

# DOING JUSTICE WITH EMPATHY: BLACK PROSECUTORS IN THE AGE OF MASS INCARCERATION

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*You named them hustlers, killers, fiends, ex-cons  
I called them cousins, aunts, pops, moms  
To you? Hoodlums, crackheads, gunmen  
To me? Just neighbors, classmates, young friends<sup>1</sup>*

## INTRODUCTION

“Roger,”<sup>2</sup> a Black attorney who formerly worked as a federal prosecutor, grew up in a low-income, high-crime neighborhood with a sibling who belonged to a violent local gang.<sup>3</sup> “Nikki,” a Black federal prosecutor, also grew up in poverty, with a parent and several other family members who were on “the other side of the law,” including one who spent decades in

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1. KA & PRESERVATION, *To Hull and Back, on 1200 B.C.*, at 00:10 (Iron Works Records / Mon Dieu Music 2015).

2. In order to preserve the confidentiality of interviews, this Essay uses pseudonyms in place of interviewees’ real names.

3. Telephone Interview with “Roger,” Former Fed. Prosecutor (Sept. 11, 2024) (on file with author).

prison.<sup>4</sup> “Marcus,” a Black state prosecutor, began his career at the same office that once prosecuted his uncle, who served a lengthy prison sentence.<sup>5</sup>

The scholarship on race and prosecution has seldom considered in-depth the perspectives of prosecutors who begin their careers with such intimate familiarity with low-income Black defendants and their communities.<sup>6</sup> Instead, it has mainly discussed prosecutors, who are disproportionately White, as socially and racially distant from the overwhelmingly low-income and non-White people they prosecute.<sup>7</sup> According to some scholars, this disconnect limits prosecutors’ compassion toward defendants, who prosecutors may callously treat like problems to be efficiently processed and disposed of rather than as individual human beings whose lives and futures matter.<sup>8</sup> Prosecutors are presented as consistently exhibiting bias against Black defendants,<sup>9</sup> while remaining indifferent toward their life circumstances and the consequences of prosecution for them and their families.<sup>10</sup>

Although these depictions may or may not accurately portray the thoughts and actions of a good number of prosecutors, they most certainly do not capture those of all prosecutors. Many prosecutors, particularly Black prosecutors, have family histories and personal experiences that provide them a deep understanding of and concern about the social worlds of their defendants that even many defense attorneys lack. Drawing insights from interviews of a diverse group of twenty-six Black attorneys who have worked

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4. Zoom Interview with “Nikki,” Current Fed. Prosecutor (Oct. 23, 2024) (on file with author).

5. Zoom Interview with “Marcus,” Current State Prosecutor (Sept. 19, 2024) (on file with author).

6. The limited exceptions include PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); DEBBIE HINES, *GET OFF MY NECK: BLACK LIVES, WHITE JUSTICE, AND A FORMER PROSECUTOR’S QUEST FOR REFORM* (2024).

7. See NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST COURT 1–6, 16–24* (2016). Demographic data on prosecutors’ offices is hard to come by, but one national study found that over 90 percent of elected prosecutors are White. See Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<https://perma.cc/2GEC-BG2G>] (citing *Democracy Facts: Justice for All?*, REFLECTIVE DEMOCRACY CAMPAIGN, <https://wholeads.us/democracy-facts/justice-for-all/> [<https://perma.cc/3RMJ-6SL8>] (last visited Feb. 14, 2025)). Conversely, White people are conspicuously underrepresented among the people prosecuted and incarcerated in large cities and other racially diverse jurisdictions. See HINES, *supra* note 6, at 12 (explaining that only two of the “thousands” of defendants she prosecuted in Baltimore were White).

8. See VAN CLEVE, *supra* note 7, at 73 (“By this logic . . . mopes should be handled as expeditiously as possible. Work ethic is reinterpreted as dutifully ‘disposing’ of these cases.”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355, 382–84 (2001); see also CARISSA BYRNE HESSICK, *PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 7–8* (2021) (arguing that the criminal legal system has “chosen efficiency as an overriding goal” and “chooses speed over truth”).

9. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 117–19* (2010) (discussing evidence of racially biased prosecutorial decision-making).

10. See Smith, *supra* note 8, at 382–84.

as state or federal prosecutors,<sup>11</sup> this Essay will explain how such personal backgrounds and lived experiences shape prosecutors' feelings and perceptions concerning their jobs and, in some instances, influence their decision-making. Data from these interviews, part of an ongoing qualitative empirical project on the experiences and perspectives of Black prosecutors<sup>12</sup>—perhaps the first of its kind—suggest that many Black prosecutors approach their jobs with a set of perspectives reflecting what might be thought of as “community empathy” for low-income Black neighborhoods and their residents. By community empathy, this Essay refers to a broader understanding of the social contexts in which crimes occur, including the structural forces and policing practices that render low-income Black people far more likely than other people to end up involved in the criminal legal system.<sup>13</sup> It also entails a firsthand appreciation of the various harms and costs that criminal acts can inflict upon disadvantaged communities as well as the long-term and collateral consequences of

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11. I conducted these interviews from September through December 2024. I used a semi-structured format that covered interviewees' career experiences and views about the criminal justice system. Interviews typically ranged from one hour to ninety minutes in length. Most were conducted through the Zoom video conferencing platform, with two conducted by phone. All but four of these interviews were recorded. Collectively, these prosecutors had worked in dozens of different offices. Almost all of these prosecutors had worked in jurisdictions that included big cities with populations of over 250,000, and most (fifteen) had worked in cities with populations greater than 500,000. Twenty-three had worked as state prosecutors and nine had worked as federal prosecutors (six had worked as both). Seventeen were currently employed as prosecutors at the time of our interviews. Interviewees varied in prosecutorial experience from fewer than two years of service to more than thirty. Twenty had worked as prosecutors for five or more years and eleven had prosecuted for more than ten years.

