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**THE STATE (NEVER) RESTS: HOW EXCESSIVE  
PROSECUTOR CASELOADS  
HARM CRIMINAL DEFENDANTS**

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# The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants

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&

Laura R. Killinger\*\*

*Although dozens of scholars have documented the appalling underfunding of indigent defense in the United States, virtually no attention has been paid to the overburdening of prosecutors. In many large jurisdictions, prosecutors handle caseloads that are as large as those handled by public defenders. Counter-intuitively, when prosecutors shoulder excessive caseloads, it is criminal defendants who are harmed. Because overburdened prosecutors do not have sufficient time and resources for their cases, they fail to identify less culpable defendants who are deserving of more lenient plea bargains. Prosecutors also lack the time to determine which defendants should be transferred to specialty drug courts where they have a better chance at rehabilitation. Overwhelmed prosecutors commit inadvertent (though still unconstitutional) misconduct by failing to identify and disclose favorable evidence that defendants are legally entitled to receive. And excessive prosecutorial caseloads lead to the conviction of innocent defendants because enormous trial delays encourage defendants to plead guilty in exchange for sentences of time-served and an immediate release from jail. This article documents the excessive caseloads of prosecutors' offices around the country, and it demonstrates how the overburdening of prosecutors harms criminal defendants, victims, and the public at large.*

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## I. Introduction

In recent decades, legal scholars have devoted enormous attention to two problems in the American criminal justice system: the appalling under-funding of indigent defense<sup>1</sup> and intentional prosecutorial misconduct.<sup>2</sup> Both problems are deeply

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<sup>1</sup> For a sampling of the dozens of excellent articles, see Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L. REV. 1031 (2006); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006); Note, *Effectively Ineffective: The Failure of*

troubling and the academic literature helpfully serves to spotlight the problems and encourage reform.<sup>3</sup>

Remarkably, however, there is virtually no scholarship focusing on the opposite side of the coin. Scholars have failed to notice that prosecutors in large counties are often as overburdened as public defenders and appointed counsel.<sup>4</sup> In some jurisdictions, individual prosecutors handle more than one thousand felony cases per year.<sup>5</sup> Prosecutors often have hundreds of open felony cases at a time and multiple

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*Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. J. 835 (2004); Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants and the Right to Counsel*, 41 AM. J. CRIM. L. 367 (2004); Erin V. Everett, *Comment, Salvation Lies Within, Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis*, 74 MISS. L.J. 213 (2004); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615 (2002); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURVEY AM. L. 783; Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

<sup>2</sup> See, e.g., BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* (2007); JOSEPH F. LAWLESS, *PROSECUTORIAL MISCONDUCT* (2003); Kelly Gier, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191 (2006); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45 (2005); Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution*, 47 S.D. L. REV. 255 (2002); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U.L.Q. 713 (1999); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083 (1994); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

<sup>3</sup> We have no criticism of the attention paid to the underfunding of indigent defense and prosecutorial misconduct, and one of us has contributed to the literature on both topics. See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009); Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007).

<sup>4</sup> A few scholars have made passing references to “extreme docket pressures” but have not provided any detailed analysis. See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005) (“Extreme docket pressure characterizes DAs' offices, particularly in the large cities where crime rates tend to be highest.”); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555 (2004) (noting that while the “number of state-court felony prosecutions more than doubled between 1978 and 1990; the number of prosecutors grew by less than twenty percent”).

<sup>5</sup> See *infra* notes 44-46 and accompanying text.

murder, robbery, and sexual assault cases set for trial on any given day. Prosecutors in many large cities have caseloads that are far in excess of the recommended guidelines that scholars often cite when criticizing public defender caseloads.<sup>6</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.

Not only have scholars neglected to analyze excessive prosecutorial caseloads, they have also failed to consider how those caseloads result in inadvertent prosecutorial error. While there is an enormous (and important) literature analyzing intentional prosecutorial misconduct, the reality is that most prosecutorial misconduct is accidental.<sup>7</sup> All too often, for instance, prosecutors fail to turn over exculpatory evidence that the defense is entitled to receive in advance of trial.<sup>8</sup> While some of these cases involve unscrupulous prosecutors,<sup>9</sup> far more often the failure to disclose evidence is inadvertent because prosecutors are too busy to properly focus on their cases or because they have not received proper guidance from senior lawyers who are terribly overburdened themselves.<sup>10</sup>

The ramifications of excessive prosecutorial caseloads extend throughout the criminal justice system and, counter-intuitively, are most harmful to criminal defendants. Excessive caseloads lead to long backlogs in court settings, trials, and bottom-line plea bargain offers. Defendants who were unable to post bail thus remain incarcerated for months because overburdened prosecutors do not have time to focus on their cases.<sup>11</sup> Jails accordingly remain overcrowded,<sup>12</sup> resulting in not only great expense to taxpayers but terrible conditions of confinement for defendants who are awaiting trial.<sup>13</sup> Worse yet, excessive prosecutorial caseloads delay trials for months or

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<sup>6</sup> See *infra* notes 25-29 and accompanying text.

<sup>7</sup> See Gershowitz, *Prosecutorial Shaming*, *supra* note 3, at 1061.

<sup>8</sup> For a discussion of the so-called “Brady” problem, see Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

<sup>9</sup> See *Banks v. Dretke*, 540 U.S. 668, 693 (2004) (reversing a death sentence because the prosecutor deliberately withheld that a key witness was paid and failed to inform the court that other witnesses had testified untruthfully).

<sup>10</sup> See Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM L. \_\_\_ (forthcoming 2010) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1476107](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476107)).

<sup>11</sup> See, e.g., Lise Olsen, *Thousands Languish in Crowded Jail: Inmates Can Stay Locked Up for More Than a Year Waiting for Trial in Low-Level Crimes*, HOUS. CHRON., Aug. 23, 2009 (finding that 200 currently incarcerated inmates in the Harris County jail had already served the minimum jail sentence for the crimes they were charged with).

<sup>12</sup> See, e.g., Steve McVicker, *Jail Crowding: Sheriff Appealing Order, Won't Transfer Inmates*, HOUS. CHRON., May 6, 2006, at B1 (“State inspectors have withheld certification from the downtown [Harris] [C]ounty jail system for the past three years, largely because of inmate crowding. . .”).

<sup>13</sup> See, e.g., *Coleman v. Schwarzenegger*, 2009 WL 2430820, at \*1 (E.D. Cal. Aug. 4, 2009) (detailing how the California prison system is operating at twice its capacity and how it imperils inmates through terrible medical care and inmate-on-inmate violence).

even years, leading some defendants who would have exercised their trial rights to simply plead guilty and accept a sentence of time-served.<sup>14</sup> Some innocent defendants plead guilty to crimes they have not committed simply to get out of jail.<sup>15</sup>

Because they are overburdened, prosecutors -- who are sworn to achieve justice, not to win at all costs<sup>16</sup> -- lack the time and resources to carefully assess which defendants are most deserving of punishment. In rare cases, this means prosecutors will be unable to separate the innocent from the guilty. In far more cases, overburdened prosecutors will be unable to distinguish the most culpable defendants from those who committed the crimes but are not deserving of harsh punishment. For example, when a defendant is charged with robbery or assault or even a gang killing, prosecutors with time to look into the case might discover that although the defendant was present at the crime scene he was a small-time player tagging along with more serious criminals. Or prosecutors might learn that a defendant charged with theft had a very low IQ, or that he stole to support his family rather than for more illicit purposes. In these cases, prosecutors who have time to dig into cases may be willing to plea bargain to lower charges or sentences. This is particularly important when, as too often is the case,<sup>17</sup> the indigent defendant is represented by an overburdened defense lawyer who did not conduct any investigation or who lacked the communication skills to bring the relevant information to the prosecutor. When prosecutors are overburdened, there is less chance that they will separate out the least culpable defendants.<sup>18</sup>

Excessive prosecutorial caseloads also harm victims. Here the problem is easy to visualize. Overburdened prosecutors have little time to meet with victims. They therefore may not receive factual information that would help to convict the guilty or victim-impact information that would be valuable at sentencing. Perhaps more importantly, overburdened prosecutors will seem aloof or uncaring to victims, or may

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<sup>14</sup> See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136 (2008) (“The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some. In this way, conviction may counter intuitively inaugurate freedom.”).

<sup>15</sup> See Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1199 (2005) (noting that time served plea offers may “be too good to ignore”); Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 437-38 (discussing how Oklahoma defendants charged with minor misdemeanors have incentive to plead guilty in exchange for sentences of time-served and an exit from jail).

<sup>16</sup> See MODEL RULE PROF'L CONDUCT 3.8 cmt 3 (2003) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”).

<sup>17</sup> See *supra* note 1.

<sup>18</sup> Of course, excessive caseloads do help defendants by limiting the number of cases that prosecutors can bring to trial and thus creating more favorable plea bargain offers for defendants. As we explain below, however, the force of this argument is limited. See *infra* notes 129-32 and accompanying text.

not have time to contact them at all. Victims are thus denied the therapeutic justice they seek from the criminal justice process.<sup>19</sup>

Finally, excessive caseloads harm the public interest as well. As every first-year law student knows, defendants are presumed innocent and prosecutors face a tough burden of proving defendants guilty beyond a reasonable doubt. While this burden is important to protect the innocent and curb governmental power, the open secret in criminal justice circles is that most criminal defendants are in fact guilty.<sup>20</sup> Overburdened prosecutors who lack the time to thoroughly investigate cases, subpoena witnesses, meet with experts, and complete a host of other tasks will find themselves disadvantaged at trial. Guilty defendants who should have been convicted will therefore go free because prosecutors lacked the time and resources necessary to win at trial.

Although excessive prosecutorial caseloads should be an obvious concern for defendants, victims, and the public, solving the problem is a difficult task. While legislatures will sometimes grudgingly allocate greater funding for prosecutors, appropriating more money to prosecutors will unfairly disadvantage already underfunded indigent defense lawyers<sup>21</sup> who are unlikely to receive comparable funding increases.<sup>22</sup> Additionally, because prosecutors' offices are so drastically understaffed, modest budget increases would have little impact on the enormous over-burdening of prosecutors. Accordingly, we suggest a bolder approach whereby overburdened prosecutors and indigent defense lawyers make a coordinated request for drastically increased funding for the criminal justice system at large, rather than their individual offices.

Part I of this article reviews the caseloads of prosecutors in some of the largest district attorney's offices in the nation. While not every large prosecutor's office is overburdened, Part I demonstrates that many offices are woefully understaffed. Part II then explains how excessive prosecutorial caseloads harm defendants, victims, and the

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<sup>19</sup> See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004) (explaining how "[v]ictims do not want vengeance so much as additional rights to participate" and that most victims do not receive an opportunity to discuss their case with prosecutors).

<sup>20</sup> See, e.g., ALAN DERSHOWITZ, *THE BEST DEFENSE* xxi (1982) (famously remarking that Rule 1 of the justice game is that "[a]lmost all criminal defendants are, in fact, guilty").

<sup>21</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 87 (noting that prosecutors offices already receive greater funding than public defenders offices).

<sup>22</sup> See, e.g., Scott Wallace, *Parity: The Failsafe Standard*, in COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS 17 (2000) (available at [www.ojp.usdoj.gov/indigentdefense/compendium/pdf/text/vol11.pdf](http://www.ojp.usdoj.gov/indigentdefense/compendium/pdf/text/vol11.pdf)) ("Congress appropriated \$100 million for fiscal year 2001 to allow states to hire 'community prosecutors.' Though the amounts of proposed federal support are very substantial, the proposals never include matching funds for the constitutionally mandated provision of legal representation services in the new cases which will be filed by the new prosecutors.").

public at large. Part III offers an approach for bringing prosecutorial caseloads to manageable levels.

## II. Prosecutors in Large Jurisdictions Often Have Excessive Caseloads

Although there are more than 2,300 prosecutors' offices throughout the United States,<sup>23</sup> most criminal activity is prosecuted by a comparatively small number of district attorney's offices in major cities.<sup>24</sup> These large district attorney's offices are all organized somewhat differently but by and large have one thing in common: far too few prosecutors are tasked with handling far too many cases. As we explain in this Part, prosecutors in many large cities are asked to handle excessive caseloads that run afoul of advisory guidelines for criminal defense attorneys. Prosecutors are also asked to make due with grossly inadequate support staff. Unfortunately, tough economic times over the past few years have only made the situation worse.

### A. *Standards Suggest Prosecutors Should Not Handle More Than 150 Felonies or 400 Misdemeanors Per Year*

In 1968, a national commission created by the Department of Justice studied the problem of excessive public defender caseloads and adopted a recommendation that defenders handle no more than 150 felonies *or* 400 misdemeanors in any year.<sup>25</sup> In subsequent years, these guidelines have been widely endorsed by criminal justice organizations,<sup>26</sup> the American Bar Association,<sup>27</sup> and academic commentators.<sup>28</sup> While the recommended caseloads are far from perfect,<sup>29</sup> there is widespread agreement that,

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<sup>23</sup> See BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS 2 (2005).

<sup>24</sup> See *infra* note 37 and accompanying text.

<sup>25</sup> See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, Courts Standard 13.12 (1973). More specifically, the guidelines limited defense attorneys to 150 felonies, 400 misdemeanors, 200 juvenile cases, or 25 appeals.

<sup>26</sup> See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, DEFENDER RESOURCES, (available at [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_NLADA](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA)).

