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## Article

### Stress and Prosecutorial Discretion

JANE MITCHELL

*Prosecutors wield enormous influence—and yet the factors guiding their choices remain largely unknown. Scholars have long considered the inner workings of prosecutorial discretion a “black box.”*

*This study seeks to remedy that gap by applying a discovery-based qualitative methodology to study prosecutorial discretion. Relying on fourteen in-depth interviews with prosecutors,\* this study identifies an influence on prosecutorial discretion previously unaccounted for in the literature: stress. Prosecutors’ stress responses directly impact their decision-making and performance, for better or for worse.*

*Prosecutors’ stress responses align with the principles of cognitive appraisal theory. According to this psychological theory, people “appraise” stressful situations as either “challenges” or “threats.” Each mental state triggers a distinctive set of cognitive, emotional, and physical responses. Challenge states improve performance and thinking. Threat states impair performance and decision-making.*

*The interview data demonstrates that prosecutors face a relentless stream of stressors at work. The way prosecutors respond to those stressors carries profound implications for criminal justice. Prosecutors operating in challenge states benefit from sharper decision-making and improved performance. Prosecutors in threat states, on the other hand, are more prone to negative bias, mistakes, abrasive behavior, and burnout. This has particular relevance for trial work, which prosecutors report being the most stressful part of their job: threat states predispose prosecutors to plead cases instead of going to trial.*

*While stress responses occur at an individual level, much can be done at an organizational level to promote challenge instead of threat. The Article concludes with structural recommendations for facilitating challenge states.*

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\* The study presented in this Article was approved by the New York University IRB.

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# Stress and Prosecutorial Discretion

JANE MITCHELL\*

## INTRODUCTION

Prosecutors wield enormous influence. Their daily decisions trigger scores of life-altering consequences<sup>1</sup> for millions of Americans each year.<sup>2</sup> Prosecutors, not judges or legislators, are attributed with being “the criminal justice system’s real lawmakers.”<sup>3</sup> Nearly every criminal justice outcome stems from a prosecutor’s choice.<sup>4</sup> In the words of one author, “prosecutors . . . [are] the real rulers of the American criminal justice system.”<sup>5</sup>

While some of their ascribed power may be overstated rhetoric,<sup>6</sup> it is hard to dispute that prosecutors’ use of discretion profoundly influences defendants, victims, communities, and society at large. Prosecutors have the

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<sup>1</sup> See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (asserting that the criminal justice system has “serious, adverse consequences”); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1213 (2010); see also BRADLEY D. EDWARDS & LAWRENCE F. TRAVIS III, *INTRODUCTION TO CRIMINAL JUSTICE* 35 (9th ed. 2019) (discussing the decision-making process of prosecutors when determining how a criminal defendant will be charged).

<sup>2</sup> BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, *TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US* 6 (2020), <https://nscs.contentdm.oclc.org/digital/collection/criminal/id/352/> (“Over [eighteen] million criminal cases—[five] million felony and [thirteen] million misdemeanor—are resolved each year in US state courts.”).

<sup>3</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

<sup>4</sup> Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 212 (2019).

<sup>5</sup> Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017); see also Steve Weinberg, *Harmful Error: How Prosecutors Cause Wrongful Convictions*, 7 J. INST. JUST. & INT’L STUD. 28, 29 (2007) (addressing the important role of prosecutors).

<sup>6</sup> Bellin, *supra* note 4, at 175 (stating that overall, claims regarding prosecutorial power are “oversimplified and overstated”).

discretion to charge defendants<sup>7</sup> and decide which penalties to seek.<sup>8</sup> They have the discretion to decline, dismiss, or divert cases.<sup>9</sup> They dominate the grand jury process<sup>10</sup> and impact bail setting.<sup>11</sup> They largely control the plea bargaining process,<sup>12</sup> their choices to charge stack<sup>13</sup> or threaten harsh post-trial sentences<sup>14</sup> significantly influence defendants' decisions to plead guilty or not.<sup>15</sup> The plea process effectively empowers prosecutors, not judges or

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<sup>7</sup> Charging in turn constrains sentencing, particularly when mandatory minimums are at play. See Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 327, 328 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

<sup>8</sup> Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 43 (1988); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 259 (2011); Bellin, *supra* note 4, at 181; Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 67 (2015); Matt Barno & Mona Lynch, *Selecting Charges*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 35, 36 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

<sup>9</sup> Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 224 (2003); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 74–75 (2002) (discussing the strategy associated with the prosecutor's decision on whether to prosecute certain cases or not); see also Matthew W. Epperson, Leon Sawh, Sadiq Patel, Carrie Pettus & Annie Grier, *Examining Case Dismissal Outcomes in Prosecutor-Led Diversion Programs*, 34 CRIM. JUST. POL'Y REV. 236, 237 (2023) (noting the increase in prosecutors choosing pretrial diversion programming); MICHELA LOWRY & ASHMINI KERODAL, PROSECUTOR-LED DIVERSION: A NATIONAL SURVEY 6, 8 (2019), <https://www.innovatingjustice.org/resources/prosecutor-led-diversion-a-national-survey/> (discussing a study of prosecutor-led pretrial diversion programs nationwide).

<sup>10</sup> EDWARDS & TRAVIS III, *supra* note 1, at 220; W. Thomas Dillard, Stephen R. Johnson & Timothy Lynch, *A Grand Façade: How the Grand Jury was Captured by Government*, 476 POL'Y ANALYSIS 1, 1 (2003), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa476.pdf>.

<sup>11</sup> Mary T. Phillips, *Prosecutors' Bail Requests and the CJA Release Recommendation: What Do They Tell the Judge?*, NYC CRIM. JUST. AGENCY (Aug. 2005), [https://www.nycja.org/assets/ResearchBrief9\\_\\_786.pdf](https://www.nycja.org/assets/ResearchBrief9__786.pdf); Casey Tolan, *Making Freedom Free*, SLATE (Mar. 29, 2017), <https://slate.com/news-and-politics/2017/03/poor-defendants-get-locked-up-because-they-cant-afford-cash-bail-heres-an-easy-fix.html>.

<sup>12</sup> Brian D. Johnson & Raquel Hernandez, *Prosecutors and Plea Bargaining*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 75, 77 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

<sup>13</sup> "Charge stacking" occurs when prosecutors charge multiple overlapping, duplicative offenses for a single behavioral act. See Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists' View 2* (U. Chi. Pub. L. & Legal Theory, Working Paper No. 243, 2008) (discussing prosecutors' ability to threaten harsher punishments due to charge stacking); see also Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO STATE J. CRIM. L. 453, 463 (2009) (explaining how charge stacking influences defendants' plea bargains).

<sup>14</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 104 (1968) (discussing the practice of over-charging); Stuntz, *supra* note 3, at 520 (discussing the same).

<sup>15</sup> Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312 (2018) (explaining how prosecutors can "control the defendant's incentive to plead guilty"); Stuntz, *supra* note 3, at 520 ("The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty.").

juries, to act as the “central adjudicator of facts”<sup>16</sup> and determine the sentences given in most cases.<sup>17</sup> For the rare case that goes to trial, a prosecutor’s performance and strategy decisions have an undeniable impact on jury selection, victim involvement, case outcomes, and sentencing.<sup>18</sup> As Stuntz famously put it, it is prosecutors who chiefly control “who goes to prison and for how long.”<sup>19</sup>

Despite their enormous influence, prosecutors remain walled off from public scrutiny. Prosecutorial decision-making is widely considered a “black box.”<sup>20</sup> Their choices change people’s lives in drastic ways, and yet the factors that guide those choices are mostly unknown.<sup>21</sup> District Attorney offices rarely require prosecutors to record their reasons for deciding to charge, dismiss, plead, or try cases.<sup>22</sup> A lack of external regulation—in the form of either case law or statutes<sup>23</sup>—allows prosecutors to operate with little formal oversight and no public accountability.<sup>24</sup> Their decisions are

<sup>16</sup> Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003); see also GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE at vii (2014) (explaining that prosecutors sometimes act as sole adjudicators in criminal cases).

<sup>17</sup> See Rakoff, *supra* note 5, at 1432 (“[P]rosecutors, rather than judges . . . effectively determine the sentences to be imposed in most cases.”).

<sup>18</sup> See EDWARDS & TRAVIS III, *supra* note 1, at 35–36, 220, 226 (discussing how prosecutorial performance and strategy influence various aspects of cases that go to trial); see also Nora V. Demleitner, *Prosecutors and Sentencing*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 153, 162 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021) (discussing actions prosecutors may potentially take during criminal cases).

<sup>19</sup> William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (“The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges.”).

<sup>20</sup> Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008); Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2136 (2022); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 373 (2010); Brandon L. Garrett, *Opening the Black Box: Review of Prosecution Complex*, 58 CRIME L. & SOC. CHANGE 567, 567 (2012); *Unlocking the Black Box of Prosecution*, VERA INST. OF JUST., <https://www.vera.org/unlocking-the-black-box-of-prosecution> (last visited Nov. 22, 2025).

<sup>21</sup> Wright, Baughman & Robertson, *supra* note 20, at 2135.

<sup>22</sup> Ronald F. Wright, Kay L. Levine & Marc L. Miller, *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL’Y 27, 45, 47 (2014); see also Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1130–31 (2021) (discussing the lack of information released by prosecutors regarding their decision-making process). Miller and Wright document one notable exception from the New Orleans District Attorney’s Office. See Miller & Wright, *supra* note 20, at 129.

<sup>23</sup> Miller & Wright, *supra* note 20, at 129; Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2 (2012). State bar associations also fail to provide meaningful discipline. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722–23 (2001) (noting the lack of cases sanctioning prosecutors).

<sup>24</sup> Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 392, 393 (Erik Luna & Marianne L. Wade eds., 2012); Logan Sawyer,

unreviewable and often unarticulated.<sup>25</sup> Prosecutors' reasoning is not discoverable by defendants,<sup>26</sup> and their most critical decisions are usually made during private meetings outside the courtroom, behind closed doors.<sup>27</sup> Without an incentive to share their reasoning publicly, prosecutors are rarely open about their decision-making.<sup>28</sup>

This makes it difficult for scholars to study prosecutors' use of discretion. Researchers have managed to identify case factors that affect discretion, including the strength of the evidence available, the seriousness of the crime, characteristics of the defendant and victim, a defendant's criminal history, and other contextual factors.<sup>29</sup> Scholars have also pinpointed a handful of unconscious influences that affect the decision-making process, such as gender bias,<sup>30</sup> racial bias,<sup>31</sup> confirmation bias,<sup>32</sup> and anchoring bias.<sup>33</sup>

But as many authors point out, research on this front is scant, since studying prosecutorial discretion poses serious methodological and data

*Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 613 (2020); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); see also Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960–61 (2009) (noting the lack of meaningful constraints on prosecutors).

<sup>25</sup> Miller & Wright, *supra* note 20, at 130; ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1073 (1972).

<sup>26</sup> Wright, Baughman & Robertson, *supra* note 20, at 2136.

<sup>27</sup> DAVIS, *supra* note 25, at 5.

<sup>28</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923 (2006); Baughman & Wright, *supra* note 22, at 1139; Miller & Wright, *supra* note 24, at 399. But see Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 484 (2020) (discussing instances when prosecutors issue statements about their declinations).

<sup>29</sup> Researchers have also identified two questions that prosecutors ask themselves when making decisions. BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT*, at iii (2012) (“‘Can I prove the case?’ and ‘Should I prove the case?’”).

<sup>30</sup> Stephanie Holmes Didwania, *Gender Favoritism Among Criminal Prosecutors*, 65 J.L. & ECON. 77, 78 (2022) (discussing the role of gender disparities in criminal prosecutions); Daniel Brice Baker & Shahidul Hassan, *Gender and Prosecutorial Discretion: An Empirical Assessment*, 31 J. PUB. ADMIN. RSCH. & THEORY 73, 73–74 (2021) (exploring the influence of gender bias on prosecutorial discretion).

<sup>31</sup> Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (discussing how implicit racial bias may affect the prosecutorial process); Nick Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7 RACE & JUST. 7, 9 (2017) (discussing the same).

<sup>32</sup> MOA LIDÉN, *CONFIRMATION BIAS IN CRIMINAL CASES* 6–7 (2023) (explaining confirmation bias and why it occurs); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–08 (2006) (arguing that confirmation bias can lead to tunnel vision); Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 HOFSTRA L. REV. 451, 459 (2016) (arguing the same).

<sup>33</sup> Anchoring bias refers to the tendency for people's judgments to be overly influenced by a starting reference point (or “anchor”) and then adjusting up or down from that number. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013).

collection challenges.<sup>34</sup> Indeed, “there is precious little empirical research on how prosecutors exercise their breathtaking discretion.”<sup>35</sup> Data that do exist are often localized, incomplete, anecdotal, and outdated.<sup>36</sup> “[P]rosecutors are nearly impossible to study.”<sup>37</sup> It takes “[a]n unusual alignment of the stars . . . to peer into the black box . . . [and] watch prosecutorial decisionmaking at work.”<sup>38</sup>

This study aims to remedy that gap by combining a qualitative methodology called the Listening Guide with thematic analysis to understand discretion. Influenced by the methodological innovations of Piaget and Freud,<sup>39</sup> the Listening Guide is a method of psychological inquiry whose purpose is to answer questions of “psychological logic” and uncover what is happening on a person’s inner landscape. Over the last four decades, the methodology has matured into a well-accepted qualitative approach, applied in disciplines across the social sciences and humanities.<sup>40</sup> Through a series of “listenings” applied to narrative data, the method attunes researchers’ focus to both conscious and unconscious manifestations of a person’s psyche—focusing attention on both what is said and what is *not* said, and *how* it is said.<sup>41</sup> Given the multifaceted and often hidden nature of discretion, this approach appears especially promising for making discoveries about prosecutorial decision-making.

To uncover previously unaccounted-for influences on a prosecutor’s discretion, I used the Listening Guide’s discovery-based approach to

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<sup>34</sup> See Richard D. Hartley & Rob Tillyer, *Examining Prosecutorial Discretion in Federal Criminal Cases: Legal and Extra-Legal Determinants of Declination and Charge Change Decisions*, 35 JUST. Q. 1195, 1196 (2018) (discussing factors of prosecutorial decision-making that make research challenging).

<sup>35</sup> Wright, Baughman & Robertson, *supra* note 20, at 2136; *see also* Baughman & Wright, *supra* note 22, at 1130–31:

[W]e have the answers to so few of the basic questions about how prosecutors make decisions. For instance, how many charges on average does a prosecutor charge for a single incident? How often do prosecutors decline to charge when they have evidence to do so? When do they impose a fine or incarcerate an individual? Under what circumstances does a prosecutor charge a felony or misdemeanor? . . . Without an understanding of how prosecutors make decisions, it is difficult to create a cogent theory to understand prosecutors or mass incarceration.

<sup>36</sup> Baughman & Wright, *supra* note 22, at 1130, 1147; *see also* Wright, Levine & Miller, *supra* note 22, at 27, 29 (explaining the difficulties of using traditional methodologies to study prosecutors and the need to go “beyond the limited lessons one can draw from reported appellate opinions and anecdotes from practitioners”).

<sup>37</sup> Baughman & Wright, *supra* note 22, at 1131.

<sup>38</sup> Miller & Wright, *supra* note 20, at 129.

<sup>39</sup> Carol Gilligan, *Introduction: The Listening Guide Method of Psychological Inquiry*, 2 QUALITATIVE PSYCH. 69, 69 (2015) (explaining that the Listening Guide approach was influenced by the “methodological innovations of Freud and Piaget”).

<sup>40</sup> An American Psychological Association research journal recently devoted an entire issue to the Listening Guide methodology, showcasing examples of its application across a variety of settings. *See* Carol Gilligan & Jessica Eddy, *Introduction: The Listening Guide: Replacing Judgment With Curiosity*, 8 QUALITATIVE PSYCH. 141, 142–43 (2021) (introducing the Listening Guide methodology and its various research applications).

<sup>41</sup> *See infra* Part I.A.

conduct in-depth interviews with fourteen prosecutors from around the country. I then used thematic analysis to analyze their interview transcripts. The results of this exploratory study surfaced an influence on prosecutorial discretion that has previously been absent from the literature: stress. Prosecutors' individual stress responses appear to affect their performance and decision-making.

According to these theories, people "appraise" stressful situations as either challenges or threats. They do this (usually unconsciously) by evaluating the demands of the situation against the resources they have available to cope with it.<sup>42</sup> When resources are perceived as outweighing demands, people experience challenge states. When demands outweigh resources, they experience threat states. Each psychological state triggers a cascade of biological, cognitive, emotional, and behavioral responses. Challenge states lead to improved performance, more accurate decision-making, and facilitative emotions. Threat states lead to impaired decision-making, debilitating emotions, and poorer health outcomes.<sup>43</sup>

The impact of these mental states on the criminal justice system is profound. Prosecutors who respond to stress with a challenge state tend to invite better criminal justice outcomes: clear-headed thinking, wiser choices, and, in some cases, better treatment of others. Prosecutors who respond with threat states risk compromising criminal justice outcomes: increasing the likelihood of bias, mistakes, abrasive behavior, and prosecutorial burnout. These theories carry particular relevance for trial work, which prosecutors reported being far and away the most stressful aspect of their work. Unlike challenge states, threat states predispose prosecutors to plead cases instead of going to trial.

While stress responses ultimately occur at an individual level, prosecutor office cultures and internal policies undeniably influence whether prosecutors experience threat or challenge states. The interview data indicate that offices with collegial work environments, supportive managers, and manageable workloads all promote challenge states. Those without these characteristics facilitate threat states.

This Article begins in Part I by describing the Listening Guide methodology and the parameters of the interview study. Part II then reviews the science of threat and challenge states. Part III applies this science to the work of a prosecutor, presenting interview evidence of how threat and challenge states play out in the daily lives of prosecutors. Part IV discusses the implications of threat and challenge states for the criminal justice system. Part V concludes by identifying structural strategies for facilitating challenge responses instead of threat responses.

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<sup>42</sup> Resources could be material, social, psychological, or physical.

<sup>43</sup> See *infra* Part II.

## I. EMPIRICAL STUDY

To understand how prosecutors use their discretion, we need a research method designed to access their inner world. Traditional sources of legal scholarship (e.g., court outcome data, statutes, cases) usually fall short of this task. Other quantitative and qualitative research methods, like field studies and surveys, have made inroads<sup>44</sup>—but they too have drawbacks and are not explicitly designed to reveal psychological logic.

Scholars have noted that “the prosecutor’s own account might be the best available source” for understanding discretion.<sup>45</sup> Interviews and other narrative data from prosecutors themselves are promising sources for unpacking prosecutorial discretion.

I therefore selected interviews as my primary data source for understanding how prosecutors use their discretion. In designing and conducting the interviews, I relied on the Listening Guide, a methodology intended to uncover what is happening on a person’s inner landscape.<sup>46</sup> I then used thematic analysis to code the interviews and surface findings from it. I begin with a description of the Listening Guide in Part A and then explain the parameters of this research study in Part B. Part C gives an overview of the major surprises surfaced during the analysis of the interview transcripts.

### A. *The Listening Guide*

First developed by Carol Gilligan and Lyn Mikel Brown in the 1980s, the Listening Guide offers researchers a systematic approach to discovering another person’s psyche.<sup>47</sup> Shaped by the methodological innovations of Piaget and Freud,<sup>48</sup> the Listening Guide is a method of psychological inquiry. Its purpose is to answer questions of psychological logic and uncover what is happening on a person’s inner landscape. It requires researchers to engage in “radical listening”<sup>49</sup>—listening that pays attention to what is being said and what is *not* being said, i.e., listening that tunes into how interviewees speak and how cultural context affects the narrative being told. The Listening Guide is both a methodology and a method—a “logic of working” and a “way of working.”<sup>50</sup> Its purpose is not to test hypotheses but

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<sup>44</sup> See Wright, Baughman & Robertson, *supra* note 20, at 2157 (describing a national survey administered to prosecutors); Miller & Wright, *supra* note 20, at 129–30 (noting field studies performed in prosecutors’ offices in several major American cities).

<sup>45</sup> Wright, Levine & Miller, *supra* note 22, at 45.

<sup>46</sup> See *infra* notes 47–63.

<sup>47</sup> For details on how the methodology was developed, see LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS: WOMEN’S PSYCHOLOGY AND GIRLS’ DEVELOPMENT 2–3 (1992).

<sup>48</sup> Gilligan, *supra* note 39, at 69.

<sup>49</sup> Gilligan & Eddy, *supra* note 40, at 141.

<sup>50</sup> *Id.*

to make genuinely new psychological discoveries. It facilitates uncovering the “psychological logic” of a person’s inner world.<sup>51</sup>

The Listening Guide is voice-centered. It assumes that the human voice provides evidence of intentional, conscious choices (e.g., a speaker’s decision to use certain words, with a certain tone, at a certain pitch). It also assumes that voice reflects unconscious experience: it contains stutters, pauses, slips, changes in volume, hesitations, sighs, and stumbles that offer clues of unconscious mental processes at work.<sup>52</sup> By listening to both the surface (what is spoken) and what lies beneath (how the telling occurs), researchers find entry points into the psyche of another person.<sup>53</sup>

The Listening Guide directs interviewers to pay attention to elements that may lead to discovery. In conducting interviews, researchers are trained to follow their curiosity when asking follow-up questions, to pay attention to emotional hotspots, to notice, and inquire into surprising statements.<sup>54</sup> They are taught to listen for key phrases that signal honesty or psychological tension. They approach interviewees from a humble place of “not knowing” and identify relational dynamics that may affect the interview.<sup>55</sup> They write up their reactions after each interview, noting and interrogating their reactions, judgments, and feelings about what was shared.

Once the interviews are completed and transcribed, the Listening Guide directs researchers to engage in a series of close “listenings” (or readings) of the transcript.<sup>56</sup> The first step involves listening to the story told by the interviewee or narrator—the “who, what, when, where and why” of the story.<sup>57</sup> Researchers write narrative summaries describing each interview, using direct quotes to stay close to the narrative data. The second step pays attention to how interviewees speak about themselves. Researchers identify and circle each “I” pronoun and the verb that directly follows it (“I think. . .

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<sup>51</sup> Gilligan, *supra* note 39, at 74; *see also* Deborah L. Tolman & James Christopher Head, *Opening the Black Box: A Primer for the Listening Guide Method of Narrative Inquiry*, 8 *QUALITATIVE PSYCH.* 152, 153 (2021) (calling the Listening Guide “an interpretive approach focused on illuminating the psychological processes and psychological logic of the people who share their stories with us”).

