conviction rate").

80. See BUTLER, supra note 2, at 116 (referring to “defendant sob stories about growing up in foster care, getting beat up by the police, or not being able to afford rehab”); see also id. ("I didn’t start right in calling the defendants 'cretins' and 'douche bags.'").

81. See BUTLER, supra note 2, at 115-21 (discussing what happens to progressive prosecutors). This is not to disparage the efforts of progressive chief prosecutors who try to change the culture of their office. Such efforts are, of course, commendable. See, e.g., Cyrus R. Vance Jr., N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/v/cyrus_r_vance_jr/index.html (noting that Manhattan DA Cyrus Vance set up a Conviction Integrity Unit, which focuses on wrongful conviction claims and trains prosecutors to prevent wrongful convictions in the first place); Alan Bean, A progressive icon hears from his critics, FRIENDS OF JUSTICE, Jan. 5, 2011, http://friendsofjustice.wordpress.com/2011/01/05/a-progressive-icon-hears-from-his-critics (noting that Dallas DA Craig Watkins, one of the few black prosecutors in Texas, has been an "inspiration to criminal justice reformers" and has the support of those concerned about mass and race-based incarceration). However, prosecution is inevitably political and real change difficult. See BUTLER, supra note 2, at 115.

82. See id. at 103 (suggesting that the authors views on prosecutors raise the "question of character").


84. See Angela J. Davis, The Legal Profession’s Failure to Discipline Unethical Prosecutors, 36 Hofstra L. Rev. 275, 305-06 (2007).


86. See BUTLER, supra note 2, at 103.
stopper—the opposite of my intention in titling a previous article Can You Be a Good Person and a Good Prosecutor?87 In that article, I ask prosecutors the same question routinely asked of defenders: whether such work is morally acceptable. I was and remain more concerned with whether prosecutors do good—in the current context of American criminal justice—than whether they are good.88 My view is they are on the wrong side of history, and are contributing to the “caging of America.”89

III. LAW & ORDER’S UNFORTUNATE INFLUENCE

There are some broader cultural influences worthy of blame, in particular the television show Law & Order, which seems to be on television twenty-four hours a day—a new episode or a rerun, on some channel, in some version.90 Arguably, the most popular television show of our day, most law students have grown up watching it.91 In my view, the central character, Manhattan District Attorney Jack McCoy, played by Sam Waterston from 1995 to 2010, is responsible for inspiring a generation of prosecutors.

Jack is full of his own righteousness, and has earned it. He is the son of a cop; his father was a police officer for more than thirty years. He went to NYU Law School and then worked his way to the top of the Manhattan D.A., from line D.A. to Executive Assistant D.A., to District Attorney.92 His top assistants (usually female, always attractive) come and go—to become federal prosecutors, to become high-paid defense lawyers—but he remains steadfast.93 He is a D.A.’s D.A.

He has his liberal credentials too. He protested the Vietnam War, fought for

87. See Smith, Good Person, Good Prosecutor, supra note 30.
88. One commentator seems especially sensitive to criticism of prosecutors. See Alafair S. Burke, Talking About Prosecutors, 31 CARDOZO L. REV. 2119, 2120 (2010) (referring to “a language of fault—fault placed on prosecutors who fail to value justice at each turn of the proceedings”); Burke, Improving Prosecutorial Decision Making, supra note 40, at 1589 (referring to the “rhetoric of fault” of commentators discussing prosecutorial decision making); Burke, Prosecutorial Passion, supra note 29, at 186 (noting that most depictions of prosecutor in the context of plea bargaining are “unflattering”). I can understand why heavy-handed blame might not be the most effective strategy if the aim is encourage honest self-reflection by prosecutors. However, I’m not sure why it is wrong to find fault where there has been some. See, e.g., Medwed, The Zeal Deal, supra note 38 (examining why prosecutors resist post-conviction claims of innocence); Medwed, The Prosecutor as Minister of Justice, supra note 38, at 47-53 (discussing same).
89. Gopnik, supra note 48.
90. See ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV 24, 26 (2003) (referring to Law and Order as “an institution” and noting that the flagship show or one of its spin-offs can be seen in reruns “almost endlessly”).
91. See Shannon Mader, Law & Order, in LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 117 (Michael Asimow ed., 2009) (noting that Law & Order is the most successful legal drama and second longest-running prime-time drama in television history).
First, McCoy is a prototype of the “angry, often vengeful” prosecutor, determined to put away incorrigible criminals and “driven to win at nearly any cost.” He gives little thought to the conditions that give rise to crime—which he derides as “psychobabble” and “sob stories”—and regularly expounds on his belief in “pure evil.” Second, he has become more conservative as time has gone by, his law-and-order views more strident and harsh, often expressed by “moral indignation” and “moral disgust.” Third, he is nearly incapable of dealing with complexity or nuance, preferring instead a “black and white moral certitude” that is hard to experience as anything other than “arrogant” and “self-righteous.” Fourth, he has a dark, pessimistic vision of life—especially urban life. He wears his hard-boiled, “I’ve seen it all” cynicism as armor. Any sign of hopefulness—that someone who did a bad thing might learn from it and change—is a sign of weakness.

