The Over-Punishment Impulse and Trauma Bias in Prosecutors

MARK OSLER*

Abstract

According to one strain of academic literature, prosecutors are smug, self-important, and a primary driver of over-incarceration in the United States. The last of these is objectively true, while the former characterizations (while doubtlessly accurate in some cases) are profoundly unhelpful in understanding the important problem of over-incarceration. To explore the interaction between prosecutors and over-incarceration in a worthwhile way, name-calling is not enough. This Article takes a more empathetic view of prosecutors and adds a second truth to the oft-stated fact that they enjoy wide and largely unexamined discretion: that prosecutors stand on a floodplain of tragedy in their daily work, and are barraged with stories and images of death, violence, and greed as each new case comes in. The vicarious trauma they experience—like other actors in the field of criminal law—naturally plays a role in shaping their views and actions. If we are to continue to curb over-incarceration, we must address the resulting trauma bias in prosecutors. This Article explores this dynamic, names the harms that result, and offers pathways to address trauma bias proactively.

* Robert and Marion Short Distinguished Professor of Law, University of St. Thomas School of Law (MN). Welcome input on earlier drafts of this Article was received from Rachel Barkow, Jeffrey Bellin, Adam Gershowitz, Russell Gold, Lee Kovarsky, Kay Levine, Julie Jonas, Alison Siegler, Ron Wright, and Erica Zunkel. I'm also grateful for the comments made at CrimFest.

I. INTRODUCTION

Two truths about prosecutors are clear to any observer of criminal law in the United States. First, their power is strikingly broad and deep.[1] They enjoy wide and largely unreviewable discretion in charging, selecting cases, and enhancing cases at sentencing.[2] Their power even extends to creating the definition of crimes themselves[3] and the rejection of reforms, through their influence on the legislative branch.[4] Much of their power operates under an opaque shroud as decisions are made behind closed doors rather than in open court.[5] Given that dark, wide pool of discretion, the *mind* of a prosecutor—that complex and deeply personal network of principles, biases, neuroses, memories, misunderstandings, trauma, and desires in which discretion is exercised—is perhaps the most important thing in criminal law.

The second truth is rarely discussed, at least in academic circles, but it is an important reality: prosecutors are subjected to almost

1. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176–80 (2019) (collecting academic descriptions of prosecutorial power). Bellin, correctly, argues that while "virtually every criminal justice outcome can be traced to a prosecutor's decision," other actors also have significant power in the criminal justice system. *Id.* at 212. I agree with Bellin's central point that the power of prosecutors has at times been overstated; however, in this Article, I am examining a part of the prosecutorial process that I do not believe has been addressed at all.

2. Prosecutorial power derives from a combination of executive power (either as elected officials or designees of elected officials in the executive branch) and from the delegation of power by legislatures that "create broad and deep criminal codes with incredibly harsh penalties." Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. STATE L.J. 841, 854 (2024).

3. Almost a quarter-century ago, William Stuntz made a game-changing observation about criminal law: that the definition of crimes primarily serves to "empower prosecutors, who are the criminal justice system's real lawmakers." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV 505, 506 (2001).

4. *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 405–53 (2017) (discussing the Department of Justice's resistance to reform efforts by President Obama including sentencing reform, clemency, compassionate release, and forensics).

5. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 615 (2019) ("The full range of facts available to the prosecutor are almost never available to the public. Nor are the office's internal deliberative processes or any individual prosecutor's internal thought processes.").

unimaginable tragedy as they process their cases. To work as a prosecutor is to only see the worst of the people investigated; each defendant is defined primarily or entirely by their most damaging acts. Tragedy exists everywhere in the form of drug addiction, sexual assaults, bullets in the head, and the theft of what little a neighbor might have. It is not uncommon for a prosecutor to watch a single person's murder dozens of times on video.[6] Reconciliation, rehabilitation, redemption, and restoration are too rarely the project of the prosecutor;[7] their role is largely confined to judgment, condemnation, and the workmanlike process of proving each element beyond a reasonable doubt, stacking one bloody brick on top of another.[8] Their connection to the story is largely through investigators and the victims, both of whom are likely to emphasize the most traumatic parts of the case.[9]

This Article will connect these two facts—the discretion of prosecutors and the secondhand trauma they witness—and investigate the effect of that trauma on their use of discretion. This Article will illustrate how the cavalcade of tragedy witnessed by prosecutors sometimes creates a "trauma bias" that affects their use of discretion in a way that leads to over-incarceration[10] in the United States. Such trauma

6. The role of video was not the starting point of trauma bias, though it may have intensified the effect. Before video was available, prosecutors still often spent long hours viewing photos of dead bodies and poring over autopsy reports. *See* Ronald J. Sievert, *Capital Murder: A Prosecutor's Personal Observations on the Prosecution of Capital Cases*, 27 AM J. CRIM. L. 105, 106 (1999).

7. At federal sentencings, judges are directed to consider rehabilitation, along with other goals. 18 U.S.C. § 3553(a)(2)(D). Prosecutors may, and sometimes do, include this goal in their sentencing arguments.

8. *See* Michael S. Pardo, *The Paradoxes of Legal Proof: A Critical Guide*, 99 B.U. L. REV. 233, 267 (2019). Pardo points out what is unusual about this standard: that proving each element rather than looking at the whole "appears to reject standard probabilistic reasoning." *Id.*

9. This focus is often going to be enhanced by the prosecutor, who is charged with bringing in "relevant" evidence to each element of the charge.

10. I am intentional in my use of the terms "over-incarceration" and "mass incarceration." In discussing the work of other scholars who refer to "mass incarceration," I use that term, but otherwise use the term "over-incarceration." The difference may be subtle but important. Broadly, the use of "mass incarceration" reflects a belief that governments have somewhat consistently and intentionally used incarceration to manage populations, while "over-incarceration" rests on the idea that the state incarcerates people for longer than necessary and locks up people who pose little danger to the public. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117

bias is the product of a form of "vicarious trauma" that science tells us can result in "feeling emotionally numb or shut down,"[11] or "irritable."[12] In other words, even if there is an innate "punishment impulse"[13] in people generally,[14] some prosecutors exhibit an "over-punishment impulse" (that is, a punishment that is not narrowly tailored to articulable goals), and this over-punishment impulse is a cognitive bias created, at least in part, through constant exposure to violence, tragedy, and loss.

Along that path, this Article seeks to understand more broadly what it is about prosecutors' minds[15] that drives criminal justice

MICH. L. REV. 259, 269 (2018). I am confident in the evidence showing that too many people are incarcerated for too long to accomplish the goal of reducing crime, but less confident in the assertion that this has been (at least in the recent past) the result of concerted and intentional action to control populations, notwithstanding the goal of crime control. In other words, I believe we use incarceration too often, but I am not convinced that large numbers of people are now being intentionally incarcerated because of their demographics rather than their actions. That is not to say, though, that I don't understand the bare fact that our systems are infected with racism and that we continued to use mechanisms such as the 100-1 ratio between crack and powder cocaine long after it was clear that the ratio in practice produced unwarranted racial disparities, and that the War on Drugs originated in a desire to control populations. *See* Mark Osler, *What We Got Wrong in the War on Drugs*, 17 U. ST. THOMAS L.J. 968, 971 (2022) ("Black and Hispanic people accounted for over 95 percent of crack convictions, even though more than half of crack users were white."). The mechanisms that result in these unsupportable racial disparities, though, are subtle, not blunt and obvious, and I fear that the term "mass incarceration" obscures that subtlety, which so badly needs to be rooted out and exposed.

11. Emotional numbness could manifest in a prosecutor through an inability to connect with the humanity of others, particularly defendants. *See infra* Section III.B. It also would inhibit a prosecutor's engagement with excesses built into the system, such as sentencing guidelines that overstate the dangerousness of a given person.

12. *The Vicarious Trauma Toolkit*, DEP'T OF JUST., https://ovc.ojp.gov/program/vtt/what-is-vicarious-trauma (last visited Feb. 6, 2026).

13. John M. Darley, *Citizens' Assignments of Punishments for Moral Transgressions: A Case Study in the Psychology of Punishment*, 8 OHIO ST. J. CRIM. L. 101, 101 (2010).

14. Because of self-selection in who becomes a prosecutor—those who apply for the job are already comfortable with the punishment of others—the punishment impulse is probably more prevalent among prosecutors than the population as a whole. *See infra* Section II.C.1.

15. I am not a wholly objective observer in this examination, as will become clear. I served as an Assistant United States Attorney in the Eastern District of

systems in the United States towards racial disparities, irrationally long sentences, and limited opportunities to review sentences as they are served.[16] Any move towards a better understanding of how prosecutors think as they exercise discretion is a necessary step towards the possibility of real reform and change (short of eliminating prosecutors and the system as a whole).[17] To understand the decisions made, we have to understand the decision-makers.

As part of that analysis, I am seeking a new perspective from which to view prosecutors and their work. If someone read recent academic critiques of criminal justice without discernment, they might easily conclude that prosecutors constitute something like an evil cabal dedicated to a racist status quo,[18] personal rather than public agendas,[19] and mass incarceration.[20] I do not think that is a fair or true characterization of the majority of the prosecutors I have known and supervised.[21]

It isn't that I don't agree with much of the critique or take seriously the role that prosecutors have played in driving over-

Michigan from 1995 to 2000, and as the Deputy Hennepin County Attorney and Director of the Criminal Division in 2023 and 2024.

16. *See infra* Section IV.A.

17. I acknowledge the work of those who seek this kind of abolition of police, prosecutors, and prisons. However, for the reasons Rachel Barkow has set out, I do not see this as a realistic goal within my own lifetime. *See* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 272–81 (2023) (evaluating abolitionist beliefs in light of existing policies like condemning wrongful conduct).

18. *See* Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 211 (2022) (arguing that "the racism, narrative of individual blame rather than attention to structural root causes, and reactive rather than preventive stance—are all built into" the criminal legal system).

19. *See* Vida B. Johnson, *Whom Do Prosecutors Protect?*, 104 B.U. L. REV. 289, 342 (2024) ("No matter what they call themselves and whom they claim to represent, prosecutors do not consistently represent the interests of the people.").

20. *See* Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 952 (2012).

21. This unfair characterization may play a role in the troubling understaffing of some prosecution offices. *See* Adam M. Gershowitz, *The Prosecutor Vacancy Crisis*, 50 BYU L. REV. 355, 369 (2024) (discussing "huge vacancies" among prosecutors' offices). Gershowitz found that prosecutors had encountered law students who hold negative attitudes about pursuing that role because of a belief that "you have to be mean to be a prosecutor. And the students want to be the good guy." *Id.* at 397.

incarceration. For example, when Abbe Smith asks" can you be a good person and a good prosecutor?" and after a lengthy analysis concludes that "I hope so, but I think not,"[22] it explicitly rests on three primary conclusions: (1) that American criminal law is unduly harsh;[23] (2) that prosecutors are significant creators and vehicles of that harshness;[24] and (3) that this is a result of conscious moral failings by those prosecutors.[25] I emphatically agree with the first two points, and have previously written about both the gross over-sentencing in American law[26] and how prosecutors play a role in that.[27] The third point, however, requires more nuance than it has been given. It is too easy to conclude that prosecutors create serious social problems because they are "bad people"—and there is some irony that this critique tends to come from criminal defenders like Smith who certainly would chafe (and should) at the suggestion that their clients commit crimes simply because they are "bad people." Defenders rightly advocate for an empathetic view

22. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001) [hereinafter *Can You Be a Good Person and a Good Prosecutor?*]. She reaffirmed that conclusion in 2018, stating, "I would like to believe that good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2018. But I doubt it." Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. 3, 7 (2018). And in 2019, she was slightly more optimistic in identifying a very few but significant prosecutors whose work she approved, at least in some respects. Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 421 (2019). I agree with Smith that the project of prosecution too often creates hardness—that is a core thesis of my argument here— but has produced significant good when done wisely, to solve problems rather than simply punish.