<sup>27</sup> See, e.g., GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17-18 (2004); AMERICAN BAR ASSOCIATION, KEEPING DEFENDER WORKLOADS MANAGEABLE 8 (2001).

<sup>28</sup> See Hashimoto, *supra* note 1, at 505 (noting that while the guidelines have been "the subject of some criticism over the years, they have gained widespread acceptance as absolute maximum limits for indigent defenders, and they remain frequently cited and relied upon to this day); Gershowitz, *Raise the Proof*, *supra* note 3, at 93 (same); Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 SO. U. L. REV. 245, 269 (2004) (same).

<sup>29</sup> Some experts have offered more nuanced guidelines that provide for weighted caseloads based on the types of cases being handled by defenders. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL,



roughly speaking, limiting defense counsel to no more than 150 felonies or 400 misdemeanors ensures that they have sufficient time to devote to each of their cases.

In the over forty years since defense caseloads were established, no organization has stepped forward with comparable caseload limits for prosecutors.<sup>30</sup> It is beyond the scope of our project to offer an ideal caseload limit for prosecutors,<sup>31</sup> but it is quite plausible to suggest that the guidelines should be similar to those recommended for defense attorneys. Arguably, prosecutors are in a position to handle slightly more cases than defense attorneys because they do not have to chase down leads in an effort to establish an effective defense. On the other hand, prosecutors have many obligations – such as handling arraignments or meeting with victims – that defense attorneys do not have to shoulder.<sup>32</sup> While we are not sure of the exact caseloads prosecutors should handle, we are confident that it should be very similar to the number recommended for defense attorneys.

Of course, as most criminal justice observers know, many public defenders and appointed counsel violate the recommended caseload limits.<sup>33</sup> Scholars have rightly characterized enormous public defender caseloads of 500 and 600 annual cases per lawyer as a “national crisis”<sup>34</sup> and “outrageous.”<sup>35</sup> Unfortunately, many large prosecutors’ offices also have caseloads that rise to this crisis level and beyond.

### ***B. Prosecutors in Large Counties Are Regularly Tasked with Hundreds or Even Thousands of Felony Cases Per Year***

In 2006, prosecutors in Harris County, Texas conducted a survey of twenty-five of the largest district attorneys’ offices in the nation to determine the size of their staffs and the number of cases they handle. Although the data showed a few offices to have

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CH. 2 (2009); THE SPANGENBERG GROUP, UPDATED WEIGHTED CASELOAD STUDY: COLORADO STATE PUBLIC DEFENDER (2002).

<sup>30</sup> The American Prosecutors Research Institute studied the problem, but it concluded that differences in office size, organization, and case types made a national standard impossible and undesirable. See AMERICAN PROSECUTORS RESEARCH INSTITUTE, HOW MANY CASES SHOULD A PROSECUTOR HANDLE 29 (2002).

<sup>31</sup> Indeed, the National Advisory Commission on Criminal Justice Standards and Goals, which suggested the caseload benchmarks in 1973, cautioned against the dangers of rigid guidelines. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 277 (1973).

<sup>32</sup> For a discussion of other considerations in comparing prosecutor and defender workload, see Wright, *Parity of Resources*, *supra* note 1, at 236-37.

<sup>33</sup> See Backus & Marcus, *supra* note 1, at 1053-59.

<sup>34</sup> *Id.* at 1057-58.

<sup>35</sup> Hashimoto, *supra* note 1, at 464.

reasonable workloads,<sup>36</sup> many large counties had caseloads far in excess of recommended guidelines for public defenders.

**TABLE 1: Cases Per Prosecutor in Large District Attorney's Offices<sup>37</sup>**

| County                       | Prosecutors | Felonies | Misdemeanors | Felonies Per Prosecutor | Misd. Per Prosecutor | Total Filings Per Prosecutor |
|------------------------------|-------------|----------|--------------|-------------------------|----------------------|------------------------------|
| Los Angeles, CA              | 1020        | 68,654   | 125,580      | 67                      | 123                  | 190                          |
| Cook, IL                     | 800         | 60,000   | 265,000      | 75                      | 331                  | 406                          |
| New York, NY (Manhattan)     | 532         | 11,190   | 111,055      | 21                      | 209                  | 230                          |
| Kings, NY (Brooklyn)         | 413         | 12,514   | 98,725       | 30                      | 239                  | 269                          |
| Maricopa, AZ                 | 343         | 5,000    | 40,000       | 117                     | 15                   | 132                          |
| San Diego, CA                | 310         | 18,888   | 27,654       | 61                      | 89                   | 150                          |
| Miami, FL                    | 283         | 36,286   | 54,974       | 128                     | 194                  | 322                          |
| Philadelphia, PA             | 283         | 15,515   | 54,485       | 55                      | 193                  | 247                          |
| Queens, NY                   | 276         | 5,274    | 57,938       | 19                      | 210                  | 229                          |
| Orange, CA                   | 249         | 19,011   | 50,233       | 76                      | 202                  | 278                          |
| Harris, TX (Houston)         | 238         | 39,154   | 69,454       | 165                     | 292                  | 457                          |
| San Bernardino, CA           | 219         | 20,187   | 38,459       | 92                      | 176                  | 268                          |
| Riverside, CA                | 217         | 15,518   | 21,197       | 72                      | 98                   | 169                          |
| Dallas, TX                   | 217         | 24,251   | 53,637       | 112                     | 247                  | 359                          |
| Broward, FL (Ft. Lauderdale) | 194         | 15,720   | 68,301       | 81                      | 352                  | 433                          |

<sup>36</sup> For instance, consider the San Diego District Attorney's Office, which has more than 300 prosecutors who handle approximately 45,000 cases. See SAN DIEGO COUNTY DISTRICT ATTORNEY 2008 ANNUAL REPORT (available at <http://www.sandiegodaannualreport.com/>). By contrast, the Tarrant County District Attorney's Office in Fort Worth Texas handled roughly the same number of cases with half as many prosecutors. See Table 1, accompanying *infra* note 37. Moreover, San Diego prosecutors also have the benefit of 177 investigators and 78 paralegals. Those key support personnel are greater than can be found in much larger cities such as Los Angeles, New York, Chicago, and Houston. See Table 2, accompanying *infra* note 81. Thus while there are clearly cities with excellent staffing, that only serves to reinforce how understaffed many other large prosecutors offices are.

<sup>37</sup> The data for Table 1 are drawn from HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, STATISTICS USED FOR COMPARATIVE ANALYSIS (2006) (on file with the authors).

|                           |     |        |                     |     |     |     |
|---------------------------|-----|--------|---------------------|-----|-----|-----|
| Wayne, MI (Detroit)       | 188 | 13,000 | 4,000 <sup>38</sup> | 69  | 21  | 90  |
| Sacramento, CA            | 185 | 11,491 | 20,759              | 62  | 112 | 174 |
| Santa Clara, CA           | 185 | 8,729  | 25,164              | 47  | 136 | 183 |
| Suffolk, NY (Long Island) | 177 | 2,930  | 33,889              | 17  | 191 | 208 |
| King, WA (Seattle)        | 163 | 9,815  | 16,000              | 60  | 98  | 158 |
| Tarrant, TX (Fort Worth)  | 155 | 15,328 | 27,752              | 99  | 179 | 278 |
| Alameda, CA (Oakland)     | 151 | 9,731  | 26,165              | 64  | 173 | 238 |
| Bexar, TX (San Antonio)   | 146 | 10,188 | 32,314              | 70  | 221 | 291 |
| Clark, NV (Las Vegas)     | 135 | 22,420 | 32,678              | 166 | 242 | 408 |
| Middlesex, MA (Cambridge) | 113 | 720    | 38,000              | 6   | 336 | 343 |

As Table 1 demonstrates, prosecutors in many large counties handle far more cases than guidelines suggest is possible. For example, although defense lawyer guidelines provide that attorneys should handle no more than 150 felonies *or* 400 misdemeanors, the average caseload in Clark County, Nevada was 166 felonies *and* 242 misdemeanors for every prosecutor in the office. The workload for Harris County prosecutors was even worse, with an average of 165 felonies *and* 292 misdemeanors for each prosecutor in the office.

Unfortunately, the data in Table 1 vastly understates the scope of the problem because it assumes that every prosecutor in the office handles an equal number of cases. This assumption is not correct though. Each large district attorney's office has management prosecutors and attorneys in specialized divisions who handle very small caseloads or no cases at all. This leaves the overwhelming bulk of cases to be handled by a smaller core group of prosecutors. These "in-the-trenches" prosecutors thus have a drastically higher number of cases than Table 1 indicates. To put the actual workload of these prosecutors in perspective, consider all of the attorneys in large district attorneys' offices who are not handling day-to-day cases.

First, begin with the "management" prosecutors. Every large district attorney's office employs numerous prosecutors who are responsible only for management and supervisory functions and do not personally handle any cases. The most obvious example is the elected district attorney who rarely if ever is involved in prosecuting

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<sup>38</sup> The data for Wayne County is likely incorrect because it would be unimaginable for there to be only 4,000 misdemeanors in Detroit in one year.

individual defendants.<sup>39</sup> Similarly, most large offices have a first-assistant district attorney who fills the role of chief operating officer by handling day-to-day management matters rather than individual criminal cases.<sup>40</sup> Then there are bureau chiefs who oversee departments (such as trial, appellate, white-collar crime, consumer fraud, asset forfeiture, check fraud, and other areas) and likely are personally responsible for only a handful of very high-profile cases.<sup>41</sup>

Second, consider the numerous line prosecutors who also do not have responsibility for actual cases. Large district attorney's offices often have prosecutors whose sole job is to deal with defendants who posted bail but failed to show up for court. These prosecutors spend time attempting to revoke bonds, not trying cases. Other prosecutors are assigned to "intake" and spend their days drafting warrants and answering police officers' questions about whether there is sufficient probable cause to arrest suspects. Still other prosecutors are assigned to the general counsel's office where they work on policy matters and non-criminal litigation, rather than standard felony and misdemeanor prosecutions.

Third, consider specialized departments where line prosecutors are working in the trenches on criminal cases but have unusually low caseloads. For example, many large district attorneys' offices have white-collar crime or major fraud divisions where prosecutors focus their attention on a small number of very complicated cases. Additionally, many jurisdictions also have departments in which prosecutors deal with a handful of very high-profile cases or a small number of "cold" cases that require enormous time to work up for trial.<sup>42</sup> And then, of course, there are prosecutors who handle death penalty cases and little else for months on end.

In sum, while large district attorney's offices have hundreds of prosecutors on staff, many of the prosecutors do not handle run-of-the-mill cases. The bulk of felony and misdemeanor cases are therefore left to a smaller group of prosecutors in the office. For example, the Philadelphia District Attorney's Office informed us that fewer than half of their prosecutors (roughly 150 of 309 attorneys) handle pending cases that are set

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<sup>39</sup> See, e.g., Brian Rogers et. al., *Rosenthal Steps Up in Officer's Death: DA Says Meeting Slain Policeman's Family Persuaded Him to Take Case*, HOUS. CHRON., Sept. 26, 2006, at B1 (explaining how the elected District Attorney agreed to personally prosecute a case and quoting him as saying "he could not recall the last time he helped prosecute a case, but guessed that it has been several years").

<sup>40</sup> See, e.g., SANTA CLARA DISTRICT ATTORNEY ADMINISTRATORS SALARY SURVEY 4 (2006) (listing the salary for the Chief Assistant DA and other management personnel) (on file with the authors).

<sup>41</sup> For example, the Orange County District Attorney's Office in California classifies twenty-two of its prosecutors - roughly ten percent of the office's attorneys - as management prosecutors, rather than "in-the-trenches," line prosecutors. See ORANGE COUNTY DISTRICT ATTORNEY ADMINISTRATORS: SALARY SURVEY 1 (2006) (on file with the authors).

<sup>42</sup> See, e.g., SAN DIEGO COUNTY DISTRICT ATTORNEY ORGANIZATION CHART 2008 (available at [http://www.sandiegodaannualreport.com/images/page\\_images/org\\_chart.pdf](http://www.sandiegodaannualreport.com/images/page_images/org_chart.pdf)).

for trial.<sup>43</sup> It is these “in the trenches” prosecutors in large offices across the country who are particularly overburdened.

The key question therefore is what is the workload of the in-the-trenches prosecutors who are handling the bulk of each office’s cases? In some jurisdictions, the answer is staggering. One extreme example is Harris County, Texas, where some prosecutors are handling upwards of 1,500 felonies per year and over 500 felonies at any one time. A brief description of the office’s structure highlights the problem.

The Harris County District Attorney’s Office assigns three felony prosecutors to each of its felony courts. On average, each felony court receives 2,000 new filings per year. The senior prosecutor in each court serves primarily in a supervisory role and personally handles only about a dozen of the court’s most serious cases. Almost all of the court’s 2,000 felony cases are therefore split between the other two prosecutors. The second-most senior prosecutor (the “number two prosecutor”) is responsible for the more serious crimes – non-capital murders, sexual assaults, child abuse, robberies, and other serious felonies. These cases are the most complicated and therefore the most time-consuming. In a given year, the number two prosecutor handles 500 serious felonies. All of the remaining felony cases -- drug offenses, burglaries, assaults, and various other crimes -- are assigned to the most junior prosecutor. While these cases are less complicated, they are far more numerous. On average, roughly 1,500 of these felony cases are filed in each court per year. Thus, over the span of a year, a single prosecutor handles 1,500 felonies -- ten times the number of cases than is recommended for public defenders.<sup>44</sup> At any one time, this junior prosecutor – who typically has about two years of prosecution experience under his belt -- has 500 or 600 open cases to handle.

