

9-2019

Should Good People be Doctors? A Comment on Paul Butler and Anonymous

Richard Delgado
University of Alabama School of Law

Recommended Citation

Richard Delgado, *Should Good People be Doctors? A Comment on Paul Butler and Anonymous*, 72 SMU L. REV. F. 1 (2019)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review Forum by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SMU Law Review Forum

Volume 72

September 2019

1-7

SHOULD GOOD PEOPLE BE DOCTORS? A COMMENT ON PAUL BUTLER AND ANONYMOUS

*Richard Delgado**

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE ARGUMENT THAT THERE ARE BETTER USES FOR ONE'S REFORMIST ENERGY AND SKILL
- III. THE ARGUMENT THAT THERE IS ALWAYS A BETTER JOB
 - A. SHOULD GOOD PEOPLE BE DOCTORS?
- IV. IS PROSECUTION SUCH EVIL WORK THAT NO ONE SHOULD PERFORM IT?
- V. THE YOUNG PROSECUTOR AS DOUBLE AGENT
- VI. CONCLUSION

I. INTRODUCTION

This is a nervous period for progressive people. The advent of an administration seemingly dedicated to mass cruelty¹ has raised concerns over the line between conscionable and unconscionable work—always high—to fever pitch, and produced much soul-searching and some very good writing. In a much-discussed book chapter entitled “Should Good People Be Prosecutors?,” Paul Butler concludes that the answer to his own question is no, based largely on the harm that working in a prosecutor’s office can do to one’s personal commitments and soul.² A recent Note in *Harvard Law Review* comes to much the same conclusion, but based on broader, systemic considerations—working for a

* John J. Sparkman Chair of Law, University of Alabama. Thanks to Jean Stefancic, Joyce Vance, and Chisolm Allenlundy for invaluable comments and suggestions.

1. For example, separating children from their parents at the border, maintaining prison systems that are largely black and Latino, banning Muslims from traveling to this country, and referring to African nations as “shithole” countries.

2. PAUL BUTLER, LET’S GET FREE: A HIP HOP THEORY OF JUSTICE 101-02 (2009) (“[P]rosecuting crimes brings questions about the . . . morality of American criminal justice into sharp relief.”). The chapter puts forward a number of other reasons for avoiding prosecuting work, but this one seems central to Paul Butler’s argument.

prosecutor's office strengthens and legitimizes a wicked system.³ For both writers, there is no such thing as progressive prosecution, hence most people should avoid a career of putting people in jail.⁴ Other scholars, including Abbe Smith, have arrived at much the same conclusion.⁵

The author of this article argues that part of these authors' critiques stands on an infirm footing,⁶ while another is sound.⁷ He dispatches the first criticism, then, building on the second, puts forward an even more nuanced way of approaching the choice-of-career problem. The author concludes that, for many people, prosecution should not be a high career choice, although a few hardy souls prepared to live with ambiguity might find it acceptable.⁸ His argument is based not on the politics of prosecuting people for a living,⁹ nor on the psychological effects of performing such work on a daily basis.¹⁰ Instead, it rests on the nature of the work itself.¹¹

II. THE ARGUMENT THAT THERE ARE BETTER USES FOR ONE'S REFORMIST ENERGY AND SKILL

The Harvard author writes that many young people dupe themselves into thinking that although the criminal law may be an illegitimate tool, nevertheless a progressive prosecutor may accomplish some good, at least at times.¹² Unless the supervisor runs the office with an iron hand, some believe a liberal prosecutor may cut the occasional sympathetic defendant some slack.¹³ She may, for example, go easy on first offenders or ones guilty of minor offenses, such as using small quantities of recreational drugs.¹⁴ She may also refuse to prosecute cases in which

3. Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 750 (2018) (noting that the zeal of a liberal prosecutor can easily "obscure[] her complicity" with a "fundamentally rotten system").