23. Smith, *supra* note 22, at 364–65 (providing incarceration statistics to illustrate harshness).

24. *Id.* at 373–74; Smith, *supra* note 20, at 953 ("Prosecutors may not be responsible for the laws that have ratcheted up punishment, but they enforce them, often with little compunction.").

25. *See Can You Be a Good Person and a Good Prosecutor?*, *supra* note 22, at 380–91.

26. For previous discussions on sentencing, see Osler, *supra* note 10, at 978–79; Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161, 163–70 (2020); Mark W. Bennett & Mark Osler, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. J. 117, 121–28 (2014).

27. Barkow & Osler, *supra* note 4, at 405–53; Bennett & Osler, *supra* note 26 at 145–52.

of their clients, arguing that their actions are frequently overstated in terms of how dangerous they are and are often the result of trauma[28] in their lives.[29]

What I seek here is to apply that same empathetic view to prosecutors while recognizing the harms that do, in fact, too often emanate from their work. That viewpoint informs my observation that much of the bias at work in criminal law processes is most often implicit, not explicit;[30] that there is a deep personal cost to carrying the weight of judgment;[31] and that while cognitive bias may be hard to detect and measure, it is remarkably impactful. Criminal justice is a cruel machine, and that cruelty affects everyone it touches. We are wrong to deny the complex humanity of defendants and victims, but also wrong to deny the complex humanity of prosecutors. There is deep truth in the axiom "hurt people hurt people,"[32] and sometimes those who are hurt hold power—and their brokenness, combined with that power, makes everything else worse.

In asking that we use empathy in our examination of the minds of prosecutors, I am not claiming an equivalency of harm between prosecutors and others involved in the system—and particularly with crime victims and those who are imprisoned, both of whom have an immediacy of harm and loss that is fundamentally different than the secondary trauma that prosecutors experience. Certainly, prosecutors have much

28. The importance of trauma in criminal defense has led to the promising development of "trauma-informed defense." *See* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 11–24 (2018).

29. The analogy only holds in part, of course. Smith points out that there are causes of criminal actions—"poverty, inequality, isolation, and drugs"—which generally are not in the background or current circumstances of most prosecutors. *Can You Be a Good Person and a Good Prosecutor?*, *supra* note 22, at 365.

30. By recognizing that bias is often implicit, I do not mean to imply that we should do anything less than work diligently to address and root it out—that is an essential task, and indeed part of my goal here, writ large.

31. That weight is clearly observed in court, where prosecutors stand a few feet away from a person and ask that a court strip another person of freedom or sometimes (in death penalty states) their life.

32. Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who Is a Victim?*, 87 BROOK. L. REV. 1299, 1308 (2022) (quoting a letter received from a "lifer"). Zeidman quotes a letter-writer who had been convicted of a domestic violence offense and referred to the trauma in his own past. *Id.*

more agency, power, and discretion than others.[33] Rather, my point is that in the same way that trauma often leads to the worst things done by defendants in the criminal system, the trauma prosecutor's experience inevitably affects their well-being in a way that can cause further harm. In the end, we are better served by addressing the problems with prosecutors through a lens of empathy rather than simply condemnation, if what we seek are better outcomes and a reduction in over-punishment.

This Article proceeds in four parts. Following this introduction, I discuss in Part II the over-punishment impulse by positioning my argument within the school that argues for "punishment realism" rather than "punishment naturalism." As a punishment realist, I reject the theory that ideas about punishment are primarily innate. Instead, I argue that ideas about punishment are culturally specific and learned (consciously or subconsciously) based on one's culture and experiences—including through exposure to traumatic events. I then describe the over-punishment impulse and note where it has been observed, before recapping the explanations for the over-punishment impulse offered by other scholars.

Part III, in turn, describes trauma bias and the physiological effects of trauma generally, before examining trauma bias both in my own experience as a prosecutor and through the history and literature of wartime. Finally, Part IV describes the harms caused by the over-punishment impulse driven by trauma bias and proposes solutions to mitigate that damage. Those harms include unduly harsh sentences, resistance to second-chance sentencing, and the amplification of existing racial biases. The mitigation proposals include enhanced mental health resources in prosecutors' offices, the removal of prosecutors from decision-making positions in second-chance sentencing, diminishing the role of retribution in prosecutorial decision-making in explicit and verifiable ways, and creating a mechanism (based on military lawyering) in which attorneys rotate between working as prosecutors and defense attorneys.

33. As two experts put it, citing to Judge Gerard Lynch, "American criminal justice systems have become administrative systems run by executive-branch officials (namely, prosecutors)." Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L REV. 1409, 1409 (2003).

Over-incarceration in the United States is real, even as total numbers of people incarcerated decrease.[34] To address it, we must begin in earnest to try to understand the minds of prosecutors.

II. THE OVER-PUNISHMENT IMPULSE IN PROSECUTORS

Any discussion of prosecutors' beliefs and motivations should be positioned within a fascinating debate between the ideas of "punishment naturalism" and "punishment realism," which is addressed in Section A below. Section B, in turn, addresses a different line of scholarly thought, in which Ellen Yaroshefsky and Rachel Barkow have defined the role of prosecutors in driving mass incarceration. Finally, Section C discusses scholarly explanations for the over-punishment impulse in prosecutors, which include self-selection, office and law enforcement culture, and cognitive biases, including confirmation bias and selective bias.

A. A Perspective of Punishment Realism

The nature versus nurture debate is as old as man, and still unresolved. In the realm of understanding ideas about punishment, two schools of thought emerged in the 2000s. One school, that of "punishment naturalism," saw nature as the primary influence on feelings about punishment, holding that there were inherent norms that humans have in common across cultures—for example, that murder is a most serious offense.[35] In response, scholars described a school of "punishment realism," which echoed the logic of the legal realists of the 1920s and 1930s, asserting that influences in the course of a person's life, rather than biology, primarily shape a person's view on appropriate punishment.[36] My analysis here is consistent with the trajectory of the punishment realists, with the goal of understanding what those influences on a person might be.

34. *See Jail and Prison Populations Have Decreased Since 2019—But Continued Progress Isn't Promised*, VERA INST. (Nov. 12, 2024), https://www.vera.org/news/jail-and-prison-populations-have-decreased-since-2019-but-continued-progress-isnt-promised (showing incarceration trends).

35. *See infra* Section II.A.1.

36. *Infra* Section II.A.2.

1. Punishment Naturalism

In the prologue to his book *Moral Minds*, Marc Hauser described a groundwork for punishment naturalism, saying "[t]he central idea of this book is simple: we evolved a moral instinct . . . . Part of this machinery was designed by the blind hand of Darwinian selection millions of years before our species evolved; other parts were added or upgraded over the evolutionary history of our species . . . ."[37] He allows for the influence of nurture, as well, but only to build on top of the moral base we inherit: "we are born with abstract rules or principles, with nurture entering the picture to set the parameters and guide us toward the acquisition of particular moral systems."[38] For the punishment naturalist, criminal law is shaped by a basic and universal human sense that dictates retribution in varying degrees for moral offenses.

The core idea of punishment naturalism is premised on an observation that humans show high levels of agreement on the relative punishments for different kinds of wrongful acts; this cross-cultural consensus is taken as evidence that such agreement "traces to effects of evolutionary processes on species-typical brains, which predispose humans to develop intuitions about core wrongs."[39] In other words, our beliefs about punishment are "natural" within us as intuitions regardless of the circumstances of our lives, and because of this common evolutionary source, there is broad agreement to punish for various types of crime. While that does not mean that social environments do not also play a role,[40] this view uses intuition to root the idea of punishment in biology. The punishment naturalists were essentially conservative: they believed that "reforms" moving punishment away from those common norms would undermine the people's faith in, and respect for, the criminal justice system.[41]

37. MARC HAUSER, MORAL MINDS xvii (2006).

38. *Id.* at 165. At times, Hauser claims fairly extensive primacy of nature over nurture in the development of moral instincts, pointing to a study showing that four- to five-year-olds consider harmful actions worse than harmful omissions. *Id.* at 207.

39. Owen D. Jones & Robert Kurzban, *Intuitions of Punishment*, 77 U. CHI. L. REV. 1633, 1633 (2010).

40. *Id.* at 1635.

41. *See* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 51–52 (2007) (asserting

When the punishment naturalists write of a gut instinct that is "natural" in its origin, they are talking about retribution. The other traditional sentencing purposes—deterrence, incapacitation, and rehabilitation[42]—all rest on analysis rather than instinct, leaving retribution alone as the functioning mechanism. To accept the naturalists' conception, then, is to favor retribution over other purposes of sentencing, which is anathema to the larger project of modern criminal law, which aspires to something more than mere expression of bloodlust.

There *are* readily observable phenomena that would seem to support the idea of punishment naturalism. Nearly everyone would agree that murder is a very serious crime worthy of punishment, for example. It's right there in the Ten Commandments,[43] after all, and part of nearly any criminal code, formal or informal.[44] It would seem there can be no real argument with that universality. While our sense of what constitutes murder has changed radically over the centuries as we have carved out manslaughter,[45] self-defense, and even killing justified under "stand your ground" laws[46] from what is punishable as murder, people across cultures and time have been consistent in their desire to punish murder more harshly than other crimes. Punishment naturalism is in tension with the idea that trauma can be a primary input to

that reforms, lesser than what we have now, would harm the criminal justice system rather than advance its core purposes).

42. *See* 18 U.S.C. § 3553(a)(2)(A)–(D) (listing purposes of imposing a sentence).

43. Of course, there are different versions of the Ten Commandments within the Bible itself. *Exodus* 34:28; *Deuteronomy* 4:13; *Deuteronomy* 10:4. The idea of the Ten Commandments as representing a universal moral code is undermined by the current reality that its prohibition on adultery and its insistence that the Sabbath be protected find almost no mandate in contemporary American law.

44. Hauser points to a different similarity in moral codes, noting that some variation of the Golden Rule (treat others as you would like to be treated) appears in Buddhism, Confucianism, Taoism, Judaism, Christianity, and Islam. HAUSER, *supra* note 37, at 357–58.

45. *See* John Rockwell Snowden, *Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup*, 76 NEB. L. REV. 399, 401–09 (1997) (showing how a state's definitions of malice and murder have changed over time).

46. *See* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J. L. & PUB. POL'Y 504, 523–25 (2007).

prosecutors' ideas and intuitions about punishment, since trauma is "nurture" rather than a "nature" factor.