The situation is similarly dire in other large district attorney’s offices. In Cook County, Illinois, the average felony prosecutor has 300 or more open cases at any one time.<sup>45</sup> In a given year, many felony prosecutors in Cook County handle between 800 and 1,000 total cases.<sup>46</sup> Indeed, although it might be hard for criminal justice observers

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<sup>43</sup> See Email from Colleen Bauer, Paralegal, Trial Division of the Philadelphia County District Attorney’s Office to Sachiv Mehta, March 9, 2010.

<sup>44</sup> See *supra* notes 25 and accompanying text (describing recommended workload of 150 felonies for public defenders).

<sup>45</sup> See Telephone Interview with Randy Roberts, Executive Assistant State’s Attorney, Cook County State’s Attorney Office, March 2, 2010. Unlike in Harris County, the felony prosecutors in Cook County do not divide the cases by types of crime. Every felony prosecutor handles lower-level felonies all the way up to serious murders.

<sup>46</sup> See *id.*

to believe,<sup>47</sup> Cook County prosecutors actually handle more cases than their public defender counterparts and are paid lower salaries.<sup>48</sup>

In Fort Worth, Texas, prosecutors in the Tarrant County District Attorney's Office handle upwards of 150 felony cases at any one time and misdemeanor prosecutors have open caseloads of between 1200 and 1500 matters.<sup>49</sup> In Philadelphia County, prosecutors working in the major trials unit or the family violence and sexual assault unit have open caseloads of 250 cases.<sup>50</sup>

Although it may not be the most overburdened prosecutor's office in the country, the Clark County District Attorney's Office in Las Vegas, Nevada truly puts the problem in perspective. The entire Clark County criminal justice system is terribly overburdened. In 2009, a report by an outside indigent defense consultant demonstrated that Clark County public defenders cleared 215 cases per year, in addition to dealing with other open cases.<sup>51</sup> In light of this report and longstanding concern about the overburdening of the public defender's office, the Nevada Supreme Court contemplated imposing caps on the number of cases that the public defender's office could be asked to handle.<sup>52</sup> Almost any reasonable observer would conclude that Clark County public defenders are overburdened. Yet, very little attention has been paid to the fact that prosecutors in Clark County have more cases than public defenders do. In 2009, the District Attorney's Office filed more than 71,000 felonies and misdemeanors.<sup>53</sup> After budget cuts and excluding attorneys whose sole job was to screen cases, the Clark County District Attorney's Office had only 90 prosecutors to handle those 71,000 filings,<sup>54</sup> a ratio of nearly 800 cases per prosecutor.

### ***C. Caseloads Have Become Worse and Staffing Has Been Reduced in Recent Years***

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<sup>47</sup> As Ron Wright has detailed, prosecutors often earn larger salaries and have lighter caseloads than their defender counterparts. See Wright, *Parity of Resources*, *supra* note 1, at 230-31.

<sup>48</sup> See John Flynn Rooney, *Survey: Public Defenders Earn Slightly More Than Prosecutors*, CHI. DAILY L. BULL., Sept. 22, 2008, at 1 (attributing public defenders' higher salaries to the fact that they are unionized).

<sup>49</sup> See Email from Marilyn Carter, Administrative Specialist, Tarrant County District Attorney's Office, to Sachiv Mehta, Feb. 2, 2010.

<sup>50</sup> See Email from Colleen Bauer, Paralegal, Trial Division of the Philadelphia County District Attorney's Office to Sachiv Mehta, March 9, 2010.

<sup>51</sup> See Alan Maimon, *Indigent Defense: Court Stalls Over Caseloads: Justices Expected More Guidance From Report*, LAS VEGAS REV. JOURNAL, Oct. 7, 2009.

<sup>52</sup> See *id.*

<sup>53</sup> See Email from Cara Campbell, Chief Deputy District Attorney for Training and Development, Clark County District Attorney's Office, Jan. 29, 2010.

<sup>54</sup> See *id.*

Although prosecutors have long been overburdened in some jurisdictions, events over the last few years have greatly exacerbated the problem. As scholars have observed, criminal filings tend to increase rather than contract.<sup>55</sup> This may be due to new laws being placed on the books, more aggressive law enforcement with respect to particular crimes,<sup>56</sup> or economic downturns that lead to increased crime rates.

Whatever the cause, the simple fact is that filings in many prosecutors' offices are on the rise. For example, in Dallas County, Texas, felony filings increased by more than ten percent between 2005 and 2009.<sup>57</sup> Matters were far worse in Harris County, Texas, where filings rose by more than 20% over a three-year period.<sup>58</sup> In San Bernardino County, California total case filings rose by more than twenty percent in just the two-year period between 2006 and 2008.<sup>59</sup> Indeed, in the entire State of California, criminal filings increased by more than 100,000 cases between 2005 and 2006.<sup>60</sup> In New York state, criminal case filings rose by nearly 200,000 between 2004 and 2008.<sup>61</sup>

Not surprisingly, as filings have increased most large district attorney's offices have not been in a position to hire additional prosecutors to handle the increased workload.<sup>62</sup> The Bureau of Justice Statistics found that while the staff levels in prosecutors' offices nationwide rose consistently during the 1990s, the numbers

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<sup>55</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 566 (2001) ("Over the course of the past century the number of criminal charges filed has increased very substantially.").

<sup>56</sup> See, e.g., Jane Hadley, *Domestic Violence Cases Overwhelm Prosecutors*, SEATTLE POST-INTELLIGENCER, Nov. 7, 1995, at B1 (explaining that, for various reasons, felony domestic abuse cases in King County (Seattle) Washington increased by 400 percent in a five year period).

<sup>57</sup> Compare DISTRICT COURTS: REPORTED CRIMINAL ACTIVITY BY COUNTY FROM JANUARY 1, 2005 TO DECEMBER 31, 2005 (available at <http://168.39.176.29/OCA/ReportSelection.aspx>) (33,499 felony filings) with DISTRICT COURT: REPORTED CRIMINAL ACTIVITY BY COUNTY FROM JANUARY 1, 2009 TO DECEMBER 31, 2009 (available at <http://168.39.176.29/OCA/ReportSelection.aspx>) (37,017 felony filings).

<sup>58</sup> Case filings in Harris County rose from 106,648 in 2006 to 131,100 in 2009. See Table 1, accompanying *supra* note 37; Email from Jessica Milligan, Assistant District Attorney Harris County District Attorney's Office to Adam Gershowitz, March 18, 2010.

<sup>59</sup> Compare Table 1, accompanying *supra* note 37 (less than 59,000 cases in 2006) with Telephone Interview With Jane Allen, San Bernardino County District Attorney's Office, Feb. 11, 2010 (more than 71,000 cases in 2008).

<sup>60</sup> See JUDICIAL COUNCIL OF CALIFORNIA, 2007 ANNUAL REPORT: BUILDING THE BRANCH 22 (2007) (1,691,790); JUDICIAL COUNCIL OF CALIFORNIA, 2006 ANNUAL REPORT: BUILDING PROGRESS THROUGH UNITY 25 (2006) (1,575,098 filings).

<sup>61</sup> See STATE OF NEW YORK, REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS FOR THE CALENDAR YEAR JANUARY 1, 2008 - DECEMBER 31, 2008, at 18 (available at <http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2008.pdf>) (noting increase from 1,705,369 cases in 2004 to 1,894,925 cases in 2008).

<sup>62</sup> See Stuntz, *Plea Bargain's Disappearing Shadow*, *supra* note 4, at 2555 (explaining how prosecutorial budgets are unable to keep up with increasing caseloads).

plateaued in 2001 and actually declined slightly thereafter.<sup>63</sup> Accordingly, as total case filings increase, the workload of individual prosecutors also increases as the same or fewer lawyers are asked to handle more cases with each passing year.

Jurisdictions with stagnant staffing levels are the lucky ones however. The economic downturn has led a number of district attorney's offices to reduce the number of prosecutors through hiring freezes or even layoffs.<sup>64</sup>

In Detroit, the Wayne County District Attorney's Office was forced to cut a stunning 48 prosecutors between 2008 and 2010.<sup>65</sup> This amounted to a 26% reduction in its prosecution staff. In Las Vegas, the Clark County District Attorney's Office suffered a similarly drastic cut from 135 prosecutors in 2006 to only 102 prosecutors by 2010.<sup>66</sup> Budget cuts forced the Cook County State's Attorney's Office to cut 40 prosecutors and 50 staff in 2008.<sup>67</sup> The Sacramento District Attorney's Office had to lay off 18 lawyers and staff and to leave another 45 positions unfunded.<sup>68</sup> In Seattle, the King County District Attorney's Office was forced to cut 18 prosecutor positions in 2008.<sup>69</sup> In San Bernardino, California, the District Attorney's Office eliminated sixteen prosecutor positions between 2006 and 2010. Other counties, including Harris County,<sup>70</sup> Broward County,<sup>71</sup> and Miami-Dade County,<sup>72</sup> have also been forced to cut prosecutors in recent years.

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<sup>63</sup> See BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS 2 (2005).

<sup>64</sup> In a handful of jurisdictions, additional prosecutors and staff have been appropriated for overburdened district attorney's offices in the last few years. See Brian Rogers, *Commissioners Approve DA's Plan To Add Prosecutors: Additions Will Help Ease Growing Caseload That Has Increased Turnover*, HOUS. CHRON., Oct. 25, 2006, at B4 (discussing additional funding for forty-nine prosecutors, four investigators and two fraud analysts). Unfortunately, Harris County has also suffered hiring freezes in recent years. See *infra* note 70 and accompanying text.

<sup>65</sup> See Email from Maria C. Miller, Assistant Prosecuting Attorney and Director of Communications, Wayne County District Attorney's Office to Adam Gershowitz, March 4, 2010. ("Currently we have 142 prosecutors on staff, down from 190 in 2008.")

<sup>66</sup> See Telephone Interview with Cara Campbell, Chief Deputy District Attorney for Training and Development, Clark County District Attorney's Office, March 1, 2010. See also Table 1 accompanying *supra* note 37.

<sup>67</sup> See Interview with Randy Roberts, *supra* note 45.

<sup>68</sup> See Email from Shelly Orio, Sacramento County District Attorney's Office, to Adam Gershowitz, March 1, 2010.

<sup>69</sup> See Levi Pulkkinen, *Public Defense Lawyers Protest Cuts: County Budget Plan Will Hurt Poor, They Say*, SEATTLE POST-INTELLIGENCER, Oct. 31, 2008, at B1.

<sup>70</sup> See Speech by Hon. Patricia R. Lykos, District Attorney of Harris County, University of Houston Law Center, March 22, 2010.

<sup>71</sup> See Email from Renata Annati, Human Resources Director, Broward County Office of the State Attorney to Adam Gershowitz, March 8, 2010.

<sup>72</sup> See Email from Lorna Salomon, Senior Employment Counsel, Miami-Dade Office of the State's Attorney, to Adam Gershowitz, March 11, 2010.



#### D. *Inadequate Support Staff*

Although excessive caseloads are indefensible, the burden on individual prosecutors would be lessened if large district attorneys' offices had adequate support staff to help prosecutors handle the cases. For instance, paralegals are helpful in keeping track of files, drafting and responding to simple motions, and conducting legal research. Investigators are crucial in finding missing witnesses, serving subpoenas, and doing other background investigation. Victim witness coordinators also serve a useful purpose in keeping victims apprised of court hearings and listening to family concerns. This is to say nothing of secretaries and other basic support staff necessary to answer phones, make copies, and keep the office running. It is well known that public defender offices around the country must make do with inadequate support staff,<sup>73</sup> but resources are also inadequate in district attorney's offices as well.

For example, the four largest counties in Texas handle a combined total of more than 300,000 criminal cases per year.<sup>74</sup> Yet, they have a total of fewer than 35 paralegals to work on all of those cases.<sup>75</sup> The Cook County District Attorney Office is the second largest prosecutor's office in the nation and handles hundreds of thousands of cases per year, but it has less than ten paralegals on staff.<sup>76</sup>

Although large prosecutor's offices tend to have more investigators than paralegals, the numbers are still woefully inadequate. In Clark County, Nevada – which had 29,308 felonies and 41,298 misdemeanors in 2009 – there are only twenty investigators for the whole office<sup>77</sup> and most of their time is spent serving subpoenas because the office does not have enough process servers to contact all of its witnesses.<sup>78</sup> In Seattle, the King County District Attorney's Office handled nearly 15,000 criminal cases without a single investigator on staff. Perhaps most staggeringly, in 2006, the ten largest prosecutor's offices in the country represented a population of nearly forty million people and handled more than one million cases, but had a combined total of only 1,043 investigators on staff.<sup>79</sup> On average, in those ten district attorney's offices, there were more than 1,000 cases per investigator. In Chicago and Houston, the ratio approached 2,000 cases per investigator. And in Miami-Dade County, there were more than 4,500 cases per investigator. Worse yet, by 2010, the total number of investigators in Miami-Dade County was cut from 20 to 14, resulting in a ratio of more than 6,800 cases for every investigator on staff.<sup>80</sup>

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<sup>73</sup> See Backus & Marcus, *supra* note 1, at 1097-1103.

<sup>74</sup> See Table 1, accompanying *supra* note 37.