4. BUTLER, *supra* note 2, at 101 (declaring that "prosecutors are more part of the problem than the solution"); see also *The Paradox of "Progressive Prosecution"*, *supra* note 3, at 770 (proposing to defund prosecutors' offices because "[d]oing better means confronting a regime controlled by dictators: not by asking them to be nice, but by demanding an entirely different form of government").

5. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398 (2001).

6. See *infra* Part II (discussing the argument that there's always a better job).

7. See *infra* Part III (discussing whether the work of a prosecutor is evil—entirely, or just in part).

8. See *infra* Part IV; see also text following *infra* note 35 (noting the stress of working at cross purposes—in a situation fraught with ambiguity—in that one strives for justice at the same time one strives to please a public interested mainly in security and law and order).

9. That is the approach taken by the author of the Harvard Note. See generally *The Paradox of "Progressive Prosecution"*, *supra* note 3.

10. That is the approach taken by Paul Butler. See generally BUTLER, *supra* note 2.

11. See *infra* Part III.

12. *The Paradox of "Progressive Prosecution"*, *supra* note 3, at 756–58 (listing evidence that the criminal justice system is "rotten"); see also BUTLER, *supra* note 2, at 105 (observing that black or liberal prosecutors merely legitimize a system that locks up poor people and minorities).

13. See BUTLER, *supra* note 2, at 102 (conceding that "some prosecutors attempt to mitigate the harshness of the system," but noting that "[b]ecoming a prosecutor to help resolve unfairness in the criminal justice system is like enlisting in the army because you are opposed to the current war"); see also *The Paradox of "Progressive Prosecution"*, *supra* note 3, at 752–55. Arriving at an understanding about one's work assignment may be slightly more feasible in federal than in state practice, where the work allows little room for personal choice and discretion.

14. BUTLER, *supra* note 2, at 108–09 (noting that the discretion of the "worker bees" is highly

the police appear to have acted in a selective, racist manner or lied.¹⁵

But all this is self-deception, both critics insist. One's supervisor, at some point, will take one aside and explain that you are letting your political or social convictions interfere with your performance.¹⁶ You may find yourself removed from misdemeanor drug cases and shifted to prosecuting odious crimes, like spousal abuse, where your convictions are unlikely to impel you to pull your punches.¹⁷ Even if the head prosecutor allows you to choose your cases, the system will change very slowly. Your colleagues are apt to be hard-nosed types who continue as they have always done, so that the system will go on sending black and poor people to prison.¹⁸ You will merely, by your presence, contribute to the outward appearance of legitimacy of a system that is beyond redemption.

In this view, what a right-thinking progressive ought to do is work to change the system as a whole.¹⁹ It is this work—changing the system of laws and procedures that maintains social control through a congeries of unfair, oppressive laws and the police who enforce them, often unequally—that ought to occupy the best minds.²⁰

limited).

15. *Id.* at 109 (noting that some young prosecutors believe they may “opt out of cases that arise from racial profiling,” but concluding that this is impossible in practice). “If you are a typical prosecutor, you will spend most of your time locking up poor people. For better or worse, that’s what most prosecutors do.” *Id.* A prosecutor may have an ethical obligation to decline to prosecute cases in which she suspects the police have outright lied, but these are hard to detect in light of the tendency of the police to cover for each other. *Id.* at 115 (“Progressives who become prosecutors have signed up with the wrong team. Serious challenges to mass incarceration and expanding police power not only go against the prevailing ethos of the office, they undermine the premise of the adversarial system.”).

16. *Id.* at 108–09 (noting that a “line prosecutor has to answer to the boss, who has to answer to those politics,” and that one who is seen as too sympathetic toward the defendant’s plight or too suspicious of the police is not doing her job. *But see The Paradox of “Progressive Prosecution,” supra* note 3, at 766–67 (observing that federal prosecutors may enjoy a slightly freer hand than their counterparts in a state system).