2. Punishment Realism

Reacting to what they described as a theory which generated "deep concern . . . over what we take to be the politically conservative resonances with which the Punishment Naturalist has been needlessly infused," Donald Braman, Dan Kahan, and David Hoffman attacked the premises of that movement while promoting their own idea of "punishment realism."[47] Their critique argued that, actually, ideas of appropriate punishment varied widely between cultures rather than being universal. For example, Kuwaitis ranked "a married woman committ[ing] adultery" as the most serious of a long list of crimes, while Americans ranked it near the bottom.[48] Even as to murder, the realists asserted that agreement as to the severity of such a crime is "the product of shared social meaning, an agreement deriving from cultural norms that are widely shared in our society."[49]

Rooting their theory in empirical research into human judgment and legal realism, the punishment realists rejected the primacy of "nature" in determining citizens' views on punishment. To the realists, legal actors—that is, prosecutors and perhaps legislators—"are necessarily moved by extralegal influences that shape their choice of one or another of the various possible justifications and outcomes."[50] What the realists wanted was "to know what those extralegal influences are and how they manifest themselves" and to "understand the cognitive biases and heuristics that move individuals to interpret law and facts in particular ways."[51]

In the analysis that follows, I place myself firmly in the camp of the punishment realists (as they define themselves) and even aspire to partially answer their query as to what environmental cognitive biases move individuals (here, prosecutors) to not only interpret law and fact but direct outcomes consistent with those biases. I think they are

47. Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1602 (2010) (emphasis omitted).

48. *Id.* at 1558.

49. *Id.* at 1579.

50. *Id.* at 1566.

51. *Id.* at 1566–67.

right—like the legal realists before them[52]—that outcomes are determined by the particular individuals involved in a process;[53] to understand those outcomes, one must understand those individuals.[54] And when those individuals are prosecutors, a caste of people charged with the very unusual social role of accusing and condemning others, things get pretty complicated.

B. The Over-Punishment Impulse Observed

In 2017, Lissa Griffin and Ellen Yaroshefsky published *Ministers of Justice and Mass Incarceration*,[55] a rare title in that it lacked a colon but contained a wicked-smart double meaning. They began with the undeniable proposition that prosecutors play a unique role in American criminal justice, in that they are lawyers, but not advocates for a client—their task is to serve as a "minister of justice" who "represents the sovereign and must make decisions for society at large."[56] Noting the wide discretion that prosecutors have, the authors conclude that "one consequence of virtually unfettered discretion in charging has

52. *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 17–18 (G. Edward White ed. 1986).

53. The realists, in focusing on the human inputs to a justice system, viewed rules of law as "not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but [as] rather theorems in an independent system." *Id.* at 4 (quoting Felix Cohen).

54. In casting my lot with the punishment realists, I do not give up all belief in natural law. My own observations of federal sentencing led me to the conclusion that the primary effect of natural law is a mercy impulse, which is observable in federal sentencing in the ratio between upward and downward departures and variances from the guidelines—a ratio that overwhelmingly favors downward departures, even when downward departures for cooperation with the government are removed from the calculation. *See* Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J. L. & PUB. POL'Y 167, 175–76 (2010) (observing sentencing trends).

55. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301 (2017). Yaroshefsky discerned a core feature of that discretion, too—that it represents at its base an expression of one person over another, even when the Constitution might bar that expression of power. *See* Ellen Yaroshefsky, *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, 37 CHAMPION, May 2013, at 12 (2013) (describing the relationship between prosecutors, the law, and power specifically in the context of *Brady* violations).

56. Griffin & Yaroshefsky, *supra* note 55, at 304.

been a significant increase in indictments in an era when crime has decreased, thereby creating or at least contributing to conditions for mass incarceration."[57]

Rachel Barkow agrees with Griffin and Yaroshefsky's conclusion about prosecutors playing a role in driving mass incarceration, but adds two important points. First, she brings an administrative law approach to the question, saying that prosecutors "have all the powers of traditional civil regulators . . . but none of the checks designed to ensure they make rational, nonarbitrary decisions."[58] Second, she notes that instead, elections could be an important check on the over-punishment impulse as "[p]opulist fears and impulses among the electorate create pressure on prosecutors to make ill-advised short-term decisions . . . and few voters pay attention to anything other than the usual tough-on-crime campaign strategies, even when those policies produce poor results."[59] If we are concerned about mass incarceration, we must also examine the role prosecutors have played in producing it.

C. Proffered Explanations for the Over-Punishment Impulse in Prosecutors

Before presenting the idea of trauma bias as a cause of the over-punishment impulse in prosecutors, it is important to address the potential causes that other legal scholars have set out. In reviewing this literature, I find value in all of these arguments, and suspect that, in varying degrees, the mechanisms they describe all play a role in nudging prosecutors towards acting as vehicles of over-incarceration. My point that follows is simply that there is yet another factor in play as well—trauma bias.

Because we are examining thoughts and decisions made in the shadows of the criminal justice system rather than in open court, none

57. *Id.* at 313. Prosecutors, of course, are rarely the ones who actually initiate cases—rather, cases are referred to the prosecutors by investigators who exercise their own discretion in deciding whether or not to present the case. That means that there are at least two possibilities for an uptick in indictments when crime is down: either the police are referring more cases, or the prosecutors are declining fewer cases that come in the door.

58. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 143 (2019).

59. *Id.*

of this is an exact science or a full explanation. Part of my thesis here is that prosecutorial decisions can be rooted in emotion,[60] and emotion is incredibly nuanced. As Susan Bandes put it, the term "emotion" itself (and the synonyms I have used here) "attempts to encompass a complex set of internal phenomena" and "can have no fixed, acontextual, cross-disciplinary definition."[61] While this Article is not a comprehensive overview, it is important to note other possible sources of the punishment impulse in prosecutors. Some may pull away from my conclusions, and others may explain dynamics that work in tandem with what I have described as trauma bias.

1. Self-Selection and Pre-Existing Attitudes

Part of the prosecutorial mind, of course, is at the very least a willingness to seek accountability and, often, a sentence of incarceration for those that prosecutors charge with crimes.[62] Those opposed to or indifferent to punishment are unlikely to become prosecutors, creating a natural filter that draws prosecutors from a part of the population that is comfortable with judgment and condemnation, which helps explain what John M. Darley called the "punishment impulse."[63]

But prosecutors often possess more than just a willingness to view incarceration and other punishments as an essential part of the

60. I do not address here "just deserts" theory, which imagines punishments that are pegged to what is deserved by the defendant using reason. While the idea of reasoned punishment of this type serves as the justification for some sentencing guidelines and statutes, it is rare to hear practitioners use this terminology, and at any rate its employment by individual actors is likely mixed with or masks emotional responses.

61. Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 FORDHAM L. REV. 2427, 2429 (2021).

62. Technically, prosecutors in some jurisdictions do not charge some defendants as their charges come from a grand jury. However, a case only comes before a grand jury if the prosecutor chooses to present it there. While Judge Sol Wachtler, the former Chief Judge of the New York Court of Appeals, may have overstated the facts in saying that a grand jury would indict a ham sandwich at a prosecutor's request, there is no question that the charging pipeline is controlled by the prosecutor. *See* Jack W. Pirozzolo, *Grand Jury Service: Observations from a Criminal Lawyer*, BOS. BAR J. 22, 24 (2021).

63. *See* Darley, *supra* note 13, at 109 (explaining research that shows, across cultures, the "universality of the impulse to punish trust transgressions in human societies").

criminal justice system. As Aviva Orenstein points out in the context of prosecutorial intransigence when faced with evidence of innocence, "people who are attracted to prosecution possess personality traits that make it harder to confess error, such as high levels of confidence and competitiveness."[64] Changes in the culture after the murder of George Floyd also accelerated this kind of self-selection.[65] In describing a crisis in prosecutorial staffing, Adam Gershowitz compellingly establishes that progressive or moderate law students are often steered towards defense rather than prosecution by their professors and peers,[66] leaving those who are naturally more retributive to fill the ranks.

No one has done more valuable work analyzing prosecutors than Ron Wright and Kay Levine, and their surveys of state prosecutors revealed both reasonable motives for taking the job (i.e., gaining trial skills[67] and work-life balance[68]) and a common personality trait, which they called a "core absolutist identity."[69] The prosecutors with this trait had an "intrinsic commitment to rules, structure, and hardened categories of right and wrong," and reported identifying as a prosecutor as early as age twelve.[70]

Abbe Smith, in contrast, surveyed defense attorneys rather than prosecutors about the traits that they saw in prosecutors from the other side of the adversarial divide. Though her question to about fifty current and former public defenders was leading,[71] it was also fascinating: she asked them to "estimate the percentage of prosecutors they have encountered in their careers whom they would *not* describe as smug,

64. Aviva Orenstein, *Debunked, Discredited, but Still Defended: Why Prosecutors Resist Challenges to Bad Science and Some Suggestions for Crafting Remedies for Wrongful Conviction Based on Changed Science*, 48 SETON HALL L. REV. 1139, 1149 (2018). Orenstein also notes that the power and discretion of prosecutors "might shape their attitudes and worldviews over time," though she does not describe the role of exposure to tragedy. *Id.*

65. Gershowitz, *supra* note 21, at 397–99.

66. *Id.*

67. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1685–87 (2018).

68. *Id.* at 1693–97.

69. *Id.* at 1681.

70. *Id.* at 1681–82.

71. Posing a leading question, of course, is what defense attorneys do regularly in trial.

self-important, or lacking in imagination."[72] The "vast majority" of respondents answered somewhere "between two and fifteen percent."[73] Ouch!

Certainly, prosecutors sometimes choose this career because it fits their existing worldview and principles, whether we call it a "core absolutist identity" or "smugness."[74] But Wright and Levine also identified many other countervailing and more sympathetic motivations, (such as seeking out the role of public servant),[75] meaning that this starting point cannot be the whole story.[76] To conclude that most prosecutors simply are smug jerks who lack imagination is not only poorly supported (Smith's survey was an informal query to about fifty of her fellow defenders and former defenders),[77] but it gets us nowhere in attempting to siphon the undue harshness out of criminal law; calling prosecutors smug and self-important is not dialogue designed to address underlying issues. To do that actual work of reform, we need to see prosecutors as fully formed moral beings, as humans who are molded by circumstances, good and bad.

2. Office Culture and Being Part of a Team

Being part of an institution certainly matters for prosecutors, as does the culture within that institution. Aviva Orenstein posits that prosecutors are pressured by the desire to "remain team players, uphold their personal credibility, protect the image of the office, advance professionally, and, in the case of elected officials, stay in power."[78] Lissa

72. Smith, *supra* note 20, at 953.

73. *Id.* at 954.

74. Defenders, too, often fit the description of bearing a "core absolutist identity." However, that identity aligns much more strongly with their vocation than for prosecutors, as defenders represent clients who are owed strong advocacy on one side, while prosecutors are tasked with a more nuanced job as ministers of justice.

75. Wright & Levine, *supra* note 67, at 1685–1702.

76. My own experience reflects a diversity of motivations in those who seek the job of prosecutor. While at Hennepin County, I interviewed approximately 100 job-seekers and found that the majority had sympathetic reasons for wanting to be a prosecutor, such as a desire to promote balance in criminal law or to work with juveniles for their betterment. That body of interviewees may not be typical, though, because of the self-selection of who will seek a job from a "progressive" prosecutor.