<sup>75</sup> See *id.*

<sup>76</sup> See Table 2, accompanying *infra* note 81.

<sup>77</sup> See Email from Cara Campbell, *supra* note 53.

<sup>78</sup> See Telephone Interview with Cara Campbell, *supra* note 66.

<sup>79</sup> See Table 2, accompanying *infra* note 81.

<sup>80</sup> See Email from Lorna Salomon, *supra* note 72.

**Table 2: Number of Cases Per Investigators in the Ten Largest Prosecutors' Offices in 2006<sup>81</sup>**

| County          | Population | Total Cases | Investigators | Cases Per Investigator |
|-----------------|------------|-------------|---------------|------------------------|
| Los Angeles, CA | 9,935,475  | 194,234     | 280           | 694                    |
| Cook, IL        | 5,303,683  | 325,000     | 177           | 1,836                  |
| Harris, TX      | 3,693,050  | 108,648     | 59            | 1,841                  |
| Maricopa, AZ    | 3,635,528  | 45,000      | 49            | 918                    |
| Orange, CA      | 2,988,072  | 69,234      | 119           | 582                    |
| San Diego, CA   | 2,933,462  | 46,542      | 131           | 355                    |
| Kings, NY       | 2,486,235  | 111,239     | 99            | 1,124                  |
| Miami-Dade, FL  | 2,376,014  | 91,260      | 20            | 4,563                  |
| Dallas, TX      | 2,305,454  | 77,888      | 59            | 1,320                  |
| Queens, NY      | 2,241,600  | 63,212      | 50            | 1,264                  |
| Totals:         | 37,898,573 | 1,132,257   | 1,043         | 1,086                  |

*E. Why Has So Little Attention Been Paid to the Overburdening of Prosecutors?*

Skeptical observers might begin to wonder at this point why, if caseloads are in fact so excessive, they have received so little attention from academics and the news media. Given that there are dozens of scholarly articles and scores of newspaper features dissecting the indigent defense crisis, why has there been virtually no attention paid to prosecutors' excessive caseloads?

Let us begin first with the news media. The overly simplistic explanation for lack of media interest is that reporters are politically liberal and thus more interested in stories of unfairness to criminal defendants than to overworked prosecutors. Perhaps there is tiny kernel of truth to this explanation, but by and large it is unsatisfying. Reporters spend a considerable amount of time in county courthouses learning about the terrible crimes committed by criminal defendants. Those same reporters interact with prosecutors on a daily basis and likely come to see them (or, at least some of them) as noble public servants. It is therefore difficult to see how reporters would be completely biased toward writing stories that focus only on the problems faced by criminal defendants.

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<sup>81</sup> The data for Table 2 are drawn from HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, STATISTICS USED FOR COMPARATIVE ANALYSIS (2006) (on file with the author).

A more plausible explanation for the lack of media attention to prosecutor caseloads is that defense lawyers are in a far better position to generate press coverage for themselves. Over the last few decades, lawyers for indigent defendants have raised legal challenges to excessive workloads in a variety of forms ranging from ineffective assistance of counsel claims to structural reform declaratory judgment actions.<sup>82</sup> While these legal challenges have for the most part been unsuccessful,<sup>83</sup> the attendant publicity has been enormous. For instance, when a class action lawsuit against New York's public defender system was argued before the state's highest court in early 2010, the *New York Times* ran a lengthy article highlighting the terrible representation received by one defendant.<sup>84</sup> Moreover, much of the indigent defense litigation has been spearheaded by corporate law firms seeking pro bono litigation experience for their junior associates. These law firms – including powerhouses like Covington & Burling, Arnold & Porter, Kirkland & Ellis, and Davis Polk<sup>85</sup> – have public relations experience and media contacts that can be used to create publicity.

By contrast, the litigation and publicity option is not available to prosecutors. Even if prosecutors had interest in filing suit contending that their workload was excessive, they would lack a case and controversy to do so. While indigent defendants can point to Sixth or Fourteenth Amendment violations that give them access to the courthouse, prosecutors have no such constitutional hook. More importantly, overburdened prosecutors would be unlikely to file such litigation even if it were justiciable. Line prosecutors are bureaucratic employees who must follow the policy of the elected district attorney. Because elected district attorneys are usually politicians who work behind the scenes with state and county bodies to procure funding, they are unlikely to desire a public fight over their budget and workload. Rather, elected district attorneys would likely prefer to maintain a good working relationship with the other elected officials that fund them, and assistant district attorneys who want to keep their jobs have to fall into line and do the same.<sup>86</sup>

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<sup>82</sup> For an overview of the litigation and the stages of reform efforts, see Drinan, *supra* note 1.

<sup>83</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 100-106.

<sup>84</sup> See William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES, March 19, 2010.

<sup>85</sup> These law firms were responsible for indigent defense reform efforts in Virginia (Covington & Burling), Michigan (Kirkland & Ellis), Mississippi (Arnold & Porter), and New York (Davis Polk). See Jim Nolan, *Bills Lift Fee Caps for Defense Attorneys: Court-Appointed Attorneys' Low Pay Can Hurt Cases, Legal Experts Say*, RICHMOND TIMES-DISPATCH, Feb. 27, 2007 (discussing Covington & Burling's involvement); Leonard Post, *Lack of Lawyers for the Poor Fuels Suits in Six States*, NATIONAL LAW JOURNAL, Nov. 2, 2004, at 2 (discussing the other three firms).

<sup>86</sup> Of course, line prosecutors may protest their excessive caseloads by quitting and taking more attractive jobs. Many overworked prosecutors do just that after only a few years. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002) (discovering from interviews that the average tenure of line prosecutors in New Orleans is roughly two years). But even if disgruntled prosecutors were to leave in a "blaze of glory" they would be unlikely to attract much attention.

By contrast, public defender offices typically have more contentious relationships with county and state officials and have less reason to be publicly polite.<sup>87</sup> To an even greater degree, appointed lawyers have the autonomy to file litigation and start a media firestorm. The appointed lawyers with the interest and savvy to file systemic indigent defense litigation are often excellent lawyers who have paying clients they could turn to instead of doing appointed work.<sup>88</sup> As such, these appointed counsel effectively operate as independent contractors and can stir up controversy with little fear of retribution from state and county officials.<sup>89</sup>

The lack of academic interest in excessive prosecutor caseloads is harder to explain. Again, the argument that most academics are liberal and have more interest in criminal defendants than government agents is superficial and largely unhelpful. A more telling explanation focuses on the background of many law professors. The traditional route to academia does not run through state prosecutor offices. While there are numerous criminal law professors who worked as federal prosecutors before entering academia, federal prosecutors have vastly greater resources than their state counterparts.<sup>90</sup> Academics who were formerly federal prosecutors therefore did not personally experience the crushing caseloads faced by assistant district attorneys in overburdened county prosecutors' offices. By contrast, there are a number of prominent criminal justice scholars who served as public defenders prior to entering the academy.<sup>91</sup> The past experiences of these former public defenders may be the driving force for their passion and some of their indigent defense scholarship.

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<sup>87</sup> See Pulkkinen, *supra* note 69 (describing how “public defenders are protesting a proposed funding cut that they say would gut legal representation for poor defendants”).

<sup>88</sup> For instance, in Virginia, appointed lawyer Steve Benjamin filed an unsuccessful challenge arguing that appointed lawyers were under-funded. Mr. Benjamin is an extremely well-regarded attorney who served as head of the Virginia Association of Criminal Defense Lawyers and has won numerous awards. See Gershowitz, *Raise the Proof*, *supra* note 3, at 100 n.85.

<sup>89</sup> Of course, appointed counsel do need to be concerned about being denied appointed cases in the future. This concern relates to maintaining good relationships with judges, not legislators, however. And, in most instances, judges have little reason to be upset with appointed counsel who bring litigation challenging their excessive workloads. Indeed, the excessive workload of appointed counsel negatively impacts judges by burgeoning their dockets and slowing down their courtrooms.

<sup>90</sup> Of course, resources are limited even for federal prosecutors and much federal crime must go unprosecuted. See Richman & Stuntz, *supra* note 4, at 613 (noting that the “extreme disjunction between federal jurisdiction and federal resources has bred a norm of radical underenforcement”). This merely reinforces the point though. As Professors Richman and Stuntz explain, “a small but important part of state criminal codes are politically mandatory. Local prosecutors do not have the option of ignoring violent felonies and major thefts.” *Id.* at 600. Federal prosecutors do not face the same problem.

<sup>91</sup> For instance, Professor Norm Lefstein served as the Director of the Public Defender Service for the District of Columbia, Professor Erica Hashimoto served as a federal public defender in Washington DC, and Professor Mae Quinn served in the Bronx Public Defender's office in New

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In sum, there is considerable evidence that prosecutors' offices in many large counties are woefully understaffed. Prosecutors in many counties are regularly called upon to handle two or three times the caseloads that have been recommended for defense lawyers. In a smaller number of jurisdictions, certain prosecutors are handling ten times as many cases as criminal justice organizations, the American Bar Association, and academics would find acceptable for defense lawyers.<sup>92</sup> Additionally, prosecutors must handle these massive caseloads without adequate support staff. Like their public defender and appointed counsel counterparts, prosecutors in many large counties have to make due with virtually no investigative or paralegal support. Because little scholarly and press attention has been paid to the overburdening of prosecutors, policymakers have not been forced to confront how excessive caseloads harm defendants, victims, and the public at large.

### **III. Harm Caused By Excessive Prosecutorial Caseloads**

Excessive prosecutorial caseloads result in serious problems throughout the criminal justice system. Most obviously, as we discuss below in Parts II.B and II.C, excessive caseloads harm crime victims who feel ignored by busy prosecutors, and the public at large, which is disserved when overwhelmed prosecutors lack the time and resources to handle cases against clearly guilty defendants. Less apparent, but even more pernicious, is the harm that excessive prosecutorial caseloads wreaks on criminal defendants. As we explain below in Part II.A, overburdening prosecutors results in longer sentences for less culpable offenders, long delays in the dismissal of charges against the innocent, fewer disclosures of exculpatory evidence by prosecutors, and innocent defendants pleading guilty in exchange for sentences of time-served and an escape from jail. Counter-intuitively, overburdening prosecutors is more harmful than helpful to criminal defendants.

#### **A. Harm to Criminal Defendants**

The conventional wisdom is that defendants benefit when prosecutors have huge caseloads. The logic is simple: if prosecutors are overburdened they will not have time to adequately handle all of their cases and certainly not to bring many cases to trial. Accordingly, prosecutors must plea bargain cases on terms favorable to defendants in

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York City. See AMERICAN ASSOCIATION OF LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 592, 725, 918 (2008).

<sup>92</sup> See *supra* notes 26-28 and accompanying text.

order to shrink their dockets. Excessive prosecutorial caseloads means that run-of-the-mill defendants get less punishment than they would if prosecutors had more time to focus on their cases and to seriously threaten the stiffer penalty that usually is imposed at trial.<sup>93</sup>

To a certain extent, the conventional wisdom is correct. The entire class of criminal defendants – thousands of defendants in large jurisdictions -- likely receive better plea deals from overburdened prosecutors.<sup>94</sup> In some ways, this is a good thing. Given that many defense counsel are overburdened<sup>95</sup> and that legislatures tend to increase sentencing ranges to appear tough on crime,<sup>96</sup> placing time and resource constraints on prosecutors helps to keep the playing field somewhat level and to avoid excessive punishments. If this were all that were at stake, then overburdening prosecutors would not be such a bad thing. However, many other effects of excessive prosecutorial caseloads tend to harm criminal defendants, particularly those who are less culpable or even innocent.

### **1. Overburdened Prosecutors Cannot Always Identify the Least Culpable Offenders and Afford Them Sentencing Reductions**

First, consider how excessive caseloads prevent prosecutors from giving sentencing breaks to the defendants who truly deserve them, while simultaneously giving discounts to the undeserving. In a jurisdiction where prosecutors are not overburdened, assume that the going rate<sup>97</sup> for a run-of-the-mill armed robbery is ten years' imprisonment.<sup>98</sup> Of course, not all robberies are the same. Prosecutors adjust the ten-year average sentence up or down depending on the facts they discover during their pre-trial investigations. In the case of Robber A, prosecutors with adequate time and resources may learn that although police found him inside the bank while the crime

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<sup>93</sup> On the trial penalty, see Bowers, *Punishing the Innocent*, *supra* note 14, at 1157-58.

<sup>94</sup> See *infra* Part III.C.2 and accompanying text (discussing this windfall to undeserving criminal defendants).

<sup>95</sup> See *supra* note 1.

<sup>96</sup> See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005) (“Cognitive errors and biases tend to support a one way ratchet toward the enactment of additional crimes and harsher penalties.”). For a dissenting view on the idea that each year brings more crimes and tougher punishments, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

<sup>97</sup> As plea bargaining scholars have long observed, for most crimes “the bargaining range is likely to be both small and familiar to the parties, as both prosecutors and defense attorneys have a great deal of information about customary practices. Each side, in other words, is likely to have a good sense of the “market price” for any particular case.” Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1923 (1992).

<sup>98</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, SENTENCES IMPOSED IN CASES TERMINATED IN U.S. DISTRICT COURTS Tbl. 5.19 (2004) (listing 105 months as the mean sentence for robbery).

was being committed, he was actually a minor player in the robbery. Bank employees might report that he was standing sheepishly in the corner, not saying anything and not brandishing a weapon. Prosecutors might learn that Robber A had fallen in with the wrong crowd, that he had been previously been a good student, that he holds down a steady job, and that he is remorseful and shows promise for reform. The prosecutor might therefore be willing to offer Robber A a plea deal carrying five years' incarceration, well under the going rate of ten years.

