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THE JOYFUL PROSECUTOR: A MORE EMPATHETIC AND BALANCED APPROACH

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THE JOYFUL PROSECUTOR:

A MORE EMPATHETIC AND BALANCED APPROACH

Melanie Reid*

Over the years, prosecutors have been criticized for exhibiting aggressive, competitive traits while negotiating plea deals, investigating and preparing cases for trial, or arguing for their positions before, during, and after trial. Prosecutors are asked to interact with others in a highly adversarial criminal justice system on a daily basis on top of working in a highly competitive environment back in their own offices. This environment makes it difficult for a prosecutor to see the opposing party through a more compassionate lens. However, rather than continually focusing on how “bad” prosecutors can be and how to punish their misconduct, this article suggests we identify what makes a “good” prosecutor and find ways to support those qualities and instincts. A prosecutor, according to ABA Standards, is asked to exercise sound discretion, act with integrity and balanced judgment, protect the innocent, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons. A prosecutor who can exhibit these qualities and exercise good judgment in the face of conflict would be the ideal. In The Book of Joy, the Dalai Lama explains that inner peace and true happiness comes from

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having a greater concern for others' well-being and exhibiting kindness, empathy, and compassion towards others. When we recognize our connection as human beings and we exhibit compassion towards others, we, in turn, feel joyful in our own lives. A new, joyful model of prosecution would require a reframing of the prosecutor's role and relationships. An empathetic prosecutor would be able to perceive what others feel, process the information, and respond effectively with compassion rather than taking adversarial attacks personally. This is difficult to do in an environment where prosecutors must juggle the stress of seeking justice, protecting the public, working with law enforcement, consoling the victim, managing a high case load, and responding to repeated counterarguments by opposing counsel. We must encourage and support a change in the qualities exhibited by those in such a position. The rise of progressive prosecutors has changed the prosecutor's environment and made displays of empathy and compassion much more accepted and commonplace. We must build on this display of empathy and choose prosecutors that are balanced and demonstrate a cooperative, empathetic spirit as well as a decisive, rational sense of right and wrong. A joyful prosecutor will be more empathetic and exhibit more balanced characteristics for the betterment of everyone involved in the criminal justice system.

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We are most joyful when we focus on others, not ourselves. . . . You see, in order to become a happy person, we need to live more from the compassionate part of nature and to have a sense of responsibility toward others and the world we live in. In this century if we make an attempt with realistic effort and clear vision, perhaps in the later part of the century, we can really have a happier world. A more peaceful world. A kinder and more compassionate world.

—The Dalai Lama, *The Book of Joy*.¹

I. INTRODUCTION

Who would make the “ideal” prosecutor?² The answer would most likely depend on the person who responds to the question—whether that be a police officer, victim, judge, defense counsel, or the accused. It also might depend on

1. TENZIN GYATSO, DESMOND TUTU & DOUGLAS ABRAMS, *THE BOOK OF JOY: LASTING HAPPINESS IN A CHANGING WORLD* ix, 261, 298 (2016) [hereinafter *JOY*]. The Dalai Lama believes there to be 8 pillars of joy: four qualities of the mind (perspective, humility, humor, and acceptance) and four qualities of the heart (forgiveness, gratitude, compassion, and generosity). *Id.* at 193.

2. *Ideal*, LEXICO.COM, <https://www.lexico.com/en/definition/ideal> (last visited Aug. 21, 2022). I suppose we all have different standards as to what “ideal” means. “Ideal” is defined as “satisfying one’s conception of what is perfect; most suitable.”

whether the person has ever encountered a prosecutor before (and the quality of that confrontation), or has had a loved one in jail, or has a friend or family member that was a victim of a crime, or has a law enforcement officer in the family, or is a community member who has never felt heard or seen by any government representative. In making their choice, many would search for someone who would treat them with dignity and respect, who would actively listen to their words, and show them kindness, compassion, and generosity. Most likely, they would be drawn to a prosecutor that identifies with the belief that “[t]he more we care for the happiness of others, the greater our own sense of well-being becomes.”³ In essence, they would choose a joyful prosecutor.

What if I suggested one of the most joyful human beings on the planet, the Dalai Lama, as the ideal prosecutor?⁴ At eighty-seven years old, the Dalai Lama has clearly mastered what he describes as “the purpose of life”⁵—discovering happiness by focusing on others and living “more from the compassionate part of our nature.”⁶ And because of this life purpose, the Dalai Lama radiates joy and has turned his joy into a lasting way of being.⁷ If the Dalai Lama was the prosecutor on your case, and he recommended a particular sentence at the sentencing hearing, while you may disagree with his recommendation, would you question his motive? What is it about the Dalai Lama that others would want to emulate? Despite not having gone to law school, why would we trust the Dalai Lama’s judgment?

A joyful prosecutor, one who has a real sense of concern for others’ well-being and has filled their mind and heart with positive feelings and thoughts, should be considered ideal. The Dalai Lama’s joy is contagious and positively impacts those around him—even when they are experiencing significant

3. Dalia Lama, *Dalai Lama: What is the Purpose of Life*, UPLIFT, <https://uplift.love/dalai-lama-what-is-the-purpose-of-life/> (last visited Dec. 19, 2022).

4. This is assuming, of course, he had a J.D. and passed the bar exam. I am also not choosing the Dalai Lama as an ideal prosecutor based on his Buddhist philosophy but rather, his commentary (and Archbishop Tutu’s reflections) on what makes them personally happy as described in *THE BOOK OF JOY*.

5. *JOY*, *supra* note 1, at 3-4.

6. *JOY*, *supra* note 1, at 298.

7. *Id.* at 34.

suffering. Imagine the ripple effect one joyful prosecutor might have as they interact with someone charged with a crime who has chosen to testify for the government, or a police officer who had an incredibly difficult and stressful day, or a victim who fears telling her story, or a defense attorney who was yelled at by a judge, or a judicial clerk who is going through a personal crisis.

As one of seven billion human beings, [the Dalai Lama] believe[s] everyone has the responsibility to develop a happier world. We need, ultimately, to have a greater concern for others' well-being. In other words, kindness or compassion, which is lacking now. We must pay more attention to our inner values. We must look inside.⁸

If the prosecutor you encounter radiates joy, you will have been heard and seen and felt their love, compassion, and generosity.

Nonsense you say—this is hardly attainable or realistic within the criminal justice system. Or is it? In 2015, the Dalai Lama and Archbishop Desmond Tutu met for five days and discussed how being joyful on the inside might fix worldly problems on the outside and have the potential to counter injustice and inequality.⁹ The two shared their own philosophies on joy and explained how, with a bit of practice and focus, we too can become joyful. As Archbishop Tutu explained, “ultimately our greatest joy is when we seek to do good for others. . . . It’s how we are made. I mean we’re wired to be compassionate.”¹⁰ By placing our attention on the suffering of others, helping to heal the pain of others, and recognizing our connection as human beings, we will be able to heal our own pain.¹¹ It’s that simple.

ABA Criminal Justice Standard 3-1.2 describes the role of the prosecutor as “an administrator of justice, a zealous advocate, and an officer of the court.”¹² A prosecutor is required to “exercise sound discretion” and “act with integrity

8. JOY, *supra* note 1, at 30.

9. Douglas Abrams, *The Dalai Lama and Desmond Tutu on the Joy of Laughter*, TRICYCLE (Feb. 26, 2022), <https://tricycle.org/article/dalai-lama-desmond-tutu/>; JOY, *supra* note 1, at 63.

10. JOY, *supra* note 1, at 59.

11. JOY, *supra* note 1, at 49.

12. CRIM. JUST. STANDARDS FOR THE PROSECUTION OF FUNCTION 3-1.2(a) (AM. BAR ASS'N 2017).

and balanced judgment.”¹³ A prosecutor must strive to “protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”¹⁴ A prosecutor is also a “problem-solver responsible for considering broad goals of the criminal justice system.”¹⁵ In short, a prosecutor seems to have many job descriptions, many responsibilities, and has relationships with most of the players in the criminal justice system and the community at large.¹⁶

It appears much easier to identify what we do not want in a prosecutor rather than focus on the “ideal.” The courts use terms such as “vindictive” and “malicious” to describe the bad prosecutors, those who have ignored the United States Constitution and failed in their responsibilities to the court and to the defendant.¹⁷ But many behaviors we find unacceptable have not been addressed by the courts and do not rise to the level of a constitutional violation.

Jonathan Rapping writes in his book *Gideon’s Promise* about the power of a public defender movement and the need to change the culture surrounding the criminal justice system.¹⁸ *Gideon’s Promise* is a non-profit organization founded by Jonathan Rapping that was created “to develop a community of skilled, passionate, ethical public defenders that would introduce a new value-set into the systems within which they work in an effort to begin to transform the existing culture of injustice.”¹⁹ In his book, Rapping shares his own thoughts on the current state of prosecutors:

13. *Id.* at 3-1.2 (a)-(b).

14. *Id.* at 3-1.2 (b).

15. *Id.* at 3-1.2 (f).

16. Would a robot make for a better prosecutor than a human? See Stephen E. Henderson, *Should Robots Prosecute and Defend?*, 72 OKLA. L. REV. 1 (2019) (exploring the role of the prosecutor and the enormous discretion prosecutors are given in the job).

17. See *Blackledge v. Perry*, 417 U.S. 21, 21, 28-29 (1974) (where the defendant was convicted of a misdemeanor, then requested a trial de novo, and was then charged with a felony offense. The Supreme Court held that the Due Process Clause of the Fourteenth Amendment had been violated, and the prosecutor was deemed to have acted with vindictiveness.).

18. JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* 5 (2020) [hereinafter *GIDEON’S*].

19. Johnathan A. Rapping, *Grooming Tomorrow’s Change Agents: The Role of Law Schools in Helping to Create a Just Society*, 12 OHIO ST. J. CRIM. L., 465, 498 (2015).

Due to the pressures to get through cases quickly, to appear tough on crime, and to adhere to our nation's increasingly punitive culture, many prosecutors come to see their role solely as protecting society from the lawbreakers they charge—even if they have to ignore the rules, cut corners, or ignore exculpatory evidence to do so As prosecutors are acculturated to believe that the accused is a villain and the punishment is deserved, they come to see hallowed principles of procedure as irritating technicalities.²⁰

How pervasive is this misconduct? According to the National Registry of Exonerations, an estimated forty-three percent of wrongful convictions arise from misconduct involving prosecutors and other officials.²¹ According to the Center for Prosecutor Integrity, there have been 16,000 findings of prosecutorial misconduct in the United States since 1970.²² Perhaps there are only a few “bad apples” or a few aggressive, unethical district attorney’s offices that make up most of these prosecutorial misconduct cases. However, even if this is so, isn’t it important for the legal community to reflect upon the adversarial nature of the criminal justice system and the lack of compassion exhibited among the players? What about the consequences of working in such an environment? What else might explain the many instances of prosecutorial misconduct from those human beings who are, in other contexts, decent people?

If most prosecutors work hard, seek justice, follow the rules, and are simply good people with good intentions, why has the word “prosecutor” so often become synonymous with mistrust, hostility, competitiveness, and aggression?²³ Many would argue these negative connotations stem from the fact that prosecutors interact in a highly adversarial criminal

20. GIDEON’S, *supra* note 18, at 12.

21. *Update: 2012*, NAT’L REGISTRY EXONERATIONS (Apr. 3, 2013), https://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf.

22. Teri Stoddard, *Registry of Prosecutorial Misconduct Invites Submission of State-Level Cases*, CTR. FOR PROSECUTOR INTEGRITY (Mar. 25, 2014), <https://www.prosecutorintegrity.org/pr/registry-of-prosecutorial-misconduct-invites-submission-of-state-level-cases/>.

23. TCR Staff, *Memo to the Nation’s Newest Prosecutors: Restore Your Community’s Trust*, INSTITUTE FOR INNOVATION IN PROSECUTION (Dec. 10, 2018), <https://www.prosecution.org/prosecutors-must-restore-trust> (describing prosecutors as having an adversarial role, using harsh investigative tactics, alienating people in at-risk communities, and using “dehumanizing” language).

justice system on top of working in highly competitive environments in their own offices, which contributes to potential misconduct. This misconduct may take many forms, and the most extreme instances include hiding exculpatory evidence from the defense, making inflammatory, prejudicial, or otherwise improper statements during trial in front of the jury, or misrepresenting the truth.²⁴ We need to take a fresh approach on this issue and move away from the typical punitive suggestions such as eliminating prosecutorial immunity, promoting harsher penalties for prosecutorial misconduct, and filing bar complaints and ethics violations. We should ponder what joy might do to the overall system.

Criminal justice reform has become quite the buzzword in the last few years. There have been various movements and attempts made to reform policing²⁵ and inspire public defenders.²⁶ The goal of these movements is to transform the culture surrounding the criminal justice system. Legislation has also been passed pushing the criminal justice reform agenda.²⁷ At the same time, the progressive prosecutor movement began around 2014, during which newly elected District Attorneys promised their communities that they would bring fairness to the criminal justice system by instituting policies that might limit the prosecution of low-level crimes, eliminate cash bail, or support diversionary programs that might reduce mass incarceration.²⁸

24. Christopher Zoukis, *Prosecutorial Misconduct: Justice Denied as the System Turns a Blind Eye*, CRIMINAL LEGAL NEWS (Feb. 18, 2020), <https://www.criminallegalnews.org/news/2020/feb/18/prosecutorial-misconduct-justice-denied-system-turns-blind-eye/>.

25. See Miriam Aroni Krinsky & John Butler, *21 Principles for the 21st Century Prosecutor*, 16 STAN. J. C.R. & C.L., 537 (2021).