77. Smith, *supra* note 20, at 953.

78. Orenstein, *supra* note 64.

Griffin and Ellen Yaroshefsky similarly point to prosecutors' "multidimensional roles," which include constant consultations with the police and create incentives for prosecutors to seek convictions whenever possible, regardless of their role as ministers of justice.[79] Prosecutors, cut off from defendants by ethical rules and defense attorneys by culture and role, are part of a team that too easily defines itself by wins or losses.

That desire to win can become, in the words of Tracey Meares, "a central characteristic of prosecutorial culture."[80] Often, this peer pressure pushes prosecutors to project an image of "toughness." Television shows like *Law and Order* also help shape a culture in which the hero is, like District Attorney Jack McCoy,[81] the template of a "prosecutor as aggressive trial lawyer facing down the lawbreaking adversary," as Bruce Green put it.[82]

Consistent with all of this (Jack McCoy was the hero in *Law and Order*, after all), prosecutors do tend towards a sense of moral superiority.[83] In a series of interviews with state prosecutors, Kay Levine and Ron Wright found that prosecutors sometimes explained their role as "wearing the white hat," a metaphor for being the good guys in the system.[84] That metaphor defines their team—and puts a "black hat" on the defense bar on the other side of the courtroom.[85] So not only does the prosecutor see themself as part of a team, but as part of the good team in the white hats.[86]

79. Griffin & Yaroshefsky, *supra* note 55, at 312.

80. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 882 (1995).

81. Smith, *supra* note 20, at 958.

82. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 609 (1999).

83. Of course, Abbe Smith's survey of fellow defense attorneys certainly found a deep well of feelings of moral superiority in that group as they condemned their opponents as smug and self-important.

84. Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38, 43–46 (2017).

85. *Id.* at 47.

86. That sense of superiority is sometimes bolstered through interactions with the public. More than once, strangers in a restaurant offered to pay for my meal after hearing (or more accurately, overhearing) that I was a federal prosecutor working on drug cases.

Of course, culture within prosecutors' offices is not uniform. Cultures may change as new progressive prosecutors establish seniority and their staffs begin to more consistently reflect new views.[87] Similarly, the impact of a tight relationship with other parts of law enforcement (particularly the police) will vary with the culture of those other units, and as some of them change over time, the impact on prosecutors will, too.

3. Other Forms of Cognitive Bias

Trauma bias, as described below,[88] is a form of cognitive bias. What psychologists call "cognitive bias" is a systematic deviation from what is reasonably caused by the filtering of facts through our own set of experiences and beliefs. In other words, it exists when we make decisions based on what we bring to the process rather than strictly from the facts before us and rationality[89]—what we sometimes call a "gut decision" or "intuition." While seemingly objective, these decisions are often rooted in prior experiences and trauma experienced while on the job.[90] Recognizing cognitive bias in prosecutors is not a judgment that they commit malfeasance, but rather that they are affected by an unconscious process that is not subject to the ethical balancing done by a conscious mind.[91] The fact that it is unconscious, however, does not make it any less damaging in terms of producing over-incarceration and unjust outcomes.

87. Paul Butler has accurately described progressive prosecutors as "resistance lawyering but probably not subversive lawyering." Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1989 (2022).

88. *Infra* Section III.A (defining "trauma bias" as the tendency to make intuitive decisions shaped by trauma).

89. *See* Erin Morris, *Cognitive Bias and the Evaluation of Forensic Evidence*, CHAMPION, May 2012, at 12, 12.

90. Video evidence, in the form of body worn cameras and other video surveillance, has likely enhanced the trauma experienced by prosecutors, who now spend hours watching a crime occur rather than merely reading reports. The relationship prosecutors develop with victim witnesses is a constant source of trauma before and after the video revolution. Others in the system do not experience this exposure to tragedy.

91. Yaroshefsky, *supra* note 55, at 13.

Scholars critiquing the role of prosecutors in our system have described two other forms of cognitive bias, confirmation bias and selective bias, which in some ways overlap with but do not fully encompass the tragedy-driven dynamic I describe here as trauma bias.[92]

a. Confirmation Bias

Confirmation bias is "the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses."[93] That tendency can lead to "tunnel vision," which causes investigators and prosecutors to focus on an initially identified target, seek evidence that shows the target's guilt, and dismiss evidence that leads in other directions.[94] Information that confirms the hypothesis is favored over other evidence. This tendency has been seen as an important driver of wrongful convictions.[95]

Tunnel vision and confirmation bias can be remarkably strong. Even when DNA evidence shows that the wrong person has been convicted, for example, prosecutors sometimes will dismiss that scientific conclusion "as a cheap, technical ploy that an embattled prosecution cannot fight, given the passage of time."[96] Even though prosecutors are explicitly charged with serving as "ministers of justice" bearing responsibilities not held by other lawyers,[97] the tunnel vision problem can be difficult to overcome.

92. A third kind of confirmation bias, belief perseverance, involves sticking to an idea even when "new information wholly discredits the theory's evidentiary basis." Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1599 (2006). I do not discuss that here because the behavior I describe, predicated on previous exposure to tragedy, does not involve a discrediting of that perception.

93. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309 (2006).

94. Ellen Yaroshefsky, Keynote Address, *Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMPLE POL. & CIV. RTS. L. REV. 343, 352 (2010).

95. Findley & Scott, *supra* note 93, at 292–93.

96. Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 412 (2011).

97. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (A.B.A. 2023).

b. Selective Bias

Selective bias, which is sometimes referred to as "selective information processing," is the tendency to evaluate evidence through the lens of existing beliefs.[98] Though parallel to confirmation bias, it is distinguishable because confirmation bias leads to focusing on evidence that confirms an initial or existing *conclusion* (e.g., "Mr. X committed this robbery), whereas selective bias leads to focusing on evidence that confirms an existing and more general belief (e.g., "Albanian people in our community tend to commit this crime"). As with confirmation bias, information that proves our beliefs is favored while information that challenges them is disfavored.[99]

In criminal law, selective bias likely affects a broader array of a prosecutor's tasks than confirmation bias. It is distinct from trauma bias in that a prosecutor is likely more aware of her beliefs than she is of the effects of accumulated trauma. Selective bias works more at the level of the conscious mind than trauma bias, which is buried deeper inside.

What is described in this Article as trauma bias might be a *cause* of what manifests as confirmation bias or selection bias, if the inferences drawn from vicarious trauma are what is being confirmed or shape the facts that are selected. For instance, if a prosecutor thinks that gang members are violent because she has worked on prior cases that involved traumatizing examples of violent acts by gang members, she will likely be attentive to weak indicia of violence in a gang case that she might ignore with a different kind of defendant. The current gang members—even if it is a very different group behaving in distinct ways—become lumped with the ones she dealt with before in a way that is intuitive rather than logical.[100]

There is a more fundamental distinction as well. While confirmation bias and selective bias are worthwhile mechanisms for understanding some of the actions of prosecutors, they do little to reveal the underlying and common cognitive bias shared by most people in that profession: the punishment impulse born of constant exposure to tragedy. That is, the predicates for trauma bias exist for all prosecutors, regardless of the beliefs they may bring to the job or the other evidence

98. Burke, *supra* note 92, at 1596–97.

99. *See id.*

100. *See infra* Sections III.A. and III.B.

available. Even if preexisting attitudes and corroborating facts are stripped away, trauma will still affect judgment.

III. TRAUMA BIAS AS A SOURCE OF THE OVER-PUNISHMENT IMPULSE

Having surveyed established ideas about the source of the over-punishment impulse in prosecutors, it is time to turn towards new ground. Section A applies the idea of vicarious trauma to the role of prosecutors, while Section B reflects on a direct observation of that trauma within a prosecutor's office. Finally, Section C considers the lessons of war as a path to insight into prosecutors' work.

A. Vicarious Trauma and Its Effects

The recognition and definition of "vicarious trauma" has emerged within the past few decades, and is sometimes referred to in other contexts as "compassion fatigue," "secondary traumatic stress," and "empathetic strain."[101] One expert described vicarious trauma as "harmful changes that occur in professionals' views of themselves, others, and the world, as a result of exposure to . . . graphic and/or traumatic material."[102] Physiologically, secondary trauma (like other forms of stress) affects the hippocampus, which plays a key role in "memory encryption, memory union, and spatial routing"—in other words, everything we understand relies on this part of the brain.[103] One effect of vicarious trauma on the hippocampus is that it can lose its timekeeping function; that is, it fails to signal that a traumatic event is over, "causing a malicious succession of stress hormone release."[104]

Vicarious trauma can create responses that look like posttraumatic stress reactions, such as "obsessive thoughts, numbness, dissociation, and . . . 'disruptions to important beliefs'" that people would

101. Samuel D. Hodge, Jr. & Lauren Williams, *Vicarious Trauma: A Growing Problem Among Legal Professionals That May Become a More Prevalent Cause of Action*, 53 TEX. TECH L. REV. 511, 513 (2021).

102. Natalie Netzel, *Hiding in Plain Sight: Vicarious Trauma Is Just Part of the Job for Many Lawyers. Time to Talk—And Do—More About It*, BENCH & BAR MINN. June 2022, at 20, 21.

103. Hodge & Williams, *supra* note 101, at 518.

104. *Id.* at 519.

otherwise hold about themselves, others, and the world around them.[105] This can manifest as a "cynical view of humanity"[106] that could include a failure to differentiate between individual cases.[107]

The application of this science to the work of prosecutors is not difficult. Vicarious trauma is a daily reality for a wide variety of criminal practitioners, including those on both sides of a criminal case, probation officers, judges, jurors, and those serving in law enforcement.[108] It is inherent in the work, of course, but for some, there have been changes (such as the increase in video surveillance, the detail of medical images, and the more direct input given by victims of crime) that have ratcheted up the exposure to mayhem and its aftereffects.

Yet the role of prosecutors, siloed away from the larger and more human story of the defendant and focused on proving the elements, means that prosecutors take in that vicarious trauma to the exclusion of almost everything else. Prosecutors deal with hundreds of defendants, and pretty soon they may start to seem alike in the fog of tragedy that shrouds the entire enterprise.[109] As one clinician in the field put it, "[t]o most prosecutors, the millions of stories in the Naked City boil down to only a handful of plot lines such as 'who did it?', 'what happened?', or 'did he mean to do it?'. . . . The defendant is being

105. Adam S. Wolrich, *Mitigating Secondary Stress in Military Justice*, ARMY LAW., no. 4, 2019, at 44, 44.

106. *Id.* at 45.

107. Some discussions of vicarious trauma equate it with "burnout," which may be overly simplistic. *See* Maryt L. Fredrickson, *What Came First: The Burnout or the Vicarious Trauma?*, WYO. LAW., Oct. 2024, at 48, 48 (concluding that neither clearly precedes the other, and that either may arise first).

108. Though I focus on criminal law here, secondary trauma can be experienced by those involved in other areas of the law. *See* Mark Rabil, Dawn McQuiston & Kimberly D. Wiseman, *Secondary Trauma in Lawyering: Stories, Studies, and Strategies*, 56 WAKE FOREST L. REV. 825, 828–29 (2021) (describing secondary trauma experienced by a civil litigator). The authors note the shockingly high level of coping mechanisms such as problem drinking, "which is twice the national average" for lawyers. *Id.* at 829.