12. This literature has provided limited coverage of the perspectives of Black prosecutors. Although writings by former Black prosecutors have offered some insight into the experiences of individual Black prosecutors, they have mainly presented the reflections of former prosecutors who left their jobs decades ago and/or who had relatively brief careers in prosecution. *See generally, e.g.,* BUTLER, *supra* note 6 (prosecutor for approximately three years, over thirty years ago); HINES, *supra* note 6 (prosecutor for four years, over twenty-five years ago); Lenese C. Herbert, *Et in Arcadia Ego: A Perspective on Black Prosecutors' Loyalty Within the American Criminal Justice System*, 49 HOW. L.J. 495 (2006) (prosecutor for five years, over twenty-five years ago); LAURA COATES, JUST PURSUIT: A BLACK PROSECUTOR'S FIGHT FOR FAIRNESS (2022) (prosecutor for four years, over a decade ago). Largely missing are the perspectives of many broad categories of Black prosecutors including current prosecutors, career prosecutors, and prosecutors who work in offices run by reformist “progressive prosecutors.”

13. Black people are only 14 percent of America's population, but 35 percent of all Americans in prison or jail. *See* WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2024 (2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/D8CS-MEKW>]. Although the Black male incarceration rate fell by 44 percent between 1999 and 2019, researchers estimate that one in five Black men born in 2001 will spend at least some time behind bars. *See* Jason P. Robey, Michael Massoglia & Michael T. Light, *A Generational Shift: Race and the Declining Lifetime Risk of Imprisonment*, 60 DEMOGRAPHY 977, 977 (2023). The Black male incarceration rate remains 6.1 times that of White men. *Id.* at 985. Black people are twice as likely to be arrested for drug offenses than White people. *See* WILLIAM J. SABOL, AISLINN WALLACE & THADDEUS L. JOHNSON, COUNC. CRIM. J., JUSTICE SYSTEMS DISPARITIES: BLACK-WHITE NATIONAL IMPRISONMENT TRENDS, 2000 TO 2020 (2022), <https://counciloncj.foleon.com/reports/racial-disparities/national-trends> [<https://perma.cc/UNJ2-NHH8>].

prosecution on criminal suspects and their families.<sup>14</sup> Community empathy therefore entails recognizing the humanity and taking into account the interests of Black defendants—people who certain other prosecutors often write off as worthless, morally-deficient “monsters” and “mopes,” as sociologist and Professor Nicole Gonzalez Van Cleve’s research reveals.<sup>15</sup> Community empathy also involves a deep concern for the well-being of the many other Black people who bear the brunt of defendants’ crimes as neighbors and family members.

Community empathy has varied and indeterminate effects on prosecutors’ dispositions and decision-making. In general, empathetic prosecutors may be more inclined than their counterparts to see defendants as salvageable, to worry about the long-term impact of convictions on defendants’ lives, and to use their time and political capital to seek leniency for them.<sup>16</sup> But this empathy does not necessarily lead prosecutors to embrace all “progressive” approaches to crime and punishment. Although community empathy can contribute to leniency in some instances where other prosecutors may be less inclined to extend it, it can also motivate prosecutors to punish other defendants about whom other prosecutors might be far less concerned.<sup>17</sup> For example, some Black prosecutors who experienced the consequences of drug abuse and addiction while growing up have highly punitive attitudes concerning people who sell drugs unlawfully.<sup>18</sup> In these and other ways, community empathy enriches prosecutorial decision-making, which speaks to the potential value of diversity in prosecutors’ offices.

Community empathy can also subject prosecutors to considerable mental strain and distress, particularly when their work leads to defendants receiving outcomes that they consider unreasonably punitive or when they fail to bring to justice particular defendants who pose threats to their communities.<sup>19</sup> Empathetic prosecutors may therefore experience personal dilemmas and even crises of conscience with respect to their jobs, at times leading them to suffer a secondhand pain analogous to that experienced by empathetic defense attorneys.<sup>20</sup>

It would not be possible to capture the full array of experiences and perspectives of twenty-six prosecutors in a single article, so this Essay focuses on specific aspects of the lives, careers, and outlooks of a subset of interviewees who hail from low-income Black communities and who have family members who have been involved in the criminal justice system. This Essay uses their accounts to introduce the concept of community empathy

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14. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASS MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 28–38 (2018) (describing how even convictions for minor offenses can have disastrous life consequences for low-income people); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010).

15. VAN CLEVE, *supra* note 7, at 51–93.

16. See *infra* Part III.

17. See *infra* Part II.

18. See Part II.

19. See *infra* Part IV.

20. See *infra* Part IV.

and to consider some of its contours and implications. In doing so, this Essay focuses on several key themes that appear central to how at least some Black prosecutors from disadvantaged backgrounds approach and experience their work. It is my hope that the perspectives highlighted will resonate with many other Black prosecutors—and perhaps many non-Black prosecutors—while enabling other readers to better understand their experiences.<sup>21</sup>

This Essay proceeds in four parts. Part I explains how some Black prosecutors develop community empathy from their life experiences, particularly their time living in low-income Black communities and their having had friends and relatives who were prosecuted and incarcerated. The following two parts then explain how this empathy can influence how prosecutors carry out their jobs. Part II describes how this empathy instills in many Black prosecutors a determination to protect low-income Black communities from crime and victimization. Part III examines instances in which prosecutors drew from their empathy to work to extend leniency to particular criminal defendants to help spare some of them the consequences of convictions and punishment. Part IV considers a potential downside of prosecutorial empathy, namely the pain that it causes prosecutors who, due to factors beyond their control, are forced to contribute to outcomes inconsistent with their personal values and beliefs.