26. GIDEON'S, *supra* note 18, at 12.

27. Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME (July 7, 2020, 3:55 PM), <https://time.com/5863783/prosecutors-criminal-justice-reform/>. During the Obama Administration, "Smart on Crime" policies were adopted by federal prosecutors. These policies were meant to abandon the tough-on-crime stance and encourage case assessments.

28. Press Release, Terri Stoddard, Innocence Summit to Focus on Prosecutor Ethics Reform (Feb. 11, 2014), <https://www.prosecutorintegrity.org/pr/innocence-summit-to-focus-on-prosecutor-ethics-reform/> (the Innocence Summit in 2014 centered on ethical reforms and progressive prosecutors. This encouraged the development of agendas for prosecutorial reform, the eventual "blueprint" for development at the state-level).

While many of these initiatives are positive steps in the right direction (particularly those advocating for a lasting change in the culture and how defendants are treated while in the system), the fear is that these progressive prosecutor movements and reforms are fleeting—the current trend—until crime rates go up and prosecutors must again prove they can be tough-on-crime.

This leads us back to the overall public perception that prosecutors are not doing an adequate job.²⁹ Do prosecutors need a minor makeover or complete overhaul? To answer this question, Part II of this article describes the prosecutorial environment that currently exists in the criminal justice system and the culture which shaped today's prosecutors. Part III then examines the type of prosecutor we hope to encounter in the future, which depends in part on reframing the prosecutor's role based on an allowance for empathetic and compassionate lawyering. In Part IV, we return to the question previously asked as to what qualities would make for the ideal prosecutor and explore the new world of prosecutors using the Dalai Lama's thoughts on joy as the backdrop. Under such a model, prosecutors need to be supported through individual and group practices to create lasting change and aided by a like-minded community which supports this idea of community-oriented prosecutions.

II. THE CURRENT MODEL

A. *The Prosecutor's External Environment*

1. *The Adversarial System*

“Justice” is often described as just behavior, fairness/fair play, objectivity, peace, morality, respect for people, and honesty—to name a few.³⁰ Prosecutors are asked daily to rise above any pettiness or gamesmanship surrounding the adversarial legal system and seek justice for victims, play fair, and search for truth.

29. See Paul Butler, *The Prosecutor Problem*, BRENNAN CENT. JUST. (Aug. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem>.

30. See *Justice*, BLACK'S LAW DICTIONARY, (11th ed. 2019).

Justice Sutherland's description of the ideal prosecutor is one that is commonly repeated in federal and state court cases to this day:

[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality 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, [a prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or 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. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³¹

This focus on justice and the search for truth is in direct conflict with the United States' adversarial legal structure. All too often the focus at trial is about winning (point, counterpoint) and beating the other side. Prosecutors must operate under an adversarial system—where winning and losing, obtaining convictions and not acquittals—is the focal point of the criminal justice system. Office policies also encourage this sense of competition. Scholars have argued that a certain “conviction psychology” exists within prosecutors, in that prosecutors choose to focus on obtaining a conviction rather than seeking justice.³² The fact that prosecutors have been found to hide evidence from opposing counsel, or make improper or inflammatory comments at trial, are all signs of competition gone awry.

2. *The Creation of an “Us” versus “Them” Structure*

The prosecutor is purposely kept at arms-length from the most important player in the game: the defendant.³³ The

31. *Berger v. United States*, 295 U.S. 78, 88 (1935).

32. Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648, 649 (2016) [hereinafter *Prosecutor Risk*].

33. Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L.J. 475, 486 (2006) (citing Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. 197, 208 (1988)).

prosecutor is unable to speak to, or address, the defendant as they have a right to counsel under the Sixth Amendment and the right against self-incrimination under the Fifth Amendment.³⁴ Because the prosecutor is kept from ever speaking to the defendant and learning more about the case outside the evidence applicable to the particular crime, the prosecutor is oftentimes unaware of the consequences of his or her charging decisions, plea offers, and sentencing recommendations.³⁵ Due to this separation, many prosecutors can fall in the trap of making robotic-like decisions and become detached from the impact their decisions have on the defendant, the defendant's family and friends, and the community as a whole.

A prosecutor must take the word of the investigators or defense counsel when making decisions. A prosecutor and defendant rarely, if ever, speak about the crime (unless they cooperate by mutual agreement against another co-defendant), the circumstances surrounding the crime, or personal aspects of the defendant's situation. Rather, information provided to the prosecutor is filtered through a third party (the investigators or defense attorney). This information filtration system can be described as "triangulation."³⁶ If the prosecutor receives complaints or biased information from the third party that negatively affects the perspective of the prosecutor, such triangulation can create a toxic dynamic and promote passive-aggressive behavior.³⁷ Triangulation can create ineffective communication, and the real meaning behind a certain message may never be fully communicated to the individual prosecutor. A strained relationship between a prosecutor and

34. We have a similar structure in the civil system in that an attorney must always work through the intermediary of counsel. It seems the legal system is designed to work through intermediaries rather than use a direct approach to solve conflict. Rule 4.2 of the Model Rules of Professional Conduct reads, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES OF PRO. CONDUCT r. 4.2, AM. BAR. ASS'N 2020.

35. Butler, *supra* note 29.

36. See Mia Belle Frothingham, *What is Triangulation in Psychology?*, SIMPLE PSYCH. (June 8, 2022), <https://www.simplypsychology.org/what-is-triangulation-in-psychology.html>.

37. Frothingham, *supra* note 36.

defense counsel might negatively affect the outcome for the accused. The same is true if the prosecutor and case agent are hostile towards each other. A competitive atmosphere, on top of a lack of communication, can quickly lead to anger or hostility even among members of the same prosecutorial team. Misinterpreted messages and lack of communication can lead to irrational behaviors on either one or both sides of the opposing legal teams.

B. The Prosecutor's Training Ground: Law School

Overall, lawyers have not been known to be overly empathetic and compassionate, even though lawyering is, in fact, a service profession.³⁸ It is important to consider what prosecutors and defense attorneys are taught early in their law school careers. From the first day of law school, students are taught that emotions and motives are generally excluded from the legal analysis, and facts of the case that do not touch upon the particular elements of the offense are irrelevant.³⁹ Law students are taught to use reason and logic when making an argument. Emotion and rationality are rarely reconciled—detached and non-emotional behavior is preferred. In reality, emotions cannot be separated from the law. Human beings express emotions, and the human element in law cannot be ignored.

According to the book, *The Happy Lawyer*, law school can have a harmful impact on students.⁴⁰ Students' attitudes while in law school are transformed because they are drawn away from intrinsic and idealistic motives, such as helping others or making a difference in their communities and are pushed

38. See David Perla, *What's Possible: The Empathetic Lawyer*, ABOVE L. (Feb. 23, 2016, 3:14 PM), <https://abovethelaw.com/2016/02/whats-possible-the-empathetic-lawyer/>.

39. For example, in the criminal law context, whether a mother stole an item to feed her children or she had a less altruistic reason for the larceny is irrelevant. The question is simply, did she have the requisite intent to steal? (Although the reason behind why she committed the crime could be relevant at the sentencing hearing when determining punishment or might even prove she had the requisite mental state at the time of the act). Regardless, law students, particularly in the first year, are generally taught to only pull facts which support the elements of the offense out of the fact patterns and not dwell on the emotional circumstances surrounding the case when making that determination.

40. See generally NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* (1st ed. 2010).

towards more extrinsic motivations such as impressing others, rising within the ranks, or making money.⁴¹ Moreover, because law school focuses exclusively on thinking rather than feeling, students have some difficulty developing or improving their empathy skills.⁴² Many have commented that lawyers are generally not in touch with their feelings and emotions.⁴³ Lawyers need emotional re-framing and the development of self-awareness, which in turn, will allow them to increase their ability to focus and remain calm and compassionate in the face of heated litigation.

Lawyers are not the only group of human beings that struggle with suppressing emotions. As Dr. Ronald Peters discussed in his book, exploring the impact of non-expression of emotions on a person's physical health:

For reasons rooted deep in our cultural history, our society has always stressed thinking and intellect over emotions and other feelings such as intuition. Our society favors the masculine approach in life with its aggressive and controlling nature over the feminine, which is more accepting, nurturing and balanced with feeling and intuition. As a result, we try to run our world almost entirely with our minds. We make heady plans, and try to execute them with sheer mental will, bulldozing past whatever feelings arise in the process. When the outcome fails to meet our expectations, we become frustrated, disappointed, and frightened. But because our emotional

41. *Id.* at 125-26.

42. *Id.* See also Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F.L. REV. 621 (2002).

43. LEVIT & LINDER, *supra* note 40, at 74-75 ("Is the practice of law disproportionately filled by people with certain personality traits? The answer is clearly 'yes.' When compared to the general population on a standard measure of personality types, a distinctive picture of lawyer emerges. Lawyers, as a group, are more introverted, more doubt-ridden, cooler, and more logical than most people. They are less open about their feelings and less inclined to live in the present than most people. Lawyers are competitive, confident (sometimes a kiss away from arrogant), aggressive, and achievement-oriented; they can be argumentative. We're not talking about you, of course, but many lawyers—including some very successful lawyers—express 'high dominance' personalities. High dominance personalities are associated with a strong competitive drive and are marked by frequently interrupting, controlling conversations, changing topics, offering unsolicited advice or instructions, and stating strong opinions. In the courtroom, a strong competitive drive can be the difference between winning and losing for your client, so this personality type can be a career positive at the same time that it might sour the personal relationships so essential to both personal and career happiness.").

skills lag far behind our thinking ones, we deal with those feelings by resorting to more busy plans and hard work to make everything turn out right.⁴⁴

This imbalance between thought and emotion can lead to physical disease and a disconnect between the self and others. As Dr. Peters aptly states:

We are more apt now to navigate life with a balance of heart and intellect instead of by intellect alone, leading to greater levels of maturity and self-understanding Not only do emotions guide us toward greater health and well-being, they can lead us to unlimited depths of personal wisdom. The late psychiatrist, David Viscott, wrote: “Being in touch with your feelings is the only way you can become your highest self.” Being in touch with feelings is impossible without personal responsibility, for feelings must first be owned as ours, not blamed on others.⁴⁵

Even Sun Tzu in *The Art of War* recommends developing self-awareness and cultivating presence and self-reflection:

If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.⁴⁶

The criminal justice system can, at times, seem like a battlefield. While the adversarial environment will not change, the way in which prosecutors play the game can change. Empathizing with the opposing side’s circumstances and developing their own self-awareness will lead to a better, fairer playing field.

C. A Shared Prosecutorial Experience

Professors Kay Levine and Ronald Wright conducted a study in which they interviewed more than 200 state prosecutors in eight offices in the United States.⁴⁷ They found that young (rookie) prosecutors “tend to embrace a combative

44. RONALD L. PETERS, EDGEWORK: EXPLORING THE PSYCHOLOGY OF DISEASE: A MANUAL FOR HEALING BEYOND DIET AND FITNESS 132 (2003).

45. *Id.* at 133-34.

46. SUN TZU, THE ART OF WAR 15 (2006).

47. *Prosecutor Risk*, *supra* note 32, at 655. *See also* Ronald F. Wright and Kay F. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1068 (2014).

spirit to prove themselves formidable adversaries in court.”⁴⁸ In their study, they also found a group of veteran prosecutors “zealots” who “resist[ed] the normal lessons of experience and eschew[ed] the sense of proportionality and restraint that their colleagues embrace.”⁴⁹ These “zealots” were “rigid or overly aggressive throughout their careers,” and had on “blindness about the strength of their evidence and lack[ed] a sense of proportion in punishment.”⁵⁰

Prosecutors in the study described themselves as “Type A, methodical, and rule oriented.”⁵¹ Inexperienced prosecutors try “not to appear weak or scared to [their] peers and supervisors.”⁵² Such prosecutors want to “prosecute the hell out of everyone.”⁵³ Kay and Levine found that veteran prosecutors mellowed with experience and had more of an “ability to see ‘shades of gray’ in their cases and in the people involved in those cases.”⁵⁴ In contrast, Professor Laurie Levenson found that in her experience in the habeas context, “older prosecutors can become entrenched in their adversarial roles and will not adjust to a collaborative model.”⁵⁵

The idea that the adversarial system has created some sort of competition between the prosecutor and the defense counsel, suggesting that the prosecutor must win at all costs, becomes a common theme expressed by prosecutors in the past:

“What the new prosecutor is taught is that no matter how solid a case he has, there is always the possibility that he will lose at trial. And a defeat at trial means total loss.”⁵⁶

The prosecutor’s job is “constantly pushing the edge of the envelope out to see if you can get an edge for the prosecution” because “[y]ou’re trying to get every edge you can on those people who are devising increasingly more intricate schemes to

48. *Prosecutor Risk*, *supra* note 32, at 650.

49. *Id.*

50. *Id.* at 664-65.

51. *Id.* at 651.

52. *Id.* at 657.

53. *Id.* at 658 (internal citations omitted).

54. *Prosecutor Risk*, *supra* note 32, at 660.

55. Laurie L. Levenson, *The Problem with Cynical Prosecutors’ Syndrome: Rethinking a Prosecutor’s Role in Post-Conviction Cases*, 20 BERKLEY J. CRIM. L. 335, 339-40 (2015).

56. MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 111 (1st ed. 1978).

rip off the public, hiring the best lawyers, providing the best defenses.”⁵⁷

“Three types of culture—the culture of the prosecutor’s office, American popular culture, and the culture created by the modern legal norms of criminal justice—shaped how I saw the rights of the people I prosecuted. If you had asked me, I would have said that it was my job to protect constitutional rights and strike only what the Supreme Court once called ‘hard blows, not foul ones.’ But in my heart, and in my approach to law, I saw rights as a challenge, as something to be overcome to win a conviction. Nobody taught me that *explicitly*—nobody had to.”⁵⁸

“American culture relentlessly tells prosecutors that they are by definition the good guys. It tells them that assertions of rights are, at best, impediments to be overcome, and at worst cynical ploys by villains. It is tremendously difficult to ignore those cultural messages and give defendants’ constitutional rights the attention they deserve. . . . This makes for a strong team. But it doesn’t encourage introspection about wrongdoing.”⁵⁹

“It really came down ultimately to getting a plea or winning a trial so I could go home that day and say, ‘Okay I won today. That game is over.’”⁶⁰

“Ultimately, prosecutors don’t see themselves as the conscience of the community. They see themselves as having a job to do, needing to win to keep that job, and go on to bigger and better things. . . .”⁶¹

Prosecutors have been described by defense attorneys and judges as “big-head[ed],” “self-righteous,” consumed with power, swayed by their own propaganda, and “God’s designed hitter[s] in the World Series of Life.”⁶²

57. Jim McGee, *War on Crime Expands U.S. Prosecutors’ Power; Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1 (quoting former Attorney General Richard Thornburgh).

58. Ken White, *Confessions of an Ex-Prosecutor*, REASON (Jun. 23, 2016, 10:00 AM), <https://reason.com/2016/06/23/confessions-of-an-ex-prosecutor>. Ken White is a former federal prosecutor.

59. *Id.*

60. MARK BAKER, D.A: PROSECUTORS IN THEIR OWN WORDS 79 (1999).

61. *Id.*

62. *See id.*

Jonathan Rapping points out that prosecutors tend to prioritize efficiency over justice under a variety of circumstances, including conditioning plea offers upon a defendant's agreement to give up procedural rights, or threatening to pull back a plea offer if the accused does not waive a preliminary hearing, chooses to file a suppression motion, or continues to demand discovery before the change of plea.⁶³

Lastly, prosecutors, like almost every other lawyer, must deal with the stresses of practice.⁶⁴ Stress and heavy caseloads make it harder for prosecutors to see the bigger picture. Retired attorney John Eldridge describes the stress of lawyering:

Stress is almost another word for practicing law. It is everywhere! It's in that list of phone calls that need to be made. It is in the rush to get to court on time. It is in the brief that is due tomorrow. In short, stress is that everyday feeling of too much to do and too little time to do it. . . . But we as lawyers learn to live with stress and deal with it. I used to say practicing law was like keeping a bunch of balloons in the air, and then grabbing the one that is about to hit the ground. Push that balloon back up in the air and then grab the next one that is about to hit the ground.⁶⁵

Add to the normal job stress the "hustle culture"/burnout culture/workaholism/toxic productivity that surrounds the profession, and it becomes clear that most prosecutors would find it difficult to routinely "exercise sound discretion" and "act with integrity and balanced judgment"⁶⁶ at all times.

63. GIDEON'S, *supra* note 18, at 169 and 172.

64. See Adam M. Gershowitz and Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. L. REV. 261 (2011) (discussing how prosecutors are overworked and must deal with too-large caseloads).

65. John Eldridge & Knoxville Bar Association, *Lessons Learned: Reflections from a Retiring Lawyer*, DICTA (May 2022), <https://issuu.com/knoxvillebarassociation/docs/dicta.may2022/s/15528748>.

66. CRIM. JUST. STANDARDS, *supra* note 12, at 3-1.2(a)-(b). (AM. BAR ASS'N 2017). The ABA also identifies compassion fatigue, "the cumulative physical, emotional and psychological effect of exposure to traumatic stories or events when working in a helping capacity, combined with the strain and stress of everyday life ... compassion fatigue is different than burnout ... Someone affected by compassion fatigue may be harmed by the work they do, experiencing intrusive imagery and a change in world-view." *Compassion Fatigue*,

Regardless of whether a prosecutor is new or more experienced, the fact remains that all prosecutors must work in an adversarial environment and resist the temptation to blindly follow their supervisor's or law enforcement's evaluation of the case or to perceive the defendant as the rival. As with any job, what one does day-in and day-out can become routine, and at times, mindless. Maintaining presence and exercising sound discretion on each individual case may prove to be an arduous task.

D. Current Prosecutorial Guidance and Support

What guides prosecutorial behavior? On a daily basis, prosecutors are obviously guided by office policy and what their supervisor demands. Each district attorney's office has its own set of guidelines just as federal prosecutors have their own United States Attorneys' Manual, Department of Justice memos, and office guidelines. Internal investigations of misconduct and bar referrals can also impact the individual prosecutors involved. Even the media may play a role as to how the prosecutor acts on a certain case.⁶⁷

Interestingly, the Supreme Court has a lot to say about how police officers should conduct investigations and interact with the public, but the Court provides little guidance on how prosecutors should behave.⁶⁸ The prosecutor should simply follow the local rules of criminal procedure and comply with individual court and local bar rules.

The prosecutor is essentially on an island, left to follow their own moral compass. Judicial supervision is unlikely in most situations—who to charge, what to offer during plea negotiations, how to respond to defense requests, and what to argue or request at sentencing are left solely up to the executive branch.

AmericanBarAssociation.com, https://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue/ (last visited Aug. 21, 2022).

67. Repeated media stories on a particular case may influence a prosecutor to investigate further or present available evidence to a grand jury for indictment.

68. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see also* *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

1. Office Guidance

As previously mentioned, one of the biggest reasons why prosecutors tend to value convictions over justice has to do with the culture inside prosecutors' offices. "Incentive systems within the office reward prosecutors for their convictions, both at trial and through plea negotiation."⁶⁹ In most states, those who lead the office, State, District, or County Attorneys, are elected officials.⁷⁰ These officials generally run on law-and-order platforms and attempt to convince the public that they will solve the unsolved crimes, quickly convict defendants, and recommend lengthy sentences for the worst offenders. These head prosecutors are known to pressure their line attorneys "to obtain convictions at all costs."⁷¹

One of the offices that Professors Levine and Wright studied emphasized winning trials by passing around a trophy "to the prosecutor who most recently won a jury trial."⁷² Other offices have been known to display "trial scoreboards and [provide] cash rewards to prosecutors for convictions."⁷³ Other offices kept an internal list of "attorneys' batting averages" or listed "each lawyer by name on a bulletin board with a series of stickers reflecting the conclusions of their recent cases (green for convictions and red for acquittals)."⁷⁴

Professor Hadar Aviram has written about the "pervasive prosecutorial subculture that generates confirmation biases,⁷⁵ tunnel vision, and huge personal investment in a guilty

69. *Prosecutor Risk*, *supra* note 32, at 649.

70. *State and Local Government*, WHITEHOUSE.ORG, <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/>.

71. *Id.* at 653.

72. *Id.* at 667.

73. *Id.* at 668.

74. Lawton P. Cummings, *Can an Ethical Person be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2148 (2010).

75. Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1, 11, 32 (2013) ("The theory behind the bias is that humans do not approach new information with an entirely blank mind. Rather, we perceive information through our already-tainted perspective, complete with our prior opinions and biases. We tend to be attached to our perception, and therefore seek information that confirms our already-solidified perspective and resist persuasion to the contrary.").

verdict.”⁷⁶ The guidance that many prosecutors receive from their own offices confirm the dominance of a competitive spirit and supports imbalance from within.

2. Supreme Court Guidance

The Supreme Court has provided little guidance. The Court appears to trust, for the most part, that prosecutors have a strong sense of right and wrong and will do the right thing in the heat of litigation.⁷⁷ As stated in *United States v. Armstrong*, “[j]udicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.”⁷⁸

a. Charging Decisions

Who the prosecutor decides to charge, and what they decide to charge, is entirely within the prosecutor’s broad discretion.⁷⁹ The Court won’t even question if the prosecutor chooses charges with higher penalties rather than those with lesser penalties, or multiple charges that might create cumulative, longer periods of incarceration.⁸⁰ “The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.”⁸¹

The only requirement is that the prosecutor have probable cause to believe the person committed the crime charged.⁸² “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the

76. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, NOTRE DAME L. REV. 51, 97 (2016).

77. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 54 (2016).

78. *Armstrong*, 517 U.S. at 465 (1996).

79. *Batchelder*, 442 U.S. at 124 (1979). (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”). *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”).

80. *Id.*

81. *Batchelder*, 442 U.S. at 125.

82. CRIM. JUST. STANDARDS, *supra* note 12, at 3-4.36(a) *Quality and Scope of Evidence Before a Grand Jury* requires that: “(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial.”

decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”⁸³

Not only has the Court demonstrated a hands-off policy as to prosecutorial charging behavior, the Court has also made clear that it does not feel comfortable delving into the true motives behind a prosecutor’s actions. In *United States v. Wayte*, the Court stated:

Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.⁸⁴

However, the line is crossed if the prosecutor selectively prosecutes and makes a charging decision based upon “race, religion, or other arbitrary classification.”⁸⁵ “To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.”⁸⁶ In such a case, the prosecutor would be violating the Equal Protection Clause.⁸⁷

But proving selective prosecution is incredibly difficult. A defendant must demonstrate that the prosecutorial charging policy had a discriminatory effect, and that it was motivated by a discriminatory purpose.⁸⁸ “We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.”⁸⁹ On the whole, the prosecution has “broad discretion” when bringing charges. Thus, proving malicious or even inappropriate intentions is virtually impossible.

83. *Wayte*, 470 U.S. at 607 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

84. *Id.* at 607-08.

85. *Id.* at 608.

86. *Armstrong*, 517 U.S. at 465.

87. *Wayte*, 470 U.S. at 608.

88. *Armstrong*, 517 U.S. at 465.

89. *Id.* at 470.

b. Vindictive Prosecution

Vindictiveness is defined as “a strong desire to get back at someone.”⁹⁰ A person is called vindictive if they hold grudges or seek revenge.⁹¹ It is interesting the Supreme Court chose the term “vindictive” to describe prosecutors who increase or file charges in response to a defendant’s exercise of his or her constitutional rights.⁹² Prosecutors are found to be seeking revenge and exhibiting retaliatory behavior when they make charging decisions in only the rarest and narrowest of circumstances. In these instances, the charging decision must have been motivated by a desire to punish the defendant for doing something the law allowed the defendant to do.⁹³ For example, in *Blackledge v. Perry*, the defendant appealed his misdemeanor conviction after trial (something he had a constitutional right to do), and the prosecutor then proceeded to charge him with a felony.⁹⁴

Instead of looking into the internal motivations of the prosecutor behind such a decision, on an individual case-by-case basis, the Court decided it would presume vindictiveness any time a prosecutor increased charges post-trial (and after the defendant had exercised a lawful, constitutional right).⁹⁵ In contrast, if a prosecutor imposes additional charges that carry greater penalties pre-trial, and during the “give and take” of plea negotiations, such actions are presumed lawful and fair game.⁹⁶ Again, the Court dodged passing judgment on prosecutors and chose a safer route. It would be much easier to presume a vindictive motive in a post-trial situation, in response to a defendant’s right to appeal, rather than interpret prosecutors’ internal motivations and strategies during the pre-game plea negotiation process.

90. *Vindictiveness*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/vindictiveness#:~:text=vindictiveness%20Add%20to%20list%20Share,you're%20full%20of%20vindictiveness> (last visited Dec. 21, 2022).

91. *Armstrong*, 517 U.S. at 470.

92. *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

93. *Id.*

94. *Blackledge v. Perry*, 417 U.S. 21, 22-23 (1974); *Goodwin*, 457 U.S. at 372-73 (“Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to ‘presume’ an improper vindictive motive.”).

95. *Blackledge*, 417 U.S. at 28-29.

96. *Goodwin*, 457 U.S. at 377-78.

c. Discovery Obligations

Discovery is one area in which prosecutors are judicially monitored. Along with complying with the local discovery rules, prosecutors must disclose to defense counsel all evidence that is favorable to the accused and material either to the defendant's guilt or punishment.⁹⁷ The consequence for not turning over exculpatory evidence is not attorney sanctions but retrial. In *United States v. Bagley*, the Supreme Court expressed concern regarding the "justice of the finding of guilt," holding a conviction must be reversed only if evidence kept from the defendant is material and therefore, "undermines confidence in the outcome of the trial."⁹⁸

Writing in dissent, Justice Marshall seemed to recognize that it may be difficult for prosecutors, as competitors, to show their hand and assist the defense in preparing for witnesses and evidence to be presented at trial:

In perusing his files, he must make the often-difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as an advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. . . . By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play.⁹⁹

Some prosecutors have an open-file discovery policy and share everything; others choose to only turn over what is required. What is clear is that the current *Brady* framework allows for enough leeway that prosecutors can later say they were unaware at the time that such evidence would be favorable to the defendant—or even if it is later determined to be favorable—that such evidence would not have changed the outcome of the trial and therefore was not material.

97. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

98. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

99. *Id.* at 698 (Marshall, J., dissenting).

d. Plea Bargaining

Plea bargaining has been described as occurring in the “shadows” of the courtroom,¹⁰⁰ and until recently, there has been very little case law as to what a prosecutor can or cannot offer.¹⁰¹ “Plea bargaining flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.”¹⁰² The problem seems to lie in the fact that the prosecutor holds all the cards and can gain leverage using charging and sentencing recommendation powers. The defendant’s position is relatively weak depending on the defense attorney’s relationship with the prosecutor, whether the evidence against the defendant is weak or not, and which prosecutor has the case (an aggressive hard-charger, a more reasonable prosecutor, or a wanting-to-plea-out-all-cases type).

Prosecutors can charge everything imaginable and agree to drop charges, negotiate charges on the front end, threaten more charges if the defendant refuses to plead guilty, or refuse to drop charges and recommend a lesser sentence. Everything is fair game, and the Court accepts that the prosecutor holds such power, giving them total discretion. In *Bordenkircher v. Hayes*, the Supreme Court stated:

[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo this right to plead not guilty. . . . There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.¹⁰³

Similar to its stance with a prosecutor’s charging decisions, the Court refuses to delve into what might motivate a prosecutor in making the plea offers he or she makes to the defense. Absent physical coercion or outright threats, the prosecutor can manipulate and pressure the defendant into

100. Simon Stern, *Plea Bargaining in the Shadow of Narrative*, NONSITE.ORG (Aug. 2, 2021), <https://nonsite.org/plea-bargaining-in-the-shadow-of-narrative/>.

