

## Hip-Hop Theory of Justice

REVIEW BY DAVID A. HARRIS

For the first time in a long while, real reform may be on the way in the U.S. criminal justice system. Senator Jim Webb of Virginia has proposed a national criminal justice commission, modeled on the efforts of the 1960s. (S. 714.) Not less than five bills were introduced in the U.S. House of Representatives in 2009 to address the 100 to one sentencing disparity between crack and powder cocaine (H.R. 18, H.R. 265, H.R. 1459, H.R. 2178, and H.R. 3245). And the Justice Integrity Act (S. 495), also introduced in 2009, would “address any unwarranted racial and ethnic disparities in the criminal process.”

When the time for hearings comes for each of these proposals, if I were a member of Congress, I can think of one man who I would put first on my witness list: Paul Butler.

In his new book *Let's Get Free: A Hip-Hop Theory of Criminal Justice* (The New Press, 2009), Butler, a professor of law at the George Washington University Law School, makes a comprehensive, persuasive, readable case for intelligent reform across the criminal justice system. He takes on all of the major issues, from mass incarceration and the drug war to the “stop snitching” campaigns that have sprouted in many cities. Taken together, Butler’s proposals would make more Americans safe from crime, and at the same time guarantee a fairer and more just system of law enforcement and prosecution. Given the cluster of knotty and difficult issues at the intersection of crime and race in America, coming up with ideas that could realistically accomplish this is no small feat; for that reason alone, Butler’s book is no small achievement.

Butler comes to his subject with a unique set of qualifications, and the book pulls us in by starting with his rather exceptional personal story. Butler,

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a product of the South Side of Chicago with an Ivy League university and law school education, finds himself one of a rare breed in his first long-term job—he’s a black man working as a prosecutor for the U.S. Department of Justice in Washington, D.C. He relishes his court appearances in front of the district’s mostly black jurors, and many of the jurors connect with him. He appears in a court in which the judges, the prosecutors, and the defense attorneys are usually white; the only black people with major roles in most of the trials are the criminal defendants. This makes Butler stand out, and he strives to become one of the best, racking up an excellent record. On the eve of the biggest case of his career—a political corruption case against former Senator David Durenberger of Minnesota—Butler stumbles into a nightmare: he is arrested. The police charge him based on false allegations by an angry, perhaps mentally unbalanced neighbor. In a heartbeat, Butler goes from one of the high-ranking, discretion-wielding officials at the top of the criminal justice system, to just another black man accused of a crime. Butler was acquitted, but not without a full-dress trial in which he had to testify in his own defense. Some of his colleagues in the prosecutor’s office never treated him the same way after that; more to the point, the experience turned Butler into a “recovering prosecutor”—recovering, he says, “because one never quite gets over it.” He confesses that he is still “a prosecutor at heart,” and has written this book not “as an elaborate exercise in revenge” but as an opportunity to articulate a vision of a system that can keep all Americans both safe and free. This, of course, is an ambitious goal—but one that Butler achieves in this well-written, tightly argued book.

Butler takes us on a tour of the most important problems we face in the criminal justice system today. He starts with our growing system of mass incarceration, which puts us among the most punitive nations on earth. He focuses his attention not just on the size or growth of the system—both of which remain truly frightening—but on the question of public safety. He explains how locking ever more of our fellow citizens in prison reaches a point that produces not a safer society, but a more dangerous one. Moving toward alternatives, he says, will make us safer. This is difficult for any politician to do, since he or she will face charges of being “soft on crime” (not so different from the way politicians feared being called “soft

on Communism” a generation ago—just different scare tactics for different eras). But Butler gives us, and our leaders, reasons to develop some spine on the issue. The key is not being tough on crime, but being smart on crime. Locking up more and more Americans breaks down family bonds and community social ties; this destroys and corrodes society’s ability to enforce its own social strictures against crime and bad behavior. Moreover, when so many young men from particular communities go to jail that it becomes a simple rite of passage to be in the penitentiary in one’s late teens or early twenties, this strongly undercuts any deterrent value to the penal sanction.