#### I. WHEN PROSECUTION IS PERSONAL

During our interviews, prosecutors regularly discussed their work in terms that evinced personal connections between themselves and the disproportionately low socioeconomic status (SES) Black people they encountered in their cases. A number made clear that they identified personally with certain defendants, victims, and their families, whom they often likened to themselves or their own friends and relatives. Nikki, the federal prosecutor, shared, “[w]hen I see these victims, I see myself. I see my mama. I see my brothers or my nephews.”<sup>22</sup> In referring to Black male defendants, Roger explained, “[t]his is not just another statistic. When I look at them, I see myself. I see my nephews. I see my son.”<sup>23</sup> “Tiffany,” a former state and federal prosecutor, explained of her defendants, “I can see myself, or see my brother, or see my cousins, or my uncle in this individual, and that’s just an experience that my White or non-Black colleagues don’t have.”<sup>24</sup>

These interviewees’ sense of identification to a large extent reflected their experiences growing up in disadvantaged neighborhoods and their personal relationships with people involved in the criminal legal system. Roger

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21. These perspectives are not necessarily wholly unique to Black professionals, and some non-Black prosecutors undoubtedly also possess and exhibit empathy toward the residents of the communities they serve.

22. Interview with “Nikki,” *supra* note 4.

23. Interview with “Roger,” *supra* note 3.

24. Zoom Interview with “Tiffany,” Former State & Fed. Prosecutor (Sept. 23, 2024) (on file with author).

recalled that as a child, “I saw a lot of people in my circle that had to deal with the criminal justice system in some sort of way. Either they were victims or . . . defendants. I grew up around drug dealers and gang members.”<sup>25</sup> “Stephanie,” a Black state prosecutor who grew up low income, in an urban neighborhood, added, “I cannot think of one of my male cousins who has not been arrested or incarcerated.”<sup>26</sup> Tiffany mentioned having “relatives and friends who’ve been in and out of the prison system.”<sup>27</sup> Marcus shared that he has “more family who’s been on the wrong side of the criminal justice sphere . . . a lot more family that’s been arrested and locked up for various reasons than I do who have been in law enforcement.”<sup>28</sup> “Duane,” a federal prosecutor, revealed that a close family member had been prosecuted for federal gun crimes.<sup>29</sup> Other interviewees also mentioned having similar backgrounds.

These interviewees reported that their backgrounds provided them a sense of empathy based on deeper understandings of the circumstances of, and concern for, the well-being of the people involved in their cases, including defendants. Although empathy has long been recognized as a cornerstone of effective and ethical criminal law advocacy,<sup>30</sup> particularly since law professor and former public defender Charles Ogletree Jr.’s seminal article, “Beyond Justifications: Seeking Motivations to Sustain Public Defenders,”<sup>31</sup> it typically has not been associated with prosecutors.<sup>32</sup> Nevertheless, it

25. Interview with “Roger,” *supra* note 3.

26. Telephone Interview with “Stephanie,” State Prosecutor (Sept. 20, 2024) (on file with author).

27. Interview with “Tiffany,” *supra* note 24.

28. Interview with “Marcus,” *supra* note 5.

29. Microsoft Teams Interview with “Duane,” Fed. Prosecutor (Sept. 19, 2024) (on file with author).

30. *See generally* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); Philip Genty, *Clients Don’t Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273 (2000); Binny Miller, *Building Fierce Empathy*, 70 DRAKE L. REV. 205 (2022); JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* (2020); Smith, *supra* note 8; Binny Miller, *George Floyd and Empathy Stories*, 28 CLINICAL L. REV. 281 (2021). *But see generally* Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992) (discussing empathy as insufficient for effective defense advocacy). Scholars have also debated the propriety of judicial empathy. *See generally* Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PENN. L. REV. 1561 (2012); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2011); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887 (1996).

31. Ogletree, *supra* note 30. Professor Ogletree discussed empathy as an attribute that motivates defense attorneys to zealously represent their clients and that potentially improves their performance in doing so. *Id.* at 1273–74. He explained that empathy in this context entails “perceiv[ing] a shared humanity” with those accused of crimes and seeing them as “more than a criminal defendant.” *Id.* at 1243. More specifically, it involves both feeling compassion for a criminal defendant and “understanding the adverse conditions he endures and the bleak future he may well face.” *Id.*; *see also* Genty, *supra* note 30, at 275–76 (explaining that in the context of legal matters, empathy requires understanding the other person’s “social world” but also their “legal world”).

32. The literature on prosecutors has seldom referenced empathy, and mainly in passing. *See, e.g.*, Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1066, 1104, 1111–12 (2014); Rebecca Roiphe, *Revisiting Abbe Smith’s*

emerged as a significant theme across numerous interviews, as prosecutors indicated that their backgrounds gave them deeper understandings of defendants, victims, and witnesses. In referring to the involvement of several of her family members with the criminal legal system, Stephanie explained, “[h]aving that background, I know [defendants’] humanity.”<sup>33</sup> Tiffany explained, “I can identify with why [a defendant] did what he did, because I have cousins or friends who have relatives who did what they did.”<sup>34</sup> Similarly, Marcus commented, “I have an empathy for those who are arrested because I’ve seen what that can do to families. But . . . I also understand what it’s like to be on the other side where people are victimized.”<sup>35</sup>

This empathy was not simply a feeling of compassion toward the downtrodden or knowing information about low-income people that could be learned in a college elective. Marcus described:

[E]ven though you may be a liberal or . . . progressive in your thinking and you took that African American studies course in undergrad, . . . there are still going to be people that you’re not going to understand where they are, because you’re not from there . . . . It may not make sense to you why this victim behaved in a certain way, but trust me, if you ask ten people from their community the ten people will understand why they behave this way.<sup>36</sup>

This understanding of victims, defendants, and their milieus can influence prosecutors’ dispositions toward certain crimes. Marcus provided an example of this in recounting a conversation he had with a White colleague:

I said “I will never recommend jail for someone beating a fare jumping the turnstile to [the subway].” I said “if they want to plead guilty to a misdemeanor, they can do that, I will never recommend jail.” And she [says] “how dare you not recommend jail! . . . They’re stealing money from the city.” All of this and that. I said, “because I know what that’s like. I know what it’s like to go to high school, have no money, and jump a turnstile. I know what it’s like to go to college, have no money, and jump a turnstile.”<sup>37</sup>

Here, Marcus’s lived experiences enabled him to empathize with people who others wrote off as selfish scofflaws. And in sharing this perspective with his colleague, Marcus may have helped provide her a better and more sympathetic understanding of the behaviors of some of the people who come before her as defendants.