17. BUTLER, *supra* note 2, at 109. The reason is that “most people who work at prosecutors’ offices—and especially those who reach the rank of supervisor—do not view mass incarceration . . . as [a] serious problem[. . .]. [T]he average urban prosecutor spends about half her time on drug cases—a crime that, at least for users, has no victim.” *Id.*

18. *Id.* at 112 (“Some progressives worry about what would happen if prosecutors’ offices were staffed exclusively with ‘lock ‘em up’ types.”); *see also* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xiii, xxv (2019) (noting that most prosecutors subscribe to a tough-on-crime attitude and believe that this is what their constituents want); *The Paradox of “Progressive Prosecution,” supra* note 3, at 759 (positing that small improvements merely make matters worse).

19. BUTLER, *supra* note 2, at 120 (noting that “a more substantial transformation is necessary” and that “[t]hose who work inside [the system] can tinker . . . but they probably cannot overhaul it”); *The Paradox of “Progressive Prosecution,” supra* note 3, at 759 (noting that “[r]eforms should disrupt the power imbalance between the prosecutors and the prosecuted” and that current efforts fall short of this ideal).

20. *See* BUTLER, *supra* note 2, at 120; *The Paradox of “Progressive Prosecution,” supra* note 3, at 768 (“Imagining a Radical Redistribution of Power”). Note, however, that “the best minds” might well include those, like Paul Butler, who can speak with authority gained from years of experience in a prosecutor’s office and know the system from the inside.

III. THE ARGUMENT THAT THERE IS ALWAYS A BETTER JOB

In short, one should not accept a job as a prosecutor because there is always a better job: reforming the criminal justice system as a whole. Working within the system, even if one is one of the few “good” prosecutors, merely legitimizes an iniquitous system and postpones the day of reckoning.²¹ Moreover, work of this kind is bad for your soul. You will find yourself surrounded by evil people and subjected to an incentive system that rewards putting as many defendants in jail as possible.²² Eventually, you will find yourself becoming a different person—maybe One of Them.²³

Some may find this a facially appealing argument for avoiding prosecution work, but it is not compelling. Although the system as a whole does, in fact, need to change, the argument ignores the pressing question of what should be done in the meantime. It also ignores the possibility of working within the system but in concert with those outside it who are working to correct or overturn that system.²⁴

A. SHOULD GOOD PEOPLE BE DOCTORS?

To see how this is so, consider the following question: should good people be doctors? Possibly, the argument might go, it is better not to treat diseases, but rather to attack their causes, including poverty, poor childhood nutrition, unclean drinking water, lack of vaccinations, and high fat/high carbohydrate diets full of sugar and low in essential nutrients. One should, in short, abjure practicing conventional medicine which treats patients one-by-one but become a public health specialist working to eliminate the causes of disease and physical breakdown.

This argument is, of course, fallacious. The world needs both doctors treating individual sick people and public health specialists attacking the causes of disease. Neither is better than the other, since society needs both scientists working on systemic aspects of health and disease, and doctors who treat us when, despite all efforts, we fall ill.

The totalistic argument, then, is implausible both for doctors and for lawyers. What about an argument based on the iniquity of the practice (prosecution) itself?

IV. IS PROSECUTION SUCH EVIL WORK THAT NO ONE SHOULD

21. See BUTLER, *supra* note 2, at 120 (noting that “any effort at reform from within a prosecutor’s office would take place against the backdrop of received norms and practices”); *The Paradox of “Progressive Prosecution”*, *supra* note 3, at 762 (same).

22. See BAZELON, *supra* note 18, at xxvi–xxxi (noting that prosecutors like to win and that this is a necessary part of the adversary system); *The Paradox of “Progressive Prosecution”*, *supra* note 3, at 761–62 (same); BUTLER, *supra* note 2, at 116 (“Law-and-Order Culture”).

23. See BUTLER, *supra* note 2, at 114 (explaining “What Happens to Progressive Prosecutors”—namely, that they get “derailed”).