Similarly, Butler argues convincingly that we should move away from the failed war on drugs. This war has failed, in large measure, because it is based on the questionable assumption that we should incarcerate our fellow citizens for us-

the drug war in individual cases. It would also, he says, allow jurors to send a message to politicians and prosecutors: We no longer want to see draconian drug laws and drug prosecutions. I found myself disagreeing with him—not because the use of nullification in drug cases would not do what he hopes for; large-scale jury nullification by Butler’s “MLK jurors” would, indeed, send these messages. But the problem is that nullification can be used for other purposes, too—some we would undoubtedly find a lot less attractive. In the American South before (and even during) the civil rights movement, it was often said that prosecutors could not get a conviction of a white man for killing a black man, no matter how strong the evidence or how clear the law; juries simply would not convict. They would nullify, and the white defendant would walk out a free man. What, in other words, would differentiate Butler’s MLK ju-

## **The key is not being tough on crime, but being smart on crime.**

ing substances that a substantial percentage of American adults want to put into their own bodies. Beyond the demonstrated folly of the idea that we can actually use law enforcement to stop drug use, Butler shows us how the war on drugs—and not just the drugs themselves—creates a substantial amount of the damage that we see, from violent gang wars over retail territory, destroying lives and communities, to corruption of police and other government officials. Butler explains persuasively that the best we can do for ourselves regarding drug use involves harm reduction and public health strategies. For example, he says, the “designated driver” movement has saved lives by reducing the potential harm of alcohol use. Such strategies in the area of illegal drugs—decriminalization of some drugs, needle exchanges, and the like—would increase public safety for everyone.

Reprising a recommendation he made more than 10 years ago in the article “Racially Based Jury Nullification: Black Power in the Criminal Justice System,” in the *Yale Law Journal* (volume 105, page 677 (1995)), Butler recommends strategic jury nullification by jurors in drug cases. This, he tells us, would curb the silliness and waste of

juries, from (not to put too fine a point on it) KKK jurors? For most of us, the former may be heroes, and the latter the worst sort of villains. But what about people who hold very different views of the world? And in how many sorts of cases should we encourage this sort of “direct action”? What if “NRA jurors” always wanted to acquit in gun possession or registration cases? Butler assures us that this would not lead to anarchy, but I am less sure than he is.

Butler is on far more solid ground when he explains the damage done by snitches in the criminal justice system. He explains that there is a difference between snitches—people, usually criminals themselves, paid or otherwise given strong incentives to inform on others—and witnesses, who are decent citizens who cooperate with the police. In all of the media coverage of the so-called “stop snitching” campaigns that have cropped up in some cities, very little of the reporting has even acknowledged this important distinction. There is nothing at all wrong with citizens voluntarily aiding the police by giving them information to try to make their neighborhood a better place or to catch bad guys wreaking havoc on residents. Snitching,

by contrast, constitutes “the seedy underbelly of the criminal justice system.” When police cultivate snitches by setting up quid pro quo relationships in which snitches better themselves—get money, get drugs, get out from under charges—by turning in others, there is simply too much incentive to lie for the truth to be the guiding principle. This, Butler tells us, can have a devastating impact on both civil liberties and our neighborhoods, tearing at the social fabric and turning neighbor against neighbor as it produces unreliable evidence.

As a former prosecutor himself, Butler speaks with great authority in his chapter titled “Should Good People Be Prosecutors?” Revisiting some of the territory he covered in an essay in a 1997 book (*The Darden Dilemma* in a chapter entitled “Brotherman: Reflections of a Reformed Prosecutor”), Butler says he is not convinced by those who say that good people can make for better criminal justice by acting within the system, as prosecutors. His own experiences left him skeptical, he says. “My aspirations of changing the system [from within] got shot down because I liked winning too much, and I was good at it. I wanted to be well regarded by my peers, to be successful in my career, and to serve my community. And the way to do that, I learned on the job, was to send as many people to jail as I could.” Even with his own powerful desires to use his position to do good, Butler says, he was

“seduced” into becoming what he now considers part of the problem. From now on, I’m going to have every student of my own who wants to be a prosecutor read this chapter.

Butler covers other ground as well—notably, the surprising way that hip-hop music can serve as a guide to a better and more effective criminal justice system, which gives the book its subtitle. And he concludes with seven solid recommendations for reform that, he says, can help us preserve both public safety and a more humane and fair system of justice.

We need more books like this one. We face daunting and difficult problems in this country, across the spectrum of social issues. But a nation that cannot rouse itself to do justice to its own citizens, when injustice stares it in the face, is doomed to lose the confidence of its citizens, and ultimately to lose its soul. The system by which we judge each other on the most fundamental questions of criminal guilt, responsibility, and punishment cannot continue forever in its current dysfunctional mode. Sooner or later, the people who find themselves within such a system and penalized by it will refuse its demands. In many places in America, this has been happening already for years. Unless we can stir ourselves to pay attention to thoughtful critics like Paul Butler, we are headed off a cliff. It’s time to heed his alarm. ■