<sup>52</sup> Tolman & Head, *supra* note 51, at 155 (“[Voicing] carries pauses, slips, and stumbles that can indicate how multivocal discourse and cultural speech practices are negotiated *in process and not always consciously*. It is the focus on the psychic process that makes the [Listening Guide] so powerful and distinct . . .”) (emphasis in original).

<sup>53</sup> *Id.*

<sup>54</sup> Gilligan, *supra* note 39, at 144 (discussing the role curiosity plays in the Listening Guide).

<sup>55</sup> *See* Gilligan, *supra* note 39, at 69 (describing the rationale behind “not knowing”); Lyn Mikel Brown & Carol Gilligan, *Meeting at the Crossroads: Women’s Psychology and Girls’ Development*, 3 *FEMINISM & PSYCH.* 11, 15 (1993); *see also* BROWN & GILLIGAN, *supra* note 47 at 30 (describing the consequences of “not knowing.”).

<sup>56</sup> “Each of these steps is called a ‘listening’ rather than a ‘reading,’ because the process of listening requires the active participation on the part of both the teller and the listener.” Carol Gilligan, Renée Spencer, M. Katherine Weinberg & Tatiana Bertsch, *On the Listening Guide: A Voice-Centered Relational Method*, in *QUALITATIVE RESEARCH IN PSYCHOLOGY: EXPANDING PERSPECTIVES IN METHODOLOGY AND DESIGN* 157, 159 (Paul M. Camic, Jean E. Rhodes & Lucy Yardley eds., 2003).

<sup>57</sup> Brown & Gilligan, *supra* note 55, at 15.

I did . . . I said”), tracing how interviewees speak about themselves and how they see themselves.<sup>58</sup> The third step directs the researcher to listen for voices or themes that speak to the researcher’s question.<sup>59</sup> The fourth step is called “assembling the evidence”: at this point, the researcher brings together all that has been learned about the research question and starts making sense of patterns in the text.<sup>60</sup> The final step involves composing an analysis. The researcher develops an interpretation of the narrative and answers the research question through a well-supported interpretation of psychological logic.<sup>61</sup>

In practice, the Listening Guide has been used to analyze Supreme Court opinions, interview transcripts, letters, diaries, focus group discussions, and literary texts.<sup>62</sup> It can be used on any text that contains a first-person voice (or any text where a first-person voice would be expected). It pairs particularly well with the use of semi-structured interviews.<sup>63</sup> Given its focus on uncovering psychological logic, the Listening Guide appears to be an especially promising methodology for understanding how people make decisions. It is therefore particularly well suited for examining the study of prosecutorial discretion. I now describe the particulars of this empirical study.

### B. *Study Design*

The purpose of this study was to discover previously overlooked influences on prosecutorial discretion and behavior. To accomplish this aim, the study uses the Listening Guide methodology combined with thematic analysis to analyze interview transcripts with fourteen prosecutors from across the country. I conducted each interview using a semi-structured format and following the Listening Guide’s discovery-based approach to interviewing.<sup>64</sup>

The prosecutors selected for study came from a mix of backgrounds and experience levels. They were drawn from a non-probabilistic convenience sample of prosecutors from across the East Coast, South, Midwest, Intermountain West, and West Coast, from offices in urban, suburban, and rural jurisdictions. Six interviewees were women and six were people of

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<sup>58</sup> See NIOBE WAY, *DEEP SECRETS: BOYS’ FRIENDSHIPS AND THE CRISIS OF CONNECTION* 85–86 (2011) (discussing how researchers look for patterns and tensions in the “I voice” at this step, noting its distinctive rhythms, qualities, and tenor).

<sup>59</sup> See Tolman & Head, *supra* note 51, at 158 (explaining the method of going through the text and listening for voices).

<sup>60</sup> See *id.* (describing the process of assembling the evidence and finding patterns within it); see, e.g., CAROL GILLIGAN & NAOMI SNIDER, *WHY DOES PATRIARCHY PERSIST?* 16 (2018) (describing the summary analysis conducted on the behaviors witnessed).

<sup>61</sup> See Tolman & Head, *supra* note 51, at 158 (discussing steps to understand psychological logic).

<sup>62</sup> Gilligan, *supra* note 39, at 71.

<sup>63</sup> WAY, *supra* note 58, at 79 (explaining semi-structured interviews as a way to encourage the interviewee to explore relevant topics not on protocol).

<sup>64</sup> See generally Gilligan & Eddy, *supra* note 40 (discussing the Listening Guide method); Tolman & Head, *supra* note 51, at 156 (discussing semi-structured interviewing).

color. All fourteen participants had worked in county-level prosecutor offices; two had also worked as federal criminal prosecutors. They reported having worked across a range of units, including misdemeanor, felony, trial, public corruption, domestic violence, special victims, property, violent felony, gang, narcotics, murder, firearms, arson, and appellate units. Interviews lasted between one and two hours and were conducted either in person or on Zoom. All interviews were audio recorded and later transcribed.

In the context of a Listening Guide study, fourteen in-depth interviews are considered more than sufficient to achieve this study's purposes.<sup>65</sup> The fourteen interviewees selected for study are not necessarily representative of all prosecutors in general. They do not constitute a statistically representative sample—nor were they intended to. I instead sought to gather a range of prosecutor perspectives from a variety of backgrounds. As is typical with the Listening Guide, the purpose of the research inquiry is to make genuine *psychological discoveries*, not to conduct hypothesis testing (which would require a larger sample). By using a discovery-based approach and listening deeply to a small subset of prosecutors, we can unearth important discoveries that other methodologies do not generate. While the Listening Guide does not claim statistical representation, it asserts that the insights generated from this type of in-depth approach carry important empirical and theoretical implications.

In step with the Listening Guide, I conducted each interview and reviewed the data through a series of "listening." Noticing certain themes in the data, I employed thematic analysis to further explore recurring patterns. Unlike the Listening Guide, thematic analysis is "*only* a method of data analysis, rather than being an approach to conducting qualitative research."<sup>66</sup> Thematic analysis a flexible, accessible method that in this case paired well with the Listening Guide's overall orientation to qualitative research and interviewing. Using thematic analysis, I conducted a systemic analysis of the data through coding. Staying close to the content of the data, I coded and interpreted each transcript, labeling features of the data that were relevant to the research

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<sup>65</sup> In qualitative research, sample size considerations are guided by standards of thematic saturation and analytic depth, not statistical power analysis. Evidence suggests that interview projects reach thematic saturation—where no new themes in the data appear—after twelve to twenty interviews. See Greg Guest, Arwen Bunce & Laura Johnson, *How Many Interviews Are Enough? An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 74 (2006) (finding that ninety-two percent of themes were identified within the first twelve interviews). Jill J. Francis, Marie Johnston, Clare Robertson, Liz Glidewell, Vikki Entwistle, Martin P. Eccles & Jeremy M. Grimshaw, *What is an Adequate Sample Size? Operationalising Data Saturation for Theory-Based Interview Studies*, 25 *PSYCH. & HEALTH* 1229, 1229 (2010) (reporting that data saturation was achieved after seventeen interviews).

<sup>66</sup> Virginia Braun & Victoria Clarke, *Thematic Analysis*, in *APA HANDBOOK OF RESEARCH METHODS IN PSYCHOLOGY: VOL. 2, RESEARCH DESIGNS* 57, 58 (H. Cooper, ed., 2012) (emphasis in original).

inquiry. I then identified themes that emerged from the data.<sup>67</sup> Using a deductive approach,<sup>68</sup> I drew on concepts from relevant psychological theories to inform my coding and terminology choices. The next section describes key learnings and themes that emerged from this process.

### C. *Conflicting Responses to Stress*

The study revealed that prosecutors' "stress response" appears to influence their performance and decision-making, for better or for worse. Some prosecutors reported responding to stress in a way that improved their focus, accuracy, and decision-making abilities.<sup>69</sup> Other prosecutors' reactions to stress led to poor choices, less professional behavior, and worse health outcomes. At times the same person exhibited a helpful response to stress in certain situations, and an unhelpful one in other situations. Whether unconscious or conscious, these stress responses appeared to impact prosecutors' cases and job performance, with serious potential implications for the criminal justice system.

To begin accessing their inner worlds, I asked prosecutors at the outset of each interview to describe what it was like to have their job. Half of the interviewees answered by describing the stressful nature of their work.<sup>70</sup> "It's stressful . . . . That's the first word that comes to mind."<sup>71</sup> "It's stressful. It's really stressful. . . . [E]very day you don't know what's [going to] happen. . . . [Y]ou are constantly juggling fifty balls in the air and just trying not to drop them . . . ."<sup>72</sup> "It is stressful, because if you lose a trial or make mistakes in a case, someone potentially walks who did something bad and you have a victim that didn't get justice."<sup>73</sup> Stress loomed large on their psychological landscape.

I then asked interviewees follow-up questions about their stress, to develop a more nuanced picture of how they experienced stress and whether it affected discretion or performance. I also asked questions about their

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<sup>67</sup> Themes capture "something important about the data in relation to the research question, and represent[] some level of patterned response or meaning within the data set." *Id.* at 63 (emphasis omitted) (internal quotation marks omitted). Researchers immerse themselves in the data and go through the data several times to identify themes.

<sup>68</sup> Researchers using thematic analysis can either rely on theory (a deductive approach) or the data itself (an inductive approach) when defining and naming the themes and codes that emerge. In my case, I reviewed the literature on threat and challenge states while coding to identify salient features of the theory that appeared in the transcripts.

<sup>69</sup> Note that this study examines stress based on interviewees' retrospective recall. Post-hoc appraisals of stressful situations can give a sense of a person's experience of that stressor, but may differ from real-time biological assessments of threat and challenge. Further research can use more precise tools (including electrocardiographic equipment) to measure prosecutors' moment-by-moment experiences of threat and challenge during performance tasks.

<sup>70</sup> Interviews with 110, 115, 130, 135, 145, 150, 170.

<sup>71</sup> Interview with 130.

<sup>72</sup> Interview with 110.

<sup>73</sup> Interview with 115.

decision-making, charging practices, office structure, office policies, and work culture.

As prosecutors spoke about their stress, a conflict emerged: at times, they described it as debilitating and harmful, and yet other times it was beneficial—even *enjoyable*. This surprised me. These conflicting, varied responses were seen across the group of interviewees: some prosecutors tended to speak of the stress disparagingly, while others framed it in favorable terms.<sup>74</sup> These differences were also seen within single interviewees. The same prosecutor exhibited a facilitative response to stress in one situation, but a debilitating reaction in another. One prosecutor explained that sometimes stress made her panic; other times, it led her to problem solve.<sup>75</sup> Another prosecutor pointed out all the stressful parts of the job he would gladly do without, but simultaneously exhibited a distinctive, animated voice of excitement when describing the high he felt at trial.<sup>76</sup>

To make sense of these varying stress responses, I looked for trends across the interview data—and searched for a theory to explain them. What emerged from the interview data was a pattern that mirrored psychology’s cognitive appraisal theory. According to this theory, people facing stressful situations make a series of unconscious evaluations about their stressors. If they perceive the demands of the situation to outweigh their resources for coping with it, they experience a “threat response.”<sup>77</sup> If they instead believe that their resources for coping with the situation outweigh the demands, they experience a “challenge response.”<sup>78</sup> Challenge responses lead to improved performance and decision-making. Threat responses lead to worse performance and decision-making.

The interview data closely matched the theory, suggesting that this threat-challenge dynamic occurs frequently in the life of a prosecutor. The interview narratives further elucidated specific ways that stress responses affected prosecutors and their behavior—with significant implications for their cases and the criminal justice system generally. I now summarize the literature on cognitive appraisal theory and its more modern variant, the biopsychosocial model of challenge and threat, before turning to the interview evidence and describing how these theories play out in the daily work of prosecutors.

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<sup>74</sup> As one interviewee explained, “people are different, people experience [stress] to different levels and [in] different ways, and the way they cope with it is different. . . . I did see how different [prosecutors] experienced and coped with stress differently . . . .” Interview with 170.

<sup>75</sup> Interview with 150.

<sup>76</sup> Interview with 125.

<sup>77</sup> Jeremy P. Jamieson, *Challenge and Threat Appraisals*, in HANDBOOK OF COMPETENCE AND MOTIVATION 175, 177 (Andrew J. Elliot, Carol S. Dweck & David S. Yeager eds., 2d ed. 2017).

<sup>78</sup> *Id.*

## II. THE SCIENCE OF THREAT AND CHALLENGE

### A. Cognitive Appraisal Theory

In 1984, psychologists Lazarus and Folkman introduced the theory of cognitive appraisal. Their seminal work, *Stress, Appraisal, and Coping*, proposes that people categorize stressful situations as either threatening or challenging.<sup>79</sup> Threats are stressors that people “appraise” to involve some potential loss or harm.<sup>80</sup> When people perceive a situation as threatening, their mental state centers on the harm that they believe will follow from the situation.<sup>81</sup> Conversely, challenges are stressors appraised as beneficial, with the opportunity for growth, mastery, or gain.<sup>82</sup> When people perceive a stressor to be challenging, their mental state centers on the positive rewards or growth gained because of the encounter, despite some risk of harm.

Lazarus and Folkman outlined two cognitive processes that determine whether a person considers a stressful situation to be a threat or a challenge. The first process (the “primary appraisal” stage) assesses what is at stake in the situation at hand—the demands of the situation.<sup>83</sup> The mind instinctively evaluates the situation as it relates to the person’s goals, values, and beliefs, and asks: “What is required here? Am I in trouble? Am I okay? Will I be benefited by this, now or in the future?”<sup>84</sup>

The second process (“secondary appraisal” stage) examines the resources available for coping with the situation. The mind at this stage reflexively asks: “Can I cope with the situation? What can I do? What resources do I have available to deal with this? Can I handle this?”<sup>85</sup> This secondary stage assesses a person’s physical, social, material, and psychological resources available for addressing the stressful situation.

The interaction of these two evaluations determines whether a person perceives a stressor to be a threat or a challenge. If the perceived demands of the situation exceed the resources available to cope, the person experiences a threat state. If resources available exceed situational demands, a challenge state ensues.<sup>86</sup> Put another way, threats are stressors a person believes he or she cannot handle. Challenges are stressors a person believes he or she can handle. Situations perceived as high in personal significance

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<sup>79</sup> RICHARD S. LAZARUS & SUSAN FOLKMAN, *STRESS, APPRAISAL AND COPING* 32–34 (1984).

<sup>80</sup> Jamieson, *supra* note 77, at 176.

<sup>81</sup> Sarah Warren, *Good vs. Bad Stress: The Critical Difference Between Challenge and Threat*, SOMATIC MOVEMENT CTR. (Dec. 4, 2019), <https://somaticmovementcenter.com/challenge-threat-stress-response/>.

<sup>82</sup> Richard S. Lazarus, *Progress on a Cognitive-Motivational-Relational Theory of Emotion*, 46 AM. PSYCH. 819, 822, 826–827 (1991).

<sup>83</sup> Sophie Berjot & Nicolas Gillet, *Stress and Coping with Discrimination and Stigmatization*, 2 FRONTIERS PSYCH. 1, 2–3 (2011) (describing Lazarus and Folkman’s cognitive appraisal stages).

<sup>84</sup> LAZARUS & FOLKMAN, *supra* note 79, at 31.

<sup>85</sup> *Id.* at 33.

<sup>86</sup> Jamieson, *supra* note 77, at 177.

but low in controllability are typically appraised as threats. Situations perceived as high in personal significance and high in controllability are more likely seen as challenges.<sup>87</sup>

According to Lazarus and Folkman, these processes occur continuously: all throughout waking life, the brain instinctively categorizes daily encounters as threatening or challenging.<sup>88</sup> They are usually unconscious processes, though they can be made conscious.

Because people appraise stressful situations differently, the same stressor may prompt a threat state in some individuals and a challenge state in others. Appraisals are influenced by age, upbringing, beliefs, values, goals, skills, expertise, trauma, culture, context, education, relationships, social status, and past experience.<sup>89</sup> It is not a stressful event itself that triggers a threat or challenge state but the mind's *interpretation* of the event that determines whether a person experiences a threat or a challenge. Threats do not need to be real to be experienced. A person need only perceive a situation as threatening, regardless of whether the threat actually exists.

### B. Modern Developments

Since Lazarus and Folkman, scientists have refined our understanding of the appraisal process. Scholars today refer to the biopsychosocial (BPS) model of challenge and threat—a theoretical combination of Lazarus and Folkman's work with the research of Dienstbier, a psychologist who sought to ground mental states in physiological responses.<sup>90</sup>

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<sup>87</sup> Susan Folkman, *Stress: Appraisal and Coping*, in *ENCYCLOPEDIA OF BEHAVIORAL MEDICINE* 1697, 1913 (M.D. Gellman & J.R. Turner eds., 2013).

<sup>88</sup> LAZARUS & FOLKMAN, *supra* note 79, at 32–33.

<sup>89</sup> See, e.g., Kimberly Matheson, Mindi D. Foster, Amy Bombay, Robyn J. McQuaid & Hymie Anisman, *Traumatic Experiences, Perceived Discrimination, and Psychological Distress Among Members of Various Socially Marginalized Groups*, 10 *FRONTIERS PSYCH.* 1, 2, 4–7 (2019) (explaining how factors including age, religious beliefs, and education, influence whether a person experiences a stressor as a threat or a challenge); Gila Cohen Zilka, Ilan Daniels Rahini & Revital Cohen, *Sense of Challenge, Threat, Self-Efficacy, and Motivation of Students Learning in Virtual and Blended Courses*, 33 *AM. J. DISTANCE EDUC.* 2, 3, 8 (2019) (explaining the same); Jamieson, *supra* note 77, at 177 (asserting that threat or challenge depends on “appraisals of situational demands”); Freida Hopkins Outlaw, *Stress and Coping: The Influence of Racism on the Cognitive Appraisal Processing of African Americans*, 14 *ISSUES MENTAL HEALTH NURSING* 399, 400–01, 403, 407 (1993) (identifying racism as a “major stressor on the cognitive appraisals of African Americans”); Wendy Berry Mendes, Jim Blascovich, Brenda Major & Mark Seery, *Challenge and Threat Responses During Downward and Upward Social Comparisons*, 31 *EUR. J. SOC. PSYCH.* 477, 479–80 (2001) (explaining how outside factors can influence challenge and threat responses); Rodney Clark, Norman B. Anderson, Vernessa R. Clark & David R. Williams, *Racism as a Stressor for African Americans: A Biopsychosocial Model*, 54 *AM. PSYCH.* 805, 807 (1999); Sierk A. Horn, *Non-English Nativeness as Stigma in Academic Settings*, 16 *ACAD. MGMT. LEARNING & EDUC.* 579, 581–83 (2017); Karen van der Zee, Verónica Jan Benet-Martínez & Pieter van Oudenhoven, *Personality and Acculturation*, in *CAMBRIDGE HANDBOOK OF ACCULTURATION PSYCHOLOGY* 50, 51–52 (David L. Sam & John W. Berry eds., 2d ed. 2016).

<sup>90</sup> Jim Blascovich, *Challenge and Threat*, in *HANDBOOK OF APPROACH AND AVOIDANCE MOTIVATION* 431, 433 (Andrew J. Elliot ed., 2008).

The BPS model posits that challenge or threat states occur in response to any “motivated performance situation”—a goal-oriented situation that requires ongoing mental effort and active engagement to succeed.<sup>91</sup> Like Lazarus and Folkman’s stressors, motivated performance situations are commonplace. Examples include a competition, a job interview, a school exam, public speaking, or an interpersonal interaction.<sup>92</sup>

According to the BPS model of challenge and threat, the way a person appraises a situation determines the physiological response that follows.<sup>93</sup> Scientists have traced the impacts of challenge and threat mental states on the body, finding that the two prompt very different physical responses: threat appraisals trigger negative, damaging effects for the mind and body, while challenge appraisals generate more beneficial effects.

More specifically, when a person perceives a situation as threatening, the body’s fight-or-flight response activates. Adrenaline flows into the bloodstream, causing the body’s heart rate to increase slightly. Cortisol levels increase. A condition known as vascular resistance begins, restricting the amount of blood flow traveling to the brain and muscles. Even though a person’s heart rate increases somewhat, constricting blood vessels limit the flow of oxygen delivered to the brain.<sup>94</sup>

In this state, thinking and decision-making become impaired.<sup>95</sup> A person’s attention becomes biased towards negative information. The rational thinking sections of the brain often become “hijacked” or “flooded” by strong emotions like fear and anxiety that accompany the threat appraisal.<sup>96</sup> A person in this situation “can neither hear what is said without distortion, nor respond with clarity; thinking becomes muddled and the most ready responses are primitive ones—anything that will end the encounter quickly.”<sup>97</sup>

Once the stressor is overcome, the body’s threat-defense system begins to recover. Heart rate and blood pressure normalize. Over time, the body’s hormone levels readjust to a pre-threat state.

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<sup>91</sup> Sarah Beth Hunter, *Performance Under Pressure: The Impact of Challenge and Threat States on Information Processing 3* (Mar. 2000) (Ph.D. dissertation, University of California Santa Barbara) (ProQuest). The goal in any motivated performance situation must be self-relevant or personally important in some way. It may be considered self-relevant for tangible reasons (e.g., when there is a financial incentive) or for intangible reasons (e.g., when it could affect self-esteem). Motivated performance situations lead to a psychological state of “task engagement.” Task engagement is a prerequisite for challenge and threat states. Without a self-relevant goal and subsequent task engagement, challenge and threat states do not occur. See Mark D. Seery, *The Biopsychosocial Model of Challenge and Threat: Using the Heart to Measure the Mind*, 9 SOC. & PERSONALITY PSYCH. COMPASS 637, 638 (2013) (“The BPS applies to the context of *motivated performance situations*, in which individuals must actively perform instrumental responses to reach a goal that is self-relevant or important in some way.”).

<sup>92</sup> Seery, *supra* note 91, at 638.

<sup>93</sup> Jamieson, *supra* note 77, at 177–78.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> DANIEL GOLEMAN, RICHARD BOYATZIS & ANNIE MCKEE, *PRIMAL LEADERSHIP: UNLEASHING THE POWER OF EMOTIONAL INTELLIGENCE* 22, 28 (2013).

<sup>97</sup> *Id.* at 22.