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*Question, “Can a Good Person Be a Good Prosecutor?” in the Age of Krasner and Sessions*, 87 FORDHAM L. REV. ONLINE 25, 28 (2018). But see generally Melanie Reid, *The Joyful Prosecutor: A More Empathetic and Balanced Approach*, 63 SANTA CLARA L. REV. 251 (2024) (discussing empathy more extensively).

33. Interview with “Stephanie,” *supra* note 26.

34. Interview with “Tiffany,” *supra* note 24.

35. Interview with “Marcus,” *supra* note 5.

36. *Id.*

37. *Id.*

Nikki believed that her background provided her greater patience and compassion in her interactions with victims and their families. She explained:

I have a case right now where I have a dead victim . . . His momma calls me every month and says a prayer . . . I don't know that most prosecutors would talk to the momma every month like, "[h]ey, Miss [name redacted], how you doing"? . . . [W]hat it is I understand, and I see myself and I see my momma in [her].<sup>38</sup>

This empathy also made Black prosecutors vigilant to the possible mistreatment of Black defendants by other law enforcement personnel. "Donald," who formerly worked as a state prosecutor in the large city where he had grown up, reported that his personal interactions with police officers had led him to assess descriptions of potentially problematic police encounters in case files differently than his White colleagues, because he had "been on both sides of that equation."<sup>39</sup> Stephanie also discussed treating police reports with skepticism based on her and her cousins' previous encounters with police officers: "I know how law enforcement has engaged them, hell how they engage me in a traffic stop . . . I don't always believe every police report I read."<sup>40</sup> As prosecutors have long been criticized for placing too much trust in the unsupported claims of police officers—out of naivete, fear, or convenience<sup>41</sup>—this skepticism represents a departure from the norm.

Rooted as it is in individual prosecutors' lived experiences, community empathy speaks to the potential value of diversity within prosecutors' offices. The diversity that fosters this empathy is based on experience rather than race per se, but it is influenced by racial factors, specifically the continued segregation and racial character of most disadvantaged urban neighborhoods.<sup>42</sup> As "Fabiola," a state prosecutor, explained in describing her own experience-based connection to the victims and defendants in her cases, "[i]t's really not just that I'm Black, it's 'I'm Black, and I mirror the jurisdiction where I'm practicing.' My lived experiences mirror that."<sup>43</sup>

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38. Interview with "Nikki," *supra* note 4.

39. Zoom Interview with "Donald," Former State Prosecutor (Oct. 23, 2024) (on file with author).

40. Interview with "Stephanie," *supra* note 26.

41. *See, e.g.*, NATAPOFF, *supra* note 14, at 68–70 (describing misdemeanor prosecutors' excessive reliance upon and failure to adequately screen police arrest and citation reports).

42. *See generally* SOLOMON GREENE, MARGERY AUSTIN TURNER & RUTH GOUREVITCH, URB. INST., RACIAL RESIDENTIAL SEGREGATION AND NEIGHBORHOOD DISPARITIES (2017), <https://www.urban.org/sites/default/files/publication/92961/racial-residential-segregation-and-neighborhood-disparities.pdf> [<https://perma.cc/2KR6-U2KW>]. Although prosecutors from different backgrounds may also develop deep understandings of and concern and compassion for these communities through other pathways, this is distinct from the empathy discussed in this Essay.

43. Zoom Interview with "Fabiola," State Prosecutor (Oct. 3, 2024) (on file with author).



## II. PROTECTING BLACK PEOPLE

Although these prosecutors empathized with defendants, they did not place the interests of defendants over those of the community members affected by their crimes. To the contrary, their community empathy often manifested in an overriding concern for the safety and well-being of the low-income Black victims and potential victims of neighborhood crime. Interviewees consistently noted that certain crimes of violence and drug offenses most directly affected low-income Black people living in marginalized neighborhoods, a fact that in many instances served as a counterbalance to their concerns about racial disparities among criminal defendants. In discussing criminal justice disparities, several observed that although the vast majority of their defendants were Black, their victims also tended to be Black. Marcus, for example, explained:

Where I work, unfortunately, a lot of the Black and Brown communities are the ones that are most affected by crime . . . . [W]hen I saw violent crime, it was always a Black victim and it was always a Black defendant, or it was a Brown victim and Brown defendant, and what I noticed was—and I think there are studies that prove this out—that look you’re more likely to be victimized by the person that looks like you. You’re victimized by the person that’s in your own community.<sup>44</sup>

This understanding of the intraracial and intracommunity dynamics of crime helped sustain the motivation of Marcus and other empathetic prosecutors despite the racial disparities among the defendants they prosecuted.