101. *Lafler v. Cooper*, 566 U.S. 156, 176, 186 (2012) (Scalia, J., dissenting).

102. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

103. *Id.* at 364-65.

pleading guilty, and the Court seems to expect that some of this implicit pressure occurs in the negotiation process:

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. . . . All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction. Of course, agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.¹⁰⁴

In *Lafler v. Cooper*, the defendant rejected a guilty plea based on the advice of counsel and was later able to prove ineffective assistance of counsel.¹⁰⁵ The state prosecutor was then required to offer the defendant the same plea deal that he would have taken but-for his attorney's ineffective assistance of counsel.¹⁰⁶ Justice Scalia reflected on plea-bargaining law in his dissent and likened plea negotiations to a game of poker:

Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”? . . . The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.¹⁰⁷

104. *Brady v. United States*, 397 U.S. 742, 750 (1970).

105. *Lafler*, 566 U.S. at 160.

106. *Id.* at 174.

107. *Lafler*, 566 U.S. at 176, 186.

e. Jury Selection

Prosecutors can ask practically anything they want during jury selection,¹⁰⁸ but cannot strike anyone from the jury panel based on their race, sex, or other arbitrary classification.¹⁰⁹ In *Batson v. Kentucky*, the Supreme Court explained that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”¹¹⁰ “Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”¹¹¹ Above all, the Court does not want a perception that “the truth-seeking function of the trial process” has been corrupted.¹¹²

f. Conduct at Trial

“Prosecutor: Have you ever done business with the Kennedys?

Witness: No, I have not.

Prosecutor: Is that because he is a crook?”¹¹³

Time after time the Supreme Court has emphasized that despite the adversarial nature of trial, “the very nature of a [criminal] trial [is] a search for truth.”¹¹⁴ Accordingly, the Court expects the prosecutor to rise above their own competitive nature and seek out the truth rather than develop a win-at-all-costs attitude: “[A] special role [is] played by the American prosecutor in the search for truth in criminal

108. Of course, this also depends on the particular judge and his/her *voir dire* parameters.

109. Brandon Sample, *Examining Racial Bias in Jury Selection*, SENTENCING (Mar. 3, 2019), <https://sentencing.net/trial/racial-bias-jury-selection>.

110. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

111. *Id.* at 87. In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court found that the Equal Protection Clause of the Fourteenth Amendment does not permit peremptory challenges based on gender classification. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994). The opinion rejects the state’s argument that certain genders hold a predisposition to identify with like-groups, noting that discrimination has no place in the jury selection process. *Id.* at 137-40. To allow peremptory challenges based on gender would negatively impact the legitimacy of the legal system as a whole. *Id.*

112. *Bagley*, 473 U.S. at 679-80.

113. *Oregon v. Kennedy*, 456 U.S. 667, 669 (1982).

114. *Nix v. Whiteside*, 475 US 157, 166 (1986).

trials.”¹¹⁵ This may prove to be incredibly tricky, since “[e]very act on the part of a rational prosecutor during a trial is designed to ‘prejudice’ the defendant by placing before the judge or jury evidence leading to a finding of his guilt.”¹¹⁶

Prosecutors are told not to make inflammatory, irrelevant comments that might unfairly prejudice the jury.¹¹⁷ An attorney’s comments during closing argument “must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried.”¹¹⁸ Prosecutors must not personally vouch for their witnesses, or mischaracterize or misstate the evidence admitted during trial.¹¹⁹ A prosecutor should never comment on a defendant’s decision not to testify at trial.¹²⁰ Nor should they make racially-based arguments meant to inflame the jurors and arouse prejudices.¹²¹ As Justice Sotomayor commented on a prosecutor’s racially charged cross-examination question,¹²² “[s]uch conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice.”¹²³ Finally, a prosecutor should never knowingly use perjured testimony or fabricate evidence.¹²⁴

115. *Floyd v. State*, 902 So. 2d 775, 778 (Fla. 2005)

116. *Kennedy*, 456 U.S. at 674.

117. Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 900 (2018).

118. *State v. Bohannon*, 2018 WL 1831867, at *11 (Tenn. Crim. App. Apr. 17, 2018), *State v. Gann*, 251 S.W.3d 446, 459 (Tenn. Crim. App. 2007) (quoting *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1978)).

119. Radley Balko, *Are Prosecutors Obligated to Believe the Evidence they Present at Trial?*, WASH. POST (Nov. 9, 2017, 1:33PM), <https://www.washingtonpost.com/news/the-watch/wp/2017/11/09/are-prosecutors-obligated-to-believe-the-evidence-they-present-at-trial/>.

120. *Griffin v. California*, 380 U.S. 609, 609-10 (1965).

121. *Calhoun v. United States*, 568 U.S. 1206, 1206-07 (2013) (denial of writ of certiorari).

122. *Id.*; see also Eyder Peralta, *Justice Sotomayor Chastises Asst. U.S. Attorney for Race Baiting in Drug Case*, NPR (Feb. 26, 2013), <https://www.npr.org/sections/thetwo-way/2013/02/25/172879996/justice-sotomayor-chastises-u-s-attorney-for-race-baiting-in-drug-case>. During the trial, the assistant U.S. attorney, who was not named by Sotomayor, stated, “You’ve got African Americans, you’ve got Hispanics, you’ve got a bag full of money ... Does that tell you—a light bulb doesn’t go off in your head and say, “This is a drug deal?””

123. Peralta, *supra* note 122.

124. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

But even if a prosecutor errs and makes an improper comment, the defendant bears the burden of proving prejudice on appeal.¹²⁵ The question is whether the conduct was so inflammatory or improper that it affected the verdict to the defendant's detriment.¹²⁶

At trial, the defendant can ask for a mistrial due to the improper comments, but generally, double jeopardy does not bar retrial.¹²⁷ Prosecutors can try and try again. The only exception to the rule is if the defendant can prove the prosecutor intended to provoke a mistrial motion by making such comments.¹²⁸ The chances of proving prosecutorial intent are slim.¹²⁹ As Justice Stevens stated in his dissent in *Oregon v. Kennedy*, “[i]t is almost inconceivable that a defendant could prove that the prosecutor’s deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant.”¹³⁰

In conclusion, after analyzing the case law related to prosecutorial duties, it is clear the Court has given prosecutors broad discretion to govern themselves.¹³¹ While admitting the criminal justice plea/trial “game” is adversarial, the Court expects the prosecutor to rise above the temptations to win and prioritize the search for truth and justice over gaining any competitive advantage. The Court refuses to delve into prosecutorial motives behind their conduct or comments at trial and leaves it up to individual prosecutors to learn how to best conduct themselves. A quick summary of the Court’s case

125. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

126. *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965); see *People v. Dawson*, 427 N.W.2d 886, 897 (Mich. 1988).

127. See generally *Harrington*, 385 S.W.2d 758.

128. *Dawson*, 427 N.W.2d at 897 n.56; see also *Oregon v. Kennedy*, 456 U.S. at 675-76 (“Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant’s motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.”).

129. See generally *Dawson*, 427 N.W.2d 886; See generally *Kennedy*, 456 U.S. 667.

130. *Kennedy*, 456 U.S. at 688 (Stevens, J., dissenting).

131. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 1986). ABA Rule 3.8 (Special Responsibilities of a Prosecutor) is designed to provide guidance to prosecutors as to what they should or should not do, and it has been implemented in many states.

law on this issue would look something like this: treat everyone the same, don't lie or exaggerate during trial, and don't hide evidence pre-trial (exculpatory or otherwise). This tempered, minimal approach to prosecutorial monitoring makes it imperative to hire the "right type" of person who can handle a position of power with grace, humility, and remain calm under pressure.

III. THE NEW, JOYFUL MODEL

The way we see the world is the way we experience the world. Changing the way we see the world in turn changes the way we feel and the way we act, which changes the world itself.¹³²

A. Reframing the Prosecutor's Role and Relationships

In the policing context, a great deal has been written about the police officer's role and relationship with the community.¹³³ Several scholars have suggested a reframing of that role would be highly beneficial towards regaining the community's trust in police.¹³⁴ While the police have taken on a "warrior" role in the past, several have suggested a "guardian" role is more appropriate.¹³⁵ The "warrior" mission has been described as one of containment and control, law and order, search and destroy, and one in which arrests and crime-fighting is

132. JOY, *supra* note 1, at 194.

133. Gary T. Marx, *Police and Democracy*, in 2 POLICING, SECURITY AND DEMOCRACY: THEORY AND PRACTICE (Menachem Amir & Stanley Einstein eds. 2001); HERMAN GOLDSTEIN, POLICING A FREE SOCIETY (1990), <https://ssrn.com/abstract=2596883>; HERBERT JACOB, THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE 17-41 (1974); Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of Police*, in THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE (1974).

134. See RACHEL HARMON, THE LAW OF THE POLICE 33-50 (2021); Ta-Nehisi Coates, *The Myth of Police Reform*, ATLANTIC (Apr. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057/>; Christopher Slobogin, *Police as Community Caretakers: Caniglia v. Strom*, 2020-21 CATO SUP. CT. REV. 191 (2021), <https://scholarship.law.vanderbilt.edu/faculty-publications/1233>; Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. UNIV. L. REV. 65 (2021).

135. Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 226 (Apr. 10, 2015), <https://harvardlawreview.org/2015/04/law-enforcements-warrior-problem/>. Modern policing has molded around the warrior idea, and some law enforcement agencies have used "warrior" as a point of professional pride.

preferred over displaying empathy and concern.¹³⁶ Whereas, the “guardian” mission prioritizes public safety and emphasizes healing and gaining the trust of the community.¹³⁷ Efforts have been made to change priorities and redefine what justice and public safety looks like—so that the community respects and trusts the police rather than seeing them as the “other” that should not be considered a legitimate authority to be respected.¹³⁸ Police departments have been encouraged to embrace true community policing, which would promote organizational strategies that would support the systematic use of partnerships and problem-solving techniques to gain community members’ trust.¹³⁹ In turn, police officers would be more conducive to dropping the “warrior” role and viewing themselves, and others they encounter, as part of one large community, which they “guard.”

Prosecutors should take a similar look at their role within the criminal justice system and consider reassessing their part in the overall system. Perhaps instead of focusing just on their enforce-the-law role, they could reexamine the people they encounter while on the job and determine how the quality and strength of these interpersonal relationships can benefit the community. Focusing on relationship-building rather than the exercise of their power might make it easier for prosecutors to display empathy and compassion to everyone they encounter.

136. *Id.* at 231 (The “guardian” focuses on service, developing legitimacy rather than authority. “The guardian mindset prioritizes service over crimefighting.”).

137. *Id.*

138. OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING IMPLEMENTATION GUIDE (2015), <https://cops.usdoj.gov/RIC/Publications/cops-p341-pub.pdf>; NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES (NOBLE) REPORT OF THE REIMAGINING PUBLIC SAFETY TASK FORCE (2021), https://documents.takomaparkmd.gov/initiatives/project-directory/Reimagined%20Public%20Safety/ExternalResources/NationalOrganization-of-BlackLawEnforcementExecutives_%28NOBLE%29-ReportoftheReimaginingPublicSafetyTaskForce.pdf; *see also* the Georgetown Law Police for Tomorrow Fellowship with Washington D.C.’s Metropolitan Police Department at <https://www.law.georgetown.edu/cics/police-for-tomorrow-fellowship/> (launched in 2016) and the Loyola University New Orleans College of Law and the Crescent City Corps Fellowship with the New Orleans Police Department at <https://www.crescentcitycorps.org/> (launched in 2017).

139. William Scott & David Lazar, *Community Policing Strategic Plan*, POLICE CHIEF (Oct. 3, 2018), <https://www.policechiefmagazine.org/community-policing-strategic-plan/>.

A prosecutor is typically seen as the fierce advocate, ready to protect the public by convicting the guilty and seeking justice. The prosecutor is the yin to the defense counsel's yang—they advocate for their side from their own separate, isolated perspectives. Consequently, the truth is apparently revealed at the end of the trial, and justice prevails. This perspective of the prosecutor's role further separates the prosecutor from the accused, and places pressure (whether consciously or unconsciously) on the prosecutor to maintain that battle-ready mindset.

In reality, the prosecutor's role is much more complex. Prosecutors are much more than fierce advocates representing "Team Government" if we take into consideration their day-to-day activities and the relationships they create and develop throughout the criminal justice system. No other member from the legal community has the opportunity to freely interact with all other members.¹⁴⁰ A prosecutor must gather information from various other members of the criminal legal system in order to be prepared at every stage in the adjudicatory timeline: criminal charges (interact with law enforcement and office supervisors), plea agreement (interact with defense counsel), violation of probation (interact with probation officer), trial preparation and trial itself (interact with victims, witnesses, cooperating defendants, prison officials, government staff, judicial staff, judges, bailiff, jurors, defense counsel, defense investigators, media, etc.), file motions (interact with clerks, judicial staff, judges, defense counsel), prepare for sentencing (interact with probation), file appellate briefs (interact with other prosecutors, possibly defense counsel), respond to habeas petitions (interact with defense counsel), and on and on. The opportunity in one day to encounter multiple people, from various government agencies, and those representing the defendant, are endless. It is here that the prosecutor has their greatest power and responsibilities—through relationships.