If the stressor is not overcome, or if the threat continues, the body can remain stuck in threat response mode. Especially when a person views everyday situations as threatening or when a person ruminates on threats experienced,<sup>98</sup> the body's threat response can trigger repeatedly, causing a condition called chronic threat response. Chronic threat response leads to serious mental and physical illness, including depression, anxiety, ulcers, and cardiovascular disease.<sup>99</sup> Lacking recovery time between threatening situations, blood vessels stay constricted while heart rates remain high, elevating the risk of heart attack or stroke.<sup>100</sup> People in this condition suffer from weakened immune systems<sup>101</sup> and accelerated levels of cognitive decline.<sup>102</sup>

Challenge appraisals trigger very different physical responses. When a person perceives a situation as a challenge instead of a threat, the body's fight-or-flight system activates, but adrenaline increases more significantly than it does in a threat state, and heart rate increases more quickly. Only a small amount of cortisol is released; blood vessels dilate freely, sending more oxygen to the brain and muscles.<sup>103</sup> With this added oxygen, a person's coordination, accuracy, and concentration improves. Performance is

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<sup>98</sup> When people worry about what just happened, or ruminate on threats experienced, they can become stuck in threat mode. Biologically, threat states can stick around for up to an hour after an experience, while the cortisol hormone breaks down. But the psychological process of rumination can lead the threat state to extend well beyond that time frame. *See generally* Peggy M. Zoccola & Sally S. Dickerson, *Assessing the Relationship Between Rumination and Cortisol: A Review*, 73 J. PSYCHOSOMATIC RSCH. 1, 2, 6 (2012) (explaining that stress hormones can circulate in the body well after the event or threat was endured).

<sup>99</sup> KRISTIN NEFF & CHRISTOPHER GERMER, THE MINDFUL SELF-COMPASSION WORKBOOK 31 (2018); Christian E. Waugh, Sommer Panage, Wendy Berry Mendes & Ian H. Gotlib, *Cardiovascular and Affective Recovery from Anticipatory Threat*, 84 BIO. PSYCH. 169, 169 (2010). *See generally* ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS (3d ed. 2004) (noting the clinical consensus that certain types of ulcers are caused by stress). Note that there are many steps between an initial threat appraisal and eventual physical illness. The sequence is a long one.

<sup>100</sup> *See* Waugh, Panage, Mendes & Gotlib, *supra* note 99, at 170 (exploring the recovery period after anticipating a stress event).

<sup>101</sup> Jean-Philippe Gouin, Liisa Hantsoo & Janice K. Kiecolt-Glaser, *Immune Dysregulation and Chronic Stress Among Older Adults: A Review*, 15 NEUROIMMUNOMODULATION 251, 251 (2008); Ronald Glaser & Janice K. Kiecolt-Glaser, *Stress-Induced Immune Dysfunction: Implications for Health*, 5 NATURE REVS. IMMUNOLOGY 243, 243 (2005); Alison N. Saul et al., *Chronic Stress and Susceptibility to Skin Cancer*, 97 J. NAT'L CANCER INST. 1760, 1760 (2005); Jennifer N. Morey, Ian A. Boggero, April B. Scott & Suzanne C. Segerstrom, *Current Directions in Stress and Human Immune Function*, 5 CURRENT OP. PSYCH. 13, 13 (2015).

<sup>102</sup> Angela L. Jefferson et al., *Cardiac Index is Associated with Brain Aging: The Framingham Heart Study*, 122 CIRCULATION 690, 690 (2010). People in this situation also age faster. Aoife O'Donovan, A. Janet Tomiyama, Jue Lin, Eli Puterman, Nancy E. Adler, Margaret Kemeny, Owen M. Wolkowitz, Elizabeth H. Blackburn & Elissa S. Epel, *Stress Appraisals and Cellular Aging: A Key Role for Anticipatory Threat in the Relationship Between Psychological Stress and Telomere Length*, 26 BRAIN, BEHAV., & IMMUNITY 573, 573 (2012).

<sup>103</sup> *See* Jamieson, *supra* note 77, at 178 (discussing how a process known as vasodilation occurs at this point, which allows blood vessels to widen, generating more blood to flow through).

enhanced.<sup>104</sup> Task engagement deepens.<sup>105</sup> A person sometimes (but not always) feels positive emotions in this state (including excitement, eagerness, and exhilaration), while anxiety and negative emotions decrease (though they may still be present).<sup>106</sup> The immune system gets a boost,<sup>107</sup> and cell growth increases.<sup>108</sup>

Within a few minutes or hours of the challenge, the body's hormone levels return to normal. Challenge responses are typically short-term; unlike threat responses, they cannot become chronic. Challenge recovery is much faster than threat recovery.<sup>109</sup>

The BPS model sees threats and challenges as anchors on a bipolar continuum; people do not experience only full-blown threat or challenge states, but a range of responses between the two.<sup>110</sup> “Thus by definition, promoting challenge would also reduce threat. As the ratio of perceived resources to demands increases, individuals move along the continuum from threat to challenge.”<sup>111</sup>

Scholars have used the BPS model of challenge and threat to explain performance in a variety of contexts, including in health, sports, education, clinical psychology, and workplace settings.<sup>112</sup> Empirical studies involve

<sup>104</sup> Firdaus S. Dhabhar, *The Short-term Stress Response – Mother Nature's Mechanism for Enhancing Protection and Performance Under Conditions of Threat, Challenge, and Opportunity*, 49 FRONTIERS NEUROENDOCRINOLOGY 175, 175 (2018).

<sup>105</sup> See David W. Putwain, Richard Remedios & Wendy Symes, *Experiencing Fear Appeals as a Challenge or a Threat Influences Attainment Value and Academic Self-Efficacy*, 40 LEARNING & INSTRUCTION 21, 22 (2015) [hereinafter Putwain, Remedios & Symes, *Experiencing Fear Appeals*]; David Putwain, Richard Remedios & Wendy Symes, *The Appraisal of Fear Appeals as Threatening or Challenging: Frequency of Use, Academic Self-Efficacy and Subjective Value*, 36 EDUC. PSYCH. 1670, 1673 (2016) [hereinafter Putwain, Remedios & Symes *The Appraisal of Fear Appeals as Threatening or Challenging*].

<sup>106</sup> Marc Jones, Carla Meijen, Paul Joseph McCarthy & David Sheffield, *A Theory of Challenge and Threat States in Athletes*, 2 INT'L REV. SPORT & EXERCISE PSYCH. 161, 173 (2009); Kathleen Deska Pagana, *Psychometric Evaluation of the Clinical Stress Questionnaire (CSQ)*, 28 J. NURSING EDUC. 169 (1989); Joe Tomaka, Rebecca L. Palacios, Camilla Champion & Stormy Monks, *Development and Validation of an Instrument that Assesses Individual Differences in Threat and Challenge Appraisal*, 7 J. DEPRESSION & ANXIETY (2018).

<sup>107</sup> *Id.*

<sup>108</sup> Alia J. Crum, Modupe Akinola, Ashley Martin & Sean Fath, *The Role of Stress Mindset in Shaping Cognitive, Emotional, and Physiological Responses to Challenging and Threatening Stress*, 30 ANXIETY, STRESS & COPING 379, 380 (2017).

<sup>109</sup> See *supra* note 106.

<sup>110</sup> Jamieson, *supra* note 77, at 177.

<sup>111</sup> Jeremy P. Jamieson, Alia J. Crum, J. Parker Goyer, Marisa E. Marotta & Modupe Akinola, *Optimizing Stress Responses with Reappraisal and Mindset Interventions: An Integrated Model*, 31 ANXIETY, STRESS, & COPING 245, 247 (2018); see also Jeremy P. Jamieson, Brett J. Peters, Emily J. Greenwood & Aaron J. Altose, *Reappraising Stress Arousal Improves Performance and Reduces Evaluation Anxiety in Classroom Exam Situations*, 7 SOC. PSYCH. & PERSONALITY SCI. 579, 579 (2016) (explaining the dynamics of modifying appraisal processes in evaluation contexts).

<sup>112</sup> See, e.g., Mel Fugate, Gregory E. Prussia & Angelo J. Kinicki, *Managing Employee Withdrawal During Organizational Change: The Role of Threat Appraisal*, 38 J. MGMT. 890, 891 (2012) (applying the BPS model to stress in the workplace); Martin J. Turner, Marc V. Jones, David Sheffield & Sophie

both real world contexts and experimental laboratory conditions.<sup>113</sup> I next explore the model's application to prosecutorial performance and discretion in the criminal justice system.

### III. PROSECUTORS AND THREAT/CHALLENGE RESPONSE

The interview data suggest that these two theories play out continually in the work of a prosecutor. I will now chronicle how these theories manifest themselves in a prosecutor's work, using the interview narratives as evidence. I focus primarily on the BPS model of challenge and threat, given its modern additions. I begin in Part A by establishing that prosecutors' work is filled with stressors and motivated performance situations—instances where, by definition, the BPS model of challenge and threat applies. I then examine the two key components of any threat/challenge appraisal: perceived task demands and perceived resources. Part B describes prosecutors' task demands, highlighting three features that augment those demands (the unpredictable, high-stakes, and adversarial nature of the work). Part C reviews the resources prosecutors draw on to cope with those demands. As the BPS model of challenge and threat posits, it is the interplay of these two components—task demands and resources—that determines whether prosecutors view their stressors as threats or challenges. In Part D, I highlight evidence of prosecutors operating in threat states. Part E shares evidence of prosecutors operating in challenge states.

#### A. *Motivated Performance Situations*

Prosecutors experience high levels of stress at work. When asked to describe their job, half of interviewees talked about their job stress.<sup>114</sup> As one prosecutor put it, “the stress level is epic.”<sup>115</sup> For nearly all interviewees, stressful moments were experienced regularly—daily, in many cases.<sup>116</sup> When asked which moments at work felt especially stressful, two thirds of interviewees mentioned trial.<sup>117</sup> The next most frequent stressor was the job's heavy caseload, mentioned by half of interviewees.<sup>118</sup> Other common responses included going to court, “battl[ing]” opposing counsel in an adversarial system, keeping the public safe, and achieving justice.<sup>119</sup>

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L. Cross, *Cardiovascular Indices of Challenge and Threat States Predict Competitive Performance*, 86 INT'L J. PSYCHOPHYSIOLOGY 48, 48 (2012) (examining stressors in work, sports, and academic settings); Putwain, Remedios & Symes, *Experiencing Fear Appeals*, *supra* note 105, at 21 (exploring stressors in academic settings).

<sup>113</sup> See Blascovich, *supra* note 90, at 434.

<sup>114</sup> See *supra* note 70–73 and accompanying text (discussing the interviewees' descriptions of their job-related stress).

<sup>115</sup> Interview with 140.

<sup>116</sup> Interviews with 130, 135, 140, 165, 170.

<sup>117</sup> The stress of trials was mentioned by 105, 110, 115, 120, 130, 145, 160, 165, 170.

<sup>118</sup> Interviewees 105, 115, 130, 135, 140, 155, 170 mentioned the job's heavy caseload.

<sup>119</sup> Interviews with 105, 110, 115, 120, 130, 150, 165.

Interviewees also mentioned the stress of making weighty decisions, not wanting to make mistakes, working with victims and families, dealing with difficult colleagues, and handling the media.<sup>120</sup>

The BPS model of challenge and threat applies whenever the stressor or situation faced constitutes a “motivated performance situation”—any scenario where a person must actively perform to reach a “self-relevant goal.”<sup>121</sup> Nearly all the stressors mentioned in the interviews constitute motivated performance situations. Going to trial, managing a heavy caseload, dealing with opposing counsel—each presents a situation that calls on prosecutors to exert ongoing mental effort and active engagement to succeed. Each is also goal-oriented and self-relevant. Prosecutors spoke frequently about their goals in these situations: to “do the right thing,”<sup>122</sup> “maximize public safety,”<sup>123</sup> “accomplish justice,”<sup>124</sup> “help victims,”<sup>125</sup> “represent the government,”<sup>126</sup> win a conviction,<sup>127</sup> and even avoid incarceration.<sup>128</sup> Other personally important goals at play included maintaining a good reputation,<sup>129</sup> advancing in a career,<sup>130</sup> helping colleagues,<sup>131</sup> making a difference,<sup>132</sup> providing for family,<sup>133</sup> and being true to one’s morals.<sup>134</sup> Each time prosecutors engage in one of these goal-oriented motivated performance situations, we can expect the BPS model of challenge and threat to apply.<sup>135</sup>

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<sup>120</sup> Interviews with 110, 115, 125, 130, 150, 155, 170. Most prosecutors do not work with the media on a regular basis, but a few in this group did.

<sup>121</sup> Self-relevant goals are those that are considered personally important in some way. Not all self-relevant goals constitute motivated performance situations. Watching a desirable movie, for example, may be a self-relevant goal, but it is a “passive goal-relevant situation.” Blascovich, *supra* note 90, at 437. Motivated performance situations require “instrumental actions that can be evaluated by others or the performers themselves. These actions are instrumental in the sense that they are necessary for the performance to continue to completion.” *Id.*

<sup>122</sup> Interviews with 135, 115, 125, 160, 170.

<sup>123</sup> Interviews with 135, 150, 125.

<sup>124</sup> Interviews with 125, 130, 115, 145, 155, 135, 170.

<sup>125</sup> Interviews with 130, 115, 165, 105, 110, 160.

<sup>126</sup> Interviews with 125, 120.

<sup>127</sup> Interviews with 130, 140, 120, 170.

<sup>128</sup> Interviews with 135, 125.

<sup>129</sup> Interviews with 170, 165, 150, 145, 130, 125, 115, 120, 110, 105.

<sup>130</sup> Interviews with 125, 140.

<sup>131</sup> Interviews with 125, 160, 130.

<sup>132</sup> Interviews with 125, 115, 135.

<sup>133</sup> Interview with 140.

<sup>134</sup> Interview with 170.

<sup>135</sup> Interviewees’ own language reinforces this connection. Prosecutors often described their stress by comparing it to settings where the BPS model is frequently applied, such as academic examinations, athletic competitions, or performances. For example: “Before I went to trial, [I’d feel] butterflies in [my] stomach. That kind of feeling of . . . uneasiness, . . . like before you’re going to take a big exam at school.” Interview with 170. “[The stress is] a little bit like being in school . . . and coming up against a deadline for an assignment.” Interview with 120. They also likened it to performing: “[Trial] is like a performance.” Interview with 110. “It’s sort of . . . the same feeling that I felt as a child when I was in

## B. *Task Demands*

The BPS model predicts that the ratio between perceived task demands and perceived resources determines whether a person experiences a situation as a threat or a challenge. If task demands outweigh resources, threat states ensue. If resources outweigh task demands, challenge states occur. I will now review the task demands prosecutors identified in their work, along with factors that affected their evaluation of those demands.

A prosecutor's job is filled with task demands. First and foremost, prosecutors carry the burden of proof in a criminal case—a huge task demand. As one interviewee insinuated, there is a reason they call it a burden of proof: it is a *burden* to carry.<sup>136</sup> “Beyond a reasonable doubt isn't an easy standard . . . It's not easy to prove a criminal case in court.”<sup>137</sup>

To meet this burden of proof, prosecutors find themselves with “a million things to do to get a case together.”<sup>138</sup> They gather evidence, decide what to charge, make bail recommendations, lead pretrial hearings, meet discovery obligations, work with victims, file motions in a timely manner, make sentencing recommendations, and so on.<sup>139</sup> In the rare cases that proceed to trial, the task demands skyrocket<sup>140</sup>: prosecutors further prepare witnesses, assemble evidence, meet with experts, choose jurors, write jury instructions, prepare briefs, deliver arguments, examine and cross-examine. “There's just so many things to think about”<sup>141</sup>—“a lot of moving pieces and moving parts.”<sup>142</sup>

competitive situations. . . . As a young girl . . . I was in dancing and gymnastics . . . During my competitions, I'll be so nervous . . . just the thought of like, oh my God, I have to win this medal. Or I have to do this recital. I have to make sure I do this triple pirouette on point. . . . So you go in there . . . with your heart beating, but then you do fine.” Interview with 165. One interviewee compared it to athletics, a common setting for BPS research: “It's like playing rugby. It's like playing . . . sports. We practice a lot. We train a lot. We prepare a lot. And until we're on the field, it doesn't mean anything. It means something when you step in the courtroom and there's a black robe on the bench . . . now it means something. . . . The stress is on game day. The stress is on . . . when you're going into court. . . . Trials are stressful. . . . that's game day.” Interview with 145.

<sup>136</sup> Interview with 120.

<sup>137</sup> Interview with 130.

<sup>138</sup> Interview with 105.

<sup>139</sup> Interview with 135.

<sup>140</sup> One interviewee compared the experience of learning a case was going to trial instead of pleading out with having a bomb dropped on her: “You think in your mind that the case is gonna plead out, and then all of a sudden the case is on this random trial calendar, that you haven't even prepared for because you thought the case was gonna plead out. It's . . . like a bomb, like a bomb just dropp[ed] on you.” Interview with 165.

<sup>141</sup> Interview with 130.

<sup>142</sup> Interview with 170. One prosecutor compared the burden of proving a case with building a house: “A prosecutor is building a house. You have to start with your foundation. You have to make sure your foundation's solid. You have to make sure your . . . walls are framed up, that you've got solid trusses, that . . . everything is all set up . . . that it makes sense, that it all fits together, that it all works. A defense lawyer is throwing rocks, hoping the windows break. And that's all, that's your only job as a criminal defense lawyer. . . . Because if the windows break, then there's reasonable doubt and you win.

As prosecutors attempt to meet this burden of proof, three features of their work heighten their perception of task demands: the unpredictable nature of the work; the high-stakes nature of the cases; and the adversarial system.

1. *Uncertainty*

The theme of uncertainty featured prominently across the interviews.<sup>143</sup> Much of a prosecutor's work feels outside of his or her control, despite best efforts and prior preparation. Thirteen out of fourteen interviewees mentioned the unpredictable nature of their work, citing uncertainty about scheduling, caseloads, witnesses, judges, juries, sentencing, defense attorneys, defendants, victims, families, and the media.<sup>144</sup> As one mid-level prosecutor from an urban county described:

State court is insane. Everything is unpredictable. The timing [is a mess] . . . your case is going to be on at 10, and it could be 11:30, it could be 12, it could be in the afternoon because someone doesn't show up, and so it's a . . . bit chaotic . . . It's just kind of constant triage. . . . Things are constantly happening . . . it's constantly changing, and it requires just constant flexibility. . . . It's unpredictable and that's the stressful piece.<sup>145</sup>

The unpredictable nature of their work led them to feel a lack of control on a regular basis:

You don't have control. . . . You can't control whether your witnesses show up. You can't control what kind of judge you get. . . . You can't control what [the] defense attorney is gonna be like, . . . how they're going to manage [the] situation. . . . [Y]ou can't control what police officers [are] assigned to your case. You can't control whether or not the police did a good investigation. You can't control whether people are gonna lie to you, which they do all the time. Nothing. You have no control. You can only control what you do, which is like, call people and say, please call me back. . . . What's in your control . . . is very little. Very little.<sup>146</sup>

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. . . As a defense lawyer, I could prepare a murder case in a week. . . . As a prosecutor, I can't prepare a murder [case] in six months. Not if I really want to be prepared." Interview with 145.

<sup>143</sup> Other scholars have noted that uncertainty affects prosecutorial behavior. See Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processings*, 24 *CRIMINOLOGY* 623, 640 (1986) (explaining that prosecutorial discretion is substantially impacted by, among other things, a preference to avoid uncertainty).

<sup>144</sup> Interviews with 105, 110, 115, 120, 125, 130, 135, 145, 150, 155, 160, 165, 170.

<sup>145</sup> Interview with 135.

<sup>146</sup> Interview with 110.

[T]here [are] variables . . . you cannot control. . . . Whether you've put a whole lot of effort in or not . . . you [have] got no control over it. And that's not [a] great feeling for people . . . . It causes stress . . . . That is the most stressful thing—to try a case with all those variables, you try to affect them, but you don't control those variables.<sup>147</sup>

Uncertainty significantly colors how prosecutors view their task demands. The more unpredictable the situation, the greater the task demands. When working with a dependable witness, for example, a prosecutor might consider the task of getting them to come to court relatively simple. But if a witness is unpredictable, the task of getting him or her to show up proves far more difficult.<sup>148</sup> Uncertainty makes perceived tasks more demanding, increasing the likelihood of a threat appraisal.

## 2. *High-Stakes Work*

Prosecutors' perceptions of their task demands were also influenced by the weighty, high-stakes nature of their work. Especially when working on serious felony cases, interviewees understood that their work carried significant consequences for public safety, defendants, victims, and families—and they felt an added sense of pressure as a result. Multiple prosecutors expressed feeling stressed in connection with keeping the community safe: “There [have] been times where I have worried like, we need to do a good job on this trial because this person is dangerous and is somebody that we need to protect the community from, so there is stress associated with that.”<sup>149</sup> “Anytime there's a real public safety concern . . . . Those are more serious cases have [more] stressful elements to them for sure.”<sup>150</sup> Some prosecutors were concerned about being blamed if dangerous defendants stayed in the community and then reoffended.<sup>151</sup> Others, well aware of the collateral consequences of incarceration, felt added stress whenever prison was on the table for a defendant.<sup>152</sup> Even their altruistic

<sup>147</sup> Interview with 155.

<sup>148</sup> Interview with 105 (“The most stressful [thing] was trying to get [witnesses] to come to court. . . . All of them had criminal records. Nobody wanted to testify. I can remember . . . pacing up and down the courtroom hallways, waiting for the witnesses to show up. That was stressful.”).

<sup>149</sup> Interview with 120.

<sup>150</sup> Interview with 135.

<sup>151</sup> See Interview with 130 (“I was stressed that the defendant who I believed was a danger was going to get released, and that is what happened. [The victim] didn't come [to court] . . . and the judge had no choice but to just dismiss it. . . . The last thing I want is to be the prosecutor in the news who's like, ‘guy who rapes woman is now arrested for murder . . . .’ There's always blame that people want to put as to why this dangerous guy is out on the streets.”).

<sup>152</sup> See Interview with 170 (“Deciding whether or not to file a case creates stress. . . . Those are decisions that . . . can make a lot of difference, and have serious consequences. . . . Whichever decision you make has the potential to significantly impact people's lives and our society. You're looking at somebody's life as a defendant . . . . You're looking at somebody's life. You're looking at their potential

aspirations for achieving justice were an added source of stress,<sup>153</sup> increasing the high-stakes nature of their work. As one prosecutor explained,

Your job was to seek justice. . . . You were to do the right thing in every situation. Your dog in the fight was the right thing: justice, justice. And as long as that was your goal, and as long as you kept your eye on that ball, . . . there was stress, . . . there were high stakes, there were some long hours.<sup>154</sup>

All of these elements—concerns for public safety, for defendants’ futures, for doing justice—added to the high-stakes nature of the work. While not every case was high-stakes, those that were significantly increased prosecutors’ perceptions of task demands. The higher the stakes, the greater the task demands. And the greater the task demands, the higher the likelihood of threat perception—unless counterbalanced with an increase in resources. High-stakes work makes threat appraisals more likely.