Several interviewees’ beliefs about the importance of punishing and holding people accountable for crime were grounded in their earlier life experiences living in violent, high-crime neighborhoods. In reflecting on his childhood observations of the criminal legal system, Roger noted that it had not only treated defendants from his neighborhood unfairly but also failed to hold people accountable for crimes they committed against other community members. He recalled, “I saw people who were mistreated both as criminal defendants, and as victims. It became clear to me that we weren’t being treated seriously by the criminal justice system . . . . I felt like nobody cared.”<sup>45</sup>

Although several interviewees spoke out against “the War on Drugs”<sup>46</sup> or described their unease prosecuting drug crimes,<sup>47</sup> others supported incarcerating people who dealt drugs. Nikki revealed that her outlook on drug crimes had been shaped by her father’s long-term struggles with addiction. Recalling her experience “living with an addict, seeing not only

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44. Interview with “Marcus,” *supra* note 5.

45. Interview with “Roger,” *supra* note 3.

46. “The War on Drugs,” refers to the punitive and militaristic approach to illegal drug trade championed by President Richard M. Nixon and still pursued today by federal, state, and local governments. See Ernesto Londoño, *Nixon Started the War on Drugs. Privately, He Said Pot Was ‘Not Particularly Dangerous,’* N.Y. TIMES (Sept. 14, 2024), <https://www.nytimes.com/2024/09/14/us/nixon-marijuana-tapes.html> [<https://perma.cc/3D8A-DYLU>].

47. See, e.g., Interview with “Roger,” *supra* note 3 (“I don’t believe in the War on Drugs. I would like to see in my lifetime where drugs are decriminalized.”).

him deteriorate sort of in front of your eyes, but all the other terrible stuff that went along with that,”<sup>48</sup> she explained:

My life, my brothers’ lives would have been very, very different if my father was not addicted to drugs. And so I think about kids in these communities, whose parents are strung out on this stuff . . . . I make no apologies. Maybe somebody would say I’m a part of the War on Drugs; I would say that I’m here to help little Black girls like me, whose mama or whose daddy is addicted to a substance that has completely thrown their life into a tailspin.<sup>49</sup>

Nikki’s framing of her motivation as wanting “to help little Black girls like me,” rather than as condemning the character of people who sell drugs, underscores the role of empathy in driving her to support punitive outcomes for drug dealers, distinguishing her from the standard “law and order” narratives. “Winston,” a state prosecutor who had spent part of his childhood living in a notoriously violent neighborhood, evoked the immense social harms and devastation inflicted on many low-income Black communities by the crack cocaine trade in explaining why he continued to support incarcerating street-level drug dealers.<sup>50</sup>

So we’re about the same age. So you’ve seen a crackhead, like in the wild, walking around. Whoever sold them that [crack]: you bought some Jordans, and you caused that. That dude probably broke in his uncle’s house, stole his mama’s TV—it keeps on going down the line. May have robbed people, broken into people’s cars. And that’s just one. You sold to hundreds of people. And they did that and basically made an entire neighborhood dangerous. Then you have to deal with: “You know what? You’re standing on the wrong corner.” So some rival drug dealer is going to come and spray your corner. Well, while they spray your corner, some nine-year-old gets shot in the head while eating cereal, watching cartoons . . . . So my attitude towards low-level drug dealers really hasn’t changed.<sup>51</sup>

In contrasting his views on such drug offenses with those of other prosecutors, Winston concluded that prosecutors from “more modest upbringings,” such as himself, “tend to be less forgiving of people who run afoul of the law.”<sup>52</sup> Although the opinions of other interviewees suggest that

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48. Interview with “Nikki,” *supra* note 4.

49. *Id.*

50. On the profound and continued impact of crack cocaine markets on Black communities, see William N. Evans, Craig Garthwaite & Timothy J. Moore, *Guns and Violence: The Enduring Impact of Crack Cocaine Markets on Young Black Males*, J. PUB. ECON., Feb. 2022, at 1; Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Levitt & Kevin M. Murphy, *Measuring the Impact of Crack Cocaine* 6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 11318, 2005) (“[T]he rise in crack from 1984–1989 is associated with a doubling of homicide victimizations of Black males aged 14–17, a 30 percent increase for Black males aged 18–24, and a 10 percent increase for Black males aged 25 and over.”).

51. Zoom Interview with “Winston,” State Prosecutor (Oct. 14, 2024) (on file with author).

52. *Id.*

this assessment is an inaccurate overgeneralization,<sup>53</sup> at least some prosecutors who experienced the helplessness of living in dangerous neighborhoods as children or witnessed the damage that the drug trade and associated crimes caused countless Black families may be especially committed to holding people accountable for certain offenses that others consider less worthy of prosecution.

Other interviewees discussed the value of prosecution in deterring crimes that affected low-income Black people less directly. Marcus offered an example of this when he shared his views about retail theft:

I don't believe that it's always the answer to say, "okay, people routinely shoplift. That's all right. Well, [regional chain store]'s a big company—they'll be fine. We shouldn't prosecute it." I understand that can be the view of some . . . . But I'm seeing how that affects the communities where these people live. How when you allow people to routinely shoplift, stores are like, "well, no need for me to be in [local Black neighborhood] anymore." And what does that do to the rest of the community? So I think that having the criminal justice system involved in certain things can serve as a deterrence for others to see, "hey, I shouldn't go out and do these things because I'll be held accountable." [It will] help the communities that are affected by these things even if they are low-level.<sup>54</sup>

These prosecutors' concerns about the impact of crime on the residents of Black communities were intensified by their continued personal connections to these neighborhoods. Nikki explained that her elderly mother lived in a neighborhood where the threat of crime limited her freedom of movement, causing her to avoid traveling to a nearby variety store after dark. This bothered Nikki, who with evident frustration insisted, "[m]y mama should be able to go to Family Dollar after six o'clock."<sup>55</sup> When "Corrine," a state prosecutor who explained that she had grown up in "the hood," was making one of her regular trips back home to visit her mother, she was disturbed to discover that a former defendant she considered very dangerous lived close by.<sup>56</sup>

Because of their concerns about the well-being of Black communities, even the interviewees most compassionate toward criminal defendants rejected calls to abolish prisons and policing, which they considered likely to inflict greater suffering upon nonaffluent Black people.<sup>57</sup> In arguing for the importance of prosecuting people for committing crimes, these prosecutors at times highlighted the plight of victims and precarious conditions faced by

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53. See *supra* note 47 and accompanying text; *infra* Part III.