By contrast, consider the case of Robber B. By looking at the paper record, prosecutors might initially think he is entitled to a sentencing break as well. Robber B is charged with stealing a relatively small amount of money and he has only one prior criminal conviction for a simple assault that occurred over five years ago. However, if prosecutors had the time to conduct a proper investigation, they might discover that Robber B is not the type of defendant who deserves a favorable plea deal. Witnesses to the current robbery might tell prosecutors that Robber B pointed his shotgun directly at the victims' heads and that he was clearly the ringleader of the operation. Moreover, the victim of Robber B's previous crime might inform prosecutors that Robber B had severely beaten him to the point of breaking his nose and cheek bones and that his case was plead down to simple assault (rather than aggravated assault) only because Robber B had agreed to provide testimony against another perpetrator. With this information in hand, prosecutors might decide that Robber B should serve the going rate of ten years, or perhaps more. In sum, with time and resources to investigate their cases, prosecutors are able to carefully differentiate between defendants and to tailor plea bargain offers accordingly.

Now consider what likely would have happened if the cases of Robbers A and B had been handled by overburdened prosecutors. Although the going rate for "average" robberies should be ten years, in jurisdictions with overburdened prosecutors the typical punishment may end up being closer to eight years because defense attorneys can push a harder bargain knowing that trial is very unlikely. Even though they are overburdened, prosecutors nevertheless try to differentiate between offenders as best they can. Of course, overburdened prosecutors must make do with less information. They will not have time to meet with Robber B's previous victim and learn how severe his injuries were. Nor will prosecutors have time to personally interview the bank tellers and hear the details of how Robber B masterminded the operation and instilled fear in the employees and bank customers. Similarly, prosecutors will not hear detailed accounts of how Robber A was a passive participant and that he is regarded in the community as a good kid who had fallen in with a bad crowd. While Robber A's attorney may convey this information, without neutral witnesses to attest to it, prosecutors may discount the defense attorney's description as self-serving.

Accordingly, based primarily on the paper record in front of them, overburdened prosecutors might determine that both Robber A and B are entitled to slight discounts on the going rate. Perhaps the prosecutor will offer both of them plea bargains for seven years' imprisonment. In the case of Robber A, the overburdened prosecutor will thus offer a plea bargain in excess of what the defendant deserves. Because he is

represented by a mediocre lawyer or overburdened public defender, Robber A may accept this “excessive” sentence. And in the case of Robber B, the prosecutor will have offered a plea bargain of far less than the defendant deserves. Mediocre lawyer or not, Robber B will likely jump to accept this discounted sentence and consider himself quite lucky. In both cases, overburdened prosecutors will have failed to achieve the most just result.

This scenario likely plays out on a daily basis in courthouse across the country. Try as they might, prosecutors with too many cases and inadequate investigative staff are often unable to accurately assess which defendants are most culpable.

## **2. Excessive Caseloads Hinder Prosecutors From Transferring Deserving Defendants to Specialty Drug Courts**

As noted above, most criminal defendants are in fact guilty and prosecutors typically process clearly guilty defendants through the criminal justice system with standard plea bargain arrangements. Yet, policymakers have recognized that some defendants might be better served by placing them into specialty courts that will closely monitor them and help them to avoid re-offending. For instance, across the country, there are now more than 2,000 specialty drug courts designed to treat and rehabilitate non-violent offenders rather than incarcerate them.<sup>99</sup>

Unfortunately, there are far too many drug offenders to place them all into specialty courts, so prosecutors often have to make important decisions about which defendants should be transferred.<sup>100</sup> As Professor Eric Miller has explained, “[t]he prosecutor exercises the sole power to recommend that a defendant be diverted to drug court . . . If the prosecutor decides that the criteria do not apply, the defendant has no further recourse and must proceed through the criminal justice system in the normal manner.”<sup>101</sup>

In determining whether to transfer a defendant to drug court, the prosecutor must be sufficiently familiar with the offender and her criminal history to recognize that

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<sup>99</sup> See Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 463 (2009) (noting that “specialized drug treatment courts have grown phenomenally popular, with nearly 2,000 now in existence”).

<sup>100</sup> We do not mean to endorse specialty courts as the solution to the criminal justice system’s ills. While we believe drug courts are worthwhile in many instances, there are scholars who are far more skeptical of the systemic benefits. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008).

<sup>101</sup> Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Intervention*, 65 OHIO ST. L.J. 1479, 1540 (2004); see also Mae C. Quinn, *Whose Team am I on Anyway? Musing of a Public Defender on Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 57 (2000) (“Like other diversionary programs, most drug treatment courts operate at the whim of the prosecution. In New York, drug courts cannot make promises to defendants without the approval of the Office of the District Attorney.”).



she is deserving of being moved to a specialty court. And it also requires the prosecutor to fill out the time-consuming paperwork to transfer the defendant. For overburdened prosecutors, it is easy to overlook such offenders.

For example, consider a defendant who has been charged with prostitution for the third time in a single year and has prior convictions for drug crimes. At the time of her first conviction, the judge lectured her about the perils of prostitution and how women are often beaten and sometimes killed by their clients. After her second arrest, the judge sternly informed her that if she were caught again he would send her to jail rather than give her probation. Yet, the same defendant was arrested for the third time only a few months later.<sup>102</sup> At first glance, our defendant does not seem like a good candidate for transfer to a specialty drug court. Prosecutors are sometimes disinclined to offer drug court spots to recidivists<sup>103</sup> and our defendant is (at least this time) charged with prostitution rather a drug crime. A busy prosecutor is therefore likely to spend a few minutes on the case, offer a plea bargain carrying a jail sentence, and to move on to the next case.

Yet, if the prosecutor had time to conduct a closer investigation, he might discover that the defendant's real problem is not prostitution, but an underlying drug addiction. Like many drug-addicted young women, this particular defendant engages in prostitution to support her drug habit and has been arrested for crack possession in the past.<sup>104</sup> But for the drug habit she would have a good chance of living a productive life. She has ties to the community, a high school degree, and appears to be intelligent and capable of handling a regular job. If the prosecutor were to transfer her to the drug court, she would be subject to drug testing, intensive meetings with probation officers, and would stand a better chance of escaping the cycle of trading sex for drugs.<sup>105</sup> Yet, because her case initially looks like just a prostitution charge, and because the overburdened prosecutor has dozens of other cases to deal with that day, our defendant will not have the chance to go through drug court. She will almost certainly plead guilty, spend time in jail, and start the cycle all over again following her release. This is bad for not only the defendant, but also for the community that should prefer to reform a drug user rather than tolerating recidivism.

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<sup>102</sup> Unfortunately, this scenario is extremely common. See *A Trail of Disrepute: Crackdown on Prostitution Needs to Address Substance Abuse*, SARASOTA HERALD TRIB., Oct. 2, 2006, at A10 ("Many of the prostitutes are repeat offenders who have substance-abuse problems.").

<sup>103</sup> See Bowers, *Contraindicated Drug Courts*, *supra* note 100, at 798-99 (describing how prosecutors in New York City typically sent only first-time offenders to drug court).

<sup>104</sup> Unfortunately and unsurprisingly, there is a close connection between prostitution and drug addiction. For instance, the Bureau of Justice Statistics reported that 85% of females arrested for prostitution in one study tested positive for drugs. See U.S. DEP'T OF JUSTICE, FACT SHEET: DRUG-RELATED CRIME 2 (1994).

<sup>105</sup> Although studies conflict, there is evidence that defendants who complete drug court have lower recidivism rates. For a list of the conflicting studies, see Leslie Paik, *Maybe He's Depressed: Mental Illness as a Mitigating Factor for Drug Offender Accountability*, 34 LAW & SOC. INQUIRY 569, 575 (2009).

### 3. Excessive Caseloads Hinder Prosecutors From Turning Over *Brady* Material to Criminal Defendants

As detailed above, excessive caseloads prevent prosecutors from exercising their discretion to achieve the most just and beneficial outcomes. In those instances, prosecutors have done nothing wrong, but were unable to achieve good results that they likely could have accomplished with reasonable caseloads. Perhaps more troubling than these failures of discretion is how excessive caseloads lead prosecutors to run afoul of their constitutional obligations and commit inadvertent prosecutorial misconduct. Overburdened prosecutors likely fail to comply with many constitutional and statutory obligations but, as explained below, the most pervasive is likely so-called *Brady* violations.

One of the most important obligations imposed on prosecutors is to turn over “*Brady*” material to defendants.<sup>106</sup> Under the *Brady* doctrine, prosecutors are required to disclose favorable evidence that either tends to exculpate the defendant or impeach witnesses against him. When criminal defendants appeal their convictions, one of their most common claims is that the State has violated the *Brady* doctrine.<sup>107</sup> Although most *Brady* claims fail, violations do result in convictions being reversed.<sup>108</sup> And many more *Brady* violations likely go unnoticed because defendants plead guilty and waive their appeals, or because defendants never become aware that *Brady* information was not disclosed.<sup>109</sup> Academic commentators are very critical of *Brady* violations,<sup>110</sup> and when the violations are intentional such criticism is justified. What most commentators fail to recognize, however, is that the overwhelming majority of *Brady* violations are

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<sup>106</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>107</sup> See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 54 (stating that *Brady* claims are the most common fair trial claim brought in wrongful conviction cases).

<sup>108</sup> See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1141 (2004) (“[W]hile claims of governmental failure to turn over *Brady* material are common, one study found only 270 federal and state court cases in the last forty years that had resulted in reversal of conviction or a new hearing due to withheld *Brady* material.”);

<sup>109</sup> See Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors To Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997) (“For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor’s refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.”); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 909 (1995) (“[I]t is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported”).

<sup>110</sup> For an excellent assessment of the issues, see Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 536 (2007).

unintentional and occur because prosecutors are over-burdened or have received inadequate guidance from supervising prosecutors who themselves are overburdened.<sup>111</sup> Of course, inadvertent failure to turn over *Brady* material is still a constitutional violation<sup>112</sup> and can be just as damaging to criminal defendants as intentional violations. But unlike intentional violations, which can only be stopped by snuffing out the covert actions of manipulative prosecutors, inadvertent *Brady* violations can be reduced by limiting prosecutorial caseloads and providing resources for better training.

A hypothetical – but all too common – situation describes the problem of inadvertent *Brady* violations. Imagine that a felony prosecutor in a large district attorney’s office arrives at work on Monday morning. She has 200 open felony cases – murders, robberies, and other complicated violent cases – in folders spread around her office. On average, four felony cases are set for trial in her court every week,<sup>113</sup> and the prosecutor strives to give the defense attorney in each case notice of *Brady* material (and other more mundane matters<sup>114</sup>) a few weeks in advance of trial.<sup>115</sup> Unfortunately, it is difficult to keep up with the workload, and our prosecutor must make choices about which cases to prioritize. Perhaps the prosecutor believes that three of the four cases set for trial on, for example, June 1<sup>st</sup>, will plea bargain, so she focuses most of her attention on the case that she thinks is most likely to go to trial. Unfortunately, our prosecutor is not clairvoyant and by the time May 28<sup>th</sup> rolls around one of the three cases she thought would plea bargain fails to settle. Because that case has been on the docket longer than

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<sup>111</sup> See Corn & Gershowitz, *supra* note 10, at 10.

<sup>112</sup> See *Stickler v. Greene*, 527 U.S. 263, 288 (1999) (“Under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.”).

<sup>113</sup> See, e.g., Kim Smith, *Why Wheel of Justice Roll Slowly in Tucson*, ARIZONA DAILY STAR, Dec. 26, 2006, at A1 (explaining that lack of prosecutors and defense lawyers leads judges to “do what they can to move the cases along” and that they often schedule three or four trials for the same day in the hope one of them will actually move forward”); Jane Hadley, *Domestic Violence Cases Overwhelm Prosecutors*, SEATTLE POST INTELLIGENCER, Nov. 7, 1995, at B1 (noting that prosecutors handling domestic violence trials “have five or six cases scheduled for trial [every] day” and that “[b]ecause they can't predict which case will actually go to trial on any day, prosecutors are not able to spend the time with the victim that would help ensure the victim will remain willing to testify”).

<sup>114</sup> Prosecutors are often required to give the defendant notice of a variety of things such as expert witnesses and intention to use prior convictions at sentencing. See Boyd Patterson, *Non-Existent Trophies: Trial Preparation for Prosecutors*, 43 PROSECUTOR 40 (2009) (noting the “massive hit” prosecutors can take for failing to file witness lists or notice to use defendants’ prior convictions).

<sup>115</sup> There is no specific constitutionally imposed deadline for turning over *Brady* material. For differing views on whether prosecutors should be obligated to disclose *Brady* material during plea bargaining, see John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001) (cautioning against extending the *Brady* doctrine); Kevin McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (advocating *Brady* disclosure during plea bargaining).

the other cases set for trial that day, the judge decides that is the one that will be tried on June 1<sup>st</sup>.<sup>116</sup> The prosecutor is, of course, not totally unprepared. She has served subpoenas for likely witnesses and reviewed the other evidence in the file. But being prepared for trial requires much more than that. Our prosecutor must have in-depth meetings with the key witnesses and closely study the entire case-file. With only a few days before trial, she must scramble to be ready in time. And in scrambling to get ready, the overburdened prosecutor can easily overlook *Brady* material that she should turn over to the defendant.