### 3. *Adversarial Court System*

The competitive, adversarial nature of the court system also influenced interviewees’ perceptions of task demands. Several prosecutors explained that having an opponent in the court system added a level of stress:

You’re competing against someone [on] the other side . . . [which] creates stress . . .<sup>155</sup> because . . . you don’t all hold hands and sing Kumbaya all the time.<sup>156</sup>

You feel sort of like you have to be on all the time. . . . You’re fighting with people, defense attorneys are accusing you of being too hard on certain cases, and they’re potentially lying to you sometimes . . . . It feels like you’re going into battle every day . . . [and that requires] being adversarial even if you don’t wanna be.<sup>157</sup>

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freedom and consequences of being charged with a crime. Depending on the . . . charges in the case, it can seriously impact a person’s life and their family and their friends . . . . The gravity of the decision be impactful. . . . That increases the stress involved in . . . making the decision.”); *see also* Interview with 135 (“One of the biggest stressors that prosecutors feel is [that] we sometimes don’t have a lot of good options. [Our local jail] is not a great option right now, but also sometimes necessary in our cases. . . . Every time incarceration is on the table, it’s stressful. . . . Our job is to protect the public safety and to think about the victims of crime, . . . but also the people who are committing crime. . . . How do we maximize public safety . . . short-term *and* long-term, [given what] we know about the harms of incarceration?”).

<sup>153</sup> *See* Interview with 115 (“If you lose a trial or make mistakes in a case, someone potentially walks who did something bad, and you have a victim [who] didn’t get justice . . . . So it’s pretty high stress.”).

<sup>154</sup> Interview with 170.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Interview with 110.

It's an adversarial system . . . and it's just the structure is that you're always arguing. So . . . the stress rises. . . . It's a conflict-based business, so you're always arguing . . . . Most of us live in a state of mild stress, which spikes regularly. . . . That's where you live.<sup>158</sup>

The adversarial system increased a prosecutor's sense of how demanding his or her responsibilities were. This was especially true for more junior prosecutors: newer prosecutors reported that some defense attorneys took advantage of their naivete and inexperience.<sup>159</sup> Prosecutors' responsibilities felt heavier in the face of a structure that pitted them against defense counsel. Adversarialism increased their perceived task demands, again facilitating threat appraisals.

### C. Resources

To deal with these demanding job tasks, prosecutors drew on a range of resources—including their colleagues, external supports, experience, skill, and the power to dismiss cases. They also noted a key resource that was often absent: time. The interplay between these resources and task demands in turn determines whether prosecutors experience a challenge or a threat state.

The most frequent resource cited by prosecutors for dealing with their large set of task demands was their colleagues.<sup>160</sup> Prosecutors leaned on their colleagues to talk through difficult decisions, to shoulder the emotional burden of prosecution, or, at times, to help take on some of their assigned work:

Talking to colleagues . . . about decisions [helped]. If you had something that was causing a lot of stress, a decision or trial or something, talking to them, getting their input [helped]. . . . If I talked to other prosecutors . . . I felt less stress about the decisions I was making.<sup>161</sup>

While one prosecutor created an informal board of advisors outside of work,<sup>162</sup> most prosecutors leaned on colleagues inside the office for support. Some prosecutors described their relationships with colleagues to be like

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<sup>158</sup> Interview with 115.

<sup>159</sup> Interview with 150 (“Defense attorneys can be really stressful too when they bully you. I feel like I get bullied sometimes by defense counsel when they take advantage of my naivety. . . . I don't appreciate when people know that I'm new. . . . Some counsel will try to take advantage of my naivete and say, 'Hey, can we do this and this?' And I'm like, 'I don't know. . . .' Sometimes I would agree to stuff and then after the fact be like, wait a second . . . that was really rude.”).

<sup>160</sup> See, e.g., Interviews with 110, 115, 120, 130, 150, 155, 170 (discussing their reliance on colleagues as a resource for coping with the stress of the job).

<sup>161</sup> Interview with 170.

<sup>162</sup> See Interview with 155 (explaining that the group consisted of elders, former prosecutors, and judges).

family: “It’s like a family bond. You trust them. They trust you. We are there for each other.”<sup>163</sup>

Interviewees also spoke of non-prosecutorial staff support as a key resource for dealing with daily task demands.<sup>164</sup> Unsurprisingly, those with thorough, reliable investigators and capable legal assistants had an easier time managing certain task demands.<sup>165</sup>

Prosecutors also mentioned supports outside of work as being important in coping with stress.<sup>166</sup> Interviewees turned to physical activity,<sup>167</sup> religion,<sup>168</sup> the outdoors,<sup>169</sup> family,<sup>170</sup> friends,<sup>171</sup> and inspirational sources<sup>172</sup> to handle their stress. Some also engaged in unhealthy behaviors as a means of coping, like excessive drinking and substance use.<sup>173</sup>

Another major resource for managing daily task demands was their own experience. As prosecutors matured, they drew on their growing expertise, knowledge, and skills as a key resource for mitigating task demands. Job experience helped them better anticipate other parties’ reactions to their decisions and provided an expanded base of legal knowledge to use when handling cases. Their experience also taught them strategies for coping with the stress of the job.<sup>174</sup> Importantly, experience also taught them that they could win. Prosecutors win most cases that proceed to trial;<sup>175</sup> unlike defense

<sup>163</sup> Interview with 125.

<sup>164</sup> See, e.g., Interview with 160 (discussing how support staff help attorneys manage daily task demands).

<sup>165</sup> One supervisor made it a point with her prosecutors to emphasize not belittling or putting down the non-lawyers in the office given the invaluable resource they were. Interview with 160 (“It’s the investigators, it’s the legal assistants, it’s the victim advocates [who] are gonna save you. . . . We’re all a team, and they’re gonna make or break you.”).

<sup>166</sup> The supports listed in this paragraph helped prosecutors cope with stress generally. These coping strategies differ from the resources prosecutors draw upon while acting under stress (such as experience and competence) and responding to acute stressors.

<sup>167</sup> E.g., Interviews with 130, 170, 145, 165 (describing activities like hiking, gymnastics, and daily exercise).

<sup>168</sup> E.g., Interviews with 160, 115, 145, 170 (noting their connections to religion and its aid in coping with stress).

<sup>169</sup> E.g., Interview with 145 (describing outdoor activities like caring for horses and gardening that help with stress management).

<sup>170</sup> E.g., Interviews with 150, 135, 170 (describing support they get from loved ones).

<sup>171</sup> E.g., Interviews with 155, 130 (noting that spending time with friends helps them cope with stress).

<sup>172</sup> E.g., Interview with 145 (finding inspiration in maintaining a rose garden).

<sup>173</sup> E.g., Interviews with 155, 140 (describing their reliance on alcohol when dealing with stress).

<sup>174</sup> Interview with 155 (“What I have gotten better at [over the years as a prosecutor] is my response to whatever . . . pressure situations [I’m in]. . . . I may have an initial reaction, and I have learned to just . . . calm down, digest, and then analyze the facts before me . . . . I’ve learned not to react as much, and just meditate, think about it, and . . . [not] communicate until I fully have a full grasp of what’s going on here. I’ve gotten quicker at doing that over the years.”); see also Interview with 150 (“It sounds silly, but I do count to three and breathe deeply. . . . Especially . . . if somebody calls me and I don’t know the answer . . . I’ve learned to say, ‘I’m gonna call you back . . . .’”).

<sup>175</sup> About 90% of all federal criminal cases end in a guilty plea. Nearly 2% of all cases go to trial and receive a guilty verdict. Only 0.4% of cases go to trial and are acquitted. See John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), <https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/> (citing statistics from the federal judiciary for fiscal year 2022).

attorneys, they become used to winning and securing guilty convictions. The knowledge and subsequent confidence that they can succeed in the courtroom—and the accumulation of many wins over the years—constituted important psychological resources upon which prosecutors drew when facing ongoing task demands.

Relatedly, prosecutors' competence constituted another resource to handle task demands. Prosecutors varied in their lawyering abilities and overall competence. Some Assistant District Attorneys ("ADAs") excelled at trial.<sup>176</sup> Others admitted being less capable at trial.<sup>177</sup> Some were exceptionally thoughtful and excelled at working through complicated legal issues.<sup>178</sup> Some were thorough investigators.<sup>179</sup> Others "cut corners," were "slackers," or lacked ability, in the words of one ADA supervisor.<sup>180</sup> Competence was a critical resource prosecutors drew upon when handling task demands.

One resource was discussed frequently but considered in short supply: time. The stress literature considers time to be both a demand and a resource; it is a bipolar factor, affecting both perceived task demands and resources available. Interviewees repeatedly mentioned their lack of time as a major cause of stress. Speedy trial constraints combined with heavy caseloads and understaffed agencies created a situation where prosecutors constantly felt that they lacked time:

I always felt this sense of triage . . . like what do I need to do today? What emergency is happening? . . . It made me very on edge . . . and very rushed all the time. . . . It just made me very high strung and on edge and a bit scared . . . that something terrible was gonna happen. . . . The volume of cases [is] a lot. . . . There's just . . . so much coming at you at once. . . . You're just trying to make sure nothing you do leads to somebody's death essentially. . . . So you feel that pressure.<sup>181</sup>

You feel a lot of time pressure, because once a case has started, you have speedy trial constraints. . . . [In my state], it's unforgiving. . . . You only have [a certain number of] hours to indict the case, or else the person gets out of jail. And so . . . you feel a lot of pressure to make sure that you're able to get that case indicted.<sup>182</sup>

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<sup>176</sup> Interview with 105; *see also* Interview with 110 (discussing how trial experience and skill factored into promotion decisions).

<sup>177</sup> *See, e.g.*, Interview with 110 (admitting that trial skills came more naturally to other colleagues than to herself).

<sup>178</sup> *See id.* (describing some ADAs she worked with as "cerebral and thoughtful").

<sup>179</sup> *See* Interview with 105 (describing effective case investigation and thorough research as important considerations for promotion decisions).

<sup>180</sup> *Id.*

<sup>181</sup> Interview with 110.

<sup>182</sup> *Id.*

Time was perpetually absent for state prosecutors. Prosecutors in federal offices or on state appeals teams tended to have more time (even time to “think,” in one prosecutor’s words).<sup>183</sup> But typical line prosecutors in county offices consistently reported far too much work for the time they had available.<sup>184</sup> Prosecutors in urban offices felt particularly stretched thin.<sup>185</sup>

To deal with this lack of time, prosecutors used one additional legal resource at their disposal: the power to dismiss cases. Interviewees admitted dismissing cases to deal with their high caseloads and limited time:

There were cases that we would just get rid of because . . . [we] looked at the case compared to everything else, and would say, this is not worth even pursuing. . . . The volume was just incredible . . . [and] we just couldn’t handle that kind of a caseload.<sup>186</sup>

This set of resources (colleagues, experience, competence, time, and the power to dismiss) is not necessarily an exhaustive list of every resource prosecutors draw upon to handle stressors. The resources presented here are those that surfaced most frequently in the study’s interviews, in response to questions that directly asked prosecutors how they dealt with their job stress.

The BPS model of challenge and threat predicts that the ratio of perceived task demands to perceived resources determines the psychological response that follows. If task demands outweigh resources available for dealing with the task, the theory predicts that prosecutors will experience threat states. If resources outweigh task demands, prosecutors will experience challenge states. I now review evidence of prosecutors operating in threat and challenge states.

#### D. *Evidence of Threat*

To identify when prosecutors operate in threat or challenge states, I looked for evidence of threat and challenge states in their interview transcripts. As part of the study’s thematic analysis, I identified instances where prosecutors spoke of physical and psychological experiences symptomatic of threat states.

Several prosecutors spoke about the significant toll their job demands took on their bodies. This constitutes strong evidence that prosecutors operate frequently in threat states, or even chronic threat states. By and large, challenge states are benign or even positive for the body. But threat states are not:<sup>187</sup> when

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<sup>183</sup> Interviews with 110, 120, 170.

<sup>184</sup> For particularly salient examples, see Interviews with 150, 145, 110, or 135.

<sup>185</sup> Interviews with 105, 110, 145.

<sup>186</sup> Interview with 105.

<sup>187</sup> See Jim Blascovich, *Challenge, Threat, and Health*, in HANDBOOK OF MOTIVATION SCIENCE 481, 488 (James Y. Shah & Wendi L. Gardner eds., 2008) (“[C]hallenge can generally be regarded as

faced repeatedly, threats lead to anxiety, depression, heart disease, ulcers, a lowered immune system, cognitive decline, and weight gain.<sup>188</sup> In speaking of how their job stress negatively affected their health, prosecutors offered ample evidence of operating in threat states on a regular basis.

Interviewees identified several ways their jobs impacted their bodies. Sleep disruption or insomnia was a common problem.<sup>189</sup> Some prosecutors struggled with nightmares.<sup>190</sup> One prosecutor started wearing a mouth guard at night to deal with teeth grinding that surfaced while she was assigned to the child victims unit.<sup>191</sup> Eating habits were also frequently disrupted as a result of job stress. Several prosecutors stopped eating while on trial (one called trial her “weight loss program”).<sup>192</sup> For another prosecutor, it triggered stress eating.<sup>193</sup> One prosecutor threw up each time he ate on trial days.<sup>194</sup> Others experienced headaches,<sup>195</sup> hair loss,<sup>196</sup> and the onset of nervous ticks (such as nail biting, stuttering, and hands shaking)<sup>197</sup> due to job stress. As one supervisor put it, “[prosecutors] suffer a lot of . . . medical conditions related to the inability . . . to handle the stress.”<sup>198</sup>

Heart disease stood out as an especially prominent problem. Several interviewees spoke about heart problems they or their colleagues experienced as a result of job demands. One woman had her doctor remove her from the courtroom while pregnant due to high blood pressure.<sup>199</sup> Another interviewee attributed his recent stroke to his work.<sup>200</sup> One

relatively benign and threat as relatively malignant in terms of physical health, particularly cardiovascular health.”); *see also* Hunter, *supra* note 91, at 4 (“In terms of health outcomes, challenge is considered a relatively benign pattern of cardiovascular arousal, whereas threat is considered a rather malignant pattern.”) (citation omitted).

<sup>188</sup> *See supra* notes 98–102 and accompanying text.

<sup>189</sup> Interview with 140 (“I’d wake up at three o’clock in the morning . . . and I couldn’t get back to sleep because there were so many things that weren’t done on a case.”); Interview with 105 (“I didn’t sleep for many, many months before that case . . . [because] I was completely stressed out.”).

<sup>190</sup> One prosecutor reported having more nightmares when working on violent crimes than while working in the property crimes unit. Interview with 145.

<sup>191</sup> Interview with 110. She stopped wearing it once she transferred to less stressful work.

<sup>192</sup> Interview with 105 (“I was always good for losing five pounds. . . . Every time I went to trial, I’m like, this is my weight loss program. . . . I’ll lose five pounds during the trial because I would not eat.”); Interview with 160 (“When I’m on trial, I don’t eat. Because I’m not even hungry. . . . I’m not even really thinking about it. . . . You’re stressed, you are focused on getting things done and not the hunger. Maslow’s hierarchy of needs changes.”).

<sup>193</sup> Interview with 130.

<sup>194</sup> Interview with 145. This lasted for the first ten years of his career.

<sup>195</sup> Interview with 160.

<sup>196</sup> Interview with 150.

<sup>197</sup> Interviews with 130 and 140.

<sup>198</sup> Interview with 155.

<sup>199</sup> Interview with 160 (“My [blood] pressure was through the roof . . . . My doctor was like . . . your [blood] pressure is not good and it keeps getting worse and worse and worse . . . . I’m gonna have to take you out [of] the courtroom.”).

<sup>200</sup> Interview with 145 (“My wife keeps reminding me, ‘yes, you do have stress. You had a stroke, name another sixty-year-old who’s had a stroke’. I tend to internalize a lot of stress [at work] . . . [and] being physically ill is sort of the extreme manifestation of stress.”).

prosecutor had recently survived a heart attack and now takes nitroglycerin for heart pains. Looking at his log of when he had taken extra nitroglycerin, he noted that each dosage correlated with when he was on trial, trying major violent crimes.<sup>201</sup> He also noted heart problems experienced by a colleague: “One of my colleagues . . . dropped dead of a heart attack at age fifty-two. . . . The last time I saw him, he was exhausted. . . . He . . . never said no. . . . They worked him to death.”<sup>202</sup>

The impact of threat states on cardiovascular health is especially well documented in the literature.<sup>203</sup> Threat states are considered malignant in terms of cardiovascular health, while challenge states are seen as benign.<sup>204</sup> Interviewees’ descriptions of their heart health suggest that many prosecutors experience repeated episodes of threat.

Prosecutors also spoke frequently about the anxiety they experienced—another symptom of operating in a threat state.<sup>205</sup> While they were not directly asked about anxiety or anxiety diagnoses, nearly half of prosecutors interviewed explicitly used the term anxiety to describe their stress. “We all deal with it, your ability as a prosecutor . . . to manage anxiety. That’s why so many lawyers are drunks and suffer substance abuse. It’s that anxiety.”<sup>206</sup> “[The] anxiety is [this] constant boom, boom, boom, boom, boom . . . your brain not resting.”<sup>207</sup> While it is possible to feel some anxiousness in a challenge state, the literature typically associates anxiety with threat states. Anxiety is considered “the state felt in the presence of threat.”<sup>208</sup> The number of comments made during interviews about anxiety suggest that prosecutors operate in threat mode frequently.

Another manifestation that prosecutors operate in threat states came from their descriptions of being emotionally exhausted. The literature on threat and challenge states associates cognitive depletion with both threat and challenge states. Emotional exhaustion, however, is only associated with threat.<sup>209</sup> Interviewees certainly experienced cognitive depletion at some

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<sup>201</sup> Interview with 140.

<sup>202</sup> Interview with 140.

<sup>203</sup> Blascovich, *supra* note 187, at 488–89.

<sup>204</sup> *Id.* at 488.

<sup>205</sup> Douglas Derryberry & Don M. Tucker, *Motivating the Focus of Attention*, in *THE HEART’S EYE: EMOTIONAL INFLUENCES IN PERCEPTION AND ATTENTION* 167, 170–72, 189 (Paula M. Niedenthal & Shinobu Kitayama eds., 1994).

<sup>206</sup> Interview with 155.

<sup>207</sup> *Id.*

<sup>208</sup> Hunter, *supra* note 91, at 6 (citation omitted); *see also* Derryberry & Tucker, *supra* note 205, at 170–71 (explaining that anxiety can be elicited by threatening information and in turn, the anxious state diverts attention to the threatening information itself).

<sup>209</sup> Erin N. Palmwood & Christine A. McBride, *Challenge vs. Threat: The Effect of Appraisal Type on Resource Depletion*, 38 *CURRENT PSYCH.* 1522, 1525 (2019).

points in their work.<sup>210</sup> But they also spoke of feeling emotionally exhausted as well: “[the job] is draining physically and mentally and emotionally . . . . It’s draining.”<sup>211</sup>

I would feel like . . . drain, drain, drain, drain, drain. I would get a verdict, or [I’d] get something [like a thank-you letter] from a child . . . that will fill it back up. And so it’d be drain, drain, drain, drain, drain, fill back up, drain, drain, drain, drain . . . I wouldn’t realize I was so tired.<sup>212</sup>

Their level of emotional exhaustion led some prosecutors to “disassociate” themselves from their cases and the people involved.<sup>213</sup> They put up walls emotionally<sup>214</sup> and over time became numb to the tragedies they saw.<sup>215</sup> One prosecutor developed an “unknown rage” in response to the suffering he witnessed.<sup>216</sup> Their level of emotional exhaustion provides further evidence that prosecutors operate in threat states for at least some portion of their work.

#### E. Evidence of Challenge

In addition to surfacing evidence of threat states, the analysis also provided evidence that prosecutors operate in challenge states at times. Interviewees’ reports of heightened focus, sharper problem-solving, positive emotions, and increased heart rates in the face of motivated performance situations suggest they view certain stressors as challenges.

One of the key indicators that prosecutors experienced challenge states while on the job came from their descriptions of experiencing enhanced focus and concentration because of their stress:

For me, stress helps me focus. . . . It really helps me concentrate on things that I absolutely have to get done . . . . [Stress] helps me really drill down into what I need to be

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<sup>210</sup> Trials, for example, “are just exhausting because . . . your mind is going through everything all the time.” Interview with 150.

<sup>211</sup> Interview with 125; *see also* Interview with 110 (“Just being able to present yourself in court is exhausting. A lot of energy goes into that. . . . That by far in a way is the most stressful thing.”).

<sup>212</sup> Interview with 160.

<sup>213</sup> Interview with 110 (“You have to disassociate from the work that you’re doing in order to do the work . . . if you’re sitting and reading cases and crying every time you saw it, you couldn’t do that job. And so you have to build [up] sort of like a wall to prevent yourself from becoming too invested in the cases.”).

<sup>214</sup> *Id.*

<sup>215</sup> Interview with 155 (“I would internalize a lot of . . . what I saw . . . . I wouldn’t open up about it a lot . . . There’s a . . . dead couple and . . . brain matter all over the place at four in the morning . . . a woman’s brain dead, but seven months pregnant . . . just craziness . . . I [had] an unknown rage a little bit.”).

<sup>216</sup> *Id.*

doing . . . I work better when I'm kind of under some pressure. . . . Stress generally doesn't cripple me or paralyze me. It is more motivating for me . . . . [Stress] helps me get things done sometimes.<sup>217</sup>

Others used the term “hyperfocus” to explain their mental state during a motivated performance situation.<sup>218</sup> One prosecutor described it as feeling more alert: “When you're facing an opponent in . . . an adversarial environment . . . it gets your body and your mind to function at a higher level. You're more aware and alert.”<sup>219</sup> This kind of increased focus, improved concentration, and enhanced alertness is typical of challenge states.<sup>220</sup>

Challenge states have also been associated with problem-solving orientations and flexible thinking, which some prosecutors demonstrated when asked to describe their reactions to stressors. Unlike threat responses, challenge responses are linked to problem solving, a type of coping that uses cognitive abilities to overcome the problems faced.<sup>221</sup> Some prosecutors demonstrated this problem-solving approach to handling their stress: “I just . . . try to . . . figure out how to manage the problem . . . I don't panic usually. . . . My natural instinct is [to] want to solve the problem.”<sup>222</sup>

Some prosecutors also experienced emotions with a positive valence in connection with their work stress, which can be an indicator of a challenge state. While it is possible to feel pleasurable emotions in a threat state, they are more frequently associated with challenge states.<sup>223</sup> Eagerness, exhilaration, excitement, enjoyment, hope, and anticipation are all characteristic of challenge responses.<sup>224</sup> Interviewees demonstrated these positive feelings about certain aspects of their work: “[The job] is really

<sup>217</sup> Interview with 120.

