NOTES & COMMENTS

AVOIDING THE SECOND ASSAULT: A GUIDEBOOK FOR TRAUMA-INFORMED PROSECUTORS

by
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Many victims in the criminal justice system have already survived at least one traumatic experience, but too often the process of prosecuting their case exacerbates that trauma instead of healing it. This Article discusses how trauma may impact a victim of crime on a behavioral and neurobiological level, and how prosecutors can re-orient their interactions with victims in a way that helps victims regain their voice, choice, and sense of community.

Section I describes the necessity for prosecutors to be trauma-informed and what that means in the context of the criminal justice system. Section II seeks to inform prosecutors and those working in the criminal justice system of the neurobiological impact that surviving trauma can have on a victim's brain. Section III applies the science of trauma to the criminal justice system and describes societal myths that surround trauma and how those myths persist in many phases of the prosecutorial process. Section IV provides a non-exhaustive list of suggestions for best practices at each stage of a prosecutor's involvement in a case, centered on the principles of choice, transparency, privacy, and connection. Finally, Section V describes how prosecutors receive secondary trauma by the nature of their line of work, and what they can do to mitigate the negative impact of secondary trauma on their lives and careers.

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PREFACE

If someone set out to design a system to provoke symptoms of post-traumatic stress disorder, it might look very much like a court of law.[1] The court system is a high-risk space for a survivor of trauma.[2] To promote healing, a survivor needs social acknowledgement, control over their lives, and an opportunity to tell their story on their terms. In court, the survivor is confronted with a public challenge to their credibility, complex rules and procedures they cannot control, and limitations regarding how and when they can speak.[3]

However, when facilitated in a way that promotes participation and choice, participation in the criminal justice system can be beneficial for survivors. An opportunity to tell their story in a public venue can offer survivors validation and empowerment.[4] Advocates can connect them with other survivors, sources of help, and information about legal remedies.[5] Providing an individual with choice and

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[1] Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003).

[2] Because the word "victim" is a term of art defined by federal and state statutes, I will use the word "victim" when referring to a trauma survivor's role in the criminal justice system. However, I will use the word "survivor" in the context of trauma generally. A trauma-informed prosecutor should mirror the word choice of the victim or default to "survivor" to recognize the person as more than just a role in the criminal justice system but a person with independent needs and desires.

[3] To add salt to the psychological wound, the criminal justice process protects the offender with constitutional and statutory provisions, while the victim is not even a party to the case. Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 15, 20 (1987) (noting that victims who perceive the offenders to have received better treatment than themselves experience the most psychological distress). Furthermore, the victim may be confronted with the same stimuli that triggered the initial traumatic event: the courtroom may be the first time the victim has seen the perpetrator, photographs of the scene, or evidence from the event. *Id.* at 20. Without context or preparation, confronting the victim with these stimuli may cause them to re-experience the trauma in the moment, compounding the original trauma. *See also* Herman, *supra* note 1, at 159–60.

[4] Margret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71, 72 (2011) (noting that some studies "have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment"); Herman, *supra* note 1, at 160–61 (discussing some benefits of participation in the criminal justice system).

[5] Bell et al., *supra* note 4, at 72.

control in their case can compound these beneficial effects.[6] These opportunities for empowerment and connection can begin to mitigate crime-related symptoms of helplessness and disconnection related to the trauma.[7]

Too often, crime victims that come to the courts experience a "second assault"[8] by a system that disregards and undervalues them. By understanding how trauma impacts crime victims and how the criminal justice system can retraumatize a victim, prosecutors can begin to reframe their interactions with victims in a way that centers the victim's dignity and interest in justice.

I. INTRODUCTION

While prosecutors do not directly represent the victim in a criminal proceeding, the discretion they hold affects not only the case, but also the victim's well-being and statutory rights. As a representative of the State and the interests of the public, prosecutors must consider not just how their decisions affect the case, but also whether they are doing justice with respect to the victim.[9]

A. What Is Trauma?

Trauma is the result of experiencing an event that combines fear with actual or perceived lack of control.[10] Trauma is fundamentally subjective: two people may survive the same event, but not experience the same level of trauma because they perceived the fear or lack of control differently. It is vital for prosecutors to refrain from projecting their own expectations of how a victim may have perceived an

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[6] Alan N. Young, *The Role of the Victim in the Criminal Process: A Literature Review—1989 to 1999*, 2001 VICTIMS OF CRIME RES. SERIES, at 11, http://www.justice.gc.ca/eng/pi/rs/reprap/2000/rr00_vic20/rr00_vic20.pdf (last visited May 27, 2021). Victims consistently report that their major concern with their experience in the system was their limited role in the process, with the highest dissatisfaction from those victims who were outright denied a chance to participate in the legal system. *Id.*; *see also* Bell et al., *supra* note 4, at 73; Kilpatrick & Otto, *supra* note 3, at 23.

[7] Herman, *supra* note 1, at 163.

[8] Malini Laxminarayan, *Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type*, 25 SOC. JUST. RES. 390, 393 (2012).

[9] *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."). The Supreme Court's decision in *Snyder* was reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991). *See also* Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the administration of criminal justice, courts may not ignore the concerns of victims").

[10] Chris Wilson et al., *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, END VIOLENCE AGAINST WOMEN INT'L (Aug. 2020), https://evawintl.org/wp-content/uploads/2016-11_TB-Neurobiology.pdf; *see also* Kilpatrick & Otto, *supra* note 3, at 26.

experience and to instead allow the person to have their own experience of the event.[11]

B. What Is Trauma-Informed Prosecution?

The purpose of trauma-informed prosecution is to empower and engage people that have experienced trauma. These practices are designed to help people recover from the fear, anxiety, and damage to their sense of self-worth caused by their experience. The purpose of trauma-informed prosecution is not to guarantee success at trial.[12] However, by instilling some best practices, prosecutors may begin to see promising signs: more specific details, a trusting relationship with the victim, and a more confident victim testifying at trial.

A trauma-informed prosecutor must:

- Be able to recognize the signs and symptoms of trauma.
- Create a relationship with a victim that accounts for the impact of trauma.
- Handle the case in a way that avoids exposing the victim to further trauma.
- Establish practices to protect themselves from experiencing the effects of vicarious trauma.

C. Why Should Prosecutors Become Trauma-Informed?

While the day-to-day career of a prosecutor involves charging, preparing, and trying cases, the true mission of the prosecutor's role in the criminal justice system is much broader.[13] As the representative for the State, which necessarily includes

[11] While some crimes, such as sexual assault or harassment, might clearly traumatize a victim, many other types of crime traumatize the victim because they involve fear and a lack of control on the part of the victim. While not all crime victims will be traumatized, prosecutors need to be aware that the impacts of trauma might be present in more contexts than they may expect. "For some people, so-called traumatic events are just events. And for other people, they are really life-threatening experiences, and their body responds as if they are going to die; similar to the mouse in the jaws of the cat." Stephen W. Porges & Ruth Buczynski, *The Polyvagal Theory for Treating Trauma*, NAT'L INST. FOR CLINICAL APPLICATION BEHAV. MED., 45, https://static1.squarespace.com/static/5c1d025fb27e390a78569537/t/5cce03089b747a3598c57947/1557005065155/porges_nicabm_treating_trauma.pdf (last visited May 27, 2021).

[12] Roger Canaff et al., *Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value*, END VIOLENCE AGAINST WOMEN INT'L (Feb. 2020), http://evaw.threegate.com/Library/DocumentLibraryHandler.ashx?id=1387.

[13] "It is hard to imagine what priorities should rank higher in a prosecutor's workday than to make sure that each victim of a crime is appropriately and lawfully respected." United States v. Stevens, 239 F. Supp. 3d 417, 425 (D. Conn. 2017).

both defendants, victims, and the general public, the prosecutor's duty is not to *win* a case, "but [see] that justice shall be done."[14]

When victims are left out of the system, they are disempowered and disconnected. When victims refuse to participate in the criminal justice system[15]—by not reporting a crime or refusing to testify—it is *justice* that suffers.[16] On the contrary, a just legal system must "stand by its victims,"[17] and recognize their value not only as participants in cases, but as members of the public that need empowerment and connection in order to be made whole.

The Crime Victims' Rights Act (CVRA), along with several state statutes, protect victims' rights to dignity, respect, and privacy in the justice system.[18] However, statutory protections should be seen as a floor, not a ceiling, and prosecutors should endeavor to go beyond the statutory requirements in the pursuit of justice for victims.

Prosecutors are uniquely situated in the criminal justice system, and decisions that prosecutors make can potentially further disempower and disconnect victims.[19] While prosecutors do not represent victims directly, the victim is often a central witness to the case, and prosecutors contact victims frequently while preparing the case. Trauma-informed practices can help prosecutors frame interactions with victims in a way that engages victims rather than further alienating them.

In addition to being able to recognize the effects of trauma in crime victims, learning about trauma can help prosecutors recognize the effects of trauma in themselves. As people that regularly interact with gruesome evidence, speak with victims about brutal and violent crimes, and tell stories of those crimes to judges and juries, prosecutors are bombarded with trauma. In order to minimize the effects

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[14] Berger v. United States, 295 U.S. 78, 88 (1935). The American Bar Association codified the duty in the Criminal Justice Standards: "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

[15] Just as with "victim" vs. "survivor," the difference between "participate" and "cooperate" is another small way a prosecutor can acknowledge a victim's autonomy. A victim has no legal obligation to work with a prosecutor on the case, so using the word "participate" rather than "cooperate" gives the victim a sense of agency, not obligation.