109. "The fog of war" is a term most famously used by Robert McNamara to describe the difficulty of making reasoned decisions amidst ongoing trauma. It traces back to an 1836 poem about the Battle of Bunker Hill by M'Donald Clarke. M'DONALD CLARKE, POEMS OF M'DONALD CLARKE 188 (1836).

prosecuted for what most people do when they commit the specific crime charged."[110]

And that is where things go wrong: this process in the brain—particularly the seeming continuity of trauma—may lead prosecutors to react emotionally rather than logically when presented with the triggering event of a new case that may or may not be consistent in relevant part with a prior traumatic case or series of cases. Imagine, for example, if the facts were different in terms of violence and threat, but the defendants *looked* similar.[111] The memories of the earlier case are surfaced, and the feelings that go with it.

It is not hard to imagine this development if we consider what it is that prosecutors do all day. With changes in law enforcement, much of a prosecutor's work (and that of many defense attorneys)[112] now consists of viewing direct evidence, including video[113] of awful events. Gone are the days when an agent would come to the prosecutor's office, plop down a file full of written reports, and sit down for a chat. It also matters how prosecutors prepare a case. While defense attorneys personally interact with their clients,[114] prosecutors are almost always

110. Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 22 (1998) (emphasis omitted).

111. The danger presented by this dynamic would include (but not be limited to) racial similarities.

112. *See* Amy F. Kimpel, *Violent Videos: Criminal Defense in a Digital Age*, 37 GA. STATE U. L. REV. 305, 313 (2021) (describing the growth of digital content being used as evidence). Defense attorneys, unlike prosecutors, must temper their emotional reaction or disgust at these videos, as they represent the people depicted. *See id.* at 314 ("Watching a client be brutalized can engender sympathy, but watching the client inflict violence can alienate."). The prosecutors viewing the same evidence do not have the same brake, which could drive them deeper into the well of trauma.

113. Even still images can have a dramatic effect on viewers. Former Colorado Judge Victor Reyes suffered "clammy hands, shortness of breath and a stomachache" after viewing a single image in a murder case. Judge Victor Reyes, *How Judges Can Mitigate Vicarious Trauma,* ABA J. (May 9, 2022, at 11:19 CT), https://www.abajournal.com/voice/article/how-judges-can-mitigate-vicarious-trauma.

114. Defense counsel's access to victims is more complicated and subject to an important debate over the balance between the defense's ability to fully prepare for trial and the victim's right to refuse to engage in such contact. *See* David S. Caudill, *Professional* De*regulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights*, 17 GEO. J. LEGAL ETHICS 103, 124 (2003).

barred from that kind of relationship with the defendant in a case.[115] Instead, their key relationship in many cases is with the victim of the crime[116]—someone who has directly experienced the trauma of sexual assault, robbery, fraud, or some other crime and whose primary role at trial and sentencing is often to recount that event.[117] The proliferation of victims' rights laws expanded their role and ensured that victims had access to prosecutors even when a prosecutor was not employing the victim as a witness.[118]

Psychologists differentiate between "reasoned decisions" and "intuitive decisions," and another way of expressing my central point might be to say that vicarious trauma pushes prosecutors towards intuitive decisions shaped by that trauma rather than making reasoned decisions that could allow for more flexibility and nuance.[119] As set out above, vicarious trauma can eliminate or minimize distinctions between individuals, reducing each person to part of an undifferentiated group of wrongdoers. This perfectly describes the mindset that critics of prosecutors describe.[120] This punishment impulse is societally

115. This is not a defect in the system; rather it is a function of the important protections provided by the Constitution. *See* U.S. CONST. amend. V.

116. While victims are important witnesses and have substantial rights related to prosecutions, the view that victims are the "client" of the prosecutor conflicts with the "minister of justice" role assigned to prosecutors. *See infra* Section II.B.

117. All fifty states and the federal system have created crime victim rights within the criminal justice process. *See* Paul Cassell, Keynote Address for the 2025 *University of the Pacific Law Review* Symposium, *The Crime Victims' Rights Movement: Historical Foundations, Modern Ascendancy, and Future Aspirations*, 56 U. PAC. L. REV. 387, 426 (2025).

118. For example, the federal Crime Victims' Rights Act ensured that victims would have a reasonable right to confer with the government attorney in their case. *Id.* at 464.

119. Psychologists often differentiate between "reasoned decisions" and "intuitive decisions," as I do here. Darley, *supra* note 13, at 104 ("Reasoned decisions are ones that follow the rules for good decisions laid down in books that advise us all about decision making. Intuitive decisions are the result of the heuristic decision-making processes that psychologists have discovered lead to many of our decisions in practice.").

120. I.e., "[L]et me tell you what federal prosecutors really think: They think that the defendants they prosecute are guilty. . . . They think this regardless of other systemic or institutional problems, which they believe they can do little to correct." Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L.

important because of the way it influences and directs the crucial decisions that a prosecutor makes. Though this impulse perhaps involves something broader than trauma,[121] it is referred to below as "trauma bias"[122] and considered to be a form of cognitive bias as that term is used by psychologists.[123]

B. Trauma Bias in Action at a Prosecutor's Office

For the 2023–2024 school year, my life was very different from the preceding twenty-four. After nearly a quarter-century of teaching criminal law at two different schools, I returned to prosecution. It was an unusual opportunity. Before beginning my academic career at Baylor Law School in 2000, I served for five years as an Assistant United States Attorney in Detroit. That experience gave me authority in my field and a lifetime of identified injustices to address. I did not expect to return to prosecution, but in the spring of 2023, I received an unusual call. The new County Attorney for Hennepin County (which encompasses Minneapolis and many of its suburbs) asked me to take a year off teaching to work as the Deputy County Attorney and Director of the Criminal Division, supervising all felony prosecutions and the appellate section. My school gave me leave for an academic year, and I began this new chapter with enthusiasm. The County Attorney, Mary Moriarty (often identified as one of a group of "progressive

REV. 1591, 1602 (2004). "These prosecutors could not be surer of themselves or their cause, or more dismissive of a contrary point of view. It is hard to break through the complacency, certainty, and self-satisfaction. . . . [I]t's hard to feel compassionate in the face of so much smugness." Smith, *supra* note 20, at 949.

121. The broader examination of the role of trauma in criminal law is just now developing, though trauma has been studied in the medical community for decades. Todd J. Clark et al., *Trauma-Informed Justice*, 46 U. ARK. LITTLE ROCK L. REV. 535, 535–36 (2024).

122. My own knowledge of trauma bias is experiential rather than academic, and I hope that those with a deeper grounding in psychology will take up the challenge of connecting the idea with existing data and theories.

123. *See infra* Section III.B. "Trauma bias," as used, will deviate from the understanding of cognitive biases in that it is not unconscious—rather, it is an explicit and specific conscious thought process that includes lumping together the guilty and the innocent within a given group.

prosecutors"),[124] shared with me an overlapping set of values and goals, and it seemed to be a great opportunity to learn and lead.

I was right about the nature of that opportunity. What I did not anticipate was the overwhelming tragedy of the work. Suddenly, I was plunged into a realm of deep tragedy where each day brought a flood of stories full of gunshots, dead babies, and fentanyl everywhere[125]—all while we were trying to implement profound changes in a criminal justice system that produces sweeping racial disparities yet still fails to measurably reduce crime. A large part of my job was to approve charges, particularly in more serious cases. My schedule was often filled with meetings with line prosecutors[126] who were ready to describe murders and sexual assaults. When I was not in meetings, I was often reviewing video from body-worn cameras[127] depicting videos of people being shot in the head, pushed in front of a train, or fighting the police while their minds were clouded with meth or opioids or both.

Those tragedies changed me in the course of just ten months. On my last day of work, on that very last afternoon, a prosecutorial manager working under me reached out and asked for a meeting. One of his line supervisors wanted me to approve a charge. In Minnesota, a grand jury indictment is only required when a life sentence is on the table,[128] usually for first-degree murder, and this was one of those cases.

My office was completely packed up, so we met in a nondescript windowless room in the interior of the building within a few hours of

124. Progressive prosecutors are controversial as agents of change. For a good discussion of the argument against progressive prosecutors, see PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 101–22 (2009).

125. In 2024, in Hennepin County, opioid-related incidents resulted in more than 10,000 emergency room or hospital visits and 264 overdose deaths, with fentanyl implicated in over 91% of the fatalities. *Opioid Response*, HENNEPIN CNTY. MINN.: PROJECTS & INITIATIVES, https://www.hennepin.us/opioid (last visited Mar. 15, 2026).

126. "Line prosecutors" are those who directly handle cases—drafting charges, negotiating pleas, and trying cases. Though supervisors sometimes fulfill these functions, they are not generally referred to as being "on the line."

127. The proliferation of body-worn cameras, especially since the murder of George Floyd in 2020, has been part of a huge increase in the amount of video evidence gathered in cases. The fact that they are not attached to an inanimate object creates new types of videos. *See* Hillary B. Farber, *Write Before You Watch: Policies for Police Body-Worn Cameras That Advance Accountability and Accuracy*, 61 AM. CRIM. L. REV. 59, 70–75 (2024).

128. MINN. R. CRIM. PRO. 17.01 (2025).

my final departure back to academic life. My supervisor and the line prosecutor came in with the files and told me the story reported to them by law enforcement and described in the criminal complaint: a woman had been living in a hotel in a suburb with her baby. She was also dating a man who did not like the child and was encouraging her to put the baby up for adoption. One day, she was taking a bath while the baby was in the adjacent hotel room. The baby was crying, which upset her because she could not enjoy her bath. She went to the other room, got her baby, put him in the tub, and held him under the water until (as she put it) "he was done moving, done twitching." She took a picture of the baby floating face down in the tub. She then texted the boyfriend, who arrived at the scene. As the baby lay dead on the bathroom floor, the two had sex in the other room.[129]

For a moment, I was still and quiet, which I had learned to do after those months and months of hearing about sexual assaults, bullet wounds, fentanyl, and dead babies. Even knowing that this young woman was possibly mentally ill and clearly under the sway of the boyfriend, my mind was in the fog of that vaporous ball of tragedy. It was not fiery rage I felt, but something more like the presence of a small, hard stone forged deep in the earth.

I rarely talk about those moments in the County Attorney's office, where the worst we humans can do to one another was the essence of my work. But I do know this truth: my mind in that last moment was a powerful force, and one that, writ large, has too often turned us from the good.

C. The Lessons of War

Soldiers in wartime are often exposed to direct trauma that impacts their decisions, even after the traumatic event is over.[130] That

129. Criminal Complaint (on file with author); *see also* Katie Wermus, *Woman Drowned Child in Bathtub, Threw Body in Bloomington Hotel Dumpster: Charges*, FOX 9 NEWS (Mar. 10, 2024, at 10:49 CT), https://www.fox9.com/news/woman-drowned-child-bathtub-threw-body-bloomington-hotel-dumpster-charges.