<sup>218</sup> Interview with 150 (“[When it is] stressful . . . I . . . hyperfocus . . . . Trials are extremely stressful because there are so many things going on that . . . I kind of hyperfocus.”); *see also* interview with 160 (“When I'm on trial . . . [I'm] focused on getting things done.”).

<sup>219</sup> Interview with 170.

<sup>220</sup> Marc Jones, Carla Meijen, Paul Joseph McCarthy & David Sheffield, *A Theory of Challenge and Threat States in Athletes*, 2 INT'L REV. SPORT & EXERCISE PSYCH. 161, 173 (2009) (“[C]ognitive performance is more effective in the challenge state” than the threat state). The authors theorize that this difference exists because cognitive attention is focused on task appropriate stimuli in a challenge state, while attention is directed to irrelevant stimuli that might cause harm in a threat state. *Id.*

<sup>221</sup> Palmwood & McBride, *supra* note 209, at 1523 (citing THE CHALLENGE OF PROBLEM-BASED LEARNING 1–4 (David Boud & Grahame I. Feletti eds., 2d ed. 1997); Faye F. Didymus & David Fletcher, *Swimmers' Experiences of Organizational Stress: Exploring the Role of Cognitive Appraisal and Coping Strategies*, 8 J. CLINICAL SPORT PSYCH. 159 (2014); and Susan Folkman & Richard S. Lazarus, *An Analysis of Coping in a Middle-Aged Community Sample*, 21 J. HEALTH & SOC. BEHAV. 219 (1980)).

<sup>222</sup> Interview with 150.

<sup>223</sup> Jones, Meijen, McCarthy & Sheffield, *supra* note 220, at 169–71.

<sup>224</sup> Kathleen Deska Pagana, *Psychometric Evaluation of the Clinical Stress Questionnaire (CSQ)*, 28 J. NURSING EDUC. 169 (1989); Joe Tomaka, Rebecca L. Palacios, Camilla Champion & Stormy Monks, *Development and Validation of an Instrument that Assesses Individual Differences in Threat and Challenge Appraisal*, 7 J. DEPRESSION & ANXIETY (2018).

exciting.”<sup>225</sup> “It’s stressful. It’s really stressful . . . but at the same time, it’s fun . . . . It’s fast paced and it’s exciting . . . . That’s why people do it, and that’s why they keep doing it.”<sup>226</sup> One prosecutor’s voice became audibly excited whenever he described the high he felt at trial.<sup>227</sup> Another prosecutor clearly experienced a challenge state when trying cases:

I was *begging* my supervisor, *please* let me try this case. Please let me try this case. And you know, that’s really not the norm. People normally, if they can get out of trial, [they do] . . . I was the opposite. I love trying cases, [I am] always trying cases. And so I was begging her . . . . I just really like it [going to trial]. I just love being in front of a jury.<sup>228</sup>

One interviewee felt this way frequently: “Most of the time I experience the stress at work as part of what is also energizing about the job.”<sup>229</sup> That kind of language is typical of a challenge response.

Some prosecutors also experienced elevated heart rates in the face of motivated performance situations—again characteristic of a challenge response. One prosecutor received notifications from his Apple watch while at trial indicating that his heart rate had crossed a high threshold.<sup>230</sup> While heart rate increases somewhat during threat states, it increases much more during challenge states.<sup>231</sup>

And so prosecutors demonstrated behaviors, physical symptoms, and psychological reactions characteristic of both threat and challenge states. As the BPS model of challenge and threat predicts, these responses are determined contextually. Appraisals are based on unconscious evaluations of task demands and resources, a reflexive process that yields different responses depending on the prosecutor and the situation. While much of this variation is attributable to individual-level factors (like personality and lived experience), interview evidence also suggests that prosecutors’ appraisals are shaped by office-level factors (explored in Part V). As the next section shows, these varying responses carry important implications for the criminal justice system at large.

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<sup>225</sup> Interview with 160.

<sup>226</sup> Interview with 110.

<sup>227</sup> Interview with 125.

<sup>228</sup> Interview with 160.

<sup>229</sup> Interview with 135.

<sup>230</sup> Interview with 130.

<sup>231</sup> Blascovich, *supra* note 187, at 485.

#### IV. IMPLICATIONS FOR CRIMINAL JUSTICE

Interview evidence suggests that prosecutors' stress responses can impact their discretion, which in turn may generate important ripple effects across the criminal legal system. Drawing on the interview data and the literature on threat and challenge in other contexts, I surface eleven ways that prosecutors' threat and challenge responses may be impacting the criminal legal system generally, outlined in the table below.

**Table 1. Threat and Challenge States in Prosecutors:  
Implications for Criminal Justice**

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##### **Discretion**

- Challenge states positively influence prosecutor decision-making.
- Threat states negatively influence prosecutor decision-making.
- Threat states make prosecutors and defense attorneys more susceptible to anchor and adjustment bias.

##### **Performance**

- Challenge states improve prosecutorial performance in court and at trial.
- Threat states increase the number of mistakes made by prosecutors.
- Threat states predispose prosecutors to plead cases instead of going to trial.

##### **Behavior**

- Threat states may increase adversarialism among prosecutors.
- Threat states may increase abrasive behavior among prosecutors, diminishing defendants' and victims' sense of procedural justice.

##### **Retention**

- Challenge states lead to greater prosecutorial job satisfaction and community involvement.
  - Threat states drive prosecutor burnout and subsequent turnover.
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First and foremost, prosecutors' stress responses affect their discretion. Prosecutors in challenge states benefit from greater oxygen to the brain, which leads to clearer thinking, greater accuracy, and improved decision-making. Prosecutors in threat states, on the other hand, are more susceptible to anchor and adjustment bias and suffer from impaired decision-making.

These mental states likewise affect prosecutorial performance, behavior, and retention. Challenge states improve prosecutorial performance, while

threat states weaken it. Prosecutors in threat states are more likely to make mistakes. They may also be more likely to plead cases and avoid trial—not only for efficiency reasons, but because psychological dispositions steer them away from the unpredictable, risky nature of trial. Threat states also may make prosecutors more susceptible to adversarial or abrasive behavior, burnout, and turnover.

Before delving further into each of these implications, I acknowledge up front the tentative nature of some of these claims. Many of these relationships merit further study; I do not attempt to quantify the size of any of these implications. The purpose of the Listening Guide is to *discover*—not to quantify or prove hypotheses. As such, this study serves as an exploratory first step in uncovering potential impacts that stress responses have on prosecutors and on the criminal justice system generally. Further research (drawing on a mix of other methodologies) can gauge the strength and effect size of these relationships.

#### A. *Evidence of Threat*

The first implication of these theories on the criminal justice system relates to its ramifications for prosecutorial decision-making. As discussed earlier, scholars have identified a handful of unconscious influences that affect prosecutorial discretion, including gender bias, racial bias, confirmation bias, and anchor and adjustment bias.<sup>232</sup> This study suggests another extralegal, unconscious factor that influences prosecutorial decision-making: a prosecutor's reaction to stress.

The science of threat and challenge suggests that how people respond to stressors influences their decision-making, focus, and attention. Literature from other contexts shows that when people perceive stress to be threatening, their brain receives less oxygen. They become more vigilant for negative cues, and their attention skews towards self-protection. Decision-making becomes impaired as a result. Psychologists theorize that “a threat state . . . will decrease the efficiency and effectiveness of cognitive functioning, [while] . . . [a] challenge state will have a positive influence on decision-making.”<sup>233</sup>

Studies have confirmed these effects empirically. In one study, researchers found that people in challenge states performed better on the Stroop Test, a measure used to evaluate decision-making, than people in

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<sup>232</sup> *Supra* notes 30–33 and accompanying text.

<sup>233</sup> Jones, Meijen, McCarthy & Sheffield, *supra* note 220, at 177; *id.* at 174 (“Because a challenge state is associated with increases in epinephrine and norepinephrine (rather than cortisol in the threat state) it may have a positive influence on decision-making. Epinephrine and norepinephrine are proposed to help speed up decision making because of their role as neurotransmitters in the central nervous system . . . . [T]he neuroendocrine and cardiovascular responses [of a challenge state] demonstrate a more adaptive approach to competition and are associated with better decision-making.”).

threat states.<sup>234</sup> “[G]iven that the Stroop Test provides a widely recognized measure of attention, decision making, and self-regulation . . . the findings of [this study] support the . . . predictions that a challenge state relates to improved decision making and cognitive function.”<sup>235</sup> Other studies conclude that people in challenge states are mentally sharper, more accurate, and faster at completing mental stressor tasks than those in threat states.<sup>236</sup>

Another study found that people “manipulated” to be in a challenge state are less influenced by the anchor and adjustment bias than those manipulated to be in a threat state.<sup>237</sup> In this laboratory study, participants were randomly assigned to groups designed to engender either challenge, threat, or no-stress responses.<sup>238</sup> They then completed an anchor and adjustment questionnaire to measure how easily swayed their judgment was by a starting reference point. The results showed that participants assigned to the challenge group adjusted significantly more than those in the threat group, suggesting that people experiencing challenge states are less influenced by anchor and adjustment bias than those experiencing threat states.<sup>239</sup>

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<sup>234</sup> The Stroop Test is a classic psychological assessment that measures a person’s ability to inhibit their automatic responses. See Colin M. MacLeod, *Half a Century of Research on the Stroop Effect: An Integrative Review*, 109 PSYCH. BULL. 163 (1991) (reviewing over fifty years of literature on the Stroop Color-Word Task). During the test, participants see the names of colors (e.g., red, blue, green) that appear in ink colors that do not match the word (“red,” for example, may be printed in green). *Id.* at 163–66. The test taker must say the ink color, not read the word. *Id.* The test measures attention, cognitive control, and processing speed and is widely used in cognitive psychology and neuroscience. *Id.* at 163–93.

<sup>235</sup> Turner, Jones, Sheffield & Cross, *supra* note 112, at 5.

<sup>236</sup> People in challenge states outperform those in a threat state on mental stressor tasks (e.g., mental arithmetic, number categorization, and word finding tasks). See Jim Blascovich, Wendy Berry Mendes, Kristen Salomon & Sarah B. Hunter, *Social “Facilitation” as Challenge and Threat*, 77 J. PERSONALITY & SOC. PSYCH. 68, 70–75 (1999) (finding that individuals who are asked to perform well-learned tasks in the presence of others exhibit a challenge pattern of cardiovascular reactivity and outperform individuals who are asked to perform unlearned tasks in the presence of others); Joe Tomaka, Jim Blascovich, Robert M. Kelsey & Christopher L. Leitten, *Subjective, Physiological, and Behavioral Effects of Threat and Challenge Appraisal*, 65 J. PERSONALITY & SOC. PSYCH. 248, 249, 251–53, 256, 258 (1993) (finding that during mental arithmetic and active coping tasks, threat states are associated with higher levels of stress and challenge states are associated with better performance); Joe Tomaka, Jim Blascovich, Jeffrey Kibler & John M. Ernst, *Cognitive and Physiological Antecedents of Threat and Challenge Appraisal*, 73 J. PERSONALITY & SOC. PSYCH. 63, 64, 66–67, 69–70 (1997) (finding that when providing instructions on different tasks, instructions that emphasized threat produced threat-related cognitive appraisals, while instructions that emphasized challenge produced challenge-related cognitive appraisals).

<sup>237</sup> Karim S. Kassam, Katrina Koslov & Wendy Berry Mendes, *Decisions Under Distress: Stress Profiles Influence Anchoring and Adjustment*, 20 PSYCH. SCI. 1394, 1395, 1397 (2009).

<sup>238</sup> To engender threat and challenge responses, participants were given a modified version of the Trier Social Stress Test. They were asked to imagine that they were interviewing for a dream job. They then had five minutes to prepare a short speech detailing their strengths and weaknesses. They then gave the speech to two interviewers, who followed up with a series of questions (similar to those asked in job interviews). About thirty seconds into their speech, interviewers in the challenge response group began giving nonverbal positive feedback (nodding, smiling, leaning forward). In the threat group, interviewers gave nonverbal negative feedback (crossing arms, frowning brows, shaking heads). Participants in the no-stress group were alone in the room (giving their speeches aloud, and answering questions written on a paper, but without evaluation). After the interview, all participants had two minutes to complete a nine-question anchor and adjustment questionnaire labeled “Trivia.” *Id.* at 1395–96.

<sup>239</sup> Scholars suggest that these results might be attributed to the increase in caution experienced while in a threat state; people in challenge states prove more willing to take risks and approach gains instead of focusing on avoiding losses. *Id.* at 1397.

We cannot assume that prosecutors' decision-making abilities are immune from the psychological effects of threat and challenge states. As Daniel Kahneman reminds us in his work on cognitive biases, "[y]ou have no choice but to accept that the major conclusions of these studies are true. More important, you must accept that they are true about *you*."<sup>240</sup> Prosecutors are not impervious to these effects; their use of discretion is unconsciously impacted by their individual response to stress. All of their choices (what to charge, whether to plead, what offers to make, how many years to recommend at sentencing) are unconsciously influenced by whether they are operating in a threat or a challenge state. When operating in a challenge state, the theory suggests that their decisions are more accurate and less influenced by distracting, irrelevant factors. When operating in a threat state, prosecutors are less accurate and more likely to be preoccupied by negative emotions and self-focused factors irrelevant to the case at hand. Prosecutors in threat mode are also more susceptible to anchor and adjustment bias, which can negatively impact sentencing or plea outcomes.<sup>241</sup>

Further research is needed to quantify the extent to which threat and challenge responses influence prosecutorial decision-making. Future study can also assess whether threat and challenge states make prosecutors more prone to other cognitive biases, like confirmation bias, tunnel vision, or racial and gender biases.

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<sup>240</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 57 (2011).

<sup>241</sup> Notably, defendants and defense attorneys are also influenced by anchoring and adjustment bias. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2517–18 (2004):

For example, a prosecutor might initially offer a robbery defendant twenty years' imprisonment by piling on every plausible enhancement. The defendant, of course, rejects this unreasonable offer out of hand, but the initial offer serves as a high anchor. When the prosecutor comes back with a revised offer of fifteen years, that offer sounds more reasonable. By the time the prosecutor comes down to twelve years, the defendant is ready to jump at the deal. If the prosecutor had started out at twelve years, however, the defendant might have anchored on that number as the highest likely sentence and rejected it as a bad deal.

But prosecutors themselves are influenced by anchor and adjustment bias when setting the initial offer in the first place. In one laboratory experiment, prosecutors and judges received mock case materials about an alleged rape case. They then received a phone call from a journalist who asked them, "Do you think that the sentence for the defendant in this case will be higher or lower than [1 or 3] years?" (a low/high anchor). Participants who were exposed to the higher anchor (3 years) recommended much higher sentences on the case (mean = 33.38 months) than participants who were exposed to the lower anchor (1 year) (mean = 25.43 months). Even blatantly random sentencing anchors influenced participants' sentencing recommendations. Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCH. BULL. 188, 191–93 (2006).

## B. Performance

In addition to affecting decision-making, stress responses also affect performance. The BPS model contends that “a challenge state should lead to better performance than a threat state.”<sup>242</sup> Empirical studies find that people in challenge states consistently perform better than people in threat states, in a wide range of academic, cognitive, and motor tasks—including when taking academic examinations,<sup>243</sup> predicting stock values,<sup>244</sup> competing in athletic events,<sup>245</sup> performing surgery,<sup>246</sup> doing mental arithmetic,<sup>247</sup> handling aviation crises,<sup>248</sup> speaking in public,<sup>249</sup> and navigating change in the workplace.<sup>250</sup> Challenge states trigger emotional

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<sup>242</sup> Lee J. Moore, Paul Freeman, Adrian Hase, Emma Solomon-Moore & Rachel Arnold, *How Consistent Are Challenge and Threat Evaluations? A Generalizability Analysis*, 10 FRONTIERS PSYCH. 1, 2 (2019).

<sup>243</sup> Jeremy P. Jamieson, Wendy Berry Mendes, Erin Blackstock & Toni Schmader, *Turning the Knots in Your Stomach into Bows: Reappraising Arousal Improves Performance on the GRE*, 46 J. EXPERIMENTAL SOC. PSYCH. 208, 208–09, 211 (2010).

<sup>244</sup> Anat Drach-Zahavy & Miriam Erez, *Challenge Versus Threat Effects on the Goal-Performance Relationship*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 667, 668–69, 671, 679–80 (2002).

<sup>245</sup> Lee J. Moore, Mark R. Wilson, Samuel J. Vine, Adam H. Coussens & Paul Freeman, *Champ or Chump?: Challenge and Threat States During Pressurized Competition*, 35 J. SPORT & EXERCISE PSYCH. 551 (2013) (examining the influence of challenge and threat states on golf performance); Lee J. Moore, Samuel J. Vine, Mark R. Wilson & Paul Freeman, *The Effect of Challenge and Threat States on Performance: An Examination of Potential Mechanisms*, 49 PSYCHOPHYSIOLOGY 1417 (2012) (exploring the same); Sarah E. Williams & Jennifer Cumming, *Challenge vs. Threat: Investigating the Effect of Using Imagery to Manipulate Stress Appraisal of a Dart Throwing Task*, 8 SPORT & EXERCISE PSYCH. REV. 4 (2012); Lee J. Moore, Samuel J. Vine, Mark R. Wilson & Paul Freeman, *Reappraising Threat: How to Optimize Performance Under Pressure*, 37 J. SPORT & EXERCISE PSYCH. 339 (2015).

<sup>246</sup> Samuel J. Vine, Paul Freeman, Lee J. Moore, Roy Chandra-Ramanan & Mark R. Wilson, *Evaluating Stress as a Challenge is Associated with Superior Attentional Control and Motor Skill Performance: Testing the Predictions of the Biopsychosocial Model of Challenge and Threat*, 19 J. EXPERIMENTAL PSYCH.: APPLIED 185 (2013); Lee J. Moore, Samuel J. Vine, Mark R. Wilson & Paul Freeman, *Examining the Antecedents of Challenge and Threat States: The Influence of Perceived Required Effort and Support Availability*, 93 INT’L J. PSYCHOPHYSIOLOGY 267 (2014).

<sup>247</sup> See sources cited *supra* note 236 and accompanying text (discussing studies that highlight the performance superiority of those in challenge states versus those in threat states).

<sup>248</sup> See generally Samuel J. Vine, Liis Uiga, Aureliu Lavric, Lee J. Moore, Krasimira Tsaneva-Atanasova & Mark R. Wilson, *Individual Reactions to Stress Predict Performance During a Critical Aviation Incident*, 28 ANXIETY, STRESS & COPING 467 (2014) (experimenting with pilots’ reactions to stress through “engine failure on take-off” simulations).

<sup>249</sup> See generally Nader Amir, Geri Weber, Courtney Beard, Jessica Bomyea & Charles T. Taylor, *The Effect of a Single-Session Attention Modification Program on Response to a Public-Speaking Challenge in Socially Anxious Individuals*, 117 J. ABNORMAL PSYCH. 860 (2008) (testing the effects of an attention modification program on reducing anxiety during public speaking).

<sup>250</sup> See Fugate, Prussia & Kinicki, *supra* note 112, at 891–93 (analyzing the consequence and effect of employees’ threat appraisal during workplace structural changes). See generally Matthew J. Slater, Andrew L. Evans & Martin J. Turner, *Implementing a Social Identity Approach for Effective Change Management*, 16 J. CHANGE MGMT. 1479 (2015) (considering the effects of social identity principles during periods of managerial change).

and physical responses that facilitate performance.<sup>251</sup> Threat states do the reverse.<sup>252</sup>

Based on these findings, one would predict challenge states to boost prosecutorial performance in the courtroom and threat states to downgrade performance. Improved performance in court could look like many things: greater verbal ability, improved memory, more persuasive performance, more confident presence, more facilitative reactions to others, or greater commitment to justice.<sup>253</sup> We would expect this enhanced prosecutorial performance to bleed into any task that prompts a challenge state—whether it be preparing for court, questioning a witness, presenting evidence, addressing the jury, interacting with a judge, working with victims, and so on. Trial and court appearance were the two most prominent motivated performance situations mentioned in interviews, but many other areas of a prosecutor’s work could also elicit the consequences of operating in a threat or challenge state, with subsequent implications for performance.

Preliminary evidence from this study’s fourteen interviews supports these predictions about prosecutorial performance. Interviewees who most frequently experienced a challenge state at trial also reported the highest ratio of wins to losses at trial.<sup>254</sup> Prosecutors who tended to experience more challenge states were also those who appeared to succeed in the profession (by their own account), reported greater job satisfaction, and found energy to innovate in their work (e.g., by establishing community programs and spearheading office initiatives).<sup>255</sup>

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<sup>251</sup> See generally Sarah E. Williams, Jennifer Cumming & George M. Balanos, *The Use of Imagery to Manipulate Challenge and Threat Appraisal States in Athletes*, 32 J. SPORT & EXERCISE PSYCH. 339 (2010) (considering athletes’ responses to appraised challenge and threat situations); Carla Meijen, Martin Turner, Marc V. Jones, David Sheffield & Paul McCarthy, *A Theory of Challenge and Threat States in Athletes: A Revised Conceptualization*, 11 FRONTIERS IN PSYCH. 1, 1 (2020) (discussing recent changes in the Theory of Challenge and Threat States in Athletes (TCTSA)).

<sup>252</sup> See Williams, Cumming & Balanos, *supra* note 251, at 339–40 (explaining that threat states can be debilitating); Meijen, Turner, Jones, Sheffield & McCarthy, *supra* note 251, at 2–3 (comparing challenge and threat states in influencing athletic performance).

<sup>253</sup> Besiki Kutateladze and Don Stemen have developed a slate of “prosecutorial performance indicators” which also may be affected by stress responses. Their fifty-five indicators track prosecutorial performance towards three goals: capacity and efficiency, community safety and well-being, and fairness and justice. PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org/> (last visited Jan. 18, 2026).