Human beings are social creatures and need interpersonal relationship to thrive. Naturally, human beings are impacted by the behavior of other people they encounter. Therefore, it logically follows the attitudes, perspectives, and reactions a

140. See CRIM. JUST. STANDARDS PROSECUTION FUNCTION PART III: PROSECUTORIAL RELATIONSHIPS (AM. BAR ASS'N 2017).

prosecutor brings to every encounter with others makes a huge difference on the other person's mental state, either for good or bad. If a prosecutor can expand or even reframe their enforcement role more positively, from fierce advocate to relationship-builder, and chooses to be kind and generous in all encounters with defendants, then these expressions of concern will filter down to all others they encounter. Compassion, we have learned, is in fact, quite contagious.¹⁴¹

Imagine the overall impact in the criminal justice system if law enforcement felt respected and heard, an equal member of the prosecutorial team, rather than a subordinate with no voice, in the prosecutor's decisions. A prosecutor who demonstrates kindness and compassion in their role as advisor and teacher when suggesting a course of action during the investigative phase of a case or relaying a judicial decision on a suppression issue, might affect the way a law enforcement officer treats or perceives others within the communities they serve.

Imagine the consequences if a prosecutor developed a mental immunity to verbal attacks from defense counsel, the ability to reduce fear and anger¹⁴² as a response to such tactics. That calmer, gentler reaction might cause defense counsel to reflect on their own behavior; perhaps next time defense counsel may tone down their rhetoric. The existing adversarial relationship between prosecutor and defense lends itself to hostile words being easily exchanged and potentially vengeful and spiteful encounters (from both sides) which, in the end, might impact the well-being of the accused.¹⁴³ What if both

141. JOY, *supra* note 1, at 255, 258. We are wired to be caring of the other.

142. See JOY, *supra* note 1, at 194.

143. Timothy Lynch, *The Case Against Plea Bargaining*, CATO INSTITUTE (2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=511222. ("There is no doubt that government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do."); see also Jessica Brand, *When Prosecutors Bully*, SLATE (Aug, 4, 2017, 9:07 AM), <https://slate.com/news-and-politics/2017/08/when-prosecutors-bully.html>. ("Adversarial prosecutors that act recklessly are rarely checked. Lawyers are reluctant to file bar complaints, afraid that prosecutors will withhold favorable plea deals or provide bare-minimum discovery in cases down the line. When they do file complaints, most of them go nowhere fast. Likewise, courts seldom chastise prosecutors for unethical behavior. Until that changes, there is little incentive for prosecutors to change their ways. Likewise, courts seldom chastise prosecutors for unethical

sides viewed themselves as a team in finding the best outcome for the defendant and the community at large? Instead of an “I and they,” the relationship creates a sense of “we,” which in turn creates a sense of common humanity where the prosecutor sees their role as serving the public. Serving the public includes the prosecutor working with both the defendant and the defense counsel to reach an optimal outcome for both the defendant and community. Justice must be fair and compassionate. From this perspective, the relationship between both camps, defense and prosecution, should not be adversarial but rather all sides should work together as a team to seek justice, fairness, and compassion for both the defendant and the victims alike. Too often, negative emotions are exacerbated the closer the case gets to the trial phase. If the attention is consistently placed on this team-mentality, a common goal of reaching a holistic outcome for both defendants and community, it is less likely emotions will turn negative (and self-destructive) and more likely the end goal is met—justice tempered by compassion and good will.

Mercy and compassion are character traits which enhance all our relationships. Prosecutors who see their role as having a greater concern for the well-being of others rather than pursuing their own self-interest can maintain their equanimity in the face of adversity and be generous in the face of personal attacks; they will experience greater impact and respect from judges and witnesses. This positive energy will also be indirectly felt by the jury and others in the courtroom. This positive state of mind involves active listening; when a prosecutor focuses and attentively listens to a probation officer, witness, informant, or cooperating defendant, the prosecutor

behavior.”); see also Marc C. Gertz, *The Impact of Prosecutor/Public Defender Interaction on Sentencing: An Exploratory Typology*, 5 CRIMINAL JUSTICE REVIEW 45 (1980) (“The relationship between the prosecutor and public defender can be cooperative or uncooperative, hostile or friendly, adversary or team-oriented. In a court where the relationship is cooperative, friendly, and team-oriented, it is expected that cases will not take a long time to be disposed of, and defendants who are willing to negotiate will have more charges dropped, will be convicted of less serious charges than they were arrested for, and will end up with more lenient sentences. Conversely, in courts where the relationship between the prosecutor and public defender can be characterized as uncooperative, hostile, and adversary, disposing of cases should take a longer time. Federal charges will be dropped, convictions will be more likely on original charges, more trials will take place, and jury trials should not result in significantly harsher sentences.”).

demonstrates a concern for others. This interaction allows all parties to feel they have been respected and heard; their well-being also matters.

Prosecutors can be seen as a uniting force, allowing community members to recognize their shared humanity and interdependence.¹⁴⁴ Instead of taking a narrow view of each human encounter (focusing on the particular aspects of this case, this issue, this perceived personal attack), prosecutors should develop a wider, long-game approach to individual encounters. It is easier to maintain that spirit of kindness and compassion if we connect to our overall sense of shared humanity rather than the smaller, individual case conflicts.

These are our human brothers and sisters, who have the same right and the same desire to have a happy life. This is not a spiritual thing. It is simply common sense. We are part of the same society. We are part of the same humanity. When humanity is happy, we will be happy. When humanity is peaceful, our own lives are peaceful. Just like if your family is happy, you are better off.¹⁴⁵

The last relationship that needs reframing is the relationship between the prosecutor and the defendant. This relationship is one in which the two may never speak and interact, which makes it the most complicated.¹⁴⁶ How can we exhibit compassion, and assist in healing their pain, if prosecutors must keep their distance? The Dalai Lama would most likely suggest keeping our attention on the suffering of others and choosing to be compassionate. To be clear, this does not mean always choosing to charge the crimes with the lowest possible penalty or always recommending the lowest sentence under the law. In fact, the Dalai Lama explains in *The Book of Joy*:

You must not hate those who do harmful things. The compassionate thing is to do what you can to stop them—for they are harming themselves as well as those who suffer from their actions. . . . Forgiveness does not mean you

144. See JOY, *supra* note 1, at 142.

145. *Id.*

146. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2022) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

accept or approve of wrongdoing. . . . Where the wrong action is concerned, it may be necessary to take appropriate counteraction to stop it. Toward the actor, or the person, however, you can choose not to develop anger and hatred. This is where the power of forgiveness lies—not losing sight of the humanity of the person while responding to the wrong with clarity and firmness. We stand firm against the wrong not only to protect those who are being harmed but also to protect the person who is harming others, because eventually they, too, will suffer. So it's out of a sense of concern for their own long-term well-being that we stop their wrongdoing.¹⁴⁷

Archbishop Tutu who chaired the Truth and Reconciliation Commission in South Africa which investigated human rights abuses committed by various pro and anti-apartheid groups agreed:

Forgiveness does not mean you forget what someone has done, contrary to the saying 'forgive and forget.' Not reacting with negativity, or giving in to the negative emotions, does not mean you do not respond to the acts or that you allow yourself to be harmed again. Forgiveness does not mean that you do not seek justice or that the perpetrator is not punished.¹⁴⁸

The consistent message from most spiritual leaders tends to reflect these thoughts on forgiveness, compassion, and the reasons as to why individuals would commit crimes against others.¹⁴⁹ It is helpful to remember that those who hurt others, or themselves, do so out of their own fear, pain, limited perspective, and their feelings of separation.¹⁵⁰ Those who are extremely unhappy within themselves to cause so much pain to others potentially need the most compassion from others.¹⁵¹

147. JOY, *supra* note 1, at 234.

148. *Id.* at 233.

149. *Oprah's Super Soul, Byron Katie: Set Yourself Free* (Feb. 26, 2009) (downloaded using Apple Podcasts).

150. ANITA MOORJANI, DYING TO BE ME: MY JOURNEY FROM CANCER, TO NEAR DEATH, TO TRUE HEALING 169 (2012).

151. *Id.* at 169-70. ("I actually don't believe that criminals and murderers *are* 'being who they are.' I think that we turn to destruction only when we've lost our way and drifted far from knowing the truth of who we really are. Criminals have lost their center, and what they're doing to others is actually a reflection of how they feel inside about themselves. We like to think of perpetrators and victims as 'them' and 'us,' but there is no 'them.' It's *all* us! A serial killer is diseased, similar to a person with cancer. And if we have more murderers in the world today, it

The final report of the President's Task Force of 21st Century Policing, referred to public trust as the key to the stability of communities, because "decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have legitimate that is perceived as legitimate by those subject to the authority."¹⁵² Police will be seen as a legitimate authority only when they gain the trust of community members. Trust is gained through relationship-building. The same is true with prosecutors. All members of the criminal justice community want to be seen and heard. They want their experiences, feelings, and thoughts to be understood (even if others might disagree). Prosecutors can do a lot to build that trust, and be the change, by treating others the way they want to be treated themselves.

B. Halfway There: the Empathetic Prosecutor

"You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it."¹⁵³

—Atticus Finch, *To Kill a Mockingbird*

Shifting the focus away from prosecutorial *power*, to one of providing *support* to others in their roles (supporting law enforcement, defense counsel, judge, and jury), allows prosecutors to become less attached to the outcome (or the idea of a government "win"). A self-centered view creates a default "Team Government" judgmental perspective. A servant leader view is much more likely to create a compassionate, public

means we have a sick society. Locking them away may have short-term benefits, just like treating the symptoms of cancer. However, if we don't transform and transcend the core issues within any society, the problem will only grow, requiring us to build more prisons and straining the judicial systems. Perpetrators are more than just victims of their own circumstances. They're the physical symptoms of underlying issues with *us a whole*. I'm not condoning their acts. I'm just trying to say that the knowledge of my own magnificence changed me. I think that if everyone were able to get in touch with their own truth and know their greatness, they wouldn't choose to be harmful. A happy and loved person who feels inseparable from Oneness knows that to injure another is the same as injuring the self."

152. OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING IMPLEMENTATION GUIDE 1 (2015).

153. HARPER LEE, *TO KILL A MOCKINGBIRD* 33 (1960).

service perspective.¹⁵⁴ How do we get there? The first step is to develop and display empathy.

The good news is that empathy is a skill that can be learned and developed.¹⁵⁵ Many medical schools have incorporated empathy training into their curriculums.¹⁵⁶ Law schools, on the other hand, have lagged behind, and have rarely added empathy training into the overall curriculum.¹⁵⁷ This is despite the fact that several practitioners, judges, and academics have reiterated the importance of being empathetic as a necessary skill to be an effective lawyer.¹⁵⁸

154. Robert Greenleaf, *What is Servant Leadership?*, ROBERT K. GREENLEAF CENTER FOR SERVANT LEADERSHIP, <https://www.greenleaf.org/what-is-servant-leadership/>. “The servant leader is servant first. . . . A servant-leader focuses primarily on the growth and well-being of people and the communities to which they belong. . . . The servant-leader shares power, puts the needs of others first and helps people develop and perform as highly as possible.”

155. HELEN RIESS & LIZ NEPARENT, *THE EMPATHY EFFECT: 7 NEUROSCIENCE-BASED KEYS FOR TRANSFORMING THE WAY WE LIVE, LOVE, WORK, AND CONNECT ACROSS DIFFERENCES* 12 (2018) [hereinafter *EMPATHY EFFECT*]. While empathy is partly an automatic response, it is also cognitively regulated and managed. This means we can orient and share our empathic responses through emotion management techniques. “We showed that patients rated their doctors more highly on empathy scales after empathy training. Specific interventions can increase perception, perspective taking, and self-regulation skills to ensure that we aren’t overwhelmed by the suffering of others, leading to our own personal distress.”

156. Jill Litman, *Empathy in Medical Education: Can Kindness be Taught?*, PUB. HEALTH ADVOC. (May 16, 2018), <https://pha.berkeley.edu/2018/05/16/empathy-in-medical-education-can-kindness-be-taught/> (Implemented empathy trainings in medical schools are thought to train doctors on how to cultivate relationships, use sensitive language, and develop a greater understanding of their patients. The article looks to the Narrative Medicine program at Columbia University. The course is meant to emphasize the importance of patient stories and its role in providing comprehensive care, teaching students how to analyze the entirety of the patient when developing a care plan.).

157. Barbara A. Noah, *Teaching Bioethics: The Role of Empathy & Humility in the Teaching and Practice of Law*, 28 HEALTH MATRIX 201 (2018). Noah states, “Legal education, like medical education, should include training in listening ability, cultural competence, and the ability to experience the problem and grapple with it through the eyes of the client . . . students who naturally are able to put themselves into others’ shoes, or whose professors encourage this thought process, can learn more than the basics of litigation or mediation or torts.” *Id.* at 205.

158. John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. UNIV. L. REV. 505 (1983). Barkai and Fine’s article advocated for teaching empathy in law school, and not much has been done to develop empathy trainings and courses in empathy in law schools since its publication in 1983. *See also* Jessica Brown, *Leading with Empathy: A message*

Empathy is typically divided into three sub-parts. Cognitive empathy is described as “the ability to understand another’s perspective.”¹⁵⁹ Emotional empathy is defined as “the ability to feel what someone else feels,” cognitive empathy is “the ability to understand another person’s perspective,” and empathic concern is “the ability to sense what another person needs from you.”¹⁶⁰ The strongest forms of empathy combine cognitive and emotional empathy and empathic concern so that the person can feel something of what they imagine the other person is experiencing, but they can also remain aware that those emotions are not based on their own experience.¹⁶¹ Exhibiting empathy would allow prosecutors to understand that their decisions and reactions have concrete consequences on others. This broadest kind of empathy would not endanger the requirement to be neutral and objective, but rather allow for the prosecutor to balance empathy and objectivity. Being completely detached and non-emotional, in an attempt to be objective, may lead to harsh consequences as mass incarceration statistics (and overall dissatisfaction with the way the criminal justice system is currently operating) show.¹⁶² Emotion cannot be eliminated from the legal equation.