130. Some social workers and medical personnel, among others, also face constant tragedy and trauma, but usually outside of an adversarial relationship.

experience may offer a pathway to understanding the mind of prosecutors.[131]

I once visited the city of Trier, an ancient Roman capital that lies along the Mosel River. There are several fascinating Roman ruins there, including an enormous gate, an amphitheater, and baths, along with some medieval buildings.[132] Much of the town, though, was indistinct, as if it had been bombed to rubble and then rebuilt on a budget. That, of course, is exactly what had happened, as American and British bombers dropped over 1,200 tons of bombs on the city over the course of six days in late December of 1944, as the war was almost at an end. The attacks led to about 420 deaths and the destruction of 1,600 buildings.[133] As I walked the streets after learning this, I wondered why it was that the Allies turned such lethal force on an occupied city.

Of course, Trier was not alone, and the late-war destruction there was a small fraction of that seen in places like Dresden and Hiroshima, two cities where largely civilian populations were targeted with unprecedented force.

By the middle of February 1945, it was clear that the end of World War II was coming soon to Dresden, Germany; Soviet troops were only a little over sixty miles away.[134] Still, British and American bombers created a two-day firestorm that some consider the most "barbaric, senseless act of the war," especially given the absence of military facilities in the city.[135] First, 873 British bombers dropped incendiary and high-explosive bombs the night of February 13, creating temperatures of 1,000 degrees and windstorms. The next day, American bombers dropped 771 tons of bombs on the already flame-engulfed city, to catch firemen and rescue workers on the streets. Even those in air-raid

131. Defense attorneys who have read early drafts of this essay uniformly commented that there is a similar yet distinct effect of trauma on their experiences, and I leave that important story to be written by those with that experience.

132. *See* James Salter, *Revisiting Ancient Trier*, N.Y. TIMES (July 28, 1985), https://archive.nytimes.com/www.nytimes.com/books/97/09/07/reviews/salter-trier.html (describing Trier).

133. HEINZ CÜPPERS, 2000 JAHRE STADTENWICKLUNG TRIER 128–31 (Hans Petzold ed., 1984).

134. SINCLAIR MCKAY, THE FIRE AND THE DARKNESS: THE BOMBING OF DRESDEN, 1945, at 6 (2020).

135. STEPHEN E. AMBROSE, CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY 306 (1997).

shelters were suffocated or baked alive.[136] After the fire subsided, Kurt Vonnegut (who somehow survived while held captive in a meat locker and later included elements of the experience in his masterpiece *Slaughterhouse Five*) was given the job of pulling bodies out of "corpse mines" until a more efficient method was devised: burning up the bodies with flamethrowers.[137] And Hiroshima: the first atomic bomb was used against a civilian population rather than a military or industrial target, largely because the American leaders believed that the weapon would be more destructive against wooden buildings—houses, stores, and schools—than against concrete structures.[138] Even with the need to hasten the end of the war, how could this be justified?[139]

As I walked the streets of Trier, this was not a new question to me. I had long pondered how it was that Americans justified to themselves the seemingly senseless taking of life at the end of that war, both in Europe and Asia. Fortunately, I knew a witness to it. Someone close to me, my grandfather, was there. He served as a Captain in the United States Army, heading up a transportation battalion that was supplying troops and air units associated with General George S. Patton and others. On December 20, 1944—the same time Trier was bombed and just after the Battle of the Bulge began—he led his trucks to Charleroi, Belgium, just twenty miles from the front, and only a few hours from Trier.[140]

I spent a lot of time with my grandfather, and he rarely talked about the war at all. When he wrote a memoir, his mention of his time in Belgium during the end of the war was little more than noting that "[t]he remainder of the war was business as usual."[141] Like other veterans of the brutal parts of that war, he was deeply reluctant to revisit those tragedies. My mother's memories, though, were more telling: she

136. *Id.* at 306–07.

137. KURT VONNEGUT, SLAUGHTERHOUSE-FIVE 189–90 (1969).

138. *See* EVAN THOMAS, ROAD TO SURRENDER: THREE MEN AND THE COUNTDOWN TO THE END OF WORLD WAR II 33 (2023).

139. The atomic bomb was an astonishing advance in destructive capability. As President Truman described it, the bomb dropped on Hiroshima had "more than two thousand times the blast power of the British Grand Slam, which [was] the largest bomb" used in warfare up to that date. JOHN HERSEY, HIROSHIMA 65 (1946).

140. MILLARD BENJAMIN HODGES, THE RECOLLECTIONS OF AN OCTOGENARIAN OF THE TWENTIETH CENTURY 117 (1990).

141. *Id.* at 118.

recalls that when her father returned from Europe, he carried pictures that the children were not allowed to see. She understood that they were pictures of bodies, human bodies stacked like cords of wood, that her father's trucks were tasked to convey.

He was a bright and cheerful man, and I was an iconoclastic and impolitic teenager.[142] Deeply troubled after my high school reading of *Slaughterhouse Five* (which is largely set in Dresden as it was fire-bombed) and learning about the bombing of Hiroshima and Nagasaki, I once asked my grandfather about the thing that even then bothered me: why would we Americans choose nonmilitary targets for such death and destruction, knowing that civilian men, women and children would die in terrible ways? This normally smiling man darkened and tried to deflect the question. I persisted. He mentioned the Holocaust, which may or may not have been known to decision-makers at the end of the war. He argued that these horrors forestalled even worse events that might have occurred if the war had continued. Then, finally, he told me something that has stayed with me: that after all my grandfather and his compatriots had seen, the stench of death and horrors of war, there was in them a deep well of anger, a toxic stew of trauma, disgust, and hurt.[143] It was a primal darkness that removed the lines between civilian and combatant, between good and bad, between anything other than them and us. He struggled to find the words, but that silence was profound.

I never went to war; I never oversaw the loading of frozen bodies onto a truck. The closest I ever came to my grandfather's volunteering for the war in his mid-thirties with two kids at home was volunteering to return to prosecution after twenty-four years of teaching criminal law. And yet, that was when I finally understood my grandfather.

142. At the age of sixteen, I left my home in suburban Detroit to live for a few months with my grandparents and work on farms harvesting peas in and around the town of Lyndon, Washington. It allowed for an unusually close relationship.

143. Some expression of this emotion is common in war memoirs. For example, former World War II infantryman Charles MacDonald wrote of a "mop-up" operation where they came across an elderly German farmer who stood with his arm around his wife near their home, which was engulfed in flames. *"Alles ist kaput!"* the farmer said, sobbing. CHARLES B. MACDONALD, COMPANY COMMANDER 189 (Buford Books 1999) (1947). Rather than empathy, MacDonald felt something darker. "Thank Hitler!" MacDonald shouted before pointing to the burning house and laughing. *Id.*

IV. HARMS AND SOLUTIONS

Section A below catalogues some of the problems caused by trauma bias in prosecutors: disproportionately long sentences, resistance to second-chance sentencing, such as clemency, and racial disparities. Section B, in turn, looks with hope towards ways we can mitigate these harms.

A. The Problems Caused by Trauma Bias

To understand the full effect of trauma bias, it is imperative to look at the costs to us all. While I do not claim a comprehensive list here, those costs include disproportionately long sentences, resistance by prosecutors to second-chance sentencing, and the creation of racial disparities through implicit bias.

1. Disproportionately Long Sentences

The punishment impulse born of trauma bias naturally leads to excessive sentences, because the force shaping those sentences is not guided by reason. The punishment impulse can express itself at several points of the criminal process within the prosecutor's discretion: in seeking detention before trial (or setting bail), in choosing the charges, in negotiating a plea, in considering enhancements, in choosing a trial strategy, in working with the probation officer after conviction, and in pressing for a given outcome at sentencing.

In my first stint as a prosecutor, I served as an Assistant United States Attorney in Detroit from 1995–2000. In that role, I worked on a wide variety of criminal cases, but a disproportionate number involved the top perceived evil of the time: crack cocaine. As the system eventually realized, the sentences doled out in those cases were far too long to serve any rational purpose. Part of the reason for the continuation of that project, even when its factual basis was undermined, came from the tragedies ascribed to crack by the government and the press, ranging from the creation of "super-predators" to the downfall of basketball player Len Bias, later revealed to be falsehoods.[144] What we

144. *See* BARKOW, *supra* note 58, at 74 (discussing the harsh penalties for crack cocaine versus powder cocaine and the later realization that Len Bias had overdosed on powder cocaine).

prosecutors saw of the defendants in those cases was limited to their appearance—sometimes unkempt in an orange jumpsuit, other times presented in a suit—at a detention hearing or arraignment, and to the uniformly negative facts included in the presentence investigation report. Seeing only that small part of each defendant and taking on the task of explaining how they were "poisoning the community" with narcotics created and steadily built the trauma bias that perpetuated those long sentences (even though the trauma was not based on events that were entirely real).[145]

The deep tragedy is that the project of attacking crack cocaine through incarceration did so much harm and so little good.[146] Locking up small-time crack dealers for long terms did little to curtail the flow of drugs or address the social costs of people using crack.[147] Prosecutors served as the cutting blade of a vast machine, a role they too often serve.

2. Resistance by Prosecutors to Second-Chance Sentencing

In a saddening number of instances, government lawyers "adopt[] an intensely adversarial posture toward any challenges to past convictions,"[148] even when rooted in innocence,[149] and resist cutting

145. It is important to recognize that sometimes these superficialities were augmented by extraordinary public defenders who gave "futile speeches" in the face of mandatory minimums, describing the full personhood of their client and the tragedy the sentence would produce. It was the eloquence of federal defenders that broke me from that trance and turned me towards advocating for changes in the law. *See* Mark Osler, *The Power of Futile Speeches*, HUFFINGTON POST (Aug. 27, 2011), https://www.huffpost.com/entry/the-power-of-futile-speec_b_878186.

146. *See* Bennett & Osler, *supra* note 26, at 125–36.

147. *See* Nazgol Ghandnoosh, Ph.D. & Kristen M. Budd, Ph.D., *Incarceration and Crime: A Weak Relationship*, THE SENTENCING PROJECT (June 13, 2024), https://www.sentencingproject.org/reports/incarceration-and-crime-a-weak-relationship/.

148. Kay L. Levine & Ronald F. Wright, *Between Cooperation and Conflict in Second Look Sentence Review*, 25 CARDOZO J. CONFLICT RESOL. 289, 300–01 (2023). Notably, Levine and Wright had earlier observed that more senior prosecutors often were less adversarial than more junior prosecutors. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1080–94 (2014).

149. *See* Orenstein, *supra* note 96, at 408–17 (discussing prosecutor reluctance toward testing for and addressing exonerating evidence).

sentences short through clemency or compassionate release.[150] This resistance is rooted in the experience of prosecution, as each step of the process from charge through appeal deepens a prosecutor's commitment to the "truth" of the conviction and the appropriateness of the sentence.[151] This resistance (which may be rooted in confirmation bias[152] and selection bias[153]) is only amplified by trauma bias.