[16] "Confidence in justice is eroded, enforcement efforts are impeded, and conviction rates, when measured against crimes actually committed, tumble downward." Abraham Goldstein, *Defining the Role of Victim in Criminal Prosecution*, 52 MISS. L. REV. 515, 518 (1982).

[17] GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 258 (1996).

[18] *See* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, § 102 (codified at 18 U.S.C. § 3771 (2018)) [hereinafter Crime Victims' Rights Act]. The National Crime Victim Law Institute compiled a list of victims' rights laws by state. *See Victims' Rights Laws by State*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/live/news/23544-victims-rights-law-by-state (last visited May 27, 2021).

[19] *See* Goldstein, *supra* note 16, at 520.

of secondary trauma, prosecutors need to be able to recognize the effects and build in practices that will safeguard their own mental well-being.

II. THE SCIENCE OF TRAUMA

By recognizing that the brain has evolved to survive traumatic events—not to remember facts and details in order to describe the event for law enforcement or a jury—a prosecutor is better able to reframe evidence to the benefit of their case and the victim's well-being.

Many people have experienced some sort of traumatic event in their lifetime, so many prosecutors, judges, and juries may feel they know how a victim should have reacted in the moment or feel about the event after. However, in the last ten years, advances in neurobiology,[20] combined with studies of crime victims,[21] asylum seekers,[22] and other groups that have experienced trauma have provided an objective explanation for how the brain responds to trauma.[23]

As non-clinicians, it is vital for prosecutors not to attempt to diagnose a survivor of trauma. Because trauma physically changes how the brain responds to stimuli, diagnosing and treating a survivor should be left to mental health professionals. Instead, being a trauma-informed prosecutor is about recognizing signs of trauma and changing practices to engage and empower the survivor and minimize further harm done by the justice system.

A. How the Brain Responds to Trauma

The way the brain responds to trauma is not a conscious choice.[24] Over the course of thousands of years, our brains have developed complex defense and social systems to help us survive and adapt to a variety of threats. The brain's response to threat is automatic and based on reflex or habit that someone cannot think or wish away in the moment.[25]

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[20] *See* Kasia Kozlowska et al., *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARV. REV. PSYCHIATRY 263, 263 (2015); *see also* Stephen W. Porges, *Neuroception: A Subconscious System for Detecting Threats and Safety*, ZERO TO THREE, May 2004, at 1920.

[21] *See* Bell et al., *supra* note 4, at 71; Herman, *supra* note 1; Laxminarayan, *supra* note 8, at 390.

[22] Annie S. Lemoine, *Good Storytelling: A Trauma-Informed Approach to the Preparation of Domestic Violence-Related Asylum Claims*, 19 LOY. J. PUB. INT. L. 27 (2017); *see* Ruth Campbell, Matter of Negusie *and the Failure of Asylum Law to Recognize Child Soldiers*, 25 LEWIS & CLARK L. REV. (forthcoming Aug. 2021).

[23] Wilson et al., *supra* note 10, at 6.

[24] Porges, *supra* note 20, at 24.

[25] *Id.*

What follows is a simplified and general explanation of how the brain responds to trauma. Prosecutors must understand that each survivor will have a different experience and should use this information to *understand* that experience rather than project their own expectations onto a survivor.[26]

B. The Brain "Maps" Environments

Our brains are constantly scanning for threats. In an environment with no known threats, the logical part of our brain remains in effect, the social circuitry is engaged and the defense circuitry that commands us to freeze, flee, or fight is inhibited.[27] In these types of environments:

- The brain is constantly vigilant, scanning the environment for potential danger. The person retains the ability to control where to place focus and attention.[28]
- Sensory data is compared to known or learned sensory data.[29]
- When that data matches "safe" data, the brain inhibits the defense circuity that would otherwise take over.[30]
- With the defense circuitry inhibited, social circuitry is engaged. The body responds by dampening stress responses such as increases in heart rate and the stress hormone cortisol.[31]

C. The Brain Reacts to Threat

When the brain perceives a threat in the environment, however, the defense circuitry takes over:

- The brain is constantly vigilant, scanning the environment for potential danger. The person retains the ability to control where to place focus and attention.[32]
- Sensory data is compared to known or learned sensory data.[33]

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[26] Dr. Stephen Porges advises those who work with traumatized populations to "celebrate" their body's reaction to the event. *See* Porges & Buczynski, *supra* note 11, at 20, and accompanying text.

[27] Porges, *supra* note 20, at 20.

[28] *Id.* at 11.

[29] *Id.* at 20.

[30] *Id.*

[31] *Id.*

[32] *See* Wilson et al., *supra* note 10, at 11.

[33] *Id.* at 12.

- When that data matches a known threat, or does not match to anything, the brain freezes.[34]
- An internal "smoke alarm" goes off, inhibiting the logical part of the brain.[35] Attention is involuntarily focused on physical sensations. Rational thinking, planning responses, and the ability to remember important information are all impaired.[36]
- Defense circuitry triggers and responds with reflex or habit responses.[37]

Responses include the popular—but often misunderstood[38]—"fight or flight" response, in which a victim will either combat the threat or run away. In actuality, a "fight" response is more likely to be experienced as a hyper-aroused state resulting in overwhelming rage or outbursts.[39] Additionally "flight" may be experienced as dissociating from the event mentally rather than leaving it physically.[40]

Other possible actions the brain will take include reflex responses such as dissociation, tonic immobility, and collapsed immobility. Dissociation disconnects the brain from the physical sensations of what is happening, and may manifest as someone staring off into space, or being non- or minimally responsive.[41] Tonic immobility freezes the body's motor ability, manifesting in rigid or stiff limbs, numbness to pain or being unable to move, talk, or cry out.[42] Collapsed immobility decreases oxygen to the brain and may cause the person to faint.[43]

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[34] *Id.*; *see also* Leon F. Seltzer, *Trauma and the Freeze Response: Good, Bad, or Both?*, PSYCH. TODAY (July 8, 2015) https://www.psychologytoday.com/us/blog/evolution-the-self/201507/trauma-and-the-freeze-response-good-bad-or-both.

[35] Wilson et al., *supra* note 10, at 14.

[36] Kimberly A. Lonsway, Jim Hopper & Joanne Archambault, *Becoming Trauma-Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews*, 9–10 (Dec. 2019), http://evaw.threegate.com/Library/DocumentLibraryHandler.ashx?id=1364.

[37] Wilson et al., *supra* note 10, at 19.

[38] *See infra* Section III.A.

[39] Kozlowska et al., *supra* note 20, at 269.

[40] *See* Porges & Buczynski, *supra* note 11, at 10.

[41] *See* Wilson, *supra* note, 10, at 19–21; *see also* Kozlowska et al., *supra* note 20, at 273.

[42] Tonic immobility is often described in the context of sexual assault, and sometimes referred to as *rape-induced paralysis*. Victims report experiences of fear, numbness, shaking, as well as entrapment, futility and hopelessness. Kozlowska et al., *supra* note 20, at 273. Many victims who experience tonic immobility are mentally "present" for and experience the bodily sensations and emotions, but are unable to move, talk, or cry out, making it a particularly confusing response for victims to understand. Wilson, *supra* note, 10, at 19–20.

[43] Collapsed immobility is popularly recognized as fear-induced fainting, "playing possum" or "blacking out." Decreased blood flow can lead to compromised consciousness or complete loss of consciousness. Kozlowska et al., *supra* note 20, at 274. Dr. Stephen Porges refers to it as "death feigning" and uses the image of a mouse in the jaws of a cat: "it looks like it is dead, but it is *not*."

Habit responses are more varied and depend on the person's history and experience with the threat at hand. Social conditioning, habitual ways of dealing with aggression, or even habits learned to cope with specific people can create habits that become shortcuts when the brain perceives a threat. These shortcuts allow the brain to instantly react by relying on training that has already been engrained in its circuity.[44] Thinking through a logical response is inefficient when the brain perceives a threat.

Whether the response is based on reflex or habit, the brain is not logically or consciously choosing that action.[45] Instead, because the logical part of the brain is impaired, the brain subconsciously shortcuts to a response that is already learned and ready to go.[46] These shortcuts are "baked in"; even after years of inactivity, the patterns in which brain circuits fire do not go away.[47] This is why combat veterans might be startled by the sound of a car backfiring years after they left the battlefield: the brain registers a threat and uses a shortcut response.[48]

D. The Social Response

The response to a traumatic event may occur within the brain, but it also impacts an individual's relationship with other people.

From an evolutionary perspective, the brain's response to trauma was helpful when we faced predators but became hurtful as we became social animals.[49] Mammals are dependent on each other and could not survive early in life as solitary creatures. But in order to be social, mammals had to turn off their defense systems.[50] Of course, when the defense system is inhibited, the brain is not as vigilant.[51] However, the social system filled the gap: members of the community could look out for one another.