<sup>254</sup> “I never lost a case. . . . I [don’t] lose any . . . I won every single case [I took to trial] . . . I love trying cases . . . I really just like [going to trial] . . . I just love being in front of a jury.” Interview with 160; see also Interview with 105 (correlating “succeed[ing]” with “[doing] everything you can”). Note that not all prosecutors reported their wins-to-loss ratio. Interviewees were not asked for this information, though multiple prosecutors brought it up voluntarily.

<sup>255</sup> Interviews with 125, 105, 120, 160, 135.

### C. *Declinations*

A third implication of the BPS model of challenge and threat for the criminal justice system relates to prosecutors' use of dismissals. Prosecutors decline a huge number of cases annually. They reject twenty-eight percent of cases at screening<sup>256</sup> and dismiss an estimated one-in-four cases after filing.<sup>257</sup> Dismissals often occur when there is insufficient evidence to prove an element of the crime.<sup>258</sup> They are also used when criminal conviction is not considered appropriate nor in the interests of justice.<sup>259</sup> The power to dismiss gives prosecutors the ability to correct good faith errors made by the police or arrests made for the police's benefit.<sup>260</sup> While dismissal decisions usually receive less attention than more visible sentencing decisions,<sup>261</sup> they are regarded as "paramount in defining an offender's experience within the criminal justice system."<sup>262</sup>

When viewed through the lens of threat and challenge, the power to decline cases is a stunning resource available for prosecutors to draw upon when handling weighty task demands. Especially in situations where task demands are uniquely high (e.g., when prosecutors carry large caseloads), one would expect prosecutors to use this resource as a means of coping with the stress of too many cases. One interviewee gave voice to this logic, noting the differences between jurisdictions where she worked:

There were cases that we would just get rid of because . . . we couldn't [handle them all] . . . There were a lot of low offers because we just looked at the case compared to everything else and would say, this is not worth even pursuing . . . There were misdemeanor pleas we used to get in [suburban County A] that

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<sup>256</sup> BESIKI LUKA KUTATELADZE, REBECCA RICHARDSON DUNLEA, MELBA PEARSON, LIN LIU, RYAN MELDRUM & DON STEMEN, REJECT OR DISMISS? A PROSECUTOR'S DILEMMA, PROSECUTORIAL PERFORMANCE INDICATORS (2022) [hereinafter REJECT OR DISMISS], <https://prosecutorialperformanceindicators.org/wp-content/uploads/2022/07/PPI-Reject-Dissmiss-Final.pdf>. This percentage varies significantly from jurisdiction to jurisdiction. See Wright & Miller, *supra* note 9, at 55, 58–59, 75 ("These multiple levels of [jurisdictional] variation make it hard to evaluate and generalize about prosecutorial policies and practices, including screening.").

<sup>257</sup> Wright & Miller, *supra* note 9, at 73. For a study suggesting that prosecutors may not decline cases as frequently as thought, see generally Shima Baradaran Baughman, *Do Prosecutorial Declination Trends Provide Hope for Reducing Mass Incarceration?*, 60 GONZ. L. REV. 255 (2024).

<sup>258</sup> See generally Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1528 (2018) (suggesting a system where prosecutors communicate with police officers regarding the specific evidence that was found to be legally insufficient).

<sup>259</sup> *Id.* at 1527–28, 1533–34, 1538. See, e.g., Sarah Gonzalez, *How School Zero Tolerance Rules Turn Bad Behavior into a Crime*, STATE IMPACT FLA. (Feb. 25, 2013), <https://perma.cc/JQ9E-T5DT> (chronicling the arrest of a boy who was charged with battery for hitting his friend on the head with a tootsie pop, but the charges were eventually dropped).

<sup>260</sup> Gershowitz, *supra* note 258, at 1531–33.

<sup>261</sup> Travis W. Franklin, *Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors*, 38 J. CRIM. JUST. 693, 693 (2010).

<sup>262</sup> *Id.*

I would just ACD<sup>263</sup> in [urban County B] because the volume was just incredible . . . . The caseload size definitely informed the offers that we made . . . . And it inured to the benefit of the defendants clearly, because we just couldn't handle that kind of a caseload.<sup>264</sup>

This view supports the hypothesis advanced elsewhere that prosecutors with higher caseloads will be more likely to dismiss cases.<sup>265</sup> This conjecture is most likely to be the case in offices that employ vertical prosecution (where prosecutors screen, charge, and prosecute their own cases).<sup>266</sup> Prosecutors in horizontal offices (where separate units screen, charge, and prosecute cases) would derive less personal benefit by declining cases and may therefore be less likely to dismiss.<sup>267</sup>

This prediction does not preclude prosecutors from dismissing cases for other reasons. Of course, prosecutors can dismiss cases that lack evidence or fail to advance the interests of justice. It simply frames the power to dismiss as a resource that can impact prosecutors' stress levels. It is foreseeable that prosecutors will, at times (and when allowed by office policy),<sup>268</sup> use declinations to lower their ratio of perceived demands to perceived resources and steer themselves out of threat mode.

#### D. *Avoiding Trial*

A similar dynamic may influence prosecutors' choices to plead cases instead of going to trial. As every first-year law student learns, trials occur infrequently. Some ninety-five percent of felony convictions result from plea bargains, compared to only five percent from trials.<sup>269</sup> Efficiency

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<sup>263</sup> ACD refers to an adjournment and contemplation of dismissal. An ACD provides for a complete dismissal of the charges after a period of time (e.g., six months), if the defendant is not rearrested during that timeframe. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2015).

<sup>264</sup> Interview with 105.

<sup>265</sup> See Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 35 JUST. Q. 1166, 1172–73, 1182–84 (2018) (finding that prosecutors with higher *violent* caseloads were more likely to dismiss cases, but prosecutors with higher *felony* caseloads were not).

<sup>266</sup> REJECT OR DISMISS, *supra* note 256, at 6.

<sup>267</sup> Further research can determine whether these predictions bear out.

<sup>268</sup> Some offices have policies that constrain prosecutors' ability to dismiss certain cases. Serious violent cases, for example, may be more difficult to dismiss in some offices than other types of cases. See REJECT OR DISMISS, *supra* note 256, at 10 (“The aggressive prosecution of particularly serious offense types is . . . a tool for communicating important office priorities to the public.”).

<sup>269</sup> LINDSEY DEVERS, U.S. DEP'T JUST., BUREAU JUST. ASSISTANCE, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING I (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pleabargainresearchsummary.pdf>; Beth Schwartzapfel, Abbie VanSickle & Annaliese Griffin, *The Truth About Trials*, MARSHALL PROJECT (Nov. 4, 2020), <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials>; see also A.B.A. CRIM. JUST. SECTION, PLEA BARGAIN TASK FORCE REPORT 14 (2023) [hereinafter PLEA BARGAIN TASK FORCE REPORT] (“[T]rials have become rare legal artifacts in most U.S. jurisdictions . . . .”). As Scott and Stuntz put it, “[Plea bargaining] . . . is not some adjunct to

reasons are the most common explanation for why the criminal justice system relies so heavily on plea agreements: trials are expensive and time consuming.<sup>270</sup> Prosecutors have far too many cases to pursue them all at trial.<sup>271</sup> Relying on plea bargaining allows prosecutors to process an overwhelming volume of indictments. It also creates incentives for defendants to cooperate with the prosecution and take responsibility for criminal actions.<sup>272</sup> Pleas offer a firm resolution to cases, affording finality for the parties involved.<sup>273</sup>

While trials make up only five percent of all convictions, they consume a far greater percentage of a prosecutor's time and mental energy. For most of the prosecutors interviewed in this study, trials were by far the most stressful part of their job. One interviewee compared going to trial with adding a second full-time job to his already heavy workload.<sup>274</sup> Several prosecutors described trial as the kind of stressor that put them into a threat state: perceived task demands were enormous<sup>275</sup> and often outweighed perceived resources. Trials often carry a high degree of uncertainty,<sup>276</sup> further inching prosecutors' appraisals towards threat states. The degree of threat experienced naturally varied depending on the prosecutor and the specific situation (some enjoyed trial and clearly experienced it as a challenge). For many interviewees, trials were the most threatening aspect of their job.

No interviewee admitted outright that he or she avoided trial because it was so stressful. And yet the science of threat and challenge suggests that the choice to plead is unconsciously influenced by a prosecutor's desire to avoid the negative valence of a threat state.

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the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

<sup>270</sup> Schwartzapfel, VanSickle & Griffin, *supra* note 269, at 2–3, 10.

<sup>271</sup> Stuntz, *supra* note 19, at 2553–56.

<sup>272</sup> PLEA BARGAIN TASK FORCE REPORT, *supra* note 269, at 6.

<sup>273</sup> *Id.*

<sup>274</sup> Interview with 115 ("Generally speaking, everyone has too many cases. When you put trial on top of that, it's like adding another job . . . . You're working two jobs . . . . So then your hours jump from what's already . . . a fifty hour week to maybe . . . seventy, eighty.")

<sup>275</sup> Interviewees cited a myriad of stressful aspects of trials, including working with unpredictable witnesses, getting police to show up, meeting discovery obligations, and doing the "million things . . . to get a case together." Interview with 105. Additional stressful components included picking a jury with limited information, presenting a case in court, waiting for a verdict, giving up control to the jury, facing the prospect of losing, and so on. *See, e.g., supra* text accompanying note 146 (discussing the stressors associated with a lack of predictability and control).

<sup>276</sup> The uncertainty of trial has been noted in the literature. "In a trial, the verdict is left to an unpredictable jury . . . . The desire to reduce uncertainty, especially among prosecutors and judges, and efficiently process cases leads to the development of norms and routines in case processing. One of these norms is resolving cases by pleas of guilt . . . . [P]leading guilty works in the benefit of the government because it offers a way to convict without the uncertainty of a trial." Christi Metcalfe, *The Role of Courtroom Workgroups in Felony Case Dispositions: An Analysis of Workgroup Familiarity and Similarity*, 50 *L. & SOC'Y. REV.* 637, 639 (2016).

In general, threat responses prompt an “avoidance” motivation, while challenge responses prompt an “approach” orientation.<sup>277</sup> People experiencing threat responses tend to expend energy to avoid a potentially negative or undesirable outcome. People experiencing challenge use energy to approach a potentially positive or desirable outcome.<sup>278</sup> Psychologists find that the avoidance orientation of a threat state tends to produce more cautious decision-making.<sup>279</sup> At least among adults, people in threat states are more likely to make more cautious decisions and avoid risky choices than people in challenge states.<sup>280</sup>

This suggests that prosecutors in threat states are more likely to avoid trial than prosecutors in challenge states. Trials are riskier for prosecutors than pleas. “A trial comes with the risk of acquittal, but a guilty plea assures conviction . . . .”<sup>281</sup> “The decision to go to trial is a gamble . . . .”<sup>282</sup> The uncertainty associated with a trial is problematic for prosecutors operating in threat states, who may be more inclined to play it safe and pursue pleas instead. Prosecutors experiencing challenge states are less risk-averse and therefore may be more willing to proceed to trial than prosecutors in threat states.

This does not mean that threatened prosecutors will avoid trying cases entirely, of course. People in general avoid stimuli and situations seen as threatening.<sup>283</sup> But if they are required to face a threatening situation to reach some larger, more important goal, people will engage with the threat. The larger goal will motivate them to perform in the threatening situation—even if doing so jeopardizes their wellbeing.<sup>284</sup> In these cases, a person approaches the threat while simultaneously being predisposed to move *away*

<sup>277</sup> Jamieson, *supra* note 77, at 185.

<sup>278</sup> Blascovich, *supra* note 90, at 432.

<sup>279</sup> Jeremy P. Jamieson & Wendy Berry Mendes, *Social Stress Facilitates Risk in Youths*, 145 J. EXPERIMENTAL PSYCH.: GEN. 467, 468 (2016).

<sup>280</sup> *Id.*; see also Jeremy P. Jamieson, Katrina Koslov, Matthew K. Nock & Wendy Berry Mendes, *Experiencing Discrimination Increases Risk Taking*, 24 PSYCH. SCI. 131, 132 (2012) (comparing responses in both threat and challenge states for either same-race or out-group (i.e., discriminatory) rejection); Karim S. Kassam, Katrina Koslov & Wendy Berry Mendes, *Decisions Under Distress: Stress Profiles Influence Anchoring and Adjustment*, 20 PSYCH. SCI. 1394, 1397 (2009) (suggesting that individuals who experience more challenge tend to have more resources available to them and thus are more likely to adapt).

<sup>281</sup> Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. UNIV. L. REV. 261, 274 (2021).

<sup>282</sup> Bibas, *supra* note 241, at 2507.

<sup>283</sup> See Julina A. Rattel, Stephan F. Miedl, Jens Blechert & Frank H. Wilhelm, *Higher Threat Avoidance Costs Reduce Avoidance Behaviour Which in Turn Promotes Fear Extinction in Humans*, 96 BEHAV. RSCH. & THERAPY 37, 43 (2017) (“[A]voidance behaviour is rapidly acquired if it leads to safety.”). See generally Gerard A. Riley, Andrew J. Brennan & Theresa Powell, *Threat Appraisal and Avoidance After Traumatic Brain Injury: Why and How Often Are Activities Avoided?*, 18 BRAIN INJURY 871, 871 (2004) (analyzing the avoidance patterns of individuals post-brain-injury); Charles S. Carver, *Threat Sensitivity, Incentive Sensitivity, and the Experience of Relief*, 77 J. PERSONALITY 125, 127 (2009) (experimenting with and analyzing the effect of incentives on threat avoidance).

<sup>284</sup> Blascovich, *supra* note 90, at 432.

from the threat.<sup>285</sup> The person experiences “a tension between the need to approach and the desire to avoid.”<sup>286</sup>

A similar dynamic occurs with trial. Prosecutors will perform in a threatening situation (e.g., go to trial) to reach a higher goal (e.g., advance in their profession, achieve justice, protect public safety). But they are biologically disposed to avoid the threatening situation and would much rather do without. Particularly for those who appraise trial as threatening, prosecutors are likely to reflexively gravitate away from trial towards plea bargains. Threat states act as a hidden, unconscious force edging prosecutors to plead instead of trying more cases.

This study does not attempt to quantify the extent of this effect. But it does suggest that a prosecutor’s stress response is part of the equation and may make a difference in some cases, tipping the balance towards plea bargains and away from trial.

As the literature on plea bargains indicates, the tendency to plead instead of try cases carries significant costs for defendants, who are frequently coerced into accepting plea offers and giving up their right to trial.<sup>287</sup> The practice also harms the criminal justice system as a whole—leaving police and prosecutorial misconduct unchecked,<sup>288</sup> disincentivizing thorough investigation of cases,<sup>289</sup> and deepening racial inequities.<sup>290</sup> Prosecutors’ propensity to avoid stressors perceived as threatening very well may exacerbate these harms.

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<sup>285</sup> *Id.* at 433 (“Although . . . threat involve[s] . . . movement toward a goal, threat [also] includes at least predispositional . . . elements . . . of movement *away* from a goal.”) (emphasis added).

<sup>286</sup> *Id.*

<sup>287</sup> PLEA BARGAIN TASK FORCE REPORT, *supra* note 268, at 6. *See generally* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527, 527 (1979) (analyzing what conditions denote plea bargaining as “involuntary”). *See generally* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 69–70 (2005) (comparing the “going rate” of plea bargains with the average trial outcome); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. UNIV. L. REV. 63, 64 (2011) (exploring the plea bargaining process and suggesting a viable approach towards limiting prosecutorial abuse).

<sup>288</sup> PLEA BARGAIN TASK FORCE REPORT, *supra* note 269, at 6 (“[P]olice and government misconduct often goes unchecked because so few defendants proceed to pre-trial hearings where such misconduct is litigated. The reality that so few pretrial matters are litigated leads prosecutors to be less critical of their witnesses and less willing to scrutinize the strength of their cases, knowing that they won’t be held accountable at trial.”).

<sup>289</sup> *Id.* at 6–7 (“Defense lawyers . . . are less likely to properly investigate cases, knowing their clients will almost certainly take a plea.”).

<sup>290</sup> *Id.* at 7 (discussing the difference in circumstances and tactics utilized depending on the race of the defendant). *See generally* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190 (2018) (reviewing racial disparity in the steps leading up to trial, and the various decisions that can cause such). *See generally* Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INSTITUTE OF JUSTICE (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (taking a historical approach to analyzing the racial disparity of incarceration rates across America).

### E. *Young Prosecutors' Syndrome*<sup>291</sup>

Interview evidence suggests that prosecutors' experience of stress changes over the course of their career. While some prosecutors burned out, other prosecutors improved their ability to manage stress over time. One veteran prosecutor described changes in how he responded to stress over the course of his career: "For the first ten years I did this job . . . I couldn't eat on trial days, I would throw it up. Now I can eat on trial days . . . I'm learning to deal with [the] stress."<sup>292</sup> Another senior ADA described improvements in his coping skills over the years:

I'm better at it [now, dealing with stress] . . . There [were] a lot of failures . . . I certainly could have dealt as a . . . younger prosecutor with the stress . . . better . . . I would be very short sometimes . . . I was immature emotionally . . . deal[ing] with my feelings through others . . . But I'm much better [now].<sup>293</sup>

Multiple prosecutors voiced similar learnings as they progressed in their careers.<sup>294</sup>

In addition to learning how to better deal with stress, they also matured in other ways. Several prosecutors learned to build close relationships with judges and defense counsel over time.<sup>295</sup> Their knowledge of the criminal code expanded.<sup>296</sup> They developed greater confidence in the courtroom and at trial.<sup>297</sup> They learned to work better with colleagues.<sup>298</sup>

All of this added experience—including the improved ability to handle stress—shifted their ratio of perceived demands to perceived resources. As the threat and challenge literature asserts, experience constitutes a valuable resource from which a person can draw when facing stressors.<sup>299</sup> The new skills and expanded knowledge base that veteran prosecutors acquire over the years become important additions in their arsenal of perceived resources. With these added resources, one might expect more seasoned prosecutors to be less likely to operate in threat states.

That said, task demands also tend to increase as prosecutors gain experience. In most jurisdictions, office supervisors typically assign easier misdemeanor cases to new ADAs and reserve more difficult felony cases for

<sup>291</sup> See generally Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1068 (2014) (identifying a tendency by young prosecutors towards favoring trial).

<sup>292</sup> Interview with 145.

<sup>293</sup> Interview with 155.

<sup>294</sup> Interview with 150 ("If somebody calls me and I don't know the answer, [a situation that is particularly stressful for me.] . . . I've learned to say, I'm gonna call you back . . . I have . . . learn[ed] to say no.").

<sup>295</sup> Interview with 160.

<sup>296</sup> Interview with 150.

<sup>297</sup> Interview with 160.

<sup>298</sup> Interview with 155.

<sup>299</sup> Blascovich, *supra* note 187, at 485–86, 488, 490; LAZARUS & FOLKMAN, *supra* note 79, at 105.

senior attorneys.<sup>300</sup> Many prosecutors therefore experience an increase in task demands as they progress through their careers—offsetting their simultaneous increase in resources. This may partly explain why threat and challenge states were observed among both novice and seasoned interviewees.

In understaffed jurisdictions, however (which comprise a large portion of jurisdictions in America),<sup>301</sup> novice ADAs are frequently assigned serious cases even at early stages of their career.<sup>302</sup> The combination of less work experience (e.g., fewer resources) and more serious cases (e.g., greater task demands) makes threat response highly likely. Asking junior attorneys to handle too many high-stakes cases will inevitably facilitate threat states, which in turn spells weakened prosecutorial performance and impaired decision-making.<sup>303</sup>

These patterns in prosecutor maturation lend support for what Wright and Levine have termed “young prosecutors’ syndrome.” In their study of 200 state prosecutors, Wright and Levine found that rookie prosecutors tended to be more adversarial and more punitive than veteran prosecutors.<sup>304</sup> Rookies were less willing to reduce charges in exchange for a guilty plea, less willing to negotiate with defense counsel, and more willing to offer harsh sentences than more seasoned prosecutors.<sup>305</sup> (The instant study noted similar trends, with some of the fourteen participants admitting that they tempered their punitive tendencies and adversarial natures over time.)<sup>306</sup> Wright and Levine attributed this transformation to several factors: life experience, an increase in confidence, learning from past mistakes, and the ability to discern between small and large crimes.<sup>307</sup>

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<sup>300</sup> See Interviews with 130, 150, 125, 170 (explaining that senior prosecutors handled different types of cases than junior prosecutors due to the gap in experience; senior prosecutors also had the responsibility of mentoring or training junior prosecutors to fill that gap).

<sup>301</sup> Adam Biener, *Prosecutor Workplace and Compensation Study: Report of Findings*, ASS’N PROSECUTING ATT’YS (2021), <https://www.apainc.org/prosecutor-workplace-and-compensation-study/>.

<sup>302</sup> See Thomas Hogan, *The Prosecutor Exodus*, CITY J. (Jul. 9, 2021), <https://www.city-journal.org/article/the-prosecutor-exodus> (explaining that because experienced prosecutors are leaving—due to political pressure, more progressive junior prosecutors challenging the criminal justice system, and for financial reasons—younger and inexperienced prosecutors are filling the void and taking on more serious cases).

<sup>303</sup> *Supra* Parts IV.A, IV.B.

<sup>304</sup> Wright & Levine, *supra* note 291, at 1084–85, 1089.

<sup>305</sup> *Id.* at 1069, 1084–85, 1115.

<sup>306</sup> Interview with 105. (“I can just remember a case I had at the beginning [of my career] where this kid stole a bike. I think he was a teenager. I don’t even think he had a criminal record. And I remember going to court and the judge said, ‘What is the offer?’ And I said, ‘One year in jail.’ And I remember the whole courtroom was laughing at me—the judge, the defense attorney . . . and . . . I thought that was an appropriate offer. So obviously it’s changed quite a bit through the years.”); see also Interview with 155 (explaining that his team of prosecutors have changed how they have made charging decisions over time), and Interview with 160 (explaining that he only brings charges and negotiates hard when the evidence to convict is overwhelming).

<sup>307</sup> Wright & Levine, *supra* note 291, at 1099.