54. Interview with "Marcus," *supra* note 5.

55. Interview with "Nikki," *supra* note 4.

56. Zoom Interview with "Corrine," State Prosecutor (Nov. 26, 2024) (on file with author).

57. Indeed, interviewees frequently dismissed abolitionism as dangerously misguided appeals from out-of-touch elites removed from the threat of victimization that many less affluent Black people face. See Interview with "Nikki," *supra* note 4 ("I think a lot of folks who talk about abolition don't live here. Don't live where the people are getting hurt."); Interview with "Stephanie," *supra* note 26 ("I have to say that the notion of prison abolition sounds like tomfoolery to me.").

other residents living in high-crime neighborhoods by discussing the comparable situations of their own family members.

But although these prosecutors all perceived the need for policing and prosecution, many expressed concerns about how these institutions operated in practice. Several interviewees criticized the criminal legal system's failure to provide defendants sufficient rehabilitative and support services that might benefit them and thereby protect their receiving communities. As Stephanie explained, "if you're a gang member or a shooter or a serious robber, maybe we should be afraid of you. [But] even for them, you need some kind of rehabilitation. Because unless you have the death penalty or LWOP [life without parole], everybody's coming out eventually."<sup>58</sup>

### III. EMPATHETIC LENIENCY

Empathy for disadvantaged communities can influence prosecutors' assessments of the character and actions of defendants in their cases, leading them to extend leniency toward some who other prosecutors would likely consider reprehensible.<sup>59</sup> Roger shared an instance of this occurring when he described a case involving a Black man who had been caught manufacturing narcotics.

I've been around killers. I've been around drug dealers. Guys who are dangerous and who have no remorse. He wasn't them. He was just somebody trying to feed his family, and he made a poor decision . . . [So] I decided to push this [case] out and he showed us [he deserved a second chance]. I got the prosecutor to revise the indictment to avoid the mandatory minimum . . . He ended up walking out of court with probation instead of five years in prison. This was me coming from the hood, looking him in the eye, and saying this isn't someone we need to throw away for five years.<sup>60</sup>

In providing him leniency, Roger acted based on distinctions informed by his life experiences, more so than his professional training. As his account exemplifies, in deciding how to treat defendants, prosecutors routinely engage in what social scientists call "character construction,"<sup>61</sup> which involves looking beyond the elements of the charged offense to draw inferences about "the type of person" the defendant is.<sup>62</sup> In doing so, prosecutors draw moral and penal distinctions among defendants based on their perceived culpability and salvageability.<sup>63</sup> Defendants who are deemed salvageable are treated more leniently, including through diversion to

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58. Interview with "Stephanie," *supra* note 26.

59. See Rachel Bowman, Belén Lowrey-Kinberg & Jon Gould, *An Integrated Model of Prosecutor Decision-Making*, 58 LAW & SOC. REV. 452, 459–60 (2024) (explaining that character construction is influenced by individual prosecutors' personal backgrounds).

60. Interview with "Roger," *supra* note 3.

61. See Bowman et al., *supra* note 59, at 459.

62. *Id.*

63. Miranda A. Galvin & Jeffery T. Ulmer, *Expanding Our Understanding of Focal Concerns: Alternative Sentences, Race, and "Salvageability"*, 39 JUST. Q. 1332, 1335–36 (2022).

nonadjudicative programs that offer them rehabilitative and support services without subjecting them to criminal convictions.<sup>64</sup> Black defendants may generally be unlikely to benefit from such subjective assessments, as racial bias and a lack of empathy may lead prosecutors to consider them unworthy of leniency.<sup>65</sup> As such assessments more often work to the benefit of high-SES White defendants and are seldom accorded to Black men engaged in the manufacture of narcotics, it is highly unlikely that this defendant would have received a second chance but for Roger's background and empathy.

Once they have appraised a defendant as salvageable or otherwise undeserving of punitive treatment, empathetic prosecutors may also put forth more effort than other prosecutors to help them secure lenient treatment. Stephanie recalled being assigned an unlawful receipt of public assistance case on the eve of trial involving a Black defendant whose attorney previously requested pretrial diversion only to be ignored by one of her colleagues.<sup>66</sup> This defendant, who accepted funds to which he was not entitled and then spent the money on outstanding child support arrears, had paid back the amount owed in full by borrowing money from his father. Although Stephanie received the case well after the time window in which her office customarily considered defendants' requests for diversion, she worked to help secure a more lenient plea agreement. After unsuccessfully seeking approval from her immediate supervisor to modify the plea deal, Stephanie made the bold (and potentially risky) move of going over that person's head to seek permission from the number two prosecutor in the office directly:

I went in his office and told him, and he asked, "Why should we do it?" I said, "Because it's the right thing to do. He paid it back. If you want to give a 45-year-old Black man with no record a felony, I'll do it, but I don't think it's right." And he thought about it and he said, "I guess this is what diversion's for." So he got diversion.<sup>67</sup>

At its core, Stephanie's decision was rooted in her recognition of and concern about the adverse consequences that a felony conviction might have for the defendant.<sup>68</sup> Stephanie regarded the man's lack of a prior criminal record

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64. *Id.* at 1338, 1347.

65. *Id.* at 1339; *see also* NATAPOFF, *supra* note 14, at 154–56 (discussing evidence that prosecutors are more likely to charge Black people for various petty order maintenance offenses and dismiss such cases against White people at higher rates). Multiple interviewees reported that their White colleagues seemed unwilling or unable to draw moral distinctions among Black defendants. *See, e.g.*, Telephone Interview with "Rasheeda," Former State Prosecutor (Sept. 25, 2024) (on file with author) (describing her former colleagues' treatment of Black defendants).