Rather than a conscious response, immobility is an adaptive biological reaction. Porges & Buczynski, *supra* note 11, at 4. The resulting immobility and loss of muscle control make it easier for a perpetrator to commit the crime, and the victim's physical response may be used to indicate that they consented to the criminal act. Wilson et al., *supra* note 10, at 211; Lonsway et al., *supra* note 36, at 16.

[44] Wilson et al., *supra* note 10, at 13.

[45] Porges & Buczynski, *supra* note 11, at 10–12.

[46] *See* Wilson et al., *supra* note 10, at 15.

[47] *Id.* at 21–22.

[48] *Id.* at 7–8.

[49] Porges & Buczynski, *supra* note 11, at 7–8.

[50] *See* Christina Devereaux, *An Interview with Dr. Stephen W. Porges*, 39 AM. J. DANCE THERAPY 27, 28 (2017); *see also* Stephen W. Porges, *Making the World Safe for Our Children: Down-regulating Defense and Up-regulating Social Engagement to 'Optimise' the Human Experience*, 40 CHILD. AUSTL. 114, 116 (2015).

[51] *See* Porges & Buczynski, *supra* note 11, at 15–16.

Trauma increases the sensitivity of the defense system, making it harder for survivors of trauma to socially engage and reconnect.[52] Trauma may also cause a person to appraise the environment even when it is safe.[53] However, social connections can help lower the defense shields: our nervous system craves safety and reassurance from those we trust. When a safe person is not available, the nervous system may map to defense, not cooperation. The way to reset the nervous system is to re-map it to a safe person.[54]

E. Impact on Memory

The way the brain responds to trauma defines what details of the event become encoded into memory. Memory is a function of attention, and in threatening situations we lose the ability to control that attention to the same degree that we can in safe environments. Accordingly, survivors of traumatic situations do not remember the same details that a person in a safe situation remembers. Research confirms that the way memories are stored affects the individual's ability to recall memories of traumatic events: survivors of trauma often have memories that are vague, inaccurate, or incomplete.[55]

While trauma can cause gaps and inconsistencies, so can alcohol or drug use, inappropriate interviewing techniques, and other factors. The trauma-informed prosecutor's job is not to diagnose, but to gather, investigate, and document information as accurately as possible.[56]

1. Top-Down Versus Bottom-Up Processing

Details that may *seem* pertinent to survival from an outside perspective may not have been experienced as pertinent by the survivor in the moment. This may explain why many details that are important to law enforcement are missing from a victim's account. However, if that detail was not perceived as pertinent to survival, it was not encoded in memory.

As explained by Professor Wilson, "memory starts with attention: what you do not pay attention to, you do not remember."[57] When our brain is under stress, we lose the ability to control where our attention goes, therefore we lose the ability to control what we remember.

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[52] *See* Devereaux, *supra* note 50, at 29–30. When we are in a state of chronic defensiveness our muscles are tense, our bodies are defensive and reactive, our voices are higher pitched and lack prosody, and our faces lack affect. Underlying these behavioral manifestations, our physiological state has changed reflecting the dampened positive influences of the neural circuits that enable our body to heal, grow, and restore. *Id.* at 30.

[53] *See* Porges, *Making the World Safe*, *supra* note 50, at 119.

[54] *Id.*; *see also* Devereaux, *supra* note 50, at 31.

[55] Lemoine, *supra* note 22, at 40.

[56] *Id.* at 49–52.

[57] Wilson et al., *supra* note 10, at 26.

When our brain is not functioning under stress, we are able to control where we place our attention, and thus, what we remember. This is called "top-down processing."[58] However, when we encounter a threat, defense circuitry takes over and focuses our attention on surviving or coping with the threat. The logical part of the brain is impaired, and we lose our ability to control attention. This is called "bottom-up processing."[59]

Bottom-up processing places attention on details that are pertinent to survival.[60] These are "central" details and are firmly encoded in memory. Other details are "peripheral" and not encoded into memory as well, if at all.[61] Details a prosecutor thinks are central may have been entirely peripheral to the victim in the moment: a victim of a mugging may remember details of the suspect's knife, but not remember if the suspect had a mustache. Central and peripheral details may be different for each victim based on their experience of the event.[62]

Furthermore, peripheral details are not encoded to the same level that central details are and are vulnerable to change over time. A survivor must be encouraged to provide the information they do remember and be reminded that it is normal and okay not to remember details. This will prevent the survivor from filling in memory gaps by themselves rather than with their memory.[63]

III. PERCEPTIONS OF TRAUMA: MYTHS AND MISUNDERSTANDINGS

Many people have experienced a traumatic event in their lives and are empathetic to trauma and its impact on survivors. Accordingly, many myths regarding trauma abound, and these myths can lead to misunderstandings when applied to evidence in a particular case.

Prosecutors must not promulgate these myths and must work to dispel them in judges, juries, and victims themselves. Factfinders need accurate context in which to evaluate cases so they do not misjudge certain behavior as indicative of a victim's

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[58] *Id.* at 25.

[59] *Id.*; *see also* Andrew A. Nicholson et al., *Dynamic Causal Modeling in PTSD and Its Dissociative Subtype: Bottom-Up Versus Top-Down Processing Within Fear and Emotion Regulation Circuitry*, 38 HUM. BRAIN MAPPING 5551 (2017).

[60] Wilson et al., *supra* note 10, at 25.

[61] *Id.* at 25–26.

[62] *Id.* at 26. Furthermore, bottom-up processing may result in dissociation, tonic immobility, or collapsed immobility, which may also direct a survivor's attention to seemingly peripheral details. If the brain is dissociating during the traumatic event, it will disconnect from the details of the moment and focus on anything else rather than the event itself. This may explain, for example, why a survivor of sexual assault might recall a poster in the room where the assault happened but cannot recall any specific details of the incident itself.

[63] *Id.* at 27. For more on interviews, see *infra*, Section IV.B.

dishonesty or incredibility. When judges and juries form conclusions based on myths about trauma, victims are denied a fair adjudication of the matter.[64]

A. "Fight or Flight"

1. The Myth

Many people's understanding of trauma begins and ends with the concept of "fight or flight" as a response to a traumatic event: when the brain perceives a stimulus, the options are to fight the stimulus or run away from it.[65] This concept dangerously oversimplifies the brain's response to trauma and incorrectly implies that a person maintains some control or choice as to how they will respond.

First, by suggesting there are only two possible reactions to a threat, the phrase disregards a crucial dimension to the body's response to threat: freezing. Once a threat is perceived, the defense circuity triggers a cascade of responses that often involves freezing first.[66] The response involves heightened attention, decreased heart rate, and a tense body primed for action.[67] Many victims of crime are likely to experience a freeze response, especially in cases where the perpetrator is known to the victim.[68] The phrase is more accurate when it includes freezing: "freeze, fight or flight."[69]

Next, the phrase implies that in the moment, a person experiencing a threatening stimulus can choose or control how they will respond to it. However, when the defense circuitry takes over, logical choices are impaired, and thoughts

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[64] *Victims' Rights Compel Action to Counteract Judges' and Juries' Common Misperceptions About Domestic Violence Victims' Behaviors*, NAT'L CRIME VICTIM L. INST., 4 (Sept. 2014), https://law.lclark.edu/live/files/18123-bulletincountering-common-misperceptions-of-dv.

[65] Despite the fact that the twentieth century physiologist to whom the phrase is attributed never once used it in his work, unfortunately it became one of the most immediately recognized ways of interpreting responses to a threat. Jim Hopper, *Important Things to Get Right About the "Neurobiology of Trauma" Part 2: Victim Responses During Sexual Assault*, END VIOLENCE AGAINST WOMEN INT'L, 4 (Sept. 2020), https://evawintl.org/wp-content/uploads/TB-Trauma-Informed-Combined-1-3.pdf.

[66] Jim Hopper, *Freezing During Sexual Assault and Harassment*, PSYCH. TODAY (Apr. 3, 2018), https://www.psychologytoday.com/us/blog/sexual-assault-and-the-brain/201804/freezing-during-sexual-assault-and-harassment; *see also* Kozlowska et al., *supra* note 20, at 267; Wilson et al., *supra* note 10, at 16.

[67] Evolutionarily, this response makes sense: freezing in place might make an aggressive animal lose interest. *See* Kozlowska et al., *supra* note 20, at 264. However, this response may prevent the body from creating other responses that might help the individual escape the event, such as fleeing.

[68] Hopper, *supra* note 65, at 5.

[69] *See* Seltzer, *supra* note 34. *But see* Hopper, *supra* note 65, at 4 (noting that the term "fight, flight, or freeze" may still be misleading and arguing that "reflexes and habits" would be the most scientifically accurate term).

become simplistic or habitual. Rather than consciously choosing a response, the brain takes a shortcut based on pre-learned habit or reflex.[70]

Brains respond to threatening stimuli in many different ways. Since each person perceives and experiences a threat in their own way, each person's response will differ slightly.[71] Dividing the body's response into two options ignores the complex and subjective nature of the brain's defense circuitry.

2. The Misunderstanding

In the courtroom, juries may expect evidence that a victim tried to physically fight a perpetrator, or that the victim tried to flee from the threat. They may view evidence that the victim froze in place not as a natural response to trauma, but as consent, or evidence that the threat was less serious than it was. Evidence that the victim became hyper aroused may not be properly understood as part of the "fight" response and discounted or not given weight. Similarly, evidence that the victim dissociated from the event might not be understood as part of the "flight" response, where the victim was mentally fleeing the threat.