The present study adds another explanation to that list: as prosecutors progress in their career, they often become more adept at handling stress,<sup>308</sup> which may in turn affect how adversarial they are. While the literature on the BPS model of challenge and threat has yet to explore the effect of threat and challenge states on being adversarial, in theory the connection makes sense. When operating in threat mode, a prosecutor's mental focus centers on avoiding damage to one's self.<sup>309</sup> In that state, he or she is more likely to engage in self-protecting behaviors and see defense counsel as potentially threatening. Consequently, one would expect threatened prosecutors to behave in less cooperative, more adversarial ways than challenged prosecutors.

Over time, as prosecutors gain experience and learn to better handle their stress, they increase their perceived resources for handling stressors and thereby make threat states less likely. Adversarial behavior should then decrease as a prosecutor matures, as young prosecutors' syndrome would predict.

#### F. *Procedural Justice*

Threat and challenge states may also influence how prosecutors treat people involved with the criminal justice system. Interviewees frequently admitted that their stress levels affected their interactions with others. When operating in what appeared to be threat states, prosecutors reported at times behaving with hostility and unkindness. As one prosecutor explained:

When my stressors were coming on, I would be short with people . . . My agitation and level of patience would dwindle or be non-existent . . . I would be short with colleagues, [with] my loved ones in connection with just everyday life, [with] victims, like, "hey, get to the point." I'm not that type of person, but [I started] being an asshole.<sup>310</sup>

Others admitted becoming snappy, less professional, and more terse with others when especially stressed.<sup>311</sup> "There must be some really good cues [when I'm stressed] because . . . I could be walking down the hallway of the office . . . and people [are] like . . . you're not having a good day."<sup>312</sup> These statements confirm the psychological research that links stress with irritability and impatience.<sup>313</sup>

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<sup>308</sup> Of course, not all prosecutors become better at handling stress over time. Many burn out or choose to leave the profession because of the stress. Interviews with 110, 140 (describing how different people handle the stress).

<sup>309</sup> Warren, *supra* note 81.

<sup>310</sup> Interview with 155.

<sup>311</sup> Interviews with 155, 140, 145.

<sup>312</sup> Interview with 145.

<sup>313</sup> Melissa A. Brotman, Katharina Kircanski, Argyris Stringaris, Daniel S. Pine & Ellen Leibenluft, *Irritability in Youths: A Translational Model*, 174 AM. J. PSYCHIATRY 520 (2017); Michael J. Toohey &

Meanwhile, prosecutors who exhibited frequent challenge states did not voice these kinds of negative changes in character. Some exhibited greater self-discipline to stay in character when facing stressful moments. One developed strategies to limit behaviors that might damage relationships with colleagues.<sup>314</sup>

It is of course quite possible for prosecutors operating in challenge states to treat others poorly. Operating in a challenge state by no means guarantees saintly interpersonal behavior. Particularly if prosecutors are motivated by self-serving goals, challenge states might prompt prosecutors to take advantage of people standing in their way. But the data from these fourteen interviews suggests that prosecutors in threat states may behave more abrasively than prosecutors in challenge states.

These changes in prosecutor disposition may or may not affect case outcomes. But they certainly impact the quality of defendant and victim experiences with the criminal legal system. The difference between a collegial prosecutor and an antagonistic one will likely leave a marked impact on a defendant. It will similarly impact the experience of a victim, family member, witness, defense counsel, or other citizen involved in the criminal court process.

As procedural justice research asserts, how a person is treated while moving through the court system can, at times, matter more than the ultimate outcome given.<sup>315</sup> Furthermore, the quality of people's interactions with court officials—whether they are treated with dignity and respect, whether they are given voice, and whether they can trust decision-makers—plays a critical role in increasing the legitimacy of the criminal justice system and improving public safety.<sup>316</sup> Prosecutors who behave more abrasively as a result of operating in threat states run the risk of diminishing this important sense of procedural justice.

### G. *Burnout & Retention*

Threat and challenge states among prosecutors also carry implications for recruitment and retention in the profession. As scholars and news outlets have documented in recent years, prosecutors appear to be leaving the

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Raymond DiGiuseppe, *Defining and Measuring Irritability: Construct Clarification and Differentiation*, 53 CLINICAL PSYCH. REV. 93, 104 (2017).

<sup>314</sup> Interview with 160 (“I try to take myself out of that situation until I can gather myself and get it together . . . before I deal with it. If I feel that someone has upset me or a situation has occurred that is getting ready to take me out of character, I try to get control of myself . . . . If [the situation is] getting [me] to be out of character and I think it could go south, or it may not be as professional as I would like it to be, then I may take myself out of that situation [and] say, ‘Let’s talk tomorrow.’”).

<sup>315</sup> The Justice Collaboratory, *Procedural Justice*, YALE L. SCH., <https://law.yale.edu/justice-collaboratory/procedural-justice> (last visited Dec. 1, 2025); Tracey Meares, *Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation*, 111 NW. UNIV. L. REV. 1525, 1531 (2017).

<sup>316</sup> The Justice Collaboratory, *supra* note 315.

profession in droves.<sup>317</sup> Across the country, District Attorney offices struggle with unprecedented turnover and a lack of applicants for open positions. Reasons for this exodus include long-standing problems like burnout and low salaries, combined with reportedly burdensome new discovery laws in some jurisdictions<sup>318</sup> and shifts triggered by the COVID-19 pandemic (including massive backlogs and racial justice concerns).<sup>319</sup> These shortages in turn negatively impact the criminal justice system at large: high rates of prosecutorial turnover weaken community trust, force novice attorneys to take on high-stakes cases, and detrimentally affect case dispositions.<sup>320</sup>

While this study was not focused on prosecutor retention, statements from interviewees confirmed that unusually high stress levels both push prosecutors out and keep potential applicants away. One prosecutor explained that high stress levels led her to leave her job as an ADA for a more relaxed position in a conviction integrity unit:

For me, [the ADA job] was pretty much stressful all the time . . . . The unpredictability of the cases for me became not worth it anymore . . . . I miss the work . . . but overall, for my sanity and my general mental health, taking a step away from it was the right thing for me to do . . . . [My new job] is much less stressful . . . . I'd be lying if I said it's stressful, it's not stressful. . . . That's not to say you're not trying to do a good job and make sure that the right outcome is achieved, but it's not stressful.<sup>321</sup>

Others made statements to the effect of, “if you can’t handle the stress of this job, you shouldn’t take it.” For example, one prosecutor said, “for

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<sup>317</sup> Adam M. Gershowitz, *The Prosecutor Vacancy Crisis*, 50 *BYU L. REV.* 355, 372–74 (2024); Disha Raychaudhuri & Karen Sloan, *Prosecutors Wanted: District Attorneys Struggle to Recruit and Retain Lawyers*, *REUTERS* (Apr. 13, 2022), <https://www.reuters.com/legal/transactional/prosecutors-wanted-district-attorneys-struggle-recruit-retain-lawyers-2022-04-12/>; Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, *N.Y. TIMES* (Apr. 3, 2022), <https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html>; see also Lisa Rozner, ‘Great Resignation’ Extends to New York City’s District Attorney Offices, *CBS NEWS* (Apr. 4, 2022), <https://www.cbsnews.com/newyork/news/great-resignation-extends-to-new-york-citys-district-attorney-offices/> (explaining that hundreds of New York City prosecutors have left their jobs during the COVID pandemic); Hogan, *supra* note 302 (explaining that career prosecutors across the United States are leaving their jobs because they are being blamed for increased crime resulting from more progressive policies regarding charging and sentencing decisions).

<sup>318</sup> Bromwich, *supra* note 317.

<sup>319</sup> Raychaudhuri & Sloan, *supra* note 317 (reporting that the COVID pandemic and increasing concerns about racial inequalities in the justice system, among other factors, have contributed to the lack of new prosecutors).

<sup>320</sup> Christi Metcalfe & Joseph B. Kuhns, *Coping with Limited Prosecutorial Resources: An Assessment of the Case Processing and Community Impact from the Perspective of Prosecutors and Staff in a Southeastern County*, 34 *CRIM. JUST. POL’Y REV.* 337, 354 (2023).

<sup>321</sup> Interview with 110.

some people, [the stress of an ADA job] is debilitating, but I don't think that you will last very long as a prosecutor if that's the case."<sup>322</sup>

This study adds nuance to the traditional narrative that uniquely high stress levels explain why prosecutors are quitting. In reality, threat states lead prosecutors to quit, not stress generally. Were prosecutors to respond to ongoing stressors with challenge appraisals, far more would stay in the profession. Research in other industries reveals that threat appraisals—not challenge appraisals—are associated with employee absenteeism, intentions to quit, and voluntary turnover.<sup>323</sup> It is the experience of repeatedly operating in threat state that is especially problematic. Chronic threat response, not challenge response, leads to physical illness, anxiety, and emotional exhaustion.<sup>324</sup>

Part of the solution to prosecutor recruitment and retention, then, should include training prosecutors and their supervisors to appraise stressors as challenges rather than as threats. Much can be done at an organizational level to facilitate challenge states instead of threat states, as the next section details. Training prosecutors and law students interested in the profession to view their stress as challenging rather than threatening could leave a marked impact on recruitment and retention, generating important ripple effects across the criminal justice system.

#### V. RECOMMENDATIONS FOR ENCOURAGING CHALLENGE STATES

And so we see that, in most cases, threat states tend to worsen criminal justice outcomes while challenge states tend to improve them. Given these findings, our criminal legal system would benefit from facilitating challenge states instead of threat states. Prosecutorial stressors are unlikely to disappear anytime soon: our courts need lawyers to engage in the stressful work of representing the government, upholding justice, and ensuring public safety. To promote impartial prosecutorial decision-making in the face of this stress, it is incumbent upon us to find ways to promote challenge states.

Previous scholarship suggests five avenues for regulating unwanted influences on prosecutorial discretion: increased judicial oversight, public accountability, the professional bar, legislation, and internal office measures. I briefly review each of these avenues and their likelihood of affecting prosecutors' stress appraisals before presenting three concrete recommendations for facilitating challenge states.

The first avenue, increased judicial oversight, is unlikely to substantially affect prosecutorial stress responses. While some voices have called for greater judicial oversight to reign in improper influences on prosecutorial

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<sup>322</sup> Interview with 170.

<sup>323</sup> Fugate, Prussia & Kinicki, *supra* note 112, at 890–91.

<sup>324</sup> See *supra* notes 93–99 (discussing one's physiological response to an interpretation of a threat).

discretion,<sup>325</sup> prosecutors' significant political power has thwarted those efforts.<sup>326</sup> Prosecutors are generally "fiercely protective" of their discretion and thus far have resisted any significant judicial oversight.<sup>327</sup> Many judges previously served as prosecutors, making them less inclined to hold prosecutors accountable.<sup>328</sup> Furthermore, the bench often considers discretion to be a cornerstone of the adversarial system and an important demonstration of the constitutional principle of separation of powers.<sup>329</sup> Judges remain poor regulators of prosecutorial discretion, and it is unlikely that increased judicial oversight will facilitate prosecutor challenge states.

The public is also unlikely to make a significant difference. Most District Attorneys are locally elected and, in theory, are held accountable by the public.<sup>330</sup> In practice, however, "prosecutorial elections have long been thought feeble mechanisms for addressing any of the significant problems associated with American prosecutors."<sup>331</sup> It is unlikely that public pressure will result in any significant difference in the ways that stress negatively affects prosecutorial decision-making.

The professional bar is one avenue that could potentially facilitate challenge states among prosecutors—to a slight extent. The American Bar Association (ABA) currently imposes a set of legal and ethical obligations on prosecutors through its *Model Rules of Professional Conduct*.<sup>332</sup> While prosecutors are rarely referred to disciplinary authorities, almost every state court has adopted a disciplinary rule based on the language of the Model Rules.<sup>333</sup> The ABA has also promulgated a set of Criminal Justice Standards for prosecutors<sup>334</sup> which states rely on when setting standards of professional conduct.<sup>335</sup> Guidance offered in these sources could be expanded in ways

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<sup>325</sup> See, e.g., Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxiii (2015) (arguing that judges "can do a great deal to ensure that prosecutors comply with their constitutional obligations").

<sup>326</sup> See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 908 (2009) (arguing that such a reform is not viable).

<sup>327</sup> David Alan Sklansky, *The Problems with Prosecutors*, ANN. REV. CRIMINOLOGY 451, 462 (2018).

<sup>328</sup> Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 781 (1995).

<sup>329</sup> Sklansky, *supra* note 327, at 462.

<sup>330</sup> *Id.* at 463.

<sup>331</sup> *Id.*; see also Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (arguing that elections do not work as an adequate check on prosecutorial power because in practice, prosecutors face few challengers, and when they do, the incumbent usually wins).

<sup>332</sup> See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2025) (outlining the special responsibilities a prosecutor must follow in the course of a criminal case).

<sup>333</sup> Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 80 (2016).

<sup>334</sup> See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.1 to 3-8.4 (AM. BAR ASS'N 4th ed. 2017) [hereinafter ABA PROSECUTION FUNCTION] (outlining the standards which prosecutors must follow in carrying out their duties).

<sup>335</sup> Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 875 (2012).

that reflect an understanding of how stress can negatively impact discretion, as my recommendations below detail.

State legislatures may be another avenue for facilitating challenge states among prosecutors. Legal scholars have noted that criminal justice politics lead legislators to cooperate with prosecutors.<sup>336</sup> Legislation that is attractive to prosecutors stands a higher chance of being passed. Because prosecutors have personal and institutional incentives to operate in challenge states more frequently than threat states (e.g., challenge states lead to greater job satisfaction, improved health outcomes, and less burnout), prosecutors may well support legislation that appropriately targets their stress levels. I explore this possibility in my final recommendation below.

Internal office policies are likely the most effective avenue for mitigating threat and promoting challenge states.<sup>337</sup> As Stephanos Bibas explained, “[m]ost commentators favor more external regulation [of prosecutorial discretion] by legislatures, judges, or bar authorities . . . [But] the most promising avenue[s] of reform [are] changing the internal structure and management of prosecutors’ offices.”<sup>338</sup> Statements from this study’s interviewees concur: internal office policies and work cultures significantly influence prosecutors’ stress responses. By making structural, office-level adjustments, District Attorney offices can do much to create work environments that foster challenge states.

To that end, I now present three recommendations for facilitating challenge states among prosecutors. First, offices should develop a culture of collegiality—an atmosphere marked by high quality, positive relationships. Collegial cultures expand the pool of resources available for prosecutors to handle stressors and thereby facilitate challenge responses. Second, offices should invest in more robust management training for supervisors. To promote challenge states, team leads should be explicitly trained to help line prosecutors reappraise their stress and build psychological safety. Revised Criminal Justice Standards and National Prosecution Standards can be developed with these needs in mind. Finally, to the extent possible, offices should keep prosecutor workloads manageable, by calculating jurisdiction-specific caseload guidelines and respecting those limits when assigning work. State legislation may be needed to ensure those guidelines are respected.

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<sup>336</sup> Stuntz, *supra* note 3, at 509–11.

<sup>337</sup> “If prosecutors cannot be supervised and regulated from the outside, perhaps they should supervise and regulate themselves.” Sklansky, *supra* note 327, at 462.

<sup>338</sup> Bibas, *supra* note 24, at 959–60.

### H. Collegial Work Cultures

When asked about resources they draw upon to handle stress, interviewees mentioned their colleagues more frequently than any other single resource.<sup>339</sup> The presence of supportive, helpful colleagues constitutes a valuable resource that can shift the ratio of task demands to resources in the direction of challenge states.<sup>340</sup> As one prosecutor explained, “I find it very helpful to have really great colleagues and supervisors and bosses who I feel like are supportive . . . . If something bad happens or if I have a question . . . I have good resources to lean on. I feel very motivated . . . whatever the decision is . . . to do the right thing.”<sup>341</sup> Colleagues were seen as a resource for making decisions, testing out ideas, serving as a listening ear, or knowing that someone else was going through a similarly difficult situation.<sup>342</sup>

Interview evidence indicates that these supportive relationships rarely materialized out of thin air: the culture of the office significantly influenced the extent to which prosecutors felt they could lean on their colleagues for support. Some office cultures were described as friendly, collegial, unified, helpful, team-centered, supportive, and transparent.<sup>343</sup> Other offices were marked by competition, favoritism, backstabbing, yelling, and big egos.<sup>344</sup> Collegial environments tended to foster the types of relationships that lessened threat states. Ego-filled environments did the reverse.

Research in other settings reveals that environments marked by service, friendship, and collaboration reduce threat states. This occurs as a result of oxytocin, the hormone responsible for friendship, love, and trust. Known to lessen fear-related behaviors, oxytocin enters the bloodstream anytime a person witnesses an act of kindness, receives kindness, or offers kindness to another person.<sup>345</sup> Scientists consider the chemical “an important factor in determining a challenge response” over a threat response.<sup>346</sup> people in high-threat situations are believed to have low levels of oxytocin, while those in low-threat situations are believed to have high levels of oxytocin.<sup>347</sup> District Attorney offices that foster collegial, service-oriented cultures are more likely to elevate oxytocin levels and subsequently reduce perceived threats.

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<sup>339</sup> See *supra* note 160 and accompanying text.

<sup>340</sup> See *supra* note 110 and accompanying text.

<sup>341</sup> Interview with 135.

<sup>342</sup> Interviews with 105, 110, 170.

<sup>343</sup> Interviews with 110, 115, 130, 150.

<sup>344</sup> Interviews with 105, 130, 140, 150.

<sup>345</sup> See SIMON SINEK, *LEADERS EAT LAST* 60–62 (2017) (explaining that the more two people trust each other, the more oxytocin is released, which, in turn, results in a long-lasting feeling of comfort and stability).

<sup>346</sup> Meijen, Turner, Jones, Sheffield & McCarthy, *supra* note 251, at 8. *But see* Greg Miller, *The Promise and Perils of Oxytocin*, 339 *SCIENCE* 267 (2013) (explaining that although oxytocin was believed to help overcome social disorders like autism, recent research suggests that it may promote aggression and other anti-social behaviors in some circumstances).

<sup>347</sup> Meijen, Turner, Jones, Sheffield & McCarthy, *supra* note 251, at 11–12.

Other studies show that simply having a friend close by reduces a person's perception of task difficulty.<sup>348</sup> Having close collegial relationships at work can shift the appraisal process "by redefining the situational threat and augmenting the individual's perceived . . . ability to cope."<sup>349</sup> Prosecutors with strong colleague relationships are far better positioned to appraise stressors as challenges instead of threats. Furthermore, stress states have an element of contagion to them: when individuals regulate their stress to experience a challenge state, it tends to spill over to their teammates.<sup>350</sup>

Collegial cultures are not built accidentally but result from intentional organizational policies, practices, values, and norms perpetuated by prosecutors at the top. Interviewees identified several specific work practices that fostered a culture of collegiality. Formal mentoring programs, for example, were reported to make a difference in fostering higher quality relationships among prosecutors.<sup>351</sup> Offices with a strong culture of informal mentoring were also seen as helpful.<sup>352</sup> Architectural design choices likewise

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<sup>348</sup> In one experiment, researchers asked college students to wear a heavy backpack while standing at the bottom of a hill. The students were then asked to estimate how steep the hill was. Some participants completed the exercise alone, while others stood with strangers, acquaintances, or close friends. Those standing with close friends perceived the hill to be much less steep than those who were alone, with strangers, or with acquaintances. Furthermore, the closer and longer the relationship, the less steep the hill seemed. Having a close friend nearby mediated a person's appraisal of how difficult the hill would be to climb. Simone Schnall, Kent D. Harber, Jeanine K. Stefanucci & Dennis R. Proffitt, *Social Support and the Perception of Geographical Slant*, 44 J. EXPERIMENTAL SOC. PSYCH. 1246, 1247–50 (2008).

In a second experiment, researchers asked college students to remember a negative, neutral, or positive relationship. Then they were taken to the base of a steep hill, with a heavy backpack, and asked to estimate the steepness of the hill. Participants who recalled a positive relationship perceived the hill to be much less steep than those who remembered a negative or neutral relationship. Once again, the closer the student felt to the person they recalled, the less steep the hill seemed. *Id.* at 1250–52; *see also* Niobe Way, Carol Gilligan, Pedro Noguera & Alisha Ali, *Introduction to THE CRISIS OF CONNECTION: ROOTS, CONSEQUENCES, AND SOLUTIONS* 22 (Niobe Way, Alisha Ali, Carol Gilligan & Pedro Noguera eds. 2018) ("The world sounds and looks less stressful when standing next to, or even thinking about, a person to whom one feels close.").

<sup>349</sup> Meijen, Turner, Jones, Sheffield & McCarthy, *supra* note 251, at 7.

<sup>350</sup> *See* Christopher Oveis, Yumeng Gu, Joseph M. Ocampo, Emily J. Hangen & Jeremy P. Jamieson, *Emotion Regulation Contagion: Stress Reappraisal Promotes Challenge Responses in Teammates*, 149 J. EXPERIMENTAL PSYCH.: GEN. 2187, 2201 (2020) (examining how emotion regulation facilitates contagious responses in teammates).

<sup>351</sup> Several DA offices established formal mentoring relationships, pairing rookies with more senior prosecutors and asking them to meet regularly. Interviews with 165, 130, 150, 125. Prosecutors admitted that they primarily socialized and built relationships with colleagues at their same experience level (particularly in large offices with sizeable incoming cohorts of new prosecutors). Interviews with 110, 170. Assigning rookies a veteran mentor can help prosecutors move past typical socializing patterns and create an expectation that veterans were approachable and available to answer questions. *See* Wright & Levine, *supra* note 291, at 1117–18. By expanding a junior prosecutor's pool of resources to include more senior attorneys, these programs can lessen threat perception and facilitate challenge appraisals.

<sup>352</sup> These offices did not make formal paired assignments but encouraged supervisors and senior attorneys to continually "bring[] people under your wing." Interview with 130. Prosecutors in these environments blocked out time in their schedules to answer colleagues' questions, made it a point to be as accessible as possible to each other, and routinely sat as second chair for colleagues. Interviews with 160, 105, 165. Several interviewees had been deeply affected, both professionally and personally, by an informal mentor in the office. Interviews with 130, 150, 125.

contributed to greater collegiality: one District Attorney deliberately installed glass walls in each prosecutor's office to cultivate a culture of transparency, openness, communication, and collaboration.<sup>353</sup> Other offices cultivated a culture of collegiality by consistently reinforcing a set of organizational core values related to service.<sup>354</sup> Prosecutors who operated in "repeat player" courtroom workgroups—where the same judge, defense counsel, and prosecutor regularly work together—also reported developing more collegial relationships over time than those who rotated courtrooms frequently and rarely encountered the same judge or defense attorney.<sup>355</sup> Literature on the subject recommends regular face-to-face meetings, ample opportunities for informal interaction, and a shared sense of purpose as key drivers for promoting greater collegiality.<sup>356</sup> All of these strategies stand to facilitate challenge and reduce threat.