24. See *infra* Part IV; see also BUTLER, *supra* note 2, at 109 (arguing that it is impossible to work, essentially, as a double agent: “Ultimately, the prosecutor with a social justice agenda would have to proceed more subversively than overtly”). By working in concert with reformers in the civilian sector, the author does not mean, of course, proceeding unethically or aiming to sabotage the work of either setting. Instead, he means someone who takes on two tasks, which both overlap and stand in some contradiction. See *infra* text and notes 25–35 (noting that work of this nature can be stressful).

PERFORM IT?

Unlike with medical practice, however, an argument can be (and is) made that the ideal amount of prosecution is zero.²⁵ The work is so vile that no one should carry it out—any of it. No one should perform it, and the only remaining question is how to rid ourselves of an office whose work is entirely, one hundred percent, disreputable.

The author believes that no reasonable person should take that position. Everyone (or almost everyone) would agree that prosecuting white collar crimes, criminal civil rights violations, official malfeasance, corruption, bribery, and crimes of great violence like homicide, rape, spousal abuse, and trafficking large quantities of extremely dangerous, addictive drugs is a good idea and a vital social imperative.²⁶ Long, harsh prison sentences are another matter entirely.²⁷

If some of the typical work of a prosecutor's office is necessary and important, but other parts of it are not, then a conscientious progressive might well join such an office with an understanding with the head prosecutor that he or she would only—or mainly—prosecute cases that do not grate against his conscience and not others—or, indeed, that the entire office should adhere to such a rule.²⁸

We might also conclude that such a principled person would better spend his time working at some other job while attempting, from the outside, to bring about a total change in the way society approaches crime and conviction.²⁹ The author believes that either of these courses is defensible.

Alternatively, a principled young law graduate could, with a clear conscience, join the office with the intention of changing—via education and example—its mission, somewhat like a double agent in a spy movie.³⁰ This is the alternative the author prefers and one that large numbers of idealistic young progressives might find acceptable and attractive. In the belief that this third role offers the greatest promise, the author concludes by sketching it out in some detail.

25. *The Paradox of "Progressive Prosecution"*, *supra* note 3, at 756, 770 (positing that the current system is rotten and that it deserves to be defunded).

26. See Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 525-29 (1994) (noting that our system punishes heavily minor infractions that minority people commit, while ignoring or treating lightly much more dangerous behavior carried out in executive suites); see also BUTLER, *supra* note 2, at 111 ("Other crimes do, of course, have flesh-and-blood victims. . . . I am thrilled when violent offenders, especially murderers and rapists, are put away. It turns out, however, that . . . [f]ewer than 5 percent of all arrests are for violent crimes that cause injury.").

27. See JONATHAN SIMON, *MASS INCARCERATION ON TRIAL 4-5* (2014) (arguing that our prison system is unnecessarily cruel).

28. See BUTLER, *supra* note 2, at 108 (debunking this possibility). He perhaps overlooks that devoting a majority of the office's workload to high-impact cases, such as white collar crime, police violence, or corruption is a more efficient use of prosecutorial resources than putting yet another poor, black youth in jail for jaywalking or ingesting recreational drugs, and hence might appeal to an open-minded supervisor.

29. See *id.* at 120 (noting that a thorough overhaul of the system must come from without); *The Paradox of "Progressive Prosecution"*, *supra* note 3, at 750.

30. See *Double Agent*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/double-agent> [https://perma.cc/GUK3-5GYJ]. Such a person could also lay the groundwork for more progressive action later, as when a change of regime brings more receptive leadership. See BAZELON, *supra* note 18, at xxvii (suggesting that such a movement is now in an incipient stage).