B. Incomplete Memory Indicates Lack of Credibility

1. The Myth

Because of the way memory is encoded as the brain is trying to survive a threatening stimulus, a victim's account of the event may contain gaps, inconsistencies, or be missing details. Gaps and inconsistencies should not be interpreted as proof of credibility, innocence, or guilt on their own.[72] Despite this, victim accounts are routinely weighed by all participants of the criminal justice system: police, prosecutors, judges, and juries.

2. The Misunderstanding

Participants in the criminal justice system may turn to a victim's memory or account of an event because it seems like a quick way to assess credibility. In cases where there is little physical evidence or other corroborating facts, an inconsistent or incomplete account can be something for a judge or jury to hang their hat on. In cases with only two witnesses—the perpetrator and the victim—the negative impact on credibility may create a significant barrier to accessing justice.[73]

It is vital for the prosecutor to not assess a victim's credibility based on their account of the event. In addition to the scientifically well-established memory process, the way a victim has been interviewed may have caused further damage to

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[70] Kozlowska et al., *supra* note 20, at 273; Wilson et al., *supra* note 10, at 17.

[71] *See supra* note 11, and accompanying text.

[72] Lonsway et al., *supra* note 36, at 19.

[73] *Victims' Rights Compel Action*, *supra* note 64, at 1; *see also* Lemoine, *supra* note 22, at 35.

the victim's memory and account of the event.[74] A gap or inconsistency may be indicative of the way that memory was encoded, or the fact that the victim was interviewed without regard to their traumatic experience, rather than a reflection of their credibility. Prosecutors must realize this, help judges and juries understand this, interview the victim in a trauma-informed way, and help the victim understand they are not to blame for any gaps or inconsistencies.

C. Lack of Emotion Indicates Credibility, Consent

1. The Myth

Many victims' responses to trauma can be hard to understand after the fact. Juries may wonder why the person did not just say "no," scream for help, or display more emotion while testifying. These expectations stem from myths that a person has control over their emotions and actions during a traumatic event.

2. The Misunderstanding

How a victim appears while telling their account can be misinterpreted. Police, judges, and juries may assess a victim's credibility, or even imply that they consented to a perpetrator's actions, based on their lack of emotion or flat affect.

Just as gaps and inconsistencies in an account are a tempting but ultimately invalid way to assess credibility, so too is the victim's affect, both during the event itself and while recounting it. We know that response to trauma is inherently subjective and each person's response will be different. Participants in the criminal justice system must be careful not to project how they would feel or react to an event onto their expectations of the victim:

Traditional Credibility Factors	How They Lead to Misunderstandings
The person did not say "no" or try to run from the threat indicates that the victim consented.	For the most part, perpetrators do not announce an intention to commit a crime. Instead, they may play nice, which activates the victim's attachment circuitry and suppresses the defense circuitry. The brain may be too late to respond to the threat, or it may be overwhelmed by the presence of both threatening and non-threatening indicators.[75] In this way, if the victim does not have a habitual pattern to react with, the brain may use a reflexive response of immobility, collapsed immobility, or

[74] Lonsway et al., *supra* note 36, at 15, 19.

[75] Wilson et al., *supra* note 10, at 18.

	dissociation. Rather than "fleeing" the threat, the brain may dissociate from the reality of the event itself to try to survive it.[76]
An emotional display during testimony indicates the person is honest and feels strongly about the event.	An emotional display may in fact be a traumatic response, not an indication of how the victim feels about the event. If the victim is re-experiencing the trauma as they are explaining it, they may experience outbursts of emotions.[77] These may not be signs of honesty or credibility, but rather signs that the person is experiencing a traumatic response in the moment.
Flat affect indicates dishonesty or distrustfulness.	Revisiting the traumatic experience by recounting it may cause a victim to actually relive the trauma of the event in that moment—including the brain's response to that event. A victim may testify with a flat affect and little emotion in their voice or body language because they are dissociating while on the witness stand. This can be misinterpreted as belligerence, deception, or unwillingness to cooperate, but can be better understood in the context of the body's response to trauma.[78]
Long pauses, staring off into the distance or fidgeting indicates dishonesty.	These signs may also be indications that the victim is experiencing a traumatic response as they are signs of dissociation.[79] Again, these signs should not be used to assess credibility, but rather to indicate that the person is experiencing a response to threatening stimuli in that moment.

D. The Trauma Is Over

1. The Myth

Another myth is that the experience of trauma ends with the traumatic event: once the body has survived the experience, the brain can go back to functioning

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[76] *Id.* at 19; *see also* Kozlowska et al., *supra* note 20, at 273–74.

[77] Kozlowska et al., *supra* note 20, at 280–81.

[78] Wilson et al., *supra* note 10, at 19.

[79] *See supra* Section III.A.

normally again. Instead, trauma is a "disease of time": rather than staying in the past, trauma can be remembered and re-experienced in the present.[80] When the brain perceives a stimulus that it connects to the original trauma, the original fear or panic linked to that memory can resurface and be experienced all over again.[81]

Furthermore, an experience of trauma can enhance the body's response to potentially threatening stimuli. When the brain perceives a subsequent threat, the body's response could be magnified.[82]

2. The Misunderstanding

The myth that trauma is over as soon as the event ends leads many to believe that survivors of trauma are fully recovered from the event and are no longer impacted by it. Accordingly, many participants in the criminal justice system do not consider the victim's psychological well-being when interacting with them.

Trauma-informed prosecutors must understand that the traumatic experience does not end with the event; instead, it has lasting effects on how the victim experiences and responds to their surroundings. Accordingly, the prosecutor must take considerations when interacting with victims and handling the case in order to avoid further re-traumatization and help the victims truly put the trauma behind them.

IV. AVOIDING RE-TRAUMATIZATION IN THE PROCESS

The interactions a prosecutor has with a victim can profoundly affect a victim's physical and mental well-being. How a victim is treated—from initial contact all the way through trial—directly correlates with the victim's sense that the system is fair and their willingness to recontact law enforcement in the future.[83] Furthermore, a victim's experience of the justice system directly correlates to objective measures of *psychological* health.[84] Negative experiences in the process can lead to a "secondary victimization," where the victim perceives the process as a "second assault."[85]

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[80] Allison Crawford, *If 'The Body Keeps the Score': Mapping the Dissociated Body in Trauma Narrative, Intervention, and Theory*, 79 UNIV. TORONTO Q. 701, 705 (2010) (quoting ALLAN YOUNG, THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER 7 (1996)).

[81] *See* Seltzer, *supra* note 34.

[82] *See* Kozlowska et al., *supra* note 20, at 270.

[83] Bell et al., *supra* note 4, at 73; Herman, *supra* note 1, at 162–63; Kilpatrick & Otto, *supra* note 3, at 19, 21.

[84] Herman, *supra* note 1, at 163.

[85] Laxminarayan, *supra* note 8, at 392 (defining "secondary victimization" as "societal reactions in response to a primary victimization that may be perceived as a further violation of rights or entitlements by the victim"); *see also* Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 INT'L REV. VICTIMOLOGY 33, 34 (1994) (describing "secondary victimization" as "the wounds suffered by victims when they come in contact with the criminal

A. Principles for Trauma-Informed Prosecution

Attorneys may become prosecutors to serve their communities, advocate for public safety, or help those who have been taken advantage of. But when they ignore the mental and physical well-being of crime victims, prosecutors ignore those motivating purposes.

The way a prosecutor handles a victim's case can have a profound impact on the victim's mental well-being.[86] More than any other court personnel, the prosecutor has the most contact with a victim and frames how the case is brought. Accordingly, prosecutors must consider each stage of the process through the lens of being trauma-informed and evaluate how their decisions can help or hurt a victim's recovery.

What follows is a breakdown of the prosecutorial process and suggestions for trauma-informed practices. Before considering steps of the process individually, it may help to consider the principles behind those suggestions: more than specific practices, a prosecutor must approach a case that involves a victim with an understanding of how the victim may be impacted by the event.

1. Choice and Voice

Trauma involves a victim's lack of control, but a prosecutor can help a victim regain control in the legal process by promoting agency and choice.[87] A person never chooses to be a victim of a crime, but a victim does choose whether or not to report the crime and the extent to which they participate in bringing the perpetrator to justice. Affording victims opportunities to engage with the case in order to bolster their sense of inclusion and empowerment can be a powerful tool to combat the alienation and lack of control created by the traumatic event.[88] Even the option to participate in the system can promote a sense of agency and control, leading to better mental health outcomes in the long term.[89]

2. Transparency

Providing victims with information about the process increases their perception of control, decreases their feelings of helplessness, and reduces psychological stress.[90] Transparency includes being clear about the possibility and

justice system as complainants or witnesses").

[86] Bell et al., *supra* note 4, at 78–79.

[87] *See, e.g.*, Young, *supra* note 6, at 11.

[88] Herman, *supra* note 1, at 162–63; *see also* Tontodonato & Erez, *supra* note 85, at 36.