66. Interview with "Stephanie," *supra* note 26. Stephanie concluded that her colleague—an unempathetic White man who she did not think highly of—had likely ignored the request for leniency because he saw the case as an opportunity for trial experience and an easy "win." *Id.*

67. *Id.*

68. *See generally* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (reporting the disastrous impact of felony records for Black job seekers); *see also* NATAPOFF, *supra* note 14, at 28–38 (explaining that even misdemeanor

and his having put the money to a morally acceptable use as suggesting that the unlawful act was an aberration and not indicative of any underlying disposition toward criminality.<sup>69</sup>

Empathetic prosecutors in some instances worked to ensure that less sympathetic defendants were also treated fairly. Roger brought up another case where he worked to help a nineteen-year-old defendant who had been arrested for an alleged domestic assault and, therefore, faced three years in prison for violating the terms of his supervised release for a prior felony:

But after I reviewed the evidence, I wasn't convinced that he did it . . . . So I convinced the judge to give the guy another chance. The senior attorney who was shadowing me at the time, a White middle-aged guy, was pissed. [He told me:] "He fucking did it, I guarantee you're going to see him again in three months." I worked there for four years and I never saw him again.<sup>70</sup>

Given his criminal record and the nature of the accusation, many prosecutors likely would have given very little thought to sending this young Black man back to prison. But, because Roger took the time to review the evidence with an open mind and ultimately intervened on his behalf, the man was, against many odds, able to leave the courtroom a free man.

Empathetic prosecutors also at times act with leniency in cases that they consider tainted by discriminatory or abusive police behavior. Duane, now a federal prosecutor, recalled a time earlier in his career when as a state prosecutor he discovered that a particular police officer had been racially profiling and acting disrespectfully toward Black motorists:

I was working down in traffic court one day when a lot of people were coming in with tickets for window tint violations or other minor problems. But they all had the same complaint. They would say, "I'm here about my tint, but the way the cop treated me wasn't right." This was outside of [local high school], and they would say that every time they left that school, the cop would stop them and ask whether they had any drugs and guns on them, and he would ask if he could search their car. That resonated with me because it had happened to me multiple times with a cop in that same city back when I was in high school. So I ended up dismissing every ticket that that cop wrote that was on the docket that day.<sup>71</sup>

Here, Duane's sensitivity to racial profiling, stemming from his firsthand experience, led him to use his discretion as a check against racist policing.<sup>72</sup> He explained, "[i]t's possible that somebody who didn't have those

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convictions can result in the loss of, or inability to obtain, employment, housing, and eligibility for certain public benefits, along with other deleterious consequences).

69. See Galvin & Ulmer, *supra* note 65, at 1337 (distinguishing between and discussing the significance of "dispositional" and "environmental" attributions of criminal behavior). The man also benefited from having class-based resources likely rare among criminal defendants, namely a father who could help him pay back the money. See Interview with "Stephanie," *supra* note 26.

70. Interview with "Roger," *supra* note 3.

71. Interview with "Duane," *supra* note 29.

72. See *id.*

experiences that I had might have just dismissed the complaints about the officer, or they might have found [that] what the officer did was justified.”<sup>73</sup> Although Duane’s actions did not save anyone from jail or prison, they still made a tangible difference for the people who were able to avoid paying tickets, sent a potentially useful warning to the officer, and possibly even prevented the further erosion of the legitimacy of law enforcement in the eyes of local Black residents.<sup>74</sup> Other interviewees also provided personal explanations for their decisions to decline cases involving police misconduct. Nikki described declining to pursue charges arising from stops in which officers’ own body cam footage later revealed that they had acted inappropriately. She explained that she did so because “I can imagine if that was me. I see myself in that.”<sup>75</sup>

These individual acts of discretionary leniency cannot possibly produce the type of broad transformative changes that critics of the criminal legal system seek, but they can be life-altering for Black defendants who would have suffered far worse fates had they encountered less empathetic prosecutors. In this respect, empathetic prosecutors can make a difference in the administration of justice, even if only occasionally and at the margins. As Tiffany concluded, “you’re not going to change the world, but you can make a difference where you can.”<sup>76</sup>

#### IV. THE PAIN OF PUNISHMENT

However empathetic prosecutors are toward their defendants, most face constraints that often limit their discretion to seek their preferred dispositions.<sup>77</sup> Formal office guidelines and informal office policies, for example, sometimes dictate that prosecutors charge certain behavior more harshly than they would prefer.<sup>78</sup> As a practical matter, the “volume pressure” from their excessive caseloads also prevents many prosecutors from devoting the time necessary to individual cases to determine the most appropriate outcomes for all their defendants, let alone put forth the effort to ensure that they receive them.<sup>79</sup> And particularly in cases involving serious felony charges or high-profile issues, supervisors and office leaders can deny

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73. *Id.*

74. Concerning the impact of racially discriminatory investigative stops, see generally CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253 (2004).

75. Interview with “Nikki,” *supra* note 4.

76. Interview with “Tiffany,” *supra* note 24.

77. See Smith, *supra* note 8, at 385 (“The truth is most prosecutors have very little discretion.”); see also Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 *MICH. L. REV.* 835, 845 (2018) (explaining that prosecutors act within constraints established by other entities, including lawmakers, police, and judges).

78. See Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 *J. CRIM. L. & CRIMINOLOGY* 1119, 1133–34 (2012) (noting the prevalence of office policies that “restrict the discretion of individual line prosecutors”).

79. See Interview with “Winston,” *supra* note 51 (explaining that “there’s always volume pressure”).

them permission to extend leniency to certain defendants who they believe deserve it.