One study conducted in Sweden demonstrated how empathy increases a prosecutor’s effectiveness during the investigative, trial preparation, and trial phases.¹⁶³ At the

from *Our Attorney General*, CO. LAWYER, Feb. 2021 (quoting Colorado Attorney General Phil Weiser: “Unfortunately, law schools—and I say this as a former law school dean and the leader of the largest law firm in Colorado—rarely seek to develop emotional intelligence, including empathy, meaning that law schools are generally undervaluing this critical competency. To transform legal education and reimagine the training of lawyers, developing empathy should be placed front and center. . . . For our society, a critical challenge we are facing is our collective pull to judgment of others as opposed to empathy for others.”).

159. Daniel Goleman, *What is Empathy?*, in *EMPATHY* 4 (2017).

160. *Id.*

161. *Id.* at 4-6.

162. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017). “We simply cannot afford to spend \$80 billion annually on incarceration, to write off the seventy million Americans—that’s almost one in three adults—with some form of criminal record,” *Id.* (citing THE SENTENCING PROJECT, *AMERICANS WITH CRIMINAL RECORDS* 2 (2015)). “Equal justice depends on individualized justice, and smart law enforcement demands it.” *Id.* (citing Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors (May 19, 2010)).

163. Åsa Wettergren & Stina Bergman Blix, *Empathy and Objectivity in the Legal Procedure: The Case of Swedish Prosecutors*, 17 J. OF SCANDINAVIAN

investigative phase, displaying empathy towards law enforcement or an eyewitness could help the prosecutor better understand the crime scene: how the events unfolded leading up to the crime, what type of crime(s) should be charged, who should be charged, and the motives behind the unlawful behavior.¹⁶⁴ At the trial preparation stage, displaying empathy towards witnesses, victims, and police might improve communication and allow for more candor as the prosecutor asks for difficult information, including facts that might be embarrassing to share.¹⁶⁵ Empathy would also help reduce a witness' anxiety over having to testify, and from wondering what types of questions might be asked. At the trial phase, empathy in the courtroom would help ease the fears of the witnesses and calm victims.¹⁶⁶ Actively listening and empathizing with others demonstrates a prosecutor's commitment to ensuring that the individual feels seen and heard. Lastly, it makes sense to demonstrate empathy towards the defense as that skill alone will help the prosecutor understand what it is the defense counsel and their client want. As the Swedish study suggests, empathy can disarm one's adversary and help dampen any ill will.¹⁶⁷ It is integral to a prosecutor's professional performance.

If the good news is that everyone can learn how to become empathetic, the better news is that more and more prosecutors are exhibiting empathy on a daily basis.¹⁶⁸ In the past several years, many progressive prosecutors have taken the lead at district attorney offices, and have displayed an uncharacteristic amount of empathy towards those accused of a crime. Many times, these prosecutors have had their own experiences as a victim, former defendant, witness, or have had a family member who has been arrested or incarcerated.

STUDIES IN CRIMINOLOGY AND CRIME PREVENTION 19 (2016). This study points to issues associated with silencing emotions and maintaining a positivist notion of objectivity in the legal system.

164. *Id.* at 24.

165. *Id.* at 26.

166. *Id.* at 28.

167. *Id.* at 20-21.

168. Most of the quotes in the section referring to the traditional prosecutorial model are from the 1990s and 2000s. The prosecutor statements in this section are much more recent and demonstrate the influence the progressive prosecutor movement has had on office culture and marks a gradual evolution in prosecutorial values and priorities.

This makes it easier for the prosecutor to tap into their empathetic skills. The following statements are some examples of empathy on display:

Today's defendant is potentially tomorrow's victim and was yesterday's witness. And so, if I treat you horribly as a defendant but then want to be nice to you when you're a victim or ask you to come forward when you're a witness? People aren't stupid. . . . There are a lot of men that are very, very nervous about it because we're looking at things differently. And the system is now going to work the same for everyone, not just those that understand it or have access. . . . I come to work with a very different lens every day.¹⁶⁹

—District Attorney Rachel Rollins for Suffolk County,
Massachusetts

We do not want to swing at the wrongdoer and knock down 50,000 innocent people. But by the same token, we can't allow the corporate wrongdoer to essentially take his or her employees hostage every time we come close, and say, "[y]ou can't prosecute this corporation because you'll hurt all these innocent people. There are corporations that have a profoundly screwed-up culture. . . ." At some point we have to say, "[l]ook, we need to put you out of business. We need to hit you. We need to kill you, because you're bad in your own right, and it also serves the broader purpose of general deterrence."¹⁷⁰

—James Comey, former United States Deputy Attorney
General and former F.B.I. Director

169. Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System is fighting back*, WASH. POST (Nov. 9, 2019, 5:52 PM), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html. Rachel Rollins, U.S. Attorney for the District of Massachusetts, Former District Attorney (Suffolk County, Mass.). DA Rollins was a federal prosecutor in Boston. Two of her siblings are incarcerated and a third is in recovery for opioid addiction. DA Rollins requires prosecutors to visit jails.

170. Benjamin Weiser, *Empathy Shapes a Prosecutor, a Past Victim of Violence and Greed*, N.Y. TIMES (Dec. 21, 2002), <https://www.nytimes.com/2002/12/21/nyregion/empathy-shapes-a-prosecutor-a-past-victim-of-violence-and-greed.html>. James Comey, former U.S. Deputy Attorney General, former F.B.I. Director. Former Director Comey has repeatedly mentioned that his view of the world has been shaped by an empathy for victims. As a teenager, he and his younger brother were taken hostage and terrorized in their home by an armed gunman.

When a diverse prosecutor sits in this chair, we should be expecting diverse thought as a result of diverse experience.¹⁷¹

—Aramis Ayala, former State Attorney in Orlando

Prior to becoming New York County District Attorney, Alvin Bragg argued, based upon family members' experiences, that gun possession cases did not merit harsh prosecution and should only be pursued in "exceptional" cases.¹⁷² However, once elected, and after a series of shootings occurred in the county, Bragg reflected on his previous position and changed his perspective:

Since taking office, [I] realized [I] needed to be more clear about when traditional prosecution was called for. It's certainly a change in emphasis. It's certainly not a change in my thinking or in my work. . . . There are a lot of stakeholders, and I'm going to continue to listen and talk and hear what people are saying, but ultimately I have to do what I did before I was in this office. Look at the cases and do what I feel is right.¹⁷³

King County Deputy Prosecutor Stephan Thomas' chief goal is to "lead with a heart of compassion."¹⁷⁴ Thomas, who was part of gang in the South Side of Chicago as a teenager, often exhibits his empathy skills when discussing his own experiences with the criminal justice system:

171. Berman, *supra* note 169. Aramis Ayala, State Attorney in Orlando from 2017 to 2021.

172. Jonah E. Bromwich, *After Spate of Shootings, Manhattan D.A. Takes Tougher Stance on Guns*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/nyregion/alvin-bragg-gun-violence.html>. DA Bragg's thoughts on prosecuting gun crimes were shaped by the fact that his father had owned an illegal gun and turned it in at a buy-back event, and his brother-in-law had been charged with gun possession after being arrested with one of his friends, who had been holding a gun. By empathizing with their situations, Bragg felt that not all people who possessed guns were likely to commit violent acts. But this empathy did not cloud his judgment or limit him in making rational decisions while in office.

173. *Id.* Alvin Bragg is the New York County District Attorney.

174. Rich Smith, *Stephan M. Thomas wants to Lead the King County Prosecutor's Office with a Heart of Compassion*, STRANGER (Feb. 1, 2022, 7:00 AM), <https://www.thestranger.com/slog/2022/02/01/65833955/stephan-m-thomas-wants-to-lead-the-king-county-prosecutors-office-with-a-heart-of-compassion>. Stephan M. Thomas, King County Deputy Prosecutor. Thomas believes that the DA's office should exhaust all other options before choosing incarceration.

As a prosecutor we see that kid as a victim. But then ten years later, when he's dealing with the trauma of the event without any support, without any services, without any connection, we're trying to prosecute him and send him to prison for as long as possible. That type of culture and that type of mentality has to be uprooted. . . . I am one who believes in redemption, one who believes you are more than the worst thing that you've ever done, and that you are more than the worst thing that has ever been done to you—and I know that not because I read it in a book, but because that's my life.¹⁷⁵

St. Louis County Prosecuting Attorney Wesley Bell is the son of a police officer, and worked as a judge and public defender before running for the position of lead prosecutor.¹⁷⁶ He was asked in an interview what parts of the job he micromanaged:

Issues that deal with victims and their families. I make it a point to meet with as many as I possibly can; I want them to be able to look in my eyes and ask questions directly of me. I also try to go whenever I can to homicide scenes, talk with the family, hug them. I wasn't sure how I was going to react—I'd served as a judge, and judges don't go to homicide scenes; neither do defense attorneys. A few days after I was elected, there was a homicide, and I went to the scene. The hardest part was talking with the family. The victim was an older woman but she'd been very active, and she had family who loved her. They invited me to her wake.¹⁷⁷

175. *Id.*

176. Jeannette Cooperman, *St. Louis County Prosecutor Wesley Bell was Propelled into Power by a Crisis. This is the Progress he's Noticed in Ferguson Ever Since*, ST. LOUIS MAG. (July 24, 2019, 4:00 AM), <https://www.stlmag.com/longform/holding-court/>. In his rebuttal to critics who claim he's not tough on crime, Bell stated,

I've always been data-driven The bottom line is by not focusing on low-level crimes, we're able to reallocate our resources to the serious and violent crimes that do matter.... We're able to focus more of our resources on people who are committing the ultimate crimes, people who are taking lives. It's not so much about being 'tough on crime' as it is about being smart. We've seen that mantra for years. It doesn't work. If someone has harmed someone, they'll be held accountable. But if someone needs treatment? Drug addiction is a public health crisis. Treating it keeps us all safer.

177. *Id.*

Keith Ellison was the lead prosecutor of the Derek Chauvin trial and is the Minnesota Attorney General.¹⁷⁸ He was asked shortly after the Chauvin trial concluded, what he thought when the jury returned a guilty verdict:

Gratitude— humility—followed by a certain sense of, I'll say satisfaction. It's what we were aiming for the whole time. I spent sixteen years as a criminal defense lawyer. So, I will admit, I felt a little bad for the defendant. I think he deserved to be convicted. But he's a human being.

[Reporter:] Somehow, I did not expect to hear from you a note of compassion for Derek Chauvin.

I'm not in any way wavering from my responsibility. But I hope we never forget that people who are defendants in our criminal justice system, that they're human beings. They're people. I mean, George Floyd was a human being. And so I'm not going to ever forget that everybody in this process is a person.¹⁷⁹

These empathetic reflections are not signs of “weakness,” but rather display an ability to see the issue from other's perspective, which, in turn, lends them to make sound judgments. Unfortunately, these displays of empathy have oftentimes been linked to a certain “progressive prosecutor” political agenda or policy.¹⁸⁰ This makes it easy to label empathetic displays as being “soft-on-crime” and idealistic.¹⁸¹

178. Scott Pelley, *60 Minutes Interviews the Prosecutors of Derek Chauvin*, CBS NEWS (Apr. 26, 2021, 6:55 AM), <https://www.cbsnews.com/news/derek-chauvin-prosecutors-george-floyd-death-60-minutes-2021-04-25/>.

179. *Id.*

180. Mairead McArdle, *AG Barr: Progressive Prosecutors Portend 'More Crime, More Victims'*, NAT'L REV. (Aug. 12, 2019, 4:49 PM), <https://www.nationalreview.com/news/ag-barr-progressive-prosecutors-portend-more-crime-more-victims/>.

181.

When you got a D.A., Kim Foxx in Chicago—soft on crime. When you got a D.A., George Gascon in Los Angeles—soft on crime. Those individuals are not doing what is in the best interests of their community. . . . Enough is enough. We are sick and tired of living in fear of criminals. Criminals should fear us. They don't fear us because we have prosecutors who are soft on crime and willing to let them back out on the damn streets of this country.

Bailee Hill, *Baltimore dad pleads with soft-on-crime prosecutors to keep his teenage son in jail: 'Begging for help'*, FOX NEWS (Nov. 1, 2022), <https://www.foxnews.com/media/baltimore-dad-pleads-soft-crime-prosecutors-keep-teenage-son-jail-begging-help>; see also Fox News Staff, *Criminals should fear us but don't because of 'soft on crime' prosecutors: Ted Williams*, FOX NEWS

Some of the reactions to the “progressive” prosecutor movement have been harsh. “Tough-on-crime” prosecutors have responded that such prosecutors promote “lawlessness,”¹⁸² are “anti-law enforcement,”¹⁸³ and dangerous to the public safety.¹⁸⁴ Former Attorney General William Barr feared that such leadership evokes “more crime [and] more victims.”¹⁸⁵ Mike Hestrin, the District Attorney in Riverside County, California, stated, “What they’re after is to destroy the system, the criminal justice system that they very deeply misunderstand. . . . This is not progressive. It’s not reform. It’s just politics- and ideology-driven.”¹⁸⁶ Steve Cooley, the former Los Angeles County District Attorney, clearly demonstrated the confusion between exhibiting empathy and supporting a particular policy when he stated, “I want George Gascón to be replaced as district attorney because he is functionally, with his policies, endangering the public He does that through his many directives that basically show great empathy and sympathy for criminals, especially violent and serious criminals, murderers.”¹⁸⁷

It is unclear how long the progressive prosecutor movement will last. One article in the Atlantic argued that progressive prosecutors will not bring about meaningful change because “[i]t is unrealistic to expect that even reform-minded prosecutors (or anyone, for that matter) can and will dispense justice when they have virtually boundless power and

(Feb. 1, 2022), <https://www.foxnews.com/media/criminals-fear-soft-on-crime-prosecutors-ted-williams>.