[89] *See* Herman, *supra* note 1, at 162–63. Our system of justice puts control in the hands of the prosecutor—even states that have strong victims' rights protections do not permit the victim to control the prosecutorial process. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4419(C) (confirming that the "right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case").

[90] *See also* Kilpatrick & Otto, *supra* note 3, at 17.

manner by which the defense attorney may attack their credibility, that the defendant has many constitutional procedural protections in place during the trial, as well as logistics such as the setup of the courtroom.

Even if it is bad news, the prosecutor should communicate openly and honestly with the victim. Victims reported more satisfaction with the criminal justice system when they were involved and consistently informed of the prosecutorial process.[91]

3. Privacy

Privacy is another form of control: the ability to control what information is presented to the world and how.[92] As a case proceeds to trial, sensitive information about the victim may be involved, including medical records, information about past victimizations, or even documents that contain contact information. Exposure of that information can deprive victims of a sense of control, and even lead to public scorn or harassment, essentially re-traumatizing the victim at the hands of the justice system.[93]

Many jurisdictions now have online public records, making it easy to retrieve a plethora of information about a court proceeding and disperse that information in seconds.[94] Once spilled onto the internet, any disclosure of information—even if accidental—can be impossible to erase.[95] This uncertainty about the possibility of exposure keeps many victims from reporting crime.[96]

The legal principles of confidentiality and privilege may protect some forms of sensitive information.[97] Prosecutors may also ask for documents to be under seal, redacted, or use pseudonyms or initials in place of names.[98] But information may still be elicited by a court order. Prosecutors must alert victims when information

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[91] Herman, *supra* note 1, at 162.

[92] Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883, 909–10 (1993).

[93] Laxminarayan, *supra* note 8, at 393–94.

[94] *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV 1385, 1396 (2017).

[95] *Id.* at 1398–99.

[96] *See, e.g.*, Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1050 (1991) ("One reason frequently mentioned by victims who do not report their rapes to the police is their uncertainty about whether they will be able to maintain their privacy if they do report the rape.").

[97] Evidentiary rules may also protect privacy, for example, FED. R. EVID. 412. *See also Victim Advocate Confidentiality Statutes*, NAT'L DIST. ATT'YS ASS'N, https://ndaa.org/wp-content/uploads/Victim-Advocate-Confidentiality_1.pdf (last visited May 27, 2021) (compiling state statutes providing for a victim-advocate privilege).

[98] "[T]here is no absolute right of an accused to have a jury hear a witness's true name." Clark v. Ricketts, 958 F.2d 851, 855 (9th Cir. 1991); *see also* People v. Ramirez, 64 Cal. Rptr. 2d 9, 15 (Cal. App. 1997) (holding that a defendant's confrontation rights did not outweigh the privacy rights of a victim of a sex offense and facilitating the reporting of sex offenses).

may be susceptible to such an order, or victims may get a false sense of security that creates further harm when information becomes disclosed.

4. Connection

The final guidepost for trauma-informed practice is encouraging social connection. Trauma affects an individual's relationships with other people and can cause victims to be over vigilant or perceive otherwise safe situations as dangerous.[99] However, social engagement can lower those defense mechanisms both in the moment and in the long term.

From initial contact through testifying at trial and beyond, prosecutors should work to build a trusting relationship with the victim. Taking the time over repeated contacts to build that relationship will show the victim that the prosecutor is a safe person that is in their corner, providing the assurance and safety that inhibits the defense circuitry and promotes social engagement and healing.[100]

B. Suggestions for Trauma-Informed Practices

1. Initial Interview

The initial interview is an important place to bolster a victim's sense of control over the event.[101] Because trauma impacts how memory is encoded, a crime victim may feel like they have no control over their own memory.[102] They may fill in missing pieces or make assumptions about a detail that seems important. At this early stage of the process, prosecutors and law enforcement must not pressure victims to piece the puzzle together but encourage them to provide whatever pieces of the puzzle they have.

It is crucial for prosecutors and law enforcement not to pressure the victim into presenting a complete narrative. Rather than trying to piece together the puzzle during the interview, questions should be asked to elucidate more information. The victim must be reminded that any holes in their memory is not their fault, but a result of how the brain responded in the moment. Also, the victim should not be

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[99] *See supra* Section II.D.

[100] *See* Porges, *Making the World Safe*, *supra* note 50, at 115.

[101] Though the initial interview may be conducted by law enforcement, prosecutors need to be aware of how the victim's memory may be impacted by trauma. Prosecutors should also encourage local law enforcement agencies to become educated on trauma-informed interviewing techniques for more efficient and effective interviews of crime victims.

[102] Dr. Stephen Porges advises clinicians to take it one step further: "Tell your clients who are traumatized that they should celebrate their body's responses . . . . They should celebrate their body's responses since these responses enable them to survive. It saved their lives. It reduced some of the injury . . . . Tell them to *celebrate* how their body responded instead of making them feel guilty that their body is failing them." Porges & Buczynski, *supra* note 11, at 20.

pressured into filling any holes with speculation or assumptions but instead should be asked to be honest about where the holes in their memory are.[103]

The trauma-informed approach to interviewing the victim should be driven by the victim, and questions should be designed to allow details to emerge without pushing the victim for details that are not available.

2. Victim Contact

A victim cannot have a voice in their case if the prosecutor is not in a position to listen. A trauma-informed prosecutor views a victim as someone with a vested interest in how the case is handled, not just another witness. The result of the case may have repercussions on the victim's safety,[104] their trust in the justice system,[105] and their own mental health.[106] As such, prosecutors may have to dedicate more time and energy into building a relationship and developing a legal strategy with the individual that encourages the victim's voice in the process.

Rather than brief and efficient meetings, prosecutors need to be open to other options, including series of meetings that loop back on information until a full factual cycle is completed.[107] Rather than being driven by questions that may potentially damage the victim's memory, longer sessions where the victim is allowed to drive the conversation will allow them to process the event on their own terms. Allowing the victim space to tell their story on their own provides an opportunity for them to come to terms with the event itself.[108]

Repeated meetings also establish a relationship between the victim and prosecutor. When the prosecutor is known to the victim as someone who is

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[103] An interview that is not trauma-informed can also have serious ramifications on the case. Certain types of information, such as peripheral details, are particularly susceptible to change or leading questions. Wilson et al., *supra* note 10, at 33. When details change, or are inconsistent over the course of several interviews, the prosecutor may have to disclose that information to defense counsel. *See* Mahler v. Kaylo, 537 F.3d 494, 496 (5th Cir. 2008) (holding that the government's failure to provide an inconsistent statement to defendant prior to trial was a *Brady* violation). Questions should be open-ended and designed to peel away layers of the narrative at a time—each question should ask the victim to elaborate on the experiences and memories associated with the previous question, including sights, smells, and other sensory data that may not have an obvious association with the question. Wilson et al., *supra* note 10, at 33.

[104] Safety considerations include no contact orders, child custody or visitation rights, or incarceration for the perpetrator. *See* Herman, *supra* note 1, at 160.

[105] *Id.* at 161; *see also* Bell et al., *supra* note 4, at 79.

[106] *See generally* Herman, *supra* note 1.

[107] Lemoine, *supra* note 22, at 52.

[108] Not only will repeated meetings decrease stress on the victim, it will also prepare them for testifying. The victim will gain practice speaking about the traumatic events and may experience some catharsis of controlling the narrative. Repeated accounts will increase their confidence and comfort level as a storyteller as well as enhance the quality and consistency of the testimony. *Id*. at 52–53.

trustworthy and safe, the brain will "map" to safety when the victim sees the prosecutor in a potentially less safe place, like on the stand.[109]

Extended meetings will allow the victim to process the event, increasing their sense of autonomy and empowerment. By providing more opportunities to meet with victims, prosecutors can decrease the amount of stress in each meeting, allowing the victim to better remember the event itself and better describe it when called to testify.

3. Working with Victim Advocates

One important way for a prosecutor to encourage a victim's sense of control over the proceedings is to arm them with knowledge about the process.[110] Victim advocates can act as a vital source of information, be a bridge between the victim and the prosecutor, refer victims to local resources, explain proceedings, or help keep the victim informed of the status of the case.

While advocates can be an important support, prosecutors should take care not to rely on them as the *only* support. Rather than relying on advocates to be the sole contact, prosecutors should strive to be involved with the victim throughout the process. Doing so will establish trust between the victim and the prosecutor and enhance the victim's feeling that they are being heard and seen by the system.[111]

4. Maintaining Contact

The prosecutor may be required to notify victims of charges being filed,[112] but any requirement should be a floor—not a ceiling. A trauma-informed prosecutor should reach out to the victim throughout the process in order to check in and provide information on the case. These check-ins are opportunities for the victim

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[109] Porges & Buczynski, *supra* note 11, at 20. When the nervous system detects safety, the metabolic system adjusts, decreasing the fight, flight or freeze response. Simple things like body and face movements or familiar voices can help a person identify a safe person. *Id.*

[110] Bell et al., *supra* note 4, at 80.

[111] *Id.* at 79.