For example, an overburdened prosecutor who meets with key witnesses at the last minute may fail to realize that the witness' story now conflicts with something he had said when speaking to the police many months ago.<sup>117</sup> Or, worse yet, the prosecutor who meets with her witnesses only at the last minute might fail to check back with the police who investigated the crime and learn, as the police officer knew, that the witness had previously been convicted of theft. Because theft is a crime of honesty, it is impeachment evidence that should be disclosed.<sup>118</sup> And because police officers' knowledge is imputed to prosecutors under the *Brady* doctrine, this inadvertent mistake amounts to a constitutional violation.<sup>119</sup> Similarly, although it might be somewhere in the case-file or within the knowledge of the investigating officers, the busy prosecutor in a sexual assault case may fail to realize and disclose to the defense that the complainant had previously made unsubstantiated allegations against another individual many years before. Or prosecutors may be fully aware of evidence that impeaches government witnesses and decide to hold off on producing it out of fear that disclosing witness identities too far in advance of trial will lead to witness tampering.<sup>120</sup> In the hectic run-up to trial, prosecutors may simply forget to turn over evidence that they were personally aware of. The list of possible *Brady* scenarios is endless, but the key point is the same in each permutation: prosecutors who have hundreds of open

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<sup>116</sup> See Kim Smith, *Why Wheels of Justice Roll Slowly in Tucson*, ARIZ. DAILY STAR, Dec. 26, 2006, at A1 (stating that Tucson judges "give cases priority based on whether there are victims, the age of the case and how long defendants have been in jail").

<sup>117</sup> See, e.g., *Jamison v. Greiner*, 2003 WL 22956951, at \*6 (E.D.N.Y. Oct. 21, 2003) (finding that prosecutors should have turned over conflicting statements made by a witness in a presentence report but that statements were not critical enough to merit reversal); *State v. Coughron*, 855 S.W.2d 526, 548-49 (Tenn. 1993) (Daughtrey, J., dissenting) (contending that there had been a *Brady* violation where prosecutor failed to turn over conflicting statements made by the star witness until the night before trial).

<sup>118</sup> See, e.g., *United States v. Price*, 566 F.3d 900, 905 (9<sup>th</sup> Cir. 2009) (finding *Brady* violation when prosecutor failed to disclose that police were aware that the key witness had been arrested for theft and theft by deception and convicted of other crimes).

<sup>119</sup> See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); see also *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (same).

<sup>120</sup> See *Douglass*, *supra* note 115, at 454 n. 72 ("Concerns for witness safety generally account for the government's position that witness related disclosure should be delayed until the eve of trial in many cases.").

cases and are not sure which will actually go to trial will inadvertently overlook *Brady* material as they scramble at the last minute to be ready for trial.

More disturbing than simple oversights are instances in which junior prosecutors do not even realize they had a legal obligation to turn over evidence. In extremely busy district attorney's offices, prosecutors are quickly given enormous responsibilities. In these offices, it is not unusual to have murders, robberies, and other serious crimes prosecuted by lawyers with only a few years experience. While these prosecutors surely learned about the *Brady* doctrine in their criminal procedure classes, they may fail to remember sterile discussions of Supreme Court cases once class has ended. Because law professors sometimes do a poor job of providing practical demonstrations of problems, many junior prosecutors may fail to internalize the rules and recognize actual *Brady* obligations when they arise in the real world.<sup>121</sup>

For instance, a junior prosecutor who has tried only a few serious felonies may neglect to disclose that a domestic violence victim initially told a police officer that her bruises were from falling down, rather than from being hit by her abuser. A very junior prosecutor may simply not realize that such evidence is *Brady* material. In a properly staffed district attorney's office such oversights should not happen because even if the junior prosecutor fails to recognize that the evidence must be disclosed, a supervising prosecutor should catch the error and ensure that the State complies with the *Brady* doctrine. In over-burdened prosecutors' offices, however, supervisors will fail to correct errors because they too are overwhelmed and lack the time to provide the hands-on guidance that is necessary to avoid inadvertent misconduct. Supervising prosecutors typically have their own cases to handle. And when their subordinates are carrying hundreds of open felony matters, it is easy to see how supervisors will fail to catch *Brady* errors.

In sum, when prosecutors are over-burdened, criminal defendants likely receive fewer *Brady* disclosures than they are legally entitled to. Had the evidence been produced, some defendants might not be convicted.

#### **4. Excessive Caseloads Prevent Prosecutors From Promptly Dismissing Cases With Weak Evidence or Cases Where the Defendant Was Innocent**

More crime is committed, and more suspects are arrested, than could possibly be processed through the criminal justice system. Most prosecutors' offices – even those that are overburdened -- work hard to screen out weak cases early on before charges are

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<sup>121</sup> See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 812 (2003) (noting how professors tend to focus on Supreme Court decisions rather than real-world scenarios and that "clients do not walk in the door and say, "I have a discrete torts issue for you").

filed.<sup>122</sup> Still, prosecutors file charges against thousands of defendants each year only to later discover that the defendants are innocent or that the cases are too weak to bring forward to trial.<sup>123</sup> While these defendants are certainly happy to have the charges against them dropped, for many defendants the dismissals do not happen until weeks or months after charges were initially filed. If the defendants are too poor to post bond, as more than thirty percent of criminal defendants are,<sup>124</sup> they will be incarcerated for those weeks or months. With jails across the country overcrowded, these defendants are often forced to live in squalid conditions with poor medical care, awful food, and the risk of violence and death.<sup>125</sup> While this problem is unavoidable to a certain extent, it is magnified in jurisdictions where prosecutors carry excessive caseloads.

The over-arching story is fairly simple: When prosecutors carry excessive caseloads they handle them in a triage fashion. Prosecutors do not look ahead to cases that will come to a boil in weeks or months; they live in the here and now. If evidence is lurking in a case-file that will ultimately lead to a defendant's case being dismissed, it will lurk there until the prosecutor has time to focus on the matter. The fewer cases the prosecutor has, the faster the charges against the innocent defendant will be dismissed.<sup>126</sup>

There is a more nuanced story when prosecutors are pushed to dismiss cases by aggressive defense attorneys. Often defense lawyers will raise legitimate legal or factual questions about a case shortly after charges are filed.<sup>127</sup> On the legal side, the

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<sup>122</sup> See Ronald F. Wright, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. PENN.UMBRA 68, 73 n.22 (2008).

<sup>123</sup> See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 3 (2000) ("Contrary to those widely held beliefs, in a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution.").

<sup>124</sup> See BUREAU OF JUSTICE STATISTICS, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 2002 16 (Feb. 2006) (finding that thirty-eight percent of felony defendants in the largest seventy-five counties did not post bond even though a bail amount was set for five out of six of those defendants).

<sup>125</sup> See, e.g., Steve McVicker, *County Jail Deaths on Pace To Double '06 Total*, HOUS. CHRON., Apr. 8, 2007, at 1 (discussing deaths of inmates in the Harris County jail who were awaiting trial and attributing some deaths to poor medical care). See also *supra* notes 13.

<sup>126</sup> See, e.g., Smith, *supra* note 116 (noting that because Maricopa County (Phoenix) has a far greater number of prosecutors than Pima County (Tucson) the average time from arraignment to resolution of a felony case is 46 days in Maricopa County compared with 147 days in Pima County).

<sup>127</sup> Of course, this assumes that counsel is promptly appointed to indigent defendants early in the process, which is not always the case. In this vein, Professor Douglas Colbert has argued persuasively that courts are better served by appointing counsel to indigent defendants at bail hearings in part so that counsel can help to identify weaker cases and remove them from the system. See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusive Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 43-44 ("Rather than waiting several weeks until a lawyer first

defense attorney might alert the prosecutor that the police violated the Fourth Amendment in acquiring key evidence, or that the confession was coerced or obtained in violation of the *Miranda* doctrine. On the factual side, the defense attorney may raise questions about the accuracy of witnesses' identification or bring forward an alibi defense. In these and countless other scenarios, the defense attorney's questions are not enough to out-rightly dismiss the case, but they are sufficient to give the prosecutor pause and to have her investigate the facts and witnesses more closely.

If the prosecutor has a manageable caseload, she will likely conduct this investigation very quickly. Ethical prosecutors have no interest in continuing to lock up innocent defendants. And efficient prosecutors have no desire to keep cases on the docket that could easily and justifiably be dismissed.<sup>128</sup> If the prosecutor has an unreasonable caseload however, she may not dig into the case until absolutely necessary, which may be just before the case is set for another status hearing or, worse yet, trial. Innocent defendants may thus languish in jail for longer than necessary.

Of course, there is a flip-side to this story. If prosecutors had more manageable caseloads they might not abandon some of the weak cases that they presently dismiss after charges are filed. After all, from an ethical standpoint, prosecutors only need to believe there is probable cause to bring a case forward to a jury.<sup>129</sup> If prosecutors had more time to work on marginal cases, increased resources might actually lower dismissal rates. While this argument seems compelling, it likely accounts for a comparatively small number of cases. First, prosecutors typically make their reputations by trying cases and winning those trials.<sup>130</sup> Prosecutors thus have little incentive to push weak cases to trial where they run significant risk of losing.<sup>131</sup> Second, at least when it comes to felonies, it seems unlikely that prosecutors are presently dismissing cases outright that they would try if they had greater resources. While prosecutors may be willing to plea bargain serious felony cases when their

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appears, these weaker charges can be identified at the outset, allowing judges and prosecuting attorneys to avoid squandering valuable time on them.”).

<sup>128</sup> Indeed, because judges are often under pressure to keep the size of dockets low, they pass that pressure onto prosecutors (as well as defense lawyers) to resolve cases quickly. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 116 (1995) (“To relieve pressure on their dockets, judges push all of the actors in the system to settle their cases.”). The average prosecutor would like nothing more than to remove weak cases from the docket.

<sup>129</sup> See Model Rule 3.8(a). This rule has been the subject of criticism however. See Bennett Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522-23 (1993) (maintaining that prosecutors should be morally certain that defendants are guilty before proceeding to trial).

<sup>130</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004).

<sup>131</sup> See *id.* (“Losses at trial hurt prosecutors' public images, so prosecutors have incentives to take to trial only extremely strong cases and to bargain away weak ones. They may push strong or high-profile cases to trial to gain reputation and marketable experience.”).

evidence is weak, political pressure and a strong sense of justice likely prevents prosecutors from out-rightly dismissing charges against violent felony defendants that prosecutors believe to be guilty.<sup>132</sup> Thus, it is difficult to see how increased resources will lead prosecutors to drastically decrease the number of cases they dismiss.

In sum, innocent defendants (and those who are guilty but for which proof is lacking) are charged with crimes everyday. By and large, prosecutors do a good job removing these weak cases from the system. However, excessive caseloads prevent prosecutors from moving swiftly. Many defendants therefore languish in jail for weeks or months even though they do not truly belong there. Excessive caseloads thus harm innocent defendants and exacerbate jail overcrowding and terrible conditions of confinement.

## **5. Excessive Caseloads Occasionally Lead to the Conviction of the Innocent**

Innocent defendants are regularly convicted of crimes, both at trial<sup>133</sup> and as a result of their own guilty pleas.<sup>134</sup> In the rare cases where innocence is later established,<sup>135</sup> observers might ask “How could prosecutors ignore the defendant’s claim that he was innocent?” In the abstract, it is simple to blame prosecutors who wrongly convicted the innocent, but in the context of excessive caseloads it is possible to see how innocent defendants slip through the cracks.

### **a. Prosecutors Lack the Time and Resources To Discover Who Is Innocent**

Start with two basic truths about the criminal justice system: (1) most criminal defendants are guilty; and (2) most criminal defendants lie to prosecutors and claim to be innocent.<sup>136</sup> When prosecutors are handling hundreds of cases at a given time and

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<sup>132</sup> See Bowers, *Punishing the Innocent*, *supra* note 14, at 1152-53.

<sup>133</sup> See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM L. & CRIMINOLOGY 761 (2007) (finding a minimum of a 3.3% error rate in capital rape convictions during the 1980s).

<sup>134</sup> See Ellen Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77(2010) (explaining how the cost of trial and the risk of conviction are so great that innocent defendants might have an incentive to plead guilty or agree to deferred prosecution); Rodney J. Uphoff, *Convicting the Innocent: Aberration or Systemic Problem*, 2006 WIS. L. REV. 739, 798 (“[E]ven innocent defendants choose to plead guilty simply to get out of jail.”).

<sup>135</sup> Since DNA testing began in 1989, only slightly more than 200 individuals have been exonerated by post-conviction DNA testing. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 (2008).

<sup>136</sup> Consider the memorable exchange from the 1994 film “The Shawshank Redemption:”  
Andy Dufresne: What about you? What are you in here for?



many defendants claim to be innocent, prosecutors are understandably skeptical of most claims of innocence.<sup>137</sup> And given that prosecutors are overburdened, they have little time to devote to each case. What time prosecutors do have is likely spent trying to convict defendants they firmly believe to be guilty, rather than exploring undocumented theories that could exculpate defendants. Faced with hundreds of open cases, how are prosecutors to know which handful of defendants are truly innocent and deserving of more prosecutorial resources to uncover that innocence?