182. Catherine Marfin, *Texas Prosecutors Want to Keep low-level Criminals out of Overcrowded Jails. Top Republicans and Police aren’t Happy*, TEX. TRIB. (May 21, 2019), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/>.

183. McArdle, *supra* note 180.

184. *Id.*

185. *Id.*

186. Berman, *supra* note 169.

187. Saul Gonzalez, *Mounting Bid Against LA District Attorney Gascón Mirrors DA Recall Effort in SF*, KQED (Mar. 29, 2022), <https://www.kqed.org/news/11909665/mounting-bid-against-la-district-attorney-gascon-mirrors-da-recall-effort-in-sf>. Steve Cooley is the former LA County District Attorney.

almost unlimited discretion to use it against criminal defendants.”¹⁸⁸

The mistake is in focusing on the power-base dynamic rather than focusing on relationships, building trust, and working from a place of shared humanity. Prosecutors, regardless of their policies or politics, can demonstrate empathy. Empathy should not be linked to politics and policies. Demonstrating empathy is not a sign of weakness or being soft-on-crime. On the contrary, it is dangerous for prosecutors not to exhibit empathy. It is a critical way in which prosecutors can assist in building trust with the community and serve to instill a sense of respect for the police and prosecution arm of the criminal justice system. The fact that more prosecutors are exhibiting signs of empathy than ever before is a trend we need to see continue permanently. Community-oriented prosecutions, like community-based policing, would demonstrate that prosecutors understand and respect all the actors involved—that includes the victims, those who live in crime-ridden neighborhoods as well as those accused of crimes.

C. Ten Reasons Why the Dalai Lama’s Joyful Model Will Work

Dr. Helen Reiss, who has developed an empathy training approach based on neuroscience research, has described empathy as “a human capacity consisting of several different facets that work together to enable us to be moved by the plights and emotions of others.”¹⁸⁹ “When people show empathy for others, they are usually good at perceiving what others feel, able to process the information, and able to respond effectively.”¹⁹⁰

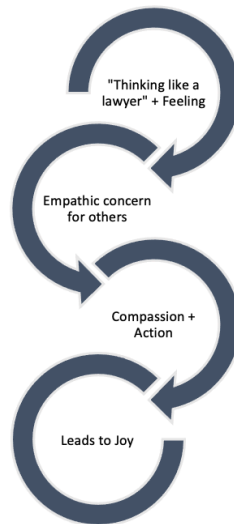
In essence, empathy is the spark which motivates people into performing kind and compassionate acts for others. Therefore, lawyers must, at first, not only think, but also feel. This thinking and feeling will then spark their empathic concern for others. This empathic concern will motivate action

188. Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (Jun. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/>.

189. EMPATHY EFFECT, *supra* note 155, at 10.

190. *Id.*

and compassion. Compassion is described as “the outward expression and evidence that empathic concern has been motivated; it is the warmhearted response to another’s suffering.”¹⁹¹ The compassionate action could be as simple as listening to a person’s story without looking at your phone, not interrupting, or offering someone a cup of coffee. It does not require complete agreement with another person’s viewpoint. Empathy and compassion must go hand-in-hand with thinking like a lawyer. And if these steps are followed, as the Dalai Lama has learned, these feelings and actions will lead to our own joy. Decreasing others’ suffering will, in turn, decrease our own.



Because empathy is not detached or abstract, but requires “intimate comprehension of others’ inner lives, the context in which they live, and their resulting actions,”¹⁹² it may come easier to defense counsel who can develop a close relationship with their clients. However, as the statements above suggest, prosecutors can empathize with others, particularly if they have lived through a similar experience or come from a similar background. Put simply, prosecutors will just have to work harder at it. The distance between them and the defendant will not change; it is up to the prosecutors to see the importance of this model and understand that it will bring them greater

191. *Id.* at 24.

192. *Id.* at 14.

job satisfaction and overall joy in their own lives, if they embrace the challenge. Once empathy is learned, the compassionate acts and reactions will come much more naturally.

The following are the top ten reasons to adopt a prosecutorial model of well-being:

It's a simple, positive message. Why does law have to be the last profession to embrace a message of empathy and compassion? Why are lawyers so uncomfortable discussing emotions? Empathy and acts of compassion should be part of the day-to-day conversations in prosecutors' offices, particularly because the message needs to be reinforced. Moreover, any lasting change starts at the top. "[L]eaders in the office can mold the ethical norms and practices of the workplace, both by word and by example."¹⁹³ The message sent from the top trickles down the line to attorneys. A leader that embraces this positive message and makes their employees aware of the dangers of hyper-adversarial criminal practice, is one who cultivates ethical practices and has fewer instances of misconduct. Those in the position of electing or appointing District Attorneys, Attorney Generals, etc. should listen to the candidate's platform: is it to fight crime and incarcerate as many criminals as possible, or is it to honor the protections in the Constitution, fight for truth and justice, and demonstrate compassion and empathy for others?

There should be automatic buy-in in prosecutor's offices for the need for empathy and displaying compassion towards others. If these feelings and actions lend themselves to create more joy in a prosecutor's life, why not explore it? Who does not want to be joyful or be a part of activities that lend themselves towards more joy in their own personal lives? It is important to find ways that prosecutors can interact with other players in criminal practice, outside the typical setting, and learn about the impact their decisions have on defendants, their friends, family, and society as a whole. While reunions with other prosecutors will cultivate positive relationships within the office, planned social activities with defense counsel might alleviate some of the more tense moments inside the courtroom. Rather than take out one's

193. *Prosecutor Risk*, *supra* note 32, at 28.

frustration with opposing counsel in the courtroom, why not wait until the next prosecution-defense softball or kickball game? To understand a prisoner's plight a bit more, how about teaching a history or English literature course at the local jail?¹⁹⁴ Prosecutors can choose to serve food at the nearby prison on family/visitor day. Community service opportunities can only strengthen a prosecutor's sense of helping society and doing what is right. Humans are inherently social beings and crave connection and cooperation with larger social groups. Prosecutors, by the nature of their profession, have to divide people into separate categories (defense attorneys, law enforcement, violent offenders, non-violent offenders, cooperators, informants, etc.) and ignore common experiences and goals. It is important for prosecutors to remember the humanity they share with the defendant and summon compassion for others.

Empathy training is relatively easy to implement.

Empathy training programs currently exist in health care, businesses, and in schools. However, the culture can only change if the values are constantly reinforced (this may require more than one empathy training session). Even annual sensitivity training will not provoke substantial change.¹⁹⁵ As Wharton management professor Larry Hrebiniak commented, "Appealing to managers to change behaviors, thinking, values, and beliefs rarely works. Culture-changing activities such as white-water rafting, rock climbing, paint-ball wars, sensitivity training, and other team-building exercises alone rarely have long-lasting effects. Spirits may be lifted or behavior changed for a while, but managers soon fall prey to the same old organizational structures, incentives, processes, and

194. Kate Silver, *Creative Expression Programs for Inmates Help Change the Narrative*, ABA J. (May 1, 2018, 2:05 AM), https://www.abajournal.com/magazine/article/art_behind_bars_creative_inmates. Teachers from the non-profit organization ConTextos lead an "Author's Circle" at the Cook County Jail in Chicago during which detainees spend "two hours a day three to four days a week for about four months reading, writing, revising, illustrating through collage and, finally, publishing their stories."

195. Danny Wong, *Does Sensitivity Training Actually Work?*, HUFFINGTON POST (Mar. 3, 2016, 10:25 AM), https://www.huffpost.com/entry/does-sensitivity-training-actually-work_b_56d23981e4b0bff54eb698c1. "It's nearly impossible to undo any underlying racism in a few hours ... the science shows most diversity training programs are ineffective ... the rare advocates of sensitivity training were exclusively consultants who offered sensitivity training services."

controls.”¹⁹⁶ It is crucial that supervisors and the top attorneys in the offices commit and continually find ways to raise consciousness, cultivate presence, and continue the inner-office dialogue as to the importance of prosecutors rising above the gamesmanship of criminal practice.

An emphasis on empathy and compassion will lend itself to positive relationships among prosecutors. Mentorships that are based around supporting each other can develop. These mentorships and “compassionate” friendships can assist prosecutors from returning to a “robot-mode” existence in the workplace.¹⁹⁷ Again, who wants to be an anti-joy advocate? Even tough-on-crime prosecutors would presumably want to increase the joy in their own lives. Prosecutors’ offices need to create a culture that counteracts hyper-adversarialism. Starting an office book club, creating a once-a-quarter movie night, or developing a mentor-mentee program where colleagues are paired to have coffee and discuss the stresses of the job all may sound too simple or too touchy-feely, but what if they work to change the culture? How could it hurt for prosecutors to prioritize taking the time to talk about the daily stresses of being a prosecutor and learning how others cope in such an adversarial environment?

The police and public defenders already have similar programs. As previously mentioned, several efforts have been made to make community policing a reality rather than a term in name only. Police officers are being trained on how to be more empathetic while on patrol.¹⁹⁸ Gideon’s Promise is working with public defenders to change the culture of the criminal justice system and train public defenders “to give their client dignity, listen to their stories, and hear their concerns.”¹⁹⁹ Prosecutors can learn from these movements in developing their own recruiting, training, and mentorship programs. An organization or program similar to Gideon’s Promise, where prosecutors could take refuge, recharge, identify their profession’s core values, and remind themselves of the impact they have on others would indelibly improve the

196. *Id.*

197. Henderson, *supra* note 16.

198. Slobogin, *supra* note 134.

199. GIDEON’S, *supra* note 18, at 23.

chances that prosecutors maintain balance and their sense of justice as the overall goal.

The Joyful Model is not political or trendy. Many advocates and critics focus on the policy changes that progressive prosecutors have made over the last few years. The key to true change is to focus on the line prosecutors and have them committed to exhibiting more empathy and compassion in their daily practice. A consistent, simple message that stays away from politics or particular criminal justice reform-type policies will have much more of a lasting effect and become the catalyst for change. Prosecutors must also be given greater autonomy to make decisions in their own cases. Oftentimes, prosecutors who may want to exercise sound judgment are told by supervisors that they need to follow office culture and act a certain way in all cases (i.e., charge the offense with the maximum penalty, offer a certain plea deal, etc.).²⁰⁰ Trust that joyful prosecutors can make the right decisions and give them the freedom to do so.

The Joyful Model requires individual action in combination with feeling. Most advice given to lawyers in this area centers around self-care and mindfulness practices. Speaking of self-care, the Dalai Lama apparently gets up at three am every morning and prays for two hours.²⁰¹ Archbishop Tutu shared that he slept until four am and then prayed on average three to four hours a day.²⁰² Stress release techniques, exercise, or some meditative practice is certainly beneficial to keep the mind calm and open to empathic concern. However, the Joyful Model also requires acts of compassion.

200. Edith Lowens, Rena Paul & Johnathan Terry, *2020 Prosecutorial Culture Change: A Primer*, INSTITUTE FOR INNOVATION IN PROSECUTION at 2, <https://www.prosecution.org/prosecutorial-culture-change-a-primer#:~:text=Authored%20by%20Ethan%20Lowens%2C%20Rena,to%20bring%20about%20sustainable%20change;see%20also%2021%20Principles%20for%20the%2021st%20Century%20Prosecutor>, BRENNAN CTR. JUST. at 14, https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf.

201. *Routine Day*, HIS HOLINESS THE 14TH DALAI LAMA OF TIBET, <https://www.dalailama.com/the-dalai-lama/biography-and-daily-life/a-routine-day> (last visited Dec. 21, 2022). The Dalai Lama's website says, "[w]hen His Holiness is at home in Dharamsala, he wakes up at 3 am. After his morning shower, His Holiness begins the day with prayers, meditations, and prostrations until 5 am." *Id.*

202. Brendan Boyle, *Archbishop Desmond Tutu*, UNITED PRESS INT'L, <https://www.upi.com/Archives/1987/03/29/Archbishop-Desmond-Tutu/7871543992400/> (last visited Dec. 21, 2022).

Therefore, this model may move the needle, creating the necessary change much more quickly than a model that simply focuses on individual feeling and self-care.

With the Joyful Model, it will be easy to recruit new prosecutors. Who wouldn't want to work in an environment in which they are valued, seen, and heard? If prosecutors are truly living this model, then the compassion is contagious, and others will be drawn to its message. Prosecutor offices should regularly hire new people, with fresh ideas, who can revive the office culture with their outside perspectives. Others have argued that incentives that reward convictions should be changed to reward fairness in charging decisions and plea deals and admitting mistakes in post-conviction reviews such as a "minister of justice" award.²⁰³ A "minister of justice" is one with "the overriding responsibility not simply to convict the guilty but to protect the innocent."²⁰⁴ Such incentives will affect behavior and performance, and can eventually lead to more compassionate lawyering.²⁰⁵

The community needs to understand that joy and compassion are not the same as soft-on-crime. This is a message and model that is being shared by some of the greatest moral leaders of our time.²⁰⁶ Listening to what they have to say and putting it into practice may create the criminal justice reform and cultural transformation we have been looking for. This practice in no way makes a prosecutor soft-on-crime; it merely makes them better at their job and better as overall

203. See also Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y. L. SCH. L. REV. 912, 931 (2011, 2012); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001).

204. Gershman, *supra* note 203, at 314.

205. *Culture as Culprit: Four Steps to Effective Change*, WHARTON ARESTY INST. EXEC. EDUC. (Sept. 2011), <https://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-at-work/2011/09/four-steps-culture-change/>.