[112] *See, e.g.*, 18 U.S.C. § 3771(a)(2) (2018); CAL. GOV'T CODE § 6254(f) (West 2020) (providing that "state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, [and] the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof" with limited exceptions); *In re* Quinn, 517 N.W.2d 895, 899–900 (Minn. 1994) (holding that the victim was entitled to access information in police files regarding a closed investigation into the reported rape and finding that the government data law recognizes a crime victim "has a greater right of access than the public/press"). For a compelling argument that the government is required to disclose case information to the victim as a due process right, see *Meaningful Crime Victims' Rights Require Discovery of Case Information*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/live/files/22581-discovery-of-case-information-and-records (last visited May 27, 2021).

to ask questions, as well as for the prosecutor to inform the victim about what to expect moving forward. Even if there is no update, consistent contact reinforces the victim's sense of status and involvement in the case and allows the prosecutor to learn more about the victim's recovery.

5. Discovery Preparation

While the prosecutor's goal in discovery is gathering and organizing evidence, it is also a crucial phase to protect a victim's privacy. Prosecutors should prioritize the victim's privacy by taking measures to protect it, but also being transparent about what information can be protected and possible ways information might be released.

In preparing for trial, counsel for both parties may seek information from the victim that is not protected by confidentiality or privilege: a laptop, a diary, Facebook information, cell phone records and more.[113] Defendants have the right to subpoena information and materials from victims in the form of a subpoena *duces tecum*.[114]

While the defendant has a constitutional right to information relevant to the trial, the subpoena may overreach and ask for more information than is absolutely necessary. If a court grants such a motion, the victim may be in the position of turning over private information without even knowing it was requested, shattering the trust the victim has established with the court system.

Prosecutors should inform victims when such subpoenas have been requested and be prepared to file motions to quash subpoenas to protect the victim's privacy. There are two sources of authority that may provide grounds for quashing an overly broad subpoena *duces tecum*: the victim's rights and the constitutional requirements of a subpoena.

At the discovery phase, victims may be granted statutory protections that trump defendant's rights to information. Federal and many state statutes grant victims the right to privacy as well as the right to be treated with fairness, dignity and respect.[115] Defense-initiated requests may also implicate a victim's rights to

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[113] In addition to requests from parties to the case, a victim's private information may be subject to requests under open records laws. Prosecutors should understand the open records laws in their jurisdictions, as well as possible protections for crime victims such as exempting or redacting documents. Another form of relief may include filing a motion to enjoin disclosure. *See Protecting Victims' Rights and Interests in the Context of Open Records Laws*, NAT'L CRIME VICTIM L. INST., 1, 3, https://law.lclark.edu/live/files/30173-protecting-victims-rights-and-interests-in-the (last visited May 27, 2021).

[114] FED. R. CRIM. P. 17; *see also* State v. Love, 395 S.E.2d 429, 431 (N.C. App. Ct. 1990) ("The subpoena *duces tecum* is the process by which a court requires that particular documents or other items which are material to the inquiry be brought into court.").

[115] Neither the State nor the defendant have a general constitutional right to obtain pretrial discovery from victims and other third parties. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (noting that "[t]here is no general constitutional right to discovery in a criminal case . . . .").

protection and to be free from harassment and intimidation.[116] Courts have recognized that states have a legitimate interest in protecting victim privacy.[117]

Federal law permits subpoenas to be quashed if they are "unreasonable or oppressive."[118] The proponent of the subpoena must show that the evidence requested is relevant, not otherwise procurable in advance of trial, necessary for the preparation of trial, and that the subpoena is requested in good faith and not a "fishing expedition."[119]

This limits the scope of possible information that could be subpoenaed significantly. For example, documents relating to the impeachment of a witness are impermissible under this standard, as they do not become relevant until the witness has testified at trial.[120] The requirement that materials be admissible eliminates records that contain hearsay as well as records protected by rape shield laws.[121] Finally, the specificity requirement eliminates sweeping "any and all" requests.[122]

Furthermore, defendants do not have a constitutional right to pretrial discovery under the Confrontation Clause or Due Process Clause. *See also* Pennsylvania v. Ritchie, 480 U.S. 39, 53 n.9 (1987) (noting that "the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial.").

[116] *See, e.g.*, 18 U.S.C. § 3771(a)(1) (guaranteeing crime victims the right to reasonable protection from the accused).

[117] *See, e.g.*, Michigan v. Lucas, 500 U.S. 145, 149 (1991) (recognizing that states have a legitimate interest in protecting rape victims' privacy); Anderson v. Blake, 469 F.3d 910, 914 (10th Cir. 2006) (holding that a rape victim has a constitutionally protected privacy interest in a videotape depicting the rape); Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape").

[118] FED. R. CRIM. P. 17(c)(2).

[119] United States v. Nixon, 418 U.S. 683, 699–700 (1974).

[120] United States v. Cuthbertson, 630 F.2d 139, 144 (3d Cir. 1980) ("[B]ecause [impeachment] statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial."); State v. Block, No. 9908006808, 2000 WL 303351, at *3 (Del. Super. Ct. Feb. 18, 2000) (quoting State v. Redd, 1993 WL 258717, at *3 (Del. Super. Ct. June 19, 1993) ("Clearly, insofar as the requested materials are sought to impeach or otherwise attack the credibility of the complainant, such right of inspection does not arise until the time of trial.")).

[121] *See, e.g.*, United States v. Cherry, 876 F. Supp. 547, 552 (S.D.N.Y. 1995) (documents compiled by local police department concerning defendant's alleged offenses could not be subpoenaed under rule providing for subpoena for books, papers, documents, or other objects, since they were inadmissible hearsay and thus could not be introduced as evidence at trial).

[122] United States v. Jackson, 155 F.R.D. 664, 668 (D. Kan. 1994) ("The subpoenas employ such terms as 'any and all documents' or 'including, but not limited to;' these are indicia of a fishing expedition . . . . The subpoenas, in several instances, seek entire files, all correspondence, and all related records. This is more indicia of a fishing expedition.").

If prosecutors must comply with a subpoena, it is vital to be transparent and honest with the victim so they can prepare themselves. Prosecutors can also argue for *in camera* review and the opportunity to turn over the materials to the court, rather than the individual party, in order to minimize the privacy intrusion.[123] Other protective measures include the possibility of a protective order or filing the document under seal with the court.

6. Plea

Of all the phases of the criminal process, the plea phase most directly implicates the victim's sense of control and autonomy. If the plea involves dismissing a charge, the victim may lose their rights as a victim.[124]

Any trauma-informed plea negotiation must begin with a transparent acknowledgement that the prosecutor does not represent the victim, and that the prosecutor's intentions may not mirror the victim's. A prosecutor may be incentivized to reduce their case load, dismiss a case that is light on evidence, or proceed on a case with a repeat offender. The victim may be seeking acknowledgement they have been wronged, protection for other potential victims, apology, revenge, or court-ordered protections from the offender specifically.[125]

After acknowledging that the victim and prosecutor may have different interests, the prosecutor should confer with the victim about the plea deal. A minority of jurisdictions have provisions requiring the State to confer with a victim before dismissing a case,[126] and courts have declined to accept dismissals where the

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[123] *See Nixon*, 418 U.S. at 713–14 (permitting *in camera* review of presumptively privileged materials upon proper showing by the government); *In re* Subpoena to Crisis Connection, Inc., 933 N.E.2d 915, 916 (Ind. Ct. App. 2010); Lucas v. State, 555 S.E.2d 440, 446 (Ga. 2001) (allowing for an *in camera* review of evidence despite the existence of a facially absolute privilege against disclosure); Pennsylvania v. Ritchie, 480 U.S. 39, 61 (1987) (allowing for an *in camera* review in the context of a pre-trial subpoena).

[124] *See* Littlefield v. Williams, 540 S.E.2d 81, 86–87 (S.C. 2000) (noting that the victim has the right to be present and involved in the criminal process concerning the specific charge related to the victim, but once those charges are resolved, the right no longer exists); *see also In re* McNulty, 597 F.3d 344, 346–53 (6th Cir. 2010).

[125] Herman, *supra* note 1, at 164.

[126] Some states have statutory provisions that grant victims a right to confer with regard to the plea negotiation. *See, e.g.*, 18 U.S.C. § 3771(a)(5) (2018) (granting the "reasonable right to confer with the attorney for the Government in the case"); ALASKA CONST. art. I, § 24 (granting victims "the right to confer with the prosecution"); ARIZ. REV. STAT. ANN. §§ 13-4419(A), (C) (2020) ("[P]rosecuting attorney shall confer with the victim about the disposition." Even then, the "right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case."); LA. CONST. art. I, § 25 (granting victims the "right to confer with the prosecution prior to final disposition of the case"); MICH. CONST. art. I, § 24(1) (granting victims the "right to confer with the prosecution"); N.M. CONST. art. II, § 24(A)(6) (granting victims the "right to confer with the prosecution"); N.C. CONST. art. I, § 37(1a)(h) (granting victims the "right to reasonably confer with the prosecution"); S.C. CONST. art. I, §

victim was not consulted.[127] Rather than telling the victim what the prosecutor is going to do, the prosecutor should lay out the possible options for resolution or taking the case to trial, including an honest assessment of the case and what negotiations from defense counsel might look like. The prosecutor should leave room for the victim to express their interests and hopes for the case and encourage the victim to do so honestly.