Moreover, even when prosecutors do take the time to inquire into defendants' claims of innocence, they likely only have time to conduct cursory investigations that are unlikely to be successful. Prosecutors may try to track down the alibi or self-defense witnesses that the defendant claims support his version of events, but when such witnesses have not come forward on their own, they are often hard to locate. Furthermore, because most violent crime is committed in poor neighborhoods where even law abiding citizens fear the police,<sup>138</sup> witnesses with helpful exculpatory information may be unwilling to come forward.<sup>139</sup> This problem is even worse when the witnesses themselves are involved in criminal activity.<sup>140</sup> And the problem is particularly vexing in border states where perfectly honest and otherwise law-abiding witnesses may be illegal immigrants afraid to speak with prosecutors out of fear of deportation.<sup>141</sup> If prosecutors' offices had greater resources to hire investigators who

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Red: Murder, same as you.

Andy Dufresne: Innocent?

Red: Only guilty man in Shawshank.

(available at <http://www.imdb.com/title/tt0111161/quotes>).

<sup>137</sup> See Scott & Stuntz, *supra* note 97, at 1946 ("In the absence of reliable signals that they can afford to take seriously, prosecutors have no viable option other than to ignore claims of innocence . . . [I]n assessing the odds of acquittal, the prosecutor has strong incentives to consider only the information available to her at the time of bargaining, and not to investigate or otherwise credit the defendant's claims.").

<sup>138</sup> See RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* 1-5 (2006); Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 108 MICH. L. REV. 1193 (2008) (same).

<sup>139</sup> See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 75 (1998) (discussing a "powerful suspicion, even hatred, of the police" in poor African-American neighborhoods).

<sup>140</sup> See Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 327 (2007) ("[M]any victims are themselves involved in criminal activity, live in neighborhoods with high crime rates, or are otherwise at high risk for involvement in or exposure to additional offenses.").

<sup>141</sup> See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 41 (2006) ("When immigrants fear the police enough to make efforts to avoid them, fewer of them will report crimes, whether they are victims or witnesses, than would be the case were they not afraid of the police."). See also Sandra Guerra Thompson, *Latinas and Their Families in Detention: The Growing Intersection of Immigration Law and Criminal Law*, 14 WM. & MARY J. WOMEN & L. 225, 234 (2008) ("[Police] need

could interact with the community and be seen as partners rather than pariahs, then prosecutors might have a more realistic chance of finding witnesses to support the claims of innocent defendants.

Without such time and resources, however, prosecutors often ask defense attorneys to shoulder the burden of investigating claims of innocence. Overburdened prosecutors who are skeptical of innocence claims (most of which are untruthful)<sup>142</sup> ask defense attorneys to find the key witnesses that defendants claim support their stories and to have those witnesses sign affidavits swearing to the information. If the defense attorney is competent and not overburdened herself, there is nothing inherently wrong with this approach. After all, it is the defendant who is claiming the existence of exculpatory information and he should be in the best position to bring it forward. The problem, of course, is that many public defenders or appointed counsel representing indigent defendants are overburdened as well.<sup>143</sup> Worse yet, in some jurisdictions, compensation for appointed counsel representing indigent defendants is capped for each case, thereby creating a financial disincentive for defense lawyers to do all they can to prove their client's innocence.<sup>144</sup> Overburdened, incompetent, or lazy defense attorneys are therefore unlikely to fare much better than overburdened prosecutors in uncovering compelling evidence that defendants are truly innocent.

In many instances, defense attorneys will come forward with some evidence that, if properly developed, might be sufficient to raise reasonable doubt. In other words, defense attorneys are unlikely to hand prosecutors smoking gun evidence so compelling that it leads prosecutors to dismiss charges on the spot. Rather, defense attorneys might come forward with phone numbers for supposed alibi witnesses that the prosecutors could contact. Or defense attorneys might ask prosecutors to hear from witnesses who challenge police officers' accounting of how a traffic stop occurred. In other cases, defense attorneys might ask prosecutors to dismiss charges because they believe a key witness has mental health problems or because they claim that the victim in a domestic violence case will now recant her original testimony. Such evidence is not immediately exculpatory (and may not turn out to be exculpatory at all after it is investigated), so it likely gets moved to the backburner when prosecutors have

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the Latino community to cooperate with them to report crimes and to testify against criminals.”).

<sup>142</sup> See Bowers, *Punishing the Innocent*, *supra* note 14, at 1162 (“Because most defendants are in fact guilty, and the overwhelming majority pleads guilty, the prosecutorial impulse to charge remains strong even if a few innocent defendants are forced to trial. Moreover, the defendant knows he is innocent, but the prosecutor *ex ante* does not. And the prosecutor resists innocence signals.”).

<sup>143</sup> See *supra* note 1.

<sup>144</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 10-11 (1997) (“The real key to the statutory fee schedules, however, is not the hourly amounts but the caps on total fees. Most states have such caps . . . Thus, a typical appointed defense lawyer faces something like the following pay scale: \$30 or \$40 an hour for the first twenty to thirty hours, and zero thereafter.”).

hundreds of other cases. When prosecutors finally find the time to focus on the case, witnesses or key evidence may already be gone. Thus the needle in the haystack defendant who deserves to be acquitted either because he is factually innocent or because there are legitimate questions about the evidence against him may ultimately be convicted.

**b. Innocent Defendants Plead Guilty in Exchange for Sentences of Time-Served and an Immediate Exit From Jail**

Most innocent defendants who are wrongfully convicted are not the victims of prosecutorial misconduct or inept defense attorneys. Rather, most innocent defendants are convicted as a result of knowingly and voluntarily pleading guilty to an offense they did not commit.<sup>145</sup> This, of course, seems counter-intuitive. Why would an innocent defendant plead guilty? The simple answer is that excessive caseloads lead to long trial backlogs and short plea bargain offers. Innocent defendants thus end up pleading guilty to sentences of time-served simply to get out of jail.<sup>146</sup>

When prosecutors have excessive caseloads, it is logistically impossible for every defendant who asserts his innocence to be afforded a quick jury trial. Excessive caseloads therefore lead to many poor defendants – including innocent defendants – languishing in jail for months or even years awaiting trial.<sup>147</sup> When these defendants are charged with the most serious crimes and face decades in prison, they can simply wait their turn for trial. If they are in fact innocent, they will at least be publicly exonerated and will not serve anywhere close to the maximum authorized sentence.

But when innocent defendants are charged with misdemeanors or low-level felonies, the wait for trial may actually exceed the sentence they would receive if they plead guilty.<sup>148</sup> For example, imagine that a defendant is charged with burglary for breaking into a garage and stealing tools. The defendant is poor and has no resources with which to post bond. Although prosecutors do not know it, the eyewitness placing

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<sup>145</sup> Given the low trial rate in the United States, this contention should not be controversial. Indeed, as Professor Bowers has explained, “a great many defense attorneys currently counsel their innocent clients to plea guilty even when no judicially sanctioned devices (like equivocal or no-contest pleas) are available.” Bowers, *Punishing the Innocent*, *supra* note 14, at 1174.

<sup>146</sup> *See id.* at 1142-43 (“[P]rosecutors make frequent offers of pleas to noncriminal violations and time-served dispositions.”).

<sup>147</sup> The same problem exists when defense counsel are overburdened. *See* Backus & Marcus, *supra* note 1, at 1032 (recounting examples, such as the man arrested for failing to pay the \$1.75 subway fare who ended up in jail for fifty-four days before an attorney was appointed to represent him).

<sup>148</sup> *See* Uphoff, *The Criminal Defense Lawyer*, *supra* note 128, at 437-38.

the defendant at the scene is mistaken.<sup>149</sup> Moreover, the case against our defendant is so weak that if it proceeded to trial, a decent defense attorney would be able to rip it apart: there was only one eyewitness, it was night time, police presented the mug shots in a suggestive fashion, and the defendant was found blocks away from the scene and was not in possession of any of the stolen property. If the defendant wants to continue waiting for a trial he will almost certainly be acquitted. However, the defendant has already been in jail for a month and the prosecutor is willing to plead the case for time served. While the innocent defendant does not want to admit to something he hasn't done, he ultimately pleads guilty simply to get out of jail.<sup>150</sup>

Moreover, the collateral consequences of pleading guilty – such as stigma or harm to employment prospects – are also unlikely to deter innocent defendants from pleading guilty. If an individual has already spent weeks in jail awaiting trial, any stigma or embarrassment has already attached. While pleading guilty may require the defendant to meet with a parole officer or be subject to random urinalysis, the added stigma of being convicted is of little consequence given that his family and friends already knew that he was locked up in jail. Perhaps more importantly, the working poor are not likely to have their career prospects hindered by pleading guilty to a crime. They are unlikely to apply to medical school or law school, and in most instances they are not concerned that General Electric and IBM do not hire individuals with burglary convictions. Instead, poor individuals are likely competing for laboring jobs or low paying employment in the service industry. Pleading guilty to a crime they did not commit, particularly a misdemeanor, will not have much effect on their employment prospects.<sup>151</sup> Innocent defendants thus have good reasons (and few obstacles) to plead guilty to crimes they did not commit.

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Although it is counter-intuitive, excessive prosecutor caseloads are very damaging to criminal defendants. Overburdened prosecutors have trouble exercising their discretion as effectively as they would like. Less culpable defendants therefore do not receive sentencing discounts that they would receive from less burdened prosecutors. Candidates for drug treatment courts may not be transferred to those

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<sup>149</sup> The literature on the inaccuracy of eyewitness testimony is voluminous. For an excellent overview, see Sandra Guerra Thompson, *Beyond a Reasonable Doubt?: Reconsidering Uncorroborated Eyewitness Testimony*, 41 U.C. Davis L. Rev. 1487, 1497-1506 (2008).

<sup>150</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 206 (1979) (“When the choice is between freedom for those who plead guilty and jail for those who want to invoke their right to trial, there really is no choice at all.”); Bowers, *Punishing the Innocent*, *supra* note 14, at 1137.

<sup>151</sup> See Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. \_\_\_ at \*16-17 (forthcoming 2011) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550733)) (noting that the collateral consequences of drunk driving convictions weigh much more heavily on wealthy defendants than poor defendants).

courts because overburdened prosecutors fail to recognize that those defendants would be better handled outside of the traditional plea bargaining process. Well-meaning but overburdened prosecutors fail to disclose *Brady* material to defendants and likely run afoul of other constitutional and statutory obligations. Excessive caseloads hinder prosecutors from promptly dismissing weak cases, leaving innocent defendants incarcerated for far longer than necessary. And overburdened prosecutors may (unknowingly) offer too-good-to-refuse plea bargain offers to innocent defendants, encouraging the innocent to plead guilty to crimes they did not commit. While the entire class of criminal defendants might receive some plea bargaining benefit from overwhelmed prosecutors, there are numerous arguments that excessive prosecutorial caseloads cause more harm than good to a host of criminal defendants.

### **B. Harm to Victims**

More obviously, excessive prosecutorial caseloads are damaging to the victims of crime and their families. When prosecutors are overburdened they are unable to spend much time with victims or to even meet with them at all. Prosecutors thus fail to acquire useful information that could be used to convict the guilty and see that they are adequately punished. Perhaps more troubling, and as we discuss in detail in this section, overburdened prosecutors who do not have time to return phone calls or meet with victims will leave them feeling victimized again and deny them the therapeutic justice they seek from the criminal justice system.

Victims of crime often feel violated twice: once by the offender who harmed them, and a second time by a criminal justice system that ignored them.<sup>152</sup> There are many ways in which victims are ignored by the process: they are not informed that offenders have been arrested or charged; if they are aware of an arrest, victims might not be notified when the defendant makes bail; victims are often not informed of court settings or plea bargain offers; nor are they told in some jurisdictions that the defendant has been convicted and sentenced.<sup>153</sup>

It is not surprising that victims believe they should be kept informed about what is happening in their cases.<sup>154</sup> Nor is it shocking that victims become upset when key steps in the process occur without their knowledge.<sup>155</sup> Just as crime victims want to receive respect and apologies from the offenders who harmed them,<sup>156</sup> so too do victims want a certain amount of attention and respect from the criminal justice process.

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<sup>152</sup> See Bibas & Bierschbach, *supra* note 19, at 136 (“[V]ictims lose control when they are victimized and again when their cases disappear into the criminal justice system.”).

<sup>153</sup> See *id.*

<sup>154</sup> See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20.

<sup>155</sup> See *id.* (“Victims repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities about developments in their cases.”).

<sup>156</sup> See Bibas & Bierschbach, *supra* note 19, at 137-38.

Victims want to tell their stories so that they can release their anger.<sup>157</sup> When victims are informed about the process and hear a sympathetic voice acknowledge that they have been wronged, they can begin to heal faster.<sup>158</sup>

Many large district attorneys offices have tried to keep victims better informed by hiring victim witness coordinators<sup>159</sup> or by instituting policies whereby cases cannot be plea bargained unless prosecutors first make contact with victims and seek their input.<sup>160</sup> Yet, these policies face enormous obstacles.

To state the obvious, when an office has tens of thousands of cases in a given year and only a handful of victim witness coordinators, many victims slip through the cracks. Prosecutors with enormous caseloads lack the time to meet with victims to discuss their cases or even to talk with them by phone. Even if prosecutors have met with some victims, the sheer number of cases makes it difficult to keep victims straight and to remember to contact them again. A prosecutor might promise a victim that he will call her at the end of the week to update her on what happened at a status hearing or whether a plea bargain was reached. But that prosecutor might find himself thrown into a last-minute trial or suppression hearing or find two-dozen new cases on his desk the next morning. The victim will wait by the phone for a call from the prosecutor that will never come.