As is true of defense attorneys, who often must accept outcomes they consider unjust because of circumstances beyond their control, these situations can be emotionally depleting for empathetic prosecutors.<sup>80</sup> Several interviewees spoke with regret of being forced to help convict defendants of offenses or ensure that defendants received sentences they considered imprudent or even unjust. Donald, the former state prosecutor, objected to how his office went about prosecuting people for certain drug offenses. He explained:

[It] just gave me pause and made me uncomfortable, as a Black man from [City] locking other Black dudes up to a degree . . . . [F]or the drug stuff, particularly the little possessory things, it gave me a front row seat to the question of whether you're doing more harm than good by pumping people through the system for substance abuse issues . . . . [So] it gave me a lot of pause and caused a good deal of internal turmoil when I had to.<sup>81</sup>

Even though very few of these arrestees received prison time for such offenses (unless they were on parole or probation for more serious offenses), it nonetheless bothered Donald that they were being processed through the system and saddled with additional costs and obligations. Tiffany described how under the Armed Career Criminal Act of 1984,<sup>82</sup> some of her defendants were sentenced to fifteen years in prison based on their prior convictions, even though the specific crimes that she had prosecuted them for warranted far less time and their previous convictions had occurred many years prior. She described instances of “conflict,” when her higher-ups forced her to pursue certain charges and sentences that she considered unfair:

There were times where we would have cases in the office and . . . I don't want to do it, but management will say you have to do it in a certain way. And what do you do when you go into court and you think that this person should get five years, but the law says that they have to get fifteen years? . . . It does not feel good. And I've had to do that.<sup>83</sup>

Along the same lines, “Jessica,” a federal prosecutor who had previously worked as a state prosecutor, described the “worst part of her job” to be the lengthy sentences that defendants in her cases received for certain drug offenses.<sup>84</sup> She explained that although she had no compunction about

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80. See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1207–08 (2004) (suggesting that empathy can lead to emotional exhaustion and burnout in defense attorneys).

81. Interview with “Donald,” *supra* note 39.

82. Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended in scattered sections of the U.S. Code); see also Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 200–02 (2019) (arguing that the act led to disproportionately harsh punishments for many offenders).

83. Interview with “Tiffany,” *supra* note 24.

84. Zoom Interview with “Jessica,” Fed. Prosecutor (Sept. 30, 2024) (on file with author).



incarcerating violent offenders for lengthy sentences, federal drug sentences disturbed her so deeply that she thought about changing jobs. She recalled, “I sent people away for *years* in the state system, but on like homicides or attempted homicides. And so drugs—while they are killing people and all of that—the sentences that the federal government gives out are astronomical . . . [I]t hurts sending somebody away for 300 months.”<sup>85</sup>

These prosecutors and other interviewees spoke candidly of the pain and ambivalence they experienced at being forced to contribute to outcomes that conflicted with their own beliefs about punishment and fairness. They were ultimately unable to change those defendants’ fates, but their reflections provide insight into the perspectives of prosecutors who are not indifferent to the human toll of mass incarceration.

Interviewees’ difficulties with punishment extended beyond the particular laws that they believed overpunished certain individuals to the broader structural inequities and societal conditions, including family and community breakdowns, that disproportionately funneled young Black men into the criminal legal system. Tiffany explained, “[p]art of the frustration of being a prosecutor, a Black prosecutor who actually cared about the community, is that with so many people that I met, there was a failure, a communal failure, of this person long before they got to me.”<sup>86</sup> She added:

My frustration with the job . . . is that we don’t have enough people who were concerned with “after the fact,” meaning after we prosecuted them, after they get out, what can we do to help them? Which is not our primary role as prosecutors, but what are we going to do?<sup>87</sup>

Interviewees also expressed sadness over the fate of certain defendants who they saw as stuck in cycles of poverty and incarceration. Nikki described feeling anguish over former defendants who, despite their sincere efforts, were unable to turn their lives around upon release from custody, eventually resulting in them landing back in prison. In language that easily could have come from an empathetic defense attorney, she shared:

A lot of these guys I feel bad for because I know where they came from. And some of them I’ve seen try to make a difference. Like they try to do something different. And for whatever reason, whether it’s untreated trauma, whether it’s lack of job skills, whether it’s the inability to get housing . . . . Sometimes they go back and those are very, very difficult times for me.<sup>88</sup>

## CONCLUSION

This Essay identified and explored an important dimension of the career experiences of many Black prosecutors: the community empathy that they have acquired through their personal connections to disadvantaged Black

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85. *Id.*

86. Interview with “Tiffany,” *supra* note 24.

87. *Id.*

88. Interview with “Nikki,” *supra* note 4.

communities and close family members who have been prosecuted and incarcerated. This community empathy appears to shape how some prosecutors think and feel about the job, and it can influence whether and how they use their discretion to extend leniency to particular defendants.

The concept of community empathy underscores the potential value of diversity, specifically with respect to prosecutors whose life experiences connect them to or provide them insights into the communities most heavily impacted by their work. Prosecutors with hiring and staffing responsibilities, therefore, should consider how the contextual knowledge and understandings possessed by empathetic prosecutors can enable them to help their offices better serve disadvantaged communities.

The concept of community empathy also has potential implications for many Black students and attorneys who might pursue careers in prosecution. Unlike in many legal positions, empathetic prosecutors—despite the considerable constraints they face—may be able to exercise their professional judgment in accordance with their personal values in ways that can profoundly affect individuals' lives while contributing to better community outcomes.

This Essay is but a brief introduction to the concept of community empathy, which requires and deserves more sustained scholarly inquiry. Further research into the preconditions of prosecutorial empathy and its potential impact on decision-making could greatly enrich our understanding of how prosecutors' life experiences influence the administration of justice.