206. Dalai Lama, *Compassion For Criminals Quotes & Sayings*, QUOTES SAYINGS, <https://quotessayings.net/topics/compassion-for-criminals/> (last visited Jan. 18, 2023) ("Criminals, people who commit crimes, usually society rejects these people. They are also part of our society. Give them some form of punishment to say they were wrong but show them they are part of society and can change. Show them compassion."); see also Martin Luther King Jr., AZ QUOTES, <https://www.azquotes.com/quote/877221> (last visited Jan. 18, 2023) ("True compassion is more than flinging a coin to a beggar. It comes to see that a system that produces beggars needs to be repaved. We are called to be the Good Samaritan, but after you lift so many people out of the ditch you start to ask, maybe the whole road to Jericho needs to be repaved.").

human beings. Prosecutors serve as a reflection of what the community prioritizes. If the community elects District Attorneys and judges who promise to incarcerate every criminal and boast that they have the highest conviction rates in the county, then the community is supporting the hyper-adversarial criminal justice model we see today. It is the prosecutor's responsibility to represent the public's interest. The public must welcome the idea of compassionate lawyering just as much as prosecutors.

There is no downside to introducing these concepts into a prosecutor's office and certainly no downside to participating in empathy training programs. If the consequence is that some individuals become less self-centered, develop empathy practices, demonstrate acts of compassion, and become less emotionally attached to an overall case outcome, it was well worth it.²⁰⁷

IV. CONCLUSION

No dark fate determines the future. We do. Each day and each moment, we are able to create and re-create our lives and the very quality of human life on our planet. This is the power we wield.

Lasting happiness cannot be found in pursuit of any goal or achievement. It does not reside in fortune or fame. It resides only in the human mind and heart, and it is here that we hope you will find it.

—the Dalai Lama and Archbishop Desmond Tutu,
*The Book of Joy*²⁰⁸

A. Focus on Positive Messaging Rather than Punitive Measures

There have been a multitude of suggestions provided by distinguished scholars, attorneys, judges, and even the public, on how to minimize, if not eliminate, prosecutorial misconduct.

207. Cynthia Alkon, *Bargaining without Bias*, 73 RUTGERS UNIV. L. REV. 1337, 1345 (2021) (discussing the importance of empathy skills in the context of plea bargaining and breaking down implicit biases). Alkon argues that empathy training would “support blind assessments and better exercise of prosecutorial discretion when making plea offers.” *Id.* at 1350. Alkon also describes the empathy training offered in negotiation and dispute resolution classes and what kind of empathy is needed in prosecutors. *Id.* at 1356-68.

208. JOY, *supra* note 1, at ix.

Some have suggested establishing more Conviction Integrity Units²⁰⁹ within individual prosecutors' offices dedicated to post-conviction review, or creating Prosecutorial Review Boards "established by the organized bar not only to review complaints, but also to conduct random reviews of prosecution decisions, including charging and plea decisions."²¹⁰ Or, perhaps "legislators should create commissions to regulate prosecutors' conduct and law licenses, with greater accountability and transparency."²¹¹

Legislation meant to counteract prosecutorial misconduct is a popular proposal. The Center for Prosecutor Integrity supports a bill titled the "Federal Prosecutor Integrity Act" which requires prosecutors to turn over all evidence to the defense at arraignment and imposes a series of sanctions if they fail to do so.²¹² The New York State Assembly passed a bill in June 2018 to create a commission to investigate prosecutorial misconduct.²¹³

Professor Keith Findley proposed the creation of an adversarial-inquisitorial hybrid system "in which an accused person, whether claiming innocence or not, can choose whether

209. Cyrus Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 631 (2013). Cyrus Vance established a Conviction Integrity Program in the Manhattan's District Attorney's Office in 2010. The program "put in place new policies, procedures and training to further guard against unjust prosecutions" and it "instituted a program to review convictions—and occasionally pending prosecutions—if the defense has raised a claim of actual innocence." *Id.*

210. Lawton P. Cummings, *Can an Ethical Person be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2158 (2010); see also CENTER FOR PROSECUTOR INTEGRITY, ROADMAP FOR PROSECUTOR REFORM 7 (2014), <https://www.prosecutorintegrity.org/wp-content/uploads/WhitePaper-RoadmapProsecutorReform.pdf>.

211. Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html>.

212. *Prosecutor Integrity Act*, CTR. FOR PROSECUTOR INTEGRITY, <https://www.prosecutorintegrity.org/legislation/fpia/> (last visited Dec. 21, 2022).

213. Dan M. Clark, *Bill to Create Prosecutorial Misconduct Commission Approved by NY State Assembly*, N.Y. L.J. (Jun. 19, 2018), <https://www.law.com/newyorklawjournal/2018/06/19/ny-das-association-takes-stand-against-prosecutorial-misconduct-commission/?slreturn=20220722171756> ("The commission would be authorized to investigate and review complaints against prosecutors specifically. The panel would have subpoena power and the ability to request documents and information in any case of misconduct. Its decisions would be made available to the public and compiled in an annual report to the legislature, governor, and Court of Appeals.").

to be prosecuted in the traditional adversarial system or under a system in which adversaries share in the inquisitorial search for the truth.”²¹⁴

Many have suggested conducting more bar investigations into prosecutorial misconduct, and altering the rules to create stricter ethical standards for prosecutors and impose harsher penalties.²¹⁵ But in reality, professional bar investigations and internal review board discipline have been considered minimal and ineffective.²¹⁶

According to the Center for Prosecutor Integrity, “studies over the past 50 years, including some of those cited above, indicate that in 3,625 identified cases of prosecutorial misconduct, ‘public sanctions [were] imposed in only 63 cases—less than 2% of the time.’”²¹⁷

Others believe judges should hold prosecutors to a higher standard and use their judicial powers to impose fines, find prosecutors in contempt of court, and temporarily imprison unethical prosecutors.²¹⁸ One prosecutor in Texas failed to disclose evidence to the defense, prior to trial, that the only eyewitness to the crime had previously stated that the defendant was not the perpetrator.²¹⁹ The prosecutor later pled guilty to criminal contempt, and the judge required that he give up his law license, perform 500 hours of community service, and spend ten days in jail.²²⁰ Such a case of a prosecutor being criminally charged with intentionally failing to disclose evidence is incredibly rare.²²¹

Prosecutors have been told in articles to “approach the preparation of a case with a healthy skepticism,” and to “assume an active role in confirming the truth of the evidence

214. Findley, *supra* note 203, at 935.

215. Anthony C. Thompson, *Retooling & Coordinating the Approach to Prosecutorial Misconduct*, 69 Rutgers U. L. REV. 623 (2017).

216. Green & Yaroshefsky, *supra* note 77, at 65.

217. Zoukis, *supra* note 24.

218. Elaine Cassel, *Prosecutor Misconduct in Two Recent High-Profile Cases: Why it Happens, and How we can Better Prevent It*, FINDLAW (Feb. 12, 2004), <https://supreme.findlaw.com/legal-commentary/prosecutor-misconduct-in-two-recent-high-profile-cases.html/>.

219. Mark Godsey, *For the First Time Ever, a Prosecutor Will go to Jail for Wrongfully Convicting an Innocent Man*, HUFFPOST (Oct. 16, 2015), https://www.huffpost.com/entry/for-the-first-time-ever-a_b_4221000.

220. *Id.*

221. *Id.* (“For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man.”).

of guilt and investigating contradictory evidence of innocence.²²² They should also have the moral courage to decline prosecution.²²³ But how can they do this? How can they rise above the competitive and, at times, petty nature of criminal practice, and stay focused on their role as “ministers of justice”?²²⁴

We must accept the adversarial nature of the justice system, and honor the protections provided to defendants to keep the prosecutor at bay. While the adversarial system and the distance a prosecutor might experience will not change, we can, at least, foster an awareness among prosecutors that because of such a system, there will be a temptation on their part to engage their more aggressive traits and go on the offensive when provoked, and provide them with the skills they need to maintain overall well-being.

B. Build on the idea of “Prosecutorial Passion”

Professor Alafair Burke writes about how prosecutors are influenced by their passion for the job:

They care not only about how many cases they win, but also *which* cases they win and *how* they are won. . . . Ultimately prosecutors are drawn to their jobs because of the identity that comes with it, the well-known obligation to be a minister of justice—an obligation prosecutors frequently and pridefully boast—that sets them apart from other lawyers.²²⁵

It is imperative to draw on this prosecutorial passion rather than advocate for more sanctions, more review boards, more legislation to punish prosecutors into complying. Constantly questioning prosecutorial motives has a tendency to create an “us” versus “them” mentality.²²⁶ For example, in 2010, the National District Attorneys Association asked the American Bar Association to pass a resolution, “calling on

222. Gershman, *supra* note 203, at 342, 348.

223. *Id.* at 350-51.

224. Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 187-88 (2007).

225. *Id.*

226. *Prosecutor Risk*, *supra* note 32; see also Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3 (discussing prosecutors’ (on her symposium panel) reactions to her questioning whether you can be a good person and a good prosecutor).

courts to stop using the term ‘prosecutorial misconduct’ for Brady violations and other infractions that the attorneys argued were mere ‘errors.’”²²⁷ One district attorney, who advocated for the resolution, stated that the word “misconduct” “feeds a narrative that prosecutors are corrupt, which is poisonous. . . . Police say there’s a war on cops. Many of us career prosecutors feel there’s something of a war on prosecutors.”²²⁸

Focusing on the bad behavior will drive the competitive divide even deeper, will not invite office culture change, and will put prosecutors on the defensive, making them resistant to exhibiting feelings of compassion and empathy for others.

C. Encourage Feelings of Empathy and Acts of Compassion

People will forget what you said, people will forget what you did, but people will never forget how you made them feel.

—Maya Angelou²²⁹

Prosecutors have a difficult job. They need to be supported so they will remember in times of conflict and hostility to take a more balanced, empathetic approach. A lawyer’s job is to question, to analyze, and to evaluate whether the law is broken or needs to be changed or challenged. Yet, as an institution, we are reluctant to change. The ideas I have proposed may seem too idealistic, yet, in an age that embraces extremes, a conversation discussing a more balanced, empathetic approach needs to occur. Prosecutors need to develop a greater sense of purpose, and not be ashamed to discuss self-care and compassionate lawyering to improve their overall wellbeing and healthy lifestyle.

Justice William Brennan discussed whether criminal prosecutions are more like a sporting event or a quest for truth

227. Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence that Would have Freed Her*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html>.

228. *Id.*

229. Marisa Méndez, *Empathy and Social Skills: Two Keys to Being A Successful Lawyer*, LAW AHEAD HUB, <https://lawahead.ie.edu/empathy-and-social-skills-two-keys-to-being-a-successful-lawyer/> (last visited Nov. 13, 2022) (exploring this Maya Angelou quote in the context of the importance of empathy in the practice of law).

at a lecture at Washington University in 1963.²³⁰ He stated that: “[T]he quest for better justice is a ceaseless quest, that the single constant for our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice.”²³¹ The safeguards we choose to follow “are checks upon government—to guarantee that government shall remain the servant and not the master of us all,” and we must remember that “many of our most precious guarantees of liberty and human dignity are at hazard in criminal procedures.”²³²

Prosecutors must be reminded of this. The “quest for better justice” should be continually discussed, and this motto of justice, liberty, and human dignity should hang on the walls in prosecutors’ offices. The criminal justice system is not in balance. Too often it borders on the extreme: good/bad, reward/punishment, win/lose. But, in order to maintain balance, in order to truly seek justice and truth, prosecutors need to tap into their empathetic concern for others to better the criminal justice system. More empathy and compassion would cultivate inner and outer peace in a system that has become the complete opposite. Honoring feelings and critical thinking skills would contradict a win-at-all-costs mentality. Prosecutors in touch with their empathetic thoughts and feelings will think twice before being drawn into petty courtroom fights, responding after careful reflection rather than in anger in the moment. There will be more moments of shared cooperation between defense counsel and prosecution. Lastly, it might raise the collective consciousness and rejuvenate prosecutors to rise above the competition and seek to live in community with others.

A lot of what has been discussed may prove to be outside our comfort zone as lawyers. Book clubs, conversations over coffee, empathy trainings, and visits to the jail? Yet creating awareness and talking through the stresses of criminal practice may prove to be more beneficial and easier to implement than additional bar sanctions and internal investigations. A prosecutor’s work is meaningful because

230. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. UNIV. L. REV. 279 (1963).

231. *Id.* at 279.

232. *Id.* at 280-81.

they have the ability to serve and help others on a daily basis. Prosecutors have the ability to impact every single agency or member of the criminal justice system, every day, through their words and actions on a daily basis. Prosecutors have a great responsibility for the well-being of their communities and the world we share.

The underlying emotions and reasons behind prosecutorial misconduct need to be identified and explored. Unfortunately, lawyers are taught early on to suppress emotions.²³³ But humans are rational *and* emotional beings.²³⁴ To deny one part is to deny an important feature of who we are.²³⁵ “Yes, reason is important, but we aim not for rationality, but reasonableness—and our emotions are a crucial component of that fundamental aspect of the human condition.”²³⁶ Imagine a world of prosecutors where evidence was critically evaluated, and empathy and compassion towards others was of the highest priority. That new way of living would stand up to any institutional efforts to create a contrary environment. Just ask the Dalai Lama.

233. See LEVIT & LINDER, *supra* notes 40-41.

234. THOM BROOKS & DIANA SANKEY, *BEYOND REASON: THE LEGAL IMPORTANCE OF EMOTIONS* 1, 3-4 (2018).

235. *Id.*

236. *Id.* at 5 (“None of us are a brain in a vat. Our emotions and feelings are essential to our reasoning and decision-making—at least from a neurological perspective. To deny it is to reject a part of our physiology. In sum, human beings—and human thinking—is more than pure rationalism. Our emotions matter for our humanity and for how we understand the world. This is because they colour and inform our experiences. Any view about human agency must take into account more than our capacity for rational thinking alone if it is to capture how human beings are agents.”).