It is hard to understate the deep cynicism that drives prosecutors to oppose second chances for those serving a sentence. Consider this response from a United States Attorney to a United States Pardon Attorney, which opposes an application for clemency for a petitioner with a remarkably strong prison record—a response that is nothing more than a template for rejecting any second chances:

> the clemency application details what appears to be a remarkable turn-around during his time in custody. I cannot offer any insight into the representations about his progress. Nor can I be of much assistance in evaluating whether the changes, if true, warrant clemency. "Jailhouse conversions" are not uncommon, and I have no tools or experience with which to evaluate which ones are genuine or may endure the beyond the confines of imprisonment.[154]

At a broader level, prosecutors also tend to resist systemic changes that restrict their power,[155] particularly where they create or enhance mechanisms that allow for sentences to be revisited. For example, during the Obama administration, the Justice Department's own Inspector General argued in a report that the compassionate release program should be expanded for older prisoners who posed little threat to public safety, a position also embraced by the medical community and the United

150. Barkow & Osler, *supra* note 4, at 439–49.

151. *See* Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1034–36 (2015).

152. *See supra* Section II.C.3.a.

153. *See supra* Section II.C.3.b.

154. Barkow & Osler, *supra* note 4, at 440.

155. Prosecutors, of course, are a powerful force in promoting measures that increase their power. *See* Stuntz, *supra* note 3.

States Sentencing Commission.[156] The prosecutors at the Department of Justice ("DOJ") pushed back, arguing that existing programs were enough.[157] The First Step Act of 2018 eventually did broaden access to compassionate release, to dramatic effect.[158]

3. The Creation of Racial Disparities Through Implicit Bias

Implicit bias is usually understood as a type of cognitive bias, where objective thinking and decision-making are undermined by existing unconscious stereotypes and associations, including those rooted in race and gender.[159] It is easy to see how trauma bias in prosecutors could amplify an existing implicit bias against minorities[160] or implicit empathy for members of one's own race (as defendants or victims).[161]

Trauma bias, as described in Part II, is expressly premised on an "us" and "them" view of the world that removes the distinction between bad actors and others in a given population: the German people in general were the "them" attacked in Dresden, for example.[162] In a similar way, prosecutors over time see the crimes committed by minorities, but

156. *DOJ OIG Releases Report on the Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN. (May 6, 2015), https://oig.justice.gov/news/doj-oig-releases-report-impact-aging-inmate-population-federal-bureau-prisons.

157. *See* Barkow & Osler, *supra* note 4, at 444–47.

158. *See* Jessie Brenner & Stephanie Wylie, *Analyzing the First Step Act's Impact on Criminal Justice*, BRENNAN CTR. FOR JUS. (Aug. 20, 2024), https://www.brennancenter.org/our-work/analysis-opinion/analyzing-first-step-acts-impact-criminal-justice.

159. *See* Manuel J. Galvan & B. Keith Payne, *Implicit Bias as a Cognitive Manifestation of Systemic Racism*, 153 DAEDALUS, no. 1, 2024, at 106, 107 (arguing that "implicit bias is best understood as the cognitive reflection of systemic racism").

160. *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST., May 2018, at 1, 8–9, https://www.vera.org/publications/for-the-record-unjust-burden (examining how implicit bias by prosecutors and judges can lead to disproportionate outcomes for Black people).

161. *See* Little, *supra* note 120, at 1600 ("If one accepts the concept of 'unconscious racial empathy,' then the fact that race disparity seems apparent from the earliest stages of the criminal process—initial investigation and charging decisions—is perhaps unsurprising, because most criminal law investigators and prosecutors (at least federally) are white.").

162. *See* MCKAY, *supra* note 134.

not the accomplishments; the worst moments and not the best. In addition, the racial mix of defendants a prosecutor deals with comes to him or her through the filter of who the police choose to bring in—and often there are unwarranted racial disparities in who the police investigate and arrest. The sample is rigged.[163] If a prosecutor brings with her to the job an implicit bias against Black men, for example, that bias is likely to be superficially confirmed by the small slice of the world she sees in her case files, which are themselves the product of bias. In other words, the "them" in a prosecutor's mind—conscious or unconscious—are too often going to be defined (at least in part) in racial terms.[164]

Determining the link between trauma bias and racially disparate outcomes is beyond the scope of this Article (and the outer limits of my own abilities). However, the danger is clear. Prosecutors who bring an existing implicit bias to the job (as, inevitably, some do) are not going to be cured of that bias by watching endless videos of criminal acts that often disproportionally focus on minorities.[165] Rather, the experience is likely to further entrench those unconscious biases.

B. Mitigating the Harm of Trauma Bias

To some degree, trauma bias will be inevitable so long as there are prosecutors; the job is inherently about tragedy. That does not mean

163. Factors creating this skewed pool would include overpolicing of minority neighborhoods, racial profiling, and stop-and-frisk policies. *See, e.g.*, Jonathan Jackson et al., *Centering Race in Procedural Justice Theory: Structural Racism and the Under- and Overpolicing of Black Communities*, 47 LAW & HUM. BEHAV. 68, 69 (2023); Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 499–508 (2016); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2468–75 (2017).

164. Some prosecutors do make conscious attempts to address implicit bias and explicitly engage with the problems of racial disparities. *See* Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1891–92 (2023) ("[P]rosecutors have increasingly used their discretion in recent years to *reduce* racial disparities by penalizing the prior convictions of white defendants more than Black defendants.").

165. The link between trauma bias and racially disparate outcomes, including disproportionality, stems from discretion at another level that is not analyzed here. It is the investigators (local police, FBI, etc.) who choose which cases to bring to prosecutors for consideration.

that we cannot try to mitigate trauma bias, for the good of both justice and prosecutors themselves.

Most academic analyses of problematic prosecutors urge that external controls be imposed or new structures created. Among many others, Stephanos Bibas has urged that juries be given the ability to review plea bargains,[166] while Albert Alschuler has suggested that plea bargaining be eliminated altogether.[167] Bennett Capers proposes allowing crime victims to prosecute their cases directly,[168] Ronald Wright has advocated for judicial restraints on prosecutorial discretion,[169] Ellen Podgor argued for enhanced use of ethics codes,[170] and Rachel Barkow described a prosecutor's office where separate teams handle trial and adjudicatory roles.[171]

Rather than add to those valuable suggestions, I advocate for four discrete reforms focused more on the human part of prosecution: embedding mental health professionals in prosecutors' offices so that therapy is sought and received more often,[172] removing prosecutors from the decision-making process in second-chance mechanisms like clemency,[173] diminishing the role of retribution in sentencing

166. Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. REV. F. 342, 342–43 (2014). Bibas has also suggested a raft of other structural reforms. *See generally* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (proposing solutions to improve prosecutorial accountability).

167. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 105–11 (1968) (identifying counterarguments to defenses of the guilty-plea system).

168. *See* I. Bennett Capers, *Against Prosecutors*, 105 CORN. L. REV. 1561, 1588 (2020).

169. *See* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. STATE L. REV. 1087, 1098–1101 (2005) (examining how guidelines may assist prosecutors in administering justice more objectively).

170. *See* Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 461–62 (2009).

171. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–97 (2009) (premising this argument on the idea that prosecutors who invest themselves in one stage of the case will succumb to biased decisions later in the process).

172. *Infra* Section IV.B.1.

173. *Infra* Section IV.B.2.

generally,[174] and creating a system where prosecutors and defense attorneys rotate roles as in the military.[175]

1. Enhancing Mental Health Resources in Prosecutors' Offices

During my time at the Hennepin County Attorney's Office, one of the highlights was the occasional visit from Barrett, a goldendoodle who served as an emotional support dog for crime victims and witnesses.[176] Every once in a while, Barrett would poke his nose into my office and turn his head to the side as if asking, "you okay?" I would call him over and rub his neck, and he would flop down next to my desk for a moment. After a while, he would look up at me with an expression of "feel better?" I would nod, because I did, and off he would go.

That was pretty much the extent of the mental health treatment I received while working in that stressful job. It is not that further resources were not available—the County had an excellent health plan that covered all kinds of mental health treatment—but I did not avail myself of it for most of my time there. In retrospect, I wonder why I did not seek out something more than Barrett's comforting presence. In part, the reason I did not was the same reason I needed help in the first place: I was overwhelmed with work and the waves of tragedy it brought.[177] With so many cases to review, who has the time to drive someplace to a fundamentally optional appointment? In addition, seeking therapy goes against the "tough" ethos of prosecutors, which can be an important part of the culture.[178]

To address both issues, it would be a wise investment[179] for an elected prosecutor to hire a full-time in-house therapist—and the first

174. *Infra* Section IV.B.3.

175. *Infra* Section IV.B.4.

176. Chao Xiong, *Hennepin County Attorney's Office Adds Emotional Support Dog*, MINNEAPOLIS STAR TRIB. (Dec. 31, 2019, at 18:26 CT), https://www.startribune.com/hennepin-county-attorney-s-office-adds-emotional-support-dog/566608071.

177. Again, I am largely accountable for creating the problem. During the academic year I took off, I didn't really leave the academy very far behind as I volunteered to continue teaching 1L Criminal Law and wrote academic pieces in addition to the beyond-full-time work at the County.

178. *See supra* Section II.B.2.

179. Beyond the reasons I advocate here for establishing greater mental health resources, elected prosecutors would be wise to do so in the interest of retaining good

appointments for that therapist, quite publicly, should be for the elected prosecutor and top deputies. Simply having the resource available solves the time problem, but the real challenge is overcoming the cultural barrier posed by the "tough-guy" image of some prosecutors.[180] It could even be worthwhile to schedule appointments proactively for line prosecutors and others who face the risk of trauma bias.[181]

As long as prosecutors serve the function that they do, there will be deep engagement with dark human tragedy; it is inherent in the job.[182] What we can do is recognize the effects of that constant drumbeat of the horrible and be more assertive and proactive in ensuring the mental health of those we put in that position. A healthier prosecutor is better for us all.

2. Removing Prosecutors from Second-Chance Sentencing

While some advocate for the total abolition of prosecutors, my proposal is less ambitious (while still a political challenge): let us remove prosecutors from the area where they are most conflicted through either trauma bias or "second chance sentencing mechanisms" like compassionate release and clemency.[183]

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lawyers. Adam Gershowitz recently described a mass exodus of prosecutors due to burnout and a sense of being overwhelmed with video evidence that was subject to discovery. Gershowitz, *supra* note 21, at 389–91.

180. *Supra* Section II.C.2.

181. Some will question the wisdom of requiring therapy, which is unlikely to be worthwhile with the unwilling. However, having everyone participate will at least give cover to those who secretly desire it or are warm to the idea once they have begun.

182. Prosecutors are not alone in this, of course, though this Article only addresses their infliction of trauma. Many others within the criminal legal system merit exploration, as they suffer from their own harms. *See generally, e.g.*, Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733 (2021) (addressing results from a 2020 National Asylum Attorney Burnout and Secondary Traumatic Stress Survey in light of sweeping changes in immigration law policies).

183. I do not seek to alter second-chance mechanisms that allow prosecutors to review sentences that otherwise might not get a second look, such as Minnesota's new prosecutor-initiated sentence adjustment (PISA) law. MINN. STAT. ANN. § 609.133 (West 2025). Those mechanisms allow more progressive prosecutors, such as Mary Moriarty in Hennepin County, to reevaluate sentencing issues under tougher-on-crime predecessors.