### I. *Supportive Managers*

A second step for promoting challenge states in District Attorney offices is to provide greater management training for supervisors. Interviewees complained frequently about some supervisors' poor management skills.<sup>357</sup> They spoke of supervisors who micromanaged incessantly, instilled fear rather than confidence, cared more about ascending their own career ladder than treating colleagues well, and lacked management skills.<sup>358</sup> One prosecutor (who had acquired substantial management experience before becoming a prosecutor) attributed these problems to a mismatch between what District Attorneys are responsible for and what they have been trained to do:

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<sup>353</sup> Interview with 150.

<sup>354</sup> Interview with 130.

<sup>355</sup> Interviews with 110, 115, 120, 150, 130, 145, 160, 165, 170. Interviewees reported that, in most cases, repeat relationships decreased antagonism and fostered collegiality. As they encountered the same set of court actors, prosecutors learned to work together. One prosecutor described her relationship with a defense attorney as being "like oil and water initially, but once we start[ed] having to work together 24/7 . . . we [became] like best buds . . . . It was fabulous. We had a great relationship, because . . . you [had] to work with them all the time." Interview with 160. Not every repeat relationship was pleasant. Interviews with 105, 150. For the most part, however, repeat player courtrooms seemed to lessen antagonism between opposing counsel. Increased familiarity with the judge and defense counsel also created an added resource for prosecutors, further lessening their sense of threat. *See, e.g.*, Interview with 165 ("One of the most important things that a prosecutor can do is to be very connected to their defense attorneys . . . and very connected to the judge. And I think that reduces the stress.").

<sup>356</sup> *See, e.g.*, Alex M. McAllister, Lesley Wiglesworth & John H. Wilson, *Establishing and Sustaining a Culture of Collegial Collaboration*, 30 PRIMUS 668, 670–74 (2020) (describing how a college mathematics department created a culture of collegiality); *see also* Geert Kelchtermans, *Teacher Collaboration and Collegiality as Workplace Conditions: A Review*, 52 ZEITSCHRIFT FÜR PÄDAGOGIK 220 (2006) (providing a literature review of organizational strategies to promote collegiality and collaboration in educational settings).

<sup>357</sup> Interviews with 110, 145, 140.

<sup>358</sup> Interviews with 110, 145, 140.

A lot of the difficulty in this office is because we have a trial lawyer in charge. [Our DA] is a great person. She's the best trial lawyer I have ever seen in a court, period . . . . We don't have a Chief Operations Officer . . . trained in . . . public administration or with a master's in business . . . . We need a manager . . . . It's the same problem everywhere. There are no professionals that run [District Attorney offices] . . . . We don't have the right managers in place. . . . It creates some internal problems that we just shouldn't have. [Our DA] realizes that . . . she doesn't know what she's doing. She doesn't know how to run a hundred lawyer law firm . . . so there are stresses that happen.<sup>359</sup>

Having strong, supportive managers can lessen threat states in the workplace. Interviewees expressed performing better, feeling more at ease, and having more confidence in their decisions when they were managed by a supportive supervisor.<sup>360</sup> A capable manager augments a prosecutor's arsenal of perceived resources, tilting the ratio of demands-to-resources more in favor of a challenge state. Skilled managers may also be more capable of creating collegial work environments than untrained managers, further lessening threat states.

To promote greater challenge states among line prosecutors, supervisors should, at a minimum, be trained to help subordinates "reappraise" or reconsider stressful situations to be challenges rather than threats. As the science of threat and challenge shows, threat and challenge states are malleable.<sup>361</sup> They stem from individuals' *perceptions* of stressors, and, as such, can be changed.<sup>362</sup> Dozens of empirical studies have manipulated participants' appraisals through language explicitly designed to foster either threat or challenge states.<sup>363</sup> We now know what to say to participants before a public speaking task, academic exam, or sporting event to encourage challenge states, and what will garner a threat state.

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<sup>359</sup> Interview with 145.

<sup>360</sup> Interview with 110 ("To be honest, I don't think I've had great supervisors throughout my career . . . . But when you have a good one, it makes a huge difference. In your confidence, too . . . . When you have somebody that believes in you, it just naturally enables you to do a better job. If you have somebody who's supervising you that you feel like doesn't trust you, it can be a self-fulfilling prophecy: you end up making more mistakes because you're worried like, . . . what if I do this, they're gonna think this . . . . I get too consumed by . . . making sure I'm pleasing them, as opposed to being . . . confident in my own abilities to make decisions."); *see also* Interview with 160 (describing contrasting supervisory conditions where the prosecutor's judgment about "what's right" was either challenged or supported, respectively).

<sup>361</sup> Jamieson, *supra* note 77, at 176.

<sup>362</sup> For greater detail on reappraising or recategorizing emotion, see LISA FELDMAN BARRETT, *HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN* 158, 182 (Mariner Books 2018).

<sup>363</sup> *See, e.g.*, Kassam, Koslov & Mendes, *supra* note 237, at 1395 (manipulating challenge and threat states using positive and negative nonverbal feedback in simulated interview task).

Empowerment language that emphasizes that a person is capable of meeting a particular stressor, for example, facilitates challenge.<sup>364</sup> Language that highlights other people who have succeeded in the task does the same.<sup>365</sup> Supervisors who encourage people to see their own symptoms of nervousness as normal, natural, and beneficial to performance also promote challenge responses.<sup>366</sup> Feedback that is framed to be constructive rather than derisive can likewise promote challenge states and aid performance.<sup>367</sup>

Language focused on a person's prior struggles with the task, by contrast, engenders threat. So too does language centered on the difficulty of the task at hand. "Fear appeals," or persuasive language focused on the consequences of failure, are also associated with greater threat appraisals.<sup>368</sup> Supervisors should be explicitly trained to avoid threat-inducing language and use challenge-inducing approaches instead.

Supervisors can further encourage challenge states by responding to mistakes made with an attitude of understanding and growth—cultivating what is called "team psychological safety."<sup>369</sup> Multiple interviewees feared making mistakes at work.<sup>370</sup> Some of this fear stemmed from a prosecutor's individual personality.<sup>371</sup> Other times, it was perpetuated by the office culture.<sup>372</sup> In either scenario, fear of making mistakes increased the perception of task demands and heightened prosecutors' sense of threat.<sup>373</sup>

Obviously, minimizing prosecutor mistakes is desirable for the criminal justice system. Interviewees were aware that their mistakes could be costly:

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<sup>364</sup> Moore, Wilson, Vine, Coussens & Freeman, *supra* note 245, at 558.

<sup>365</sup> *Id.* at 556.

<sup>366</sup> See Jeremy P. Jamieson, Wendy Berry Mendes, Erin Blackstock & Toni Schmader, *Turning the Knots in Your Stomach Into Bows: Reappraising Arousal Improves Performance on the GRE*, 46 J. EXPERIMENTAL SOC. PSYCH. 208, 211 (2010) (finding that participants who were instructed to reappraise arousal states as signs of good performance actually performed better on the task). One interviewee appeared to do this when counseling a more junior ADA. She explained, "Somebody I was talking to who's pretty new was . . . agonizing about . . . somebody who's currently incarcerated and I was . . . saying . . . this is how you should be reacting. You should be thinking about this. . . . It doesn't necessarily mean that it's the wrong decision, but you should be spending that time . . . . It shouldn't be easy. It shouldn't be easy for anybody to send someone to prison or to jail . . . . I think it's a sign that you're . . . being thoughtful and you're taking it seriously." Interview with 135.

<sup>367</sup> Jamieson, Mendes, Blackstock & Schmader, *supra* note 366, at 211; see also Marcus Buckingham & Ashley Goodall, *The Feedback Fallacy*, 97 HARV. BUS. REV. 92, 97 (2019) ("Focusing people on their shortcomings or gaps doesn't enable learning. It impairs it.").

<sup>368</sup> David Putwain & Richard Remedios, *The Scare Tactic: Do Fear Appeals Predict Motivation and Exam Scores?*, 29 SCH. PSYCH. Q. 503, 504 (2014).

<sup>369</sup> Charles Duhigg, *All Together Now: Group Study*, THE NEW YORK TIMES MAG. 20, 75 (Feb. 28, 2016).

<sup>370</sup> Interviews with 110, 155.

<sup>371</sup> Interview with 110.

<sup>372</sup> Interviews with 155 (describing "forces in our office that . . . wanna make sure that everything happens right, all the time").

<sup>373</sup> Interview with 110 ("For me, [this job] was pretty much stressful all the time because . . . as somebody who . . . wants to do things correctly and doesn't wanna make mistakes[,] . . . [well], you're gonna make mistakes.").

errors often carried serious consequences for defendants, victims, and public safety.<sup>374</sup>

And yet eliminating all mistakes is unrealistic. In the words of one interviewee, “People are gonna make mistakes. You make mistakes. Everyone does. Especially when you’re starting out [as a prosecutor]. There’s so much that you don’t know . . . . You’re . . . constantly . . . confronting situations that you’ve never dealt with before.”<sup>375</sup>

The key, then, is to help prosecutors realize their mistakes, learn from them, and, when needed, deal with them—quickly and consistently. Managers play a crucial role in this process. To help prosecutors surface mistakes and learn from them, supervisors need to intentionally cultivate team psychological safety. First coined by management guru Amy Edmondson, psychological safety refers to the shared sense that team members can admit mistakes, ask questions, express concerns, and share ideas—all without fear of retribution or negative consequences.<sup>376</sup> Teams with greater levels of psychological safety do not make more mistakes; they are simply more willing to report them, address them, and learn from them.<sup>377</sup> High psychological safety leads to better performance and better decision-making, as team members feel more free to raise questions and concerns.<sup>378</sup> It also fosters challenge more than threat: a psychologically safe team becomes a valuable resource prosecutors can use to handle stressful situations. Unafraid of admitting mistakes, team members are more likely to be open about errors and seek help to correct them. In a system where prosecutors’ mistakes often carry weighty consequences, fixing and learning from missteps is vital. Supervisors trained to develop team psychological safety can reduce threat appraisals while simultaneously working to produce better criminal justice outcomes.

Organizational management literature suggests a variety of other ways that managers can support employees—such as setting realistic expectations, giving clear instructions, taking an interest in employees’ well-

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<sup>374</sup> Interview with 115 (“If you lose a trial or make mistakes in a case, someone potentially walks who did something bad, and you have a victim that didn’t get justice.”).

<sup>375</sup> Interview with 110.

<sup>376</sup> Amy Gallo, *What is Psychological Safety?*, 102 HARV. BUS. REV. (SPECIAL ISSUE) 109, 109 (2024) (defining the term psychological safety and citing Edmondson as the originator). See TedX Talks, *Building a Psychologically Safe Workplace: Amy Edmondson: TEDxHGSE*, YOUTUBE (May 5, 2014) <https://www.youtube.com/watch?v=LhoLuui9gX8> (contrasting the performance of teams operating under a “managed impressions” approach with those operating under “psychological safety”); Duhigg, *supra* note 369, at 26 (describing how Google operationalized “psychological safety”).

<sup>377</sup> Amy Edmondson, *Psychological Safety and Learning Behavior in Work Teams*, 44 ADMIN. SCI. Q. 350, 355 (1999). See generally AMY C. EDMONDSON, *THE FEARLESS ORGANIZATION: CREATING PSYCHOLOGICAL SAFETY IN THE WORKPLACE FOR LEARNING, INNOVATION, AND GROWTH* (2019) (introducing the concept of psychological safety for management professionals).

<sup>378</sup> Gallo, *supra* note 376, at 110; cf. PATRICK LENCIONI, *THE FIVE DYSFUNCTIONS OF A TEAM: A LEADERSHIP FABLE*, 99–103 (Jossey-Bass 2002) (dramatizing a workplace conflict that models psychologically safe team dynamics to preserve integrity of business decisions).

being and development, and listening attentively.<sup>379</sup> These and other supportive management practices will go a long way in facilitating challenge over threat.

To encourage this kind of supervisor training, the ABA Criminal Justice Standards and the National District Attorneys Association (NDAA) National Prosecution Standards should be expanded.<sup>380</sup> Currently, both sets of guidelines call for some management training in District Attorney offices, but the language is weak. Standard 3-1.13 of the ABA's Prosecution Function section states: "Individuals who will supervise attorneys or staff should receive training in how effectively to supervise."<sup>381</sup> The NDAA, a membership organization responsible for providing training and assistance to prosecutors, contains a similar provision: "Prosecutors with supervisory responsibilities should include in their continuing training the study of management issues, such as staff relationships and budget preparation."<sup>382</sup> While certainly better than nothing, both provisions set too low of a bar. Revised language should set a minimum number of training hours for supervisors; forty hours annually could be a good starting point.<sup>383</sup> The language should also specify the need to train supervisors in encouraging impartial discretion among line prosecutors, addressing influences like stress, implicit bias, and other cognitive biases.

#### J. Manageable Workloads

District Attorney offices can further reduce threat states by making prosecutor workloads more manageable. Guidelines suggest that a single prosecutor should handle no more than 150 felonies or 400 misdemeanors annually.<sup>384</sup> These standards, however, are routinely violated. One

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<sup>379</sup> Kevin Rui-Han Teoh, Iain Coyne, Dwayne Devonish, Phil Leather & Antonio Zarola, *The Interaction Between Supportive and Unsupportive Manager Behaviors on Employee Work Attitudes*, 45 PERSONNEL REV. 1386, 1397 (2016); How Lee & Greta G. Cummings, *Factors Influencing Job Satisfaction of Front Line Nurse Managers: A Systematic Review*, 16 J. NURSING MGMT. 768, 778 (2008).

<sup>380</sup> See NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (4th ed. with rev. commentary updated 2024) [hereinafter NATIONAL PROSECUTION STANDARDS] (setting guidelines for professional conduct in prosecutorial functions); see also ABA PROSECUTION FUNCTION, *supra* note 334 (setting guidelines for professional conduct in prosecutorial functions with an express purpose to be used in education, training, and legal reform).

<sup>381</sup> ABA PROSECUTION FUNCTION, *supra* note 334, at Standard 3-1.13.

<sup>382</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 380, at Standard 1-5.3c.

<sup>383</sup> Some have recommended that managers spend five percent of their time devoted to training, equivalent to 100 hours a year. *How Much Time Should an Executive Invest in Training?*, IESE BUSINESS SCHOOL, UNIVERSITY OF NAVARRA: IESE STANDOUT (last accessed Nov. 11, 2025), <https://www.iese.edu/standout/time-executive-invest-training-education/#:~:text=Good>.

<sup>384</sup> National workload guidelines for prosecutors have been difficult to develop. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that defense attorneys handle no more than 150 felonies or 400 misdemeanors annually. This standard has been widely used by prosecutors as well. BARBARA JORDAN & MICKEY LELAND, CENTER FOR JUSTICE RESEARCH,

interviewee, a unit supervisor in a large urban county, reported that his ADAs averaged roughly 1,000 felony cases each per year—a “crushing load.”<sup>385</sup> Other jurisdictions report similar numbers.<sup>386</sup> “Quite simply, many prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage.”<sup>387</sup> Overwhelming caseloads have been shown to cause inadvertent prosecutorial error and harm to defendants, victims, and the public.<sup>388</sup>

Massive caseloads also increase the incidence of threat states. In this study, the prosecutors who appeared to demonstrate the greatest challenge responses were also those who reported lighter, more manageable caseloads.<sup>389</sup> The correlation makes sense: the lower a prosecutor’s caseload, the fewer the task demands—tilting the ratio of task demands-to-resources in favor of challenge states. At some point, enormous caseloads feel insurmountable and unsustainable, making threat appraisals more likely.<sup>390</sup>

To promote challenge states instead of threat states, prosecutor offices must ensure that individual attorney workloads are manageable. Drawing on research conducted by the U.S. Department of Justice, offices can use the “disposition-based method” to assess prosecutor workload and determine the number of attorneys needed to appropriately staff jurisdiction needs.<sup>391</sup> Some jurisdictions may need to hire more prosecutors to keep caseloads

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RESEARCH BRIEF: AN EXAMINATION OF PROSECUTORIAL STAFF, BUDGETS, CASELOADS AND THE NEED FOR CHANGE 4 (2019); see also Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266 (2011) (“[P]rosecutors in many large cities are asked to handle excessive caseloads that run afoul of advisory guidelines for criminal defense attorneys . . . [of] no more than 150 felonies or 400 misdemeanors in any year.”). Some agencies have resisted developing national caseload standards for prosecutors, citing too great a variety in court structures, criminal codes, and other factors that might impact workload. AMERICAN PROSECUTORS RESEARCH INSTITUTE, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T JUST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE?: RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 3 (2002) [hereinafter AMERICAN PROSECUTORS RESEARCH INSTITUTE].

<sup>385</sup> Interview with 145.

<sup>386</sup> Gershowitz & Killinger, *supra* note 384, at 267–70.

<sup>387</sup> *Id.* at 263.

<sup>388</sup> *Id.* at 263–65.

<sup>389</sup> See Interviews with 170 (describing a “manageable” caseload and recognizing “the amount of cases per prosecutor can be a source of stress”), 120 (contrasting current caseload as lighter relative to other jurisdictions).

<sup>390</sup> See Clare Amari, *She’s a Dedicated Harris County Prosecutor: An “Unsustainable” Caseload Tests Her Limits*, HOUSTON LANDING (Oct. 12, 2023), <https://houstonlanding.org/harris-county-district-attorney-prosecutor-caseload-kim-ogg/> (describing results of a consulting firm’s report analyzing department workload, commissioner response, and prosecutor impact).

<sup>391</sup> The disposition-based method involves calculating all the time prosecutors spend processing cases (beginning with initial screening through final adjudication and post-adjudication work) and doing non-case work (including office administration, community outreach, and police coordination) to obtain a clear picture of staffing needs. AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 384, at 20.

reasonable, especially in drastically understaffed jurisdictions or in offices that have experienced a significant exodus.<sup>392</sup>

Other jurisdictions can keep workloads manageable by assigning fewer cases or encouraging prosecutors to dismiss more cases. Several scholars and advocates have called on prosecutors to dismiss a greater number of low-level offenses as a strategy for reducing mass incarceration and limiting the collateral consequences of criminal justice involvement.<sup>393</sup> While these strategies have not gone without criticism,<sup>394</sup> greater use of dismissals could, in some offices, contribute to keeping prosecutor workloads manageable and help promote challenge states.

As it stands, both the ABA and NDAA standards for prosecutors contain sections related to workload. Particularly in the ABA's case, the language appears sufficiently robust:

ABA Standard 3-1.8: "(a) [Prosecutors] should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations . . . (b) The prosecutor's office should regularly review the workload of individual prosecutors, as well as the workload of the entire office, and adjust workloads (including intake) when necessary to ensure the effective and ethical conduct of the prosecution function. (c) The chief prosecutor . . . should . . . consider seeking funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a prosecutor or prosecutor's office, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief."<sup>395</sup>

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<sup>392</sup> See Amari, *supra* note 390 (reporting on conditions where consultants recommended adding staff); see also Lisa R. Pruitt, Jennifer Sherman & Jennifer Schwartz, *Legal Deserts and Spatial Injustice: A Study of Criminal Legal Systems in Rural Washington*, *YALE L. J. F.* 847, 861 (March 14, 2025) (revealing through empirical research the inequalities that emerge in rural criminal justice systems).

<sup>393</sup> See Allison Young, *The Facts on Progressive Prosecutors*, *CTR. AM. PROGRESS*, <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> (last updated April 23, 2020) (describing prosecutorial strategies that promote public safety and reduce mass incarceration). See generally Baughman, *supra* note 257, at 267 (examining prosecutorial decisions to decline charges in relation to strategies that reduce mass incarceration); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 *MO. L. REV.* 629, 642 (2015) (suggesting courts should leverage dismissals to counterbalance overzealous prosecutions that contribute to mass incarceration); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?* 119 *MICH. L. REV.* 1365, 1365 (2021) (reviewing EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019)).

<sup>394</sup> See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *VAND. L. REV.* 1055, 1089–98 (2015) (explaining how misdemeanor decriminalization actually expands, rather than eliminates, collateral consequences of criminal prosecution).

<sup>395</sup> ABA PROSECUTION FUNCTION, *supra* note 334, at Standard 3-1.8.

NDA Standard 1-4.5: “Except in extraordinary circumstances, a prosecutor should not maintain, and should not be asked to maintain, a workload that is inconsistent with the prosecutor’s duty to ensure that justice is done in each case.”<sup>396</sup>

And yet this study’s interview data reveals that some prosecutors’ offices are likely operating in violation of these standards.<sup>397</sup> To ensure greater compliance with the standards’ aims, state legislation may be needed as an added check to keep workloads manageable. Clearer enforcement mechanisms and accountability measures are needed to ensure consistent adherence to workload limits, and state legislatures can play an important role here. Prosecutors will operate in challenge states more frequently—and thereby use their discretion more impartially—when offices are required to assign them a manageable number of cases.

#### CONCLUSION

Prosecutors’ stress responses carry significant implications for the criminal justice system. Prosecutors who appraise stressful situations as challenges benefit from sharper decision-making, improved performance, better health outcomes, and greater job satisfaction. Those who perceive stressors as threats are more susceptible to biases, mistakes, abrasive behavior, and burnout. Threat responses also predispose prosecutors to plead cases and diminish defendants’ sense of procedural justice. Put another way, threat responses tend to worsen criminal justice outcomes. Challenge responses in general appear to improve them.

Thankfully, threat and challenge states are malleable—and much can be done to facilitate challenge instead of threat. To promote challenge appraisals among prosecutors, District Attorney offices should foster collegial work environments, invest in more robust management training for supervisors, and assign manageable workloads.

As it stands, far too many prosecutors operate in a chronic threat state, triggering serious negative downstream effects for defendants, victims, and communities. By harnessing the benefits of challenge states, District Attorney offices pave the way for a more just and more effective criminal justice system, one prosecutorial decision at a time.

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<sup>396</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 380, at Standard 1-4.5.

<sup>397</sup> *See, e.g.*, Interview with 145 (“[Our ADAs] handle half the felonies [in the county] with ten percent of the resources. . . . [That’s] a little over a thousand cases each . . . .”); *see also* Amari, *supra* note 390 (“The current caseload and workload of each HCDAO prosecutor are unsustainable . . . yield[ing] a negative effect on staff retention and morale and imped[ing] the ability to achieve the county’s justice and safety goals.”).