Transparency is especially important regarding the prosecutor's ability to proceed or dismiss the cases against the victim's wishes and should include an explanation of how the prosecutor made a decision, especially when that decision diverges from the wishes of a victim. The explanation should be offered with enough time for the victim to pursue a remedy if they oppose the resolution. While the plea deal is one area where prosecutorial discretion is generally unchecked by courts,[128] victims may have other ways of obtaining relief.[129]

Even in the absence of a statutory provision mandating it, the trauma-informed prosecutor should confer with the victim regarding a plea negotiation because it reaffirms their sense of voice and involvement in the process. The outcome of the

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24(A)(7) (granting victims the right to "confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition"); TENN. CONST. art. I, § 35(a) (granting victims the "right to confer with the prosecution"); TEX. CONST. art. I, § 30(b)(3) (granting victims the "right to confer with a representative of the prosecutor's office"); VA. CONST. art. I, §8-A(7) (granting victims the "right to confer with the prosecution"); WIS. CONST. art. I, § 9m(2)(h) (amended 2020) (granting victims the right to "confer with the attorney for the government").

[127] *See* United States v. Heaton, 458 F. Supp. 2d 1271, 1273 (D. Utah 2006) (denying the government's motion to dismiss a case because of a failure to confer with the victim as required by the CVRA and granting an additional 14 days to confer and provide a more detailed motion to dismiss); United States v. Stevens, 239 F. Supp. 3d 417, 422 (D. Conn. 2017) (noting that the prosecutor must take reasonable steps to confer with a victim before making a decision that the prosecutor should reasonably know will compromise the victim's interest).

[128] *See, e.g.*, McKenzie v. Risley, 842 F.2d 1525, 1536 (9th Cir. 1988) (holding that a prosecutor's decision to withdraw a plea offer after a victim disapproved of it was permissible because the court could not control the plea-bargaining process).

[129] Victims may not appear for trial, for example, and deny the state a crucial witness. *But see* People v. Williams, 625 N.W.2d 132, 134 (Mich. Ct. App. 2001) (reversing a trial court dismissal of a domestic violence prosecution because the victim failed to appear for trial). Even when moving to dismiss a case, FED. R. CRIM. P. 48(a) provides that dismissal must be "with leave of court" and the judge has inherent authority to reject a negotiated plea based on a victim's denunciation of the plea bargain at sentencing. *See also Heaton*, 458 F. Supp. 2d at 1273 (denying the government's motion to dismiss a case because of a failure to confer with the victim as required by the CVRA and granting an additional 14 days to confer and provide a more detailed motion to dismiss); United States v. Scott, 877 F.3d 42, 48 (1st Cir. 2017) (noting that while a judge may not participate in the plea bargain, if a trial judge believes a plea is insufficiently attentive to a victim's interests, the appropriate course of action is for the judge to explain that concern to the parties, rather than indicate a level of appropriate punishment).

plea bargain can have significant impacts on the psychological well-being of the victim as well as the victim's legal rights.[130] Resolving the case without going to trial may be a relief to a victim, and avoid the fear, anxiety and uncertainty associated with the process.[131]

7. Trial

Preparing the victim for trial ahead of time can reduce the stress on both the victim and prosecutor when the day of trial comes around. Trial is the culmination of months of preparation and a significant landmark on the road to recovery after trauma. It may also be the first time that the victim has confronted the perpetrator or been confronted with images or evidence from the event since the trauma occurred. If this anxiety is not managed by preparation and proper care, the victim can be further traumatized by the experience, rather than seizing the opportunity for healing and recovery.

Prosecutors should work to prevent the proceedings from being protracted and requiring multiple appearances by victims. Extensive proceedings and repeated appearances can create a sense that the court system is inefficient and unable to protect a victim's needs, as well as create a practical barrier for the victim, who may have to take off work or make arrangements for childcare.[132]

a. Preparing for the Courthouse

From airport-like security, complicated procedures, rules of decorum and the possibility of encountering the perpetrator, the traditional courthouse can be a minefield of traumatic stimuli. Predicting and preparing for extra stressors can help the victim feel more in control and know what to expect when they arrive. Victims should be made aware of the practical elements of coming to the courthouse including where to park, how to find the courtroom, and the fact that they may be required to go through airport-like security at the entrance. Victims should also be made aware of the option of bringing a friend or family member for support.

Victims may find comfort in knowing what measures are in place to maintain safety and security in the courtroom. These include metal detectors at the entrance, guards or deputies in the courtroom, security cameras and a judge's emergency button. The knowledge of these measures may help victims understand they are safe in the courthouse, but also build trust and show that the prosecutor is concerned about the victim's present and future safety.[133]

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[130] Herman, *supra* note 1, at 162–63.

[131] *Id.* at 162.

[132] Bell et al., *supra* note 4, at 79.

[133] *See* Katherine Swanson, *Providing Trauma-Informed Legal Services*, L.A. LAW., Apr. 2019, at 15; *Practical Tips and Legal Strategies for Easing Victims' Concerns About Testifying*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/live/files/21751-practical-tips-and-legal-strategies-for-easing (last visited May 27, 2021).

Prosecutors should also consider a courtroom visit as an opportunity to demystify the experience and eliminate any remaining stress about trial. The prosecutor or advocate can explain the various roles of people in the courtroom and where they will be seated. The victim may even sit in the witness stand and answer some generic questions to ease concerns about testifying.

If accessing the specific courtroom is not available, or the prosecutor does not know which courtroom the hearing will be in, having the victim watch other trials or hearings can be just as effective. By observing a trial or hearing, a victim will learn how to communicate and behave effectively in court. Furthermore, the victim will have the opportunity to observe the rules and procedures in place, such as standing when the judge enters, not being able to ask questions while the hearing is in progress, and the fact that the hearing is run by the attorneys. These measures show the victim that the courtroom is a safe place and boost the victim's confidence about testifying.[134]

b. Preparing to Testify

Even in an affirming and supportive environment, testifying can be a major stressor on a victim who has experienced trauma. Just the thought of testifying can cause victims symptoms such as nausea, vomiting, and psychological distress.[135]

Preparation can reduce anxiety and the risk of surprises at trial. Over the course of several meetings, prosecutors should work with testifying victims on courtroom communication: treating the courtroom in a dignified manner, limiting responses to the question asked, not exaggerating facts, and understanding how a judge or jury may interpret their body language.[136] Cross examination might be another source of stress, but one that can also be reduced by preparation. The prosecutor can identify possible questions that a defense attorney might ask on cross examination and have the victim practice some responses.

c. Victim Seating

Even something as small as where the victim sits in the courtroom can have a profound impact on the victim's sense of safety and control over the proceedings. The prosecutor should consider where the victim will sit in advance of the trial and provide a place where the victim can see the proceedings but feel protected from the perpetrator. The law enforcement officer that investigated the case may be familiar to the victim, and their presence may reinforce a sense of security in the courtroom.[137]

When it comes time to testify, the prosecutor has some room for creativity with respect to how the victim is positioned or seated. The Confrontation Clause

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[134] *Practical Tips and Legal Strategies*, *supra* note 133.

[135] Herman, *supra* note 1, at 164.

[136] Swanson, *supra* note 133, at 15.

[137] *Practical Tips and Legal Strategies*, *supra* note 133.

prohibits barriers between the defendant and testifying victim,[138] but it does not prohibit other alternatives to keep the victim's focus on the prosecutor rather than the defendant.[139]

d. Testifying

Testifying and cross examination are common sources of anxiety, but a prosecutor can take measures to bolster the victim's sense of control over the process. Before the victim begins testifying, the prosecutor should ensure that the victim is grounded and confident. Taking a moment to pour a glass of water and bringing it to the victim is a simple way to allow the victim to gather themselves on the stand, orient to the room, and get used to facing the defendant.

Another simple way for a prosecutor to ground the victim before testimony is to make eye contact with the victim. Identifying trustworthy and familiar faces can help the victim "map" to safety, inhibiting the areas of the brain that instigate the defense cascade.[140] If the victim slips into defense mode, they may dissociate in the moment, and lose focus or have a flat affect.[141] By taking steps to show the victim they are safe, the prosecutor can put the victim in a position where their brain is not immediately defaulting to danger stimuli.

Courtroom aids such as diagrams, models, charts, and maps may also help redirect attention away from the victim and onto the visual aid. Aids may even be

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[138] *See* Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (holding the placement of a screen that prevented child witnesses from seeing the defendant while they testified violated the defendant's right to confrontation); Smith v. State, 894 P.2d 974, 976 (Nev. 1995) (holding that the prosecutor placing his body between the child-victim and the defendant while testifying violated the defendant's right to confrontation); Casada v. State, 544 N.E. 2d 189, 196–97 (Ind. App. 1989) (holding that placing a chalkboard between the victim and the defendant violated the defendant's right to confrontation).