In the current system of federal clemency, for example, prosecutors play a significant role. When a petition for commutation or pardon is received by the Pardon Attorney,[184] she is directed by regulation to send the petition to the local U.S. Attorney who prosecuted the case, and the "views of the United States Attorney or Assistant Attorney General are given considerable weight in determining what recommendations the Department should make to the President."[185] Even after that, the Pardon Attorney's recommendation (influenced already by the "considerable weight" given to the opinion of the U.S. Attorney) goes through yet another prosecutor, the Deputy Attorney General ("DAG").[186] That review can present a real barrier to advancement of a petition—one recent Pardon Attorney actually quit when she grew frustrated with the process and the role of the DAG.[187] In compassionate release cases, it is Bureau of Prison ("BOP") officials who initially review a request, but the prosecutors of the DOJ who defend the resulting denials if a petitioner takes the matter to court under the First Step Act.[188]

Putting second-chance sentencing mechanisms such as clemency through multiple levels of review by prosecutors is clearly problematic, in part because of trauma bias.[189] For a second look to live up

184. The pardon attorney is an official within the DOJ. *See About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/about-office (last visited Mar. 22, 2026).

185. U.S. Dep't of Just., Just. Manual § 9-140.111 (2018), https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.110.

186. *Id.* at 9-140.110.

187. *See* Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016, at 17:37 ET), http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/.

188. *See* Siobhan A. O'Carroll, Note, *"Extraordinary and Compelling" Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act*, 98 WASH. U. L. REV. 1543, 1555 (2021) ("By allowing an inmate to petition a sentencing court directly for compassionate release, the First Step Act created an adversarial process for compassionate release where none existed before: on one side, the petitioning inmate, and on the other, the DOJ defending the BOP's administrative denial of the petition. This new form of compassionate release petitioning raises questions of legal representation and equity among inmates.").

189. Other concerns arise as well, such as internal pressure to preserve original sentences and other conflicts.

to the name, it deserves a fresh set of eyes. Such a structure would be easy to construct and has even been set out in proposed legislation as the FIX Clemency Act.[190] That bill would create a commission of experts to make clemency recommendations directly to the President.[191] Other, simpler fixes could also be effective. An executive order could simply move the office of the Pardon Attorney out of the DOJ and into the White House as a direct report to the President, cutting prosecutors largely out of the review and recommendation process.[192] So long as oversight of clemency remains in the hands of people who sought the conviction and sentence in the first place, the true function of the pardon power will continue to be hobbled.

Being relieved of the duty of overseeing second-look sentencing would likely be better for prosecutors as well; overburdened already, it advantages no one to saddle them with responsibilities that are embedded in conflicts of interest.

3. Diminishing the Role of Retribution

The value of retribution as a goal of criminal justice is well-established, but some are rethinking its value.[193] Retribution in the form

190. Juana Summers, *House Democrats Are Introducing a Bill to Overhaul the Clemency Process*, NPR (Dec. 10, 2021, at 05:00 ET), https://www.npr.org/2021/12/10/1062757169/house-democrats-are-introducing-a-bill-to-overhaul-the-clemency-process.

191. H.R. 6234, 117th Cong. (2021–22), https://www.congress.gov/bill/117th-congress/house-bill/6234.

192. While appointed pardon attorneys may be career prosecutors, two people who held that office recently are not: Deborah Leff had a long career in media and philanthropy before becoming the head of the DOJ's Access to Justice Office under President Obama, and Liz Oyer was a partner at Mayer Brown and a career federal defender before being appointed to the position by President Biden. *See Deborah Leff*, FREEDOM READS, https://freedomreads.org/about/people/board-of-directors/deborah-leff (last visited Mar. 22, 2026); *Former Pardon Attorney Elizabeth G. Oyer*, U.S. DEP'T OF JUST. (Mar. 10, 2025), https://www.justice.gov/pardon/staff-profile/meet-pardon-attorney.

193. *See* Chris Shanahan, *Retribution: The True Cost*, 57 IDAHO L. REV. 509, 521 (2021) (highlighting that the practice of retribution "promotes long-term incarceration that only compounds the extraordinary financial and social costs of crime without netting much tangible benefit for anyone involved"). Perhaps the strongest condemnation of retribution as a goal of criminal justice was buried in a footnote in an epic opinion by Justice Thurgood Marshall: "I cannot agree that the American people

of punishment is the first-listed sentencing goal in the federal statute that directs sentencing judges,[194] for example, and is a primary (though not exclusive) ordering principle in the Minnesota Sentencing Guidelines.[195]

Scholars are divided on the continuing value of retribution in a modern sentencing system, with some arguing that "the retribution impulse is an unnecessary and harmful artifact of early evolution, leading to excessive and inefficient punitive measures,"[196] while others argue for a continuing role for retribution as an important part of our criminal law scheme.[197] Recently, the Supreme Court examined the appropriate role of retribution as a goal when judges consider revoking supervised release, and concluded that the controlling statute simply did not provide for that consideration and that retribution should not be read into it[198]—confirming that it is possible to have a process within criminal law that is free of retributive impulses.

What seems beyond dispute is that retribution as a goal of sentencing is rooted in an emotion: the desire to hurt those who have hurt us. That primal urge is observed across cultures as "a common denominator."[199] When that kind of emotional response is enshrined as a goal of sentencing, it exacerbates and justifies the effects of trauma bias by providing it with a mask that is enshrined in statute and tradition. At charging, trial, and sentencing (and beyond), the deeply personal effects of trauma bias are expressed as the universal value of retribution

have been so hardened, so embittered that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust." Furman v. Georgia, 408 U.S. 238, 369 n.163 (1972) (Marshall J., concurring).

194. 18 U.S.C. § 3553(a)(2)(A) (directing courts to consider the need for the imposed sentence" to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

195. *See* Richard S. Frase, *Purposes of Punishment Under the Minnesota Sentencing Guidelines*, 13 CRIM. JUST. ETHICS 11, 11–20 (1994).

196. Molly J. Walker Wilson*, Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339, 1409 (2020).

197. *See* Marah Stith McLeod, *Showing Mercy Through a Presumption of Retribution*, 102 TEX. L. REV. 1473, 1477–78 (2024) (arguing for a "presumption of retribution").

198. Esteras v. United States, 606 U.S. 185, 197 (2025).

199. Anthony Walsh & Virginia L. Hatch, *Capital Punishment, Retribution, and Emotion: An Evolutionary Perspective*, 21 NEW CRIM. L. REV. 267, 268 (2018).

from a seemingly objective source: the professional prosecutor who speaks on behalf of "the people." Retribution as a stated goal of sentencing whitewashes the trauma bias of prosecutors. If we were to devalue retribution, it would mitigate the impact of trauma bias by leaving its outcomes without justification.[200]

Diminishing the role of retribution in the decisions made by prosecutors would not require the imposition of outside controls, legislation, or oversight by the courts—it simply could flow from a change in policy and culture within prosecutors' offices.[201] Internal charging and plea policies, normally silent on retribution, could affirmatively urge prosecutors not to consider that value in making key decisions.[202] While it is true that policy probably can't change emotion, at least this would unmask it as an emotional rather than a rational response, and that could lead to greater self-awareness. Culture changes slowly, though, and hiring plays a large role in the change of culture; an elected prosecutor who wanted to downplay retribution could hire towards that goal.[203]

200. This does not mean incarceration would be off the table—the sentencing goal of incapacitation is a fit justification for incarceration in serious cases. *See* 18 U.S.C. § 3553(a)(2)(C). There is a sometimes subtle but significant difference between the retributive instinct to hurt the defendant and the belief that a person needs to be held out of society for a period of time to allow for the safety of others; the first is rooted in an indelible emotion, while the latter is rooted in rational belief.

201. My own experiences proved out the old adage that "culture eats policy for lunch."

202. In my role as Deputy Hennepin County Attorney, I drafted such a policy memo, which established that retribution "is only very rarely appropriate (for example, when vigilante/mob action needs to be forestalled). It should be pursued only if directed by the elected County Attorney." Mark Osler, Community Safety: A Problem-Solving Approach (on file with *The University of Memphis Law Review*).

203. An area of conflict relating to devaluing retribution would be respecting the wishes of some crime victims, including family members of homicide victims. They sometimes seek retribution in quite explicit terms, and can marshal public sentiment against prosecutors who reject their goals. *See* Esme Murphy, *AG Keith Ellison Explains Why His Office Is Taking On Murder Case in Zaria McKeever's Death*, CBS NEWS (Apr. 9, 2023, at 20:23 CT), https://www.cbsnews.com/minnesota/news/talking-points-keith-ellison-zaria-mckeever/.

4. Adopting a JAG Model of Criminal Attorney Practice

Judge Rakoff has suggested that prosecutors sometimes rotate into positions as defense attorneys, in order to make prosecutors more conscious of their responsibilities as "ministers of justice."[204] Rakoff noted that the practice existed in the United Kingdom, and that it would be the step most likely to "make prosecutors aware of the great power they possess or the need to temper it with other considerations."[205] That leavening, of course, could also serve to temper the effects of trauma bias, as a stint as a defense attorney could train prosecutors to think more broadly about the story of the case, mitigating the unrelenting focus on the most traumatic elements.

Intriguingly, there is already a model of such a practice in the United States. Military justice does not follow the standard American practice of dividing criminal attorneys into permanent and opposing "teams" that develop distinct and very different cultures. Military lawyers typically cycle through several distinct duties, including not only criminal defense and prosecution, but civil tasks such as preparing wills and powers of attorney.[206]

V. CONCLUSION

At the end of *Slaughterhouse Five*, Kurt Vonnegut uses a literary device to seemingly diffuse the intense emotional experience of living through the fire-bombing of Dresden and its aftermath: after describing each aching bit of truth, he closes the paragraph by saying "so it goes." An Army Air Force General described the terrible losses, the 135,000 killed in Dresden, and the deaths of 5,000,000 allied troops—"so it goes."[207] A later fire-bombing of Tokyo kills 83,793 people and the atom bomb dropped on Hiroshima kills another 71,379—"so it goes."[208] Robert Kennedy and Martin Luther King are shot—"so it

204. Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1435–36 (2017).

205. *Id.* at 1436.

206. *See* Mark Gundrum, *JAG Duty Enhances Career*, 78 WIS. LAW. 24, 24 (2005).

207. VONNEGUT, *supra* note 137, at 166.

208. *Id.* at 167.

goes."[209] After the firebombing of Dresden, still a prisoner, he finds a hole full of dead bodies still sitting on benches—"so it goes."[210] One of his fellow prisoners of war is shot by the Germans for taking a teapot—"so it goes."[211] The baby lies dead on the cold bathroom floor, still wet from the bath—so it goes.[212]

The mantra of "so it goes" seems to describe an inevitability of it all, a helplessness against the tide of tragedy humans create for themselves. But to take a job in the criminal justice system, any job, including that of prosecutor, is to challenge that sense of inevitability; the choice of engaging with this grinding and dehumanizing machine of despair can be, should be, an act of rebellion against it. If there is going to be hope, we must create it, and seeing the minds of prosecutors clearly and with empathy is a necessary part of that project.

209. *Id.* at 186.

210. *Id.* at 189.

211. *Id.* at 190.

212. *See supra* Section II.A.