The reason I blame McCoy is because he is so familiar—and because he gives license to prosecutors and would-be prosecutors to be like him. He normalizes the smug, self-important, lacking imagination, full-of-his-own-righteousness prosecutor. He normalizes the narrowest prosecutorial thinking—that things can be seen as black and white, right and wrong, good and evil. Even worse, he somehow makes those qualities appealing and admirable.

IV. CONCLUSION: ON DOING JUSTICE

One of my favorite slogans is associated with the National Lawyers’ Guild:

94. See Associated Press, Jack McCoy gets a ‘Law & Order’ Promotion, supra note 93.
95. RAPPING, supra note 91, at 28; see also Dawn Keeley, Law & Order, in PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE 34 (Robert M. Jarvis & Paul R. Joseph eds., 1998) (noting the “preeminence of the moral outlook that motivates the prosecutors on ‘Law & Order’ to seek conviction and to hold people culpable”); Sam Waterston, Foreword, in LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION xii (Michael Asimow ed., 2009) (referring to McCoy’s “innate sense of moral outrage and his built-in eagerness to win” and noting that “The job fed his nature. His nature fit his job”).
96. Mader, supra note 92, at 123; see also id. (noting McCoy’s “ruthless competitiveness”).
97. RAPPING, supra note 91, at 31.
98. Id.
99. See RAPPING, supra note 91, at 24; Sam Waterston, supra note 96, at xi (actor noting that the character he plays on Law & Order has wearied and “darkened” over time).
100. Id.; see also Waterston, supra note 96, at xii (noting that McCoy has an “uncompromising way of looking at things and used the mighty powers of his office to advance it—in circumstances that were not all black and white”).
101. Mader, supra note 92, at 124.
102. Id.
103. Id. at 123.
104. See RAPPING, supra note 91, at 30.
105. Id.
"Justice Is a Constant Struggle." This is how it feels to me. Pursuing justice on behalf of my clients is a constant struggle—no matter how hard I work or how right the cause.

But so too is the meaning of justice. It is often easier to recognize injustice than it is to imagine justice. As Professor Aviarn Soifer once wrote, "Seeking justice is like going east. You can go east and go east as much as you would like—but you never get east."

Probably justice ought to be a struggle. We should have to struggle to conceptualize, envision, and articulate justice. If we don’t, we might be too narrow, too self-referential, too smug in our thinking about it. As Ntozake Shange writes:

I’ve found whatever I can call justice by forever returning to the root of a language, the design of a plantation, the workings of a sugar mill the chants of street corner B-boys, the words of those before me—Garvey, Marti, Diop, Machel, and the images of Bearden, Barthe, Michau. "I have to scrape the bottoms of souls, dreams, nightmares, and syllables to taste what justice might possibly be."

It should feel that way for prosecutors too. "Doing justice" should be a constant struggle. Prosecutors should fret, sweat, and "agonize" over justice. They should engage in endless conversations about it—with colleagues, mentors, teachers, and even defense lawyers. They should feel daunted both by their power to seek justice and their responsibility to know it.

Instead, prosecutors too often think they alone know what justice is. Whether this is a reflection of personality or culture doesn’t really matter. There needs to be more struggle.

The prosecutors “in the middle”—those not quite born that way and not yet made—have the capacity to engage in that struggle. I wish them Godspeed.

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107. See generally Smith, supra note 20.


111. See Fisher, supra note 10.

112. Fisher, supra note 10, at 261.