V. THE YOUNG PROSECUTOR AS DOUBLE AGENT

A young prosecutor bent on changing the system while doing as little harm as possible would work both inside and outside for complete reform. In her day job, she would prosecute as few cases as possible that violate her social views and commitments,³¹ while handling with vigor, energy, and imagination white collar crimes, bribery, political corruption, civil rights criminal violations, consumer fraud, and other cases that seek to reinforce democracy by convicting those who endanger it. At the same time, she would work, sometimes quietly, with forces outside the system to reform it from top to bottom. Such a prosecutor would offer her services, special knowledge, and insight to groups seeking to reform prosecution, policing, imprisonment, and border enforcement, like the Law Enforcement Action Partnership.³² She would testify at law-reform hearings and write op-eds in major newspapers.³³

She would seek out and work with journalists and academics to expose the defects of the criminal justice system.³⁴ She would cooperate with legislators, think tanks, and foundations seeking far-reaching alternatives to the current system.³⁵

She might eventually be fired or quit, finding the stress of working at cross purposes overwhelming, but her soul would be intact and she would have cultivated and maintained contacts with groups working for social change. She would have also developed skills and a background that could easily lead to her next job, which might be in politics or a think tank developing better means of coping with poverty, crime, urban development, better schools, and safer neighborhoods.

VI. CONCLUSION

Desperate times require desperate measures. But they also require careful thought about where and in what capacity one works to advance one's deepest

31. See *supra* text and note 15 (observing that this may already be her duty); see also BUTLER, *supra* note 2, at 119-20 (on "subversive prosecutors" and describing prosecutors who perform "conduct that their employers would probably view as seditious," including "missing deadlines, 'forgetting' to subpoena witnesses, leaving key sentence-enhancing facts out of indictments or pleas—all in an attempt to subvert the dominant 'tough on crime' paradigm").

32. Black Lives Matter and No More Deaths come to mind. For another example, see *Who We Are*, LAW ENF'T ACTION P'SHIP, <https://lawenforcementactionpartnership.org/about-us/who-we-are/> [https://perma.cc/S9Y4-G6E5] (last visited July 15, 2019) (describing the organization and its quarterly journal).

33. E.g., Joyce Vance, *Yes, Manafort and Cohen Are Guilty, But the Rule of Law Is Still in Danger*, WASH. POST (Aug. 23, 2018), https://www.washingtonpost.com/outlook/yes-manafort-and-cohen-are-guilty-but-the-rule-of-law-is-still-in-danger/2018/08/23/be53bffa-a64d-11e8-a656-943eefab5daf_story.html?utm_term=.8b494e1278e9 [https://perma.cc/AZ98-MBL8]. A former prosecutor's experience within the system could lend her words real authority, at least if she escaped the experience unscathed. The people who can best appreciate how to reform the system will sometimes be ones who have observed, first hand, its horrors and need for reform.

34. See generally BAZELON, *supra* note 18; SIMON, *supra* note 27; BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014). The foregoing are examples of such scholars and journalists.

35. See, e.g., *Priority Criminal Justice Needs Initiative*, RAND CORP., <https://www.rand.org/well-being/justice-policy/projects/priority-criminal-justice-needs.html> [https://perma.cc/A56F-N5FC] (last visited July 15, 2019).

commitments. There is also the matter of a salary and the job required to earn it.

In hopes of making these decisions a little easier, this article has analyzed three ways of looking at prosecution work. Two polar choices—shut up and do it or don't do it at all because no one should—are, the author argued, untenable.

A middle ground entails working within and outside the system at the same time. Young prosecutors working to minimize the damage their own office performs, while working with change agents and organizations in the civilian sphere, may lead insecure lives. But they will remain true to their basic commitments while developing skills and a background of experience that will stand them in good stead in their next job and as they go through life. This author, at least, wishes you well.³⁶

36. The author is a critical race theorist who practically dared the establishment to fire him on a number of occasions. Occasionally it encouraged him to move on, but he lived to tell the tale. See, e.g., RICHARD DELGADO, *METAMORPHOSIS: A MINORITY PROFESSOR'S LIFE*, 53 U.C. DAVIS L. REV. ONLINE 1 (2019).