[139] *See* United States v. Ellis, 313 F.3d 636, 639, 650–51 (1st Cir. 2002) (holding special seating arrangement where the victim testified facing the jury with her back to the defendant did not violate the defendant's right to confrontation where there was evidence of defendant's attempts to intimidate the witness); People v. Sharp, 29 Cal. App. 4th 1772, 1781–82 (1994) (disapproved on other grounds) (holding where prosecutor sat or stood next to witness stand so victim could look away from defense table while she testified did not violate the defendant's right to confrontation); Brandon v. State, 839 P.2d 400, 409–10 (Alaska Ct. App. 1992) (holding victim seated perpendicular to defendant did not violate the defendant's right to confrontation); State v. Hoyt, 806 P.2d 204, 209 (Utah Ct. App. 1991) (holding defendant's right to confrontation not violated where court allowed prosecution to switch tables with the defense so the victim, while seated in the witness stand, looked directly at the prosecutor); Stanger v. State, 545 N.E.2d 1105, 1112–13 (Ind. Ct. App. 1989) (holding where victim seated at angle toward jury and away from the defendant did not violate right to confrontation); People v. Tuck, 537 N.Y.S. 2d 355, 356 (N.Y. App. Div. 1989) (holding victim seated at table facing jury did not violate the defendant's right to confrontation).

[140] Porges, *supra* note 20, at 20.

[141] *See supra* Section III.C.2.

admissible as evidence and explain the facts to the jury. Using these aids not only clarifies the evidence for the jury, but also helps the victim feel less like the weight of the trial is entirely on their shoulders; instead, the aid is carrying the weight of the explanation.

8. Helping the Factfinder Understand Trauma

Judges and juries need accurate context in which to evaluate a victim's behavior and testimony so that they do not misjudge certain conduct—such as holes in their account of the event or a flat affect while testifying—as evidence of a victim's incredibility or dishonesty. Judges and juries may not be educated as to the impact of trauma on the brain, or that a victim suffers from the trauma long after the incident itself. If a factfinder misinterprets a victim's behavior because of such a misunderstanding, the victim is denied a fair adjudication of the matter.[142]

Courts have held that a defendant's fair trial rights include the right to have the jury fairly evaluate the evidence.[143] If a jury is determining guilt based on myths or misunderstandings about the victim's behavior, they are not fairly evaluating the evidence.

Accordingly, prosecutors may need to decide how best to educate the jury about the impact of trauma. Some parts of trauma can be easily understood and may be primed through questioning at *voir dire*.[144]

For more complicated cases, a trauma expert may be required to explain a victim's behavior in a case. Experts are particularly helpful where the behavior is difficult to understand, for example, an assault victim that did not flee from the assault because of fear. In a domestic violence context, courts have sanctioned the use of expert testimony as a method of preventing juries from misjudging a victim's behavior.[145] In other cases, the victim's testimony itself may provide a common-sense explanation that is more compelling than abstract expert testimony.

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[142] "Victims have a fundamental right to access justice, which . . . compel[s] offering information during the justice process to educate judges and juries about common victim behaviors that they may otherwise perceive to be 'counterintuitive.'" *Victims' Rights Compel Action*, *supra* note 64, at 4; *see also* Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DIST. ATT'YS ASS'N, https://www.forensichealth.com/wp-content/uploads/2016/10/pub_introducing_expert_testimony.pdf.

[143] *Victims' Rights Compel Action*, *supra* note 64, at 9 n.38.

[144] For example, a prosecutor may ask the panel what they understand about trauma and ask for personal experiences with trauma in order to begin the conversation about trauma and its effects. Follow up questions could include triggering events, or how survivors of trauma experience the impact in the present.

[145] *See Victims' Rights Compel Action*, *supra* note 64, at 4, 9–10 n.41.

V. MITIGATING VICARIOUS TRAUMA

Even though attorneys do not experience the criminal trauma first-hand, by working with traumatized clients they experience significant secondary symptoms, including stress, anxiety, insomnia, altered world view, and more.[146] This secondary or "vicarious" trauma can come from a variety of sources, including police reports, interviews with victims, prolonged exposure to crime scene photographs, or preparing the case and communicating it to a judge.

Exposure can lead to long-term, sometimes irreversible changes in brain structure, as well as changes to the body down to the cellular level.[147] High caseloads and working directly with traumatized clients are considered risk factors for vicarious trauma, making prosecutors highly likely to experience it in their careers.[148]

Prosecutors must increase self-awareness and work to mitigate the effects of trauma and stress. Doing so may reduce those physiological changes and ensure a long and healthy career.

A. Recognizing Symptoms

Self-awareness is key to detecting symptoms of exposure to trauma.[149] Just as individual responses to trauma depend on that person's history with the stimuli, responses to vicarious trauma are also dependent on the person experiencing the exposure.[150] In fact, not all prosecutors that experience exposure to trauma will develop symptoms or develop them to the same degree.[151]

Just as prosecutors will experience different degrees of vicarious trauma, the impact may also vary in a wide range of ways. Vicarious trauma may create a disruption in an individual's world view, including assumptions about truth and dependency, safety, power, independence, and esteem.[152] It may manifest as

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[146] Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 246, 251 (2003) (explaining that the mental health community has recognized the effects of working with trauma victims as early as 1980, but when compared with mental health providers and social service workers, attorneys surveyed demonstrated significantly higher levels of secondary stress and burnout).

[147] Megan Zwisohn et al., *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, 22 RICHMOND PUB. INT. L. REV. 101, 108, 120 (2019) ("This type of career literally changes the brain.").

[148] Levin & Greisberg, *supra* note 146, at 251; Zwisohn et al., *supra* note 147, at 113 (noting that the average person will spend 90,000 hours at work over a lifetime; for time-intensive career paths, such as attorneys, those numbers are anticipated to be even higher).

[149] Zwisohn et al., *supra* note 147, at 117.

[150] *Id.*

[151] *Id.* at 112.

[152] Lemoine, *supra* note 22, at 53–54; Levin & Greisberg, *supra* note 146, at 246.

physical symptoms such as fatigue, poor sleep, or headaches or emotional symptoms such as aggression, cynicism, or depression.[153]

However it manifests in individuals, vicarious trauma can lead to poor job performance, deteriorating interpersonal relationships, substance abuse as well as burnout and high job turnover.[154] Recognizing the symptoms is not enough; in order to protect their own mental well-being, and safeguard the longevity of their careers, prosecutors must take steps to mitigate those symptoms.

B. Mitigating Impact

Responding to the symptoms of vicarious trauma requires a holistic approach that considers mental and physical well-being. Just as the principles of control, connection, and transparency drive the prosecutor's contact with the victim, those same principles apply to mitigating the impact of vicarious trauma.

Establishing and maintaining social support in the form of friends, family, and colleagues works to combat the social isolation and negative mental health symptoms of vicarious trauma.[155] This connection and engagement with people we know to be "safe" inhibits the defense systems raised by exposure to trauma.[156] A healthy diet combined with exercise can also fight against some of the physiological changes that occur in the brain as a result of workplace stress.[157] Pairing movement of some kind with social engagement can maximize the restorative benefits of each.[158]

Prosecutors do not have to wait for exposure to take steps to mitigate the effects of vicarious trauma. Many attorneys point to a lack of systemic education regarding the effects of trauma as well as the lack of forums for talking openly about mental health in the field.[159]

On an organizational level, prosecutors' offices can address concerns before they get out of hand. Trainings in mental health, trauma management, and stress reduction can be folded into orientation for new prosecutors and CLEs throughout the year. Offices can promote self-care and work to recognize—not stigmatize—mental health symptoms and conversations about mental health. Supervisors can be trained in recognizing the warning signs of vicarious trauma and check in with newer attorneys before negative results set in.[160]

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153 Levin & Greisberg, *supra* note 146, at 248.

154 *Id.* at 248–49.

155 Zwisohn et al., *supra* note 147, at 118.

156 *See supra* Section II.D and accompanying notes.

157 Kilpatrick & Otto, *supra* note 3, at 15.

158 Devereaux, *supra* note 50, at 31–32.

159 Levin & Greisberg, *supra* note 146, at 252.

160 Lemoine, *supra* note 22, at 55; Zwisohn et al., *supra* note 147, at 118.

VI. CONCLUSION

Trauma results from experiencing an event that combines fear with a lack of control, and survivors of trauma may be impacted by that fear and lack of control in a variety of ways. In order to heed the prosecutor's duty that "justice shall be done," prosecutors would be well served to understand how trauma impacts survivors, both in the moment that the survivor is experiencing the trauma and how it may affect them long after the incident.

A trauma-informed mindset can help prosecutors wield their discretion in a manner that empowers crime victims and enables them to heal from the traumatic experience. An in-depth understanding of the science of neurobiology can instruct prosecutors to recognize and combat the pervasive myths about trauma that persist in our society, and by consequence, our criminal justice system. But mere knowledge is not sufficient: Prosecutors must put such knowledge into practice in their everyday interactions with crime victims. By centering on the principles of choice, transparency, privacy, and connection, prosecutors can reshape the way a victim perceives the system. Trauma-informed prosecution can not only prevent the victim from experiencing further trauma by the process but use the prosecutorial process to empower the victim and strengthen their sense of community.

Finally, trauma-informed prosecution would not be complete without an appreciation for the fact that working with traumatized individuals causes vicarious trauma that can cause stress and burnout. To safeguard themselves from the negative effects of vicarious trauma, prosecutors must be able to recognize the symptoms and mitigate the impact of such trauma by fostering connection and community inside and outside of the office. With a deeper understanding of trauma, prosecutors can prevent crime victims, themselves, and their colleagues from experiencing the second assault.