Of course, most prosecutors do not intentionally ignore victims. They would prefer to have time to meet with them, update them on their cases and to offer encouragement. Perhaps some victims will understand how overburdened prosecutors are. Most, however, will not. To many crime victims (and civil litigants for that matter) their case is one of the most important things in their lives. A rape victim or the family of a murder victim likely does not stop to consider how overburdened the prosecutor is, nor does she care that the prosecutor's failure to return her call was inadvertent. Put simply, whether the prosecutor had the best of intentions or not, victims of crime who receive minimal attention from overburdened prosecutors leave the process feeling victimized by the criminal justice system twice.

### C. *Harm to the Public at Large*

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<sup>157</sup> See *id.* at 138.

<sup>158</sup> See *id.*

<sup>159</sup> See Michelle Permenter, *Crime Victims' Rights in Texas*, HOUS. LAW, Jan. 2009, at 8 (explaining how victim assistance coordinators help victims to maneuver through the Harris County criminal justice system).

<sup>160</sup> See Norm Maleng, *Where Prosecutors' Guidelines Help Both Sides*, 1 CRIM. JUST. 6, 44 (1987) (noting that internal policies of the King County District Attorney's Office require prosecutors to contact victims and give them an opportunity to be heard before reducing or dismissing charges); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 45 (2006) (noting Manhattan District Attorney's Office protocol requiring prosecutors to attempt to contact and meet with every domestic violence victim as soon as possible).

Although it is fairly obvious, no discussion of excessive prosecutorial caseloads would be complete without mention of the harm to the public at large. While the current system ensures that most guilty defendants either plead guilty or are convicted at trial, it is undoubtedly true that excessive caseloads result in a substantial number of guilty defendants being wrongfully acquitted or receiving plea bargain offers that are far too generous. Such windfalls to defendants encourage politicians to enact criminal justice “reforms” which actually cause more harm than good.

### **1. Overburdened Prosecutors Fail to Attain Convictions For Guilty Defendants At Trial**

As almost every citizen knows, defendants are presumed innocent and the State shoulders a high burden to prove them guilty beyond a reasonable doubt.<sup>161</sup> We do not question this burden of proof, nor would we suggest that it is possible to create a system in which the guilty are always convicted. Because the American criminal justice system believes (wisely, in our opinion) that it is better for ten guilty to go free rather than one innocent person be convicted,<sup>162</sup> there will always be some guilty defendants who escape justice. Yet, there is a significant difference between letting the guilty go free because we require a high burden of proof and letting the guilty escape justice because prosecutors lack the time and resources to properly prepare their cases. Unfortunately, in jurisdictions with overburdened prosecutors, clearly guilty defendants are acquitted at trial.

Criminal cases can fall apart for dozens of reasons when time and resources are limited. Prosecutors may be unable to locate key witnesses in advance of trial. Or, after locating reluctant witnesses, prosecutors may lack the staff necessary to serve subpoenas or bring recalcitrant witnesses to the courthouse for trial. Witnesses who are honest and cooperative may nevertheless come across badly and be in need of hours of trial preparation meetings that prosecutors lack the time to conduct. Prosecutors may not have time to search out the best expert witnesses or the money to hire the ones they do find. Faced with huge numbers of other cases, prosecutors may lack the time to prepare effective presentations of complicated scientific testimony ranging from ballistics to breathalyzers.<sup>163</sup> Busy prosecutors might lack the time to jump through the hoops necessary to subpoena cell phone tower records that would place the defendant at the crime scene or medical records that would demonstrate sufficient injury to convict a defendant of aggravated assault rather than simple battery. Or prosecutors might simply miss an obvious and important detail about a case because they lacked the time to visit the crime scene before trial.

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<sup>161</sup> See *In re Winship*, 397 U.S. 358 (1970).

<sup>162</sup> See 4 BLACKSTONE COMMENTARIES ON THE LAW OF ENGLAND 352.

<sup>163</sup> See Gershowitz, *12 Unnecessary Men*, *supra* note 151, at \*19 (noting the difficulties inexperienced junior prosecutors face in trying to debunk scientific challenges to breathalyzer tests).

Of course, public defenders and appointed counsel in many jurisdictions face the exact same obstacles in defending indigent criminal defendants. We do not mean to suggest that the overburdening of defense lawyers is not a problem or that prosecutors should be given greater resources than defense lawyers. We only assert that just as the lack of defense resources results in the conviction of the innocent,<sup>164</sup> so is it true that the lack of prosecutorial resources allows the guilty to escape conviction in some cases.

The problem posed by lack of prosecutorial resources is more apparent in the instances where defendants are wealthy enough to retain private attorneys. While some of these defendants receive the same level of defense that would be provided by public defenders, in many instances defendants who spend a lot of money on private lawyers are getting what they pay for. In some cases, prosecutors are simply no match for well-funded defense lawyers (who themselves are often former prosecutors) with adequate time to devote to each of their cases.

Drunk driving prosecutions provide a good example. Wealthy defendants who spend \$20,000 or \$30,000 to hire a lawyer specializing in drunk driving defense are buying time and attention for their case. The defense lawyer will have time to visit the scene where the sobriety tests were conducted to check for irregularities. The lawyer will be able to blow up photographs or maps to highlight the questionable conditions under which the tests were conducted. The defense will thoroughly investigate the background of the officer who conducted the tests, the crime lab where blood samples were processed, and the chemist who ran the analysis. And the defense will also retain the services of a skilled expert witness who can cast doubt on the validity of breathalyzer tests in general and how they were applied in particular cases.

By contrast, our prosecutor will lack the time to personally visit the crime scene, nor will she have an investigator who she can task to do so. The prosecutor will also lack the time and money to blow up photographs or create helpful charts and visual displays. Worse yet, the prosecution's expert witness will be a chemist from the local crime lab who himself is juggling dozens of other cases and likely will not have time for a detailed meeting with the prosecutor to discuss his testimony in advance of trial. In these circumstances, it is not difficult to see how a factually guilty defendant escapes justice.

## **2. Overburdened Prosecutors Plea Bargain the Cases of Some Guilty Defendants for Sentences That Are Far Too Low**

While excessive prosecutorial caseloads lead to a small number of guilty defendants being acquitted at trial, the far more significant problem is guilty defendants receiving plea bargains that are too lenient. As we explained in Part II.A.1 above, some defendants receive lighter plea deals than they deserve because prosecutors lack the time to dig into an offender's case and criminal history to discover that he is deserving

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<sup>164</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 97-98.



of considerably greater punishment. We will not repeat that problem here, but instead extend the analysis to cases in which prosecutors know that a defendant deserves a longer sentence but lack the time and resources to stand firm. Put simply, in an unknown (though likely substantial) number of cases, prosecutors knowingly agree to plea deals carrying sentences well below what they believe the defendants deserve.

Consider again the prosecutor who has multiple cases set for trial on a given day and is carrying hundreds of other open felony matters. And imagine that the prosecutor has made a plea bargain offer of ten years' imprisonment to a robbery defendant with a lengthy criminal history. The prosecutor firmly believes that the case will result in at least a fifteen-year sentence if the defendant is convicted at trial. The prosecutor should thus hold firm on her plea bargain offer and proceed to trial if the defendant refuses to accept ten years' incarceration. Of course, matters are not that simple. If the prosecutor proceeds to trial on this robbery case it will likely take three entire days to try the case. That will be three days the prosecutor will lose in terms of preparing subpoenas, interviewing witnesses, researching the law, responding to motions, and getting up to speed on the other cases sitting on her desk. Some of those cases can be put on the back burner, but what about the three cases set for trial the following week? How can the prosecutor possibly prepare for next week's cases if she is tied up in trial this week?

The defense lawyer, if he is remotely worth his salt, is aware of this problem. Indeed, in large cities, many defense lawyers are former prosecutors who switched to the other side of the courtroom in part to escape the crushing caseloads that they shouldered for government pay.<sup>165</sup> The defense lawyer will therefore respond to the prosecutor's bottom line plea bargain with a lower counter-offer. If that counter-offer is ridiculously low – say three years, in response to the prosecutor's offer of ten years – even an overburdened prosecutor will likely reject it. But if the offer is slightly lower, say seven years instead of the prosecutor's bottom line offer of ten years, it is easier for the prosecutor to acquiesce and to accept a deal below her bottom line.

The prosecutor can justify accepting the much lower plea bargain by telling herself that if she had insisted on going to trial that it would have hindered her from dealing with the hundreds of other cases on her docket and would have made it nearly impossible to prepare next week's cases for trial. This rationalization is even more persuasive to our prosecutor if next week's defendants committed more serious offenses -- think of murders and rapists – than the robber whose case is being resolved today.<sup>166</sup>

Put simply, for even the most hard-working and committed prosecutors, excessive caseloads make it impossible to hold firm on every plea bargain offer and

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<sup>165</sup> See Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223, 231 n.38 (2005).

<sup>166</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006) (describing how repeat players in the criminal justice system become jaded and noting that "[a]fter one has seen many armed robberies, for example, unarmed burglaries and thefts pale in comparison").

credibly threaten to go to trial. Prosecutors therefore plea bargain cases for less than what they believe many defendants deserve.

### **3. Windfalls to Clearly Guilty Defendants Encourage Politicians To Enact Criminal Justice “Reforms” Which Are Actually Harmful**

When guilty defendants are acquitted at trial or receive lighter than justified plea bargains, the harm goes beyond those offenders themselves. Windfalls to obviously guilty defendants fuel the one-way ratchet of criminal law by encouraging legislatures to add new crimes to the books and increase punishments.<sup>167</sup> In turn, this results in the United States locking up more people and spending even more money on jails and prisons without actually addressing the underlying problem of the underfunding of prosecutors and indigent defense lawyers.

In most instances where prosecutors agree to lighter plea bargains than defendants deserve the cases disappear into the system never to be heard from again. But in some cases – particularly those in which a defendant received probation or a short prison sentence and later committed a new high-profile offense -- the news media seize on the case. Front-page stories announce that today’s vehicular manslaughter defendant never received jail time for his previous drunk driving charges.<sup>168</sup> In short order, politicians come forward with legislation to increase punishment ranges or impose mandatory minimums.<sup>169</sup>

As scholars have detailed, such legislation is often harmful. Mandatory minimum sentences prevent judges from individualizing justice to less culpable defendants who deserve mercy.<sup>170</sup> Longer punishments separate offenders from their

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<sup>167</sup> See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (“[L]awmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system.”).

<sup>168</sup> See, e.g., Amy Starnes, *A Valentine’s Tragedy: Family Left To Ask “Why” After DUI Takes the Life of Their Beloved*, MERCED SUN-STAR, Feb. 17, 2010 (defendant was on probation for DWI when he committed gross vehicular manslaughter); Rachanee Srisavasdi, *Drunken Driver Gets 20 Years: Driver With Previous DUI Convictions Killed Woman in 2007 Crash*, ORANGE COUNTY REGISTER, Aug. 22, 2009 (same); Jacqueline Soteropoulos, *Nov. 21 Trial Date Is Set for Goihman’s DUI Case: She Was In Probation for a Jan. Arrest When, Police Said, Her Car Struck and Killed Kayla Peter in June*, PHIL. INQUIRER, Sept. 15, 2005, at B4.

<sup>169</sup> See, e.g., Gov. Romney Pushes for Tougher Drunk Driving Penalties, US ST. NEWS, 2005 WLNR 17359633, Oct. 26, 2005 (proposing “Melanie’s Bill,” including tougher punishments and mandatory minimums, after thirteen-year-old Melanie Powell was killed by a repeat drunk driver).

<sup>170</sup> See Lynette Clemetson, *Judges Look to New Congress for Changes in Mandatory Sentencing Laws*, N.Y. TIMES, Jan. 9, 2007, at A12. For a discussion of other problems related to mandatory minimums, see Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

families, thus increasing the number of children in urban areas who go through their entire childhood without male parents.<sup>171</sup> And the public must spend more tax money on jails and prisons.<sup>172</sup>

To be sure, harmful criminal justice legislation is not solely attributable to the backlash following lenient plea bargain deals. And, of course, in some instances there are good public policy arguments for increasing sentencing ranges or imposing mandatory minimums. Our point here is not to wade too deeply into that debate but to simply raise the possibility that excessive prosecutorial caseloads can result in unanticipated backlashes for sentencing policy. To put the matter in perspective, we are unaware of any instance in which legislators responded to wrongful acquittals or unpopularly light plea bargains by providing additional funding for prosecutors' offices.

#### **IV. Solutions to the Excessive Caseload Problem**

Although it appears clear that defendants, victims, and the public at large are harmed by excessive prosecutorial caseloads, remedying the problem is difficult. It would be a mistake for legislatures to simply appropriate more money for prosecutors' offices and leave public defenders' offices under-funded. Moreover, it is not beneficial for prosecutors and public defenders to each complain to legislative bodies that the other is un-deserving of funding increases. When prosecutors and public defenders bicker with each other over funding, it is too easy for legislatures to deny both offices the funds they need. Accordingly, a more productive approach would be for overburdened prosecutors and public defenders to make joint proposals for a major influx of money to properly fund the criminal justice system.

##### ***A. Simply Appropriating More Money for More Prosecutors Is the Wrong Approach***

The initial reaction to data showing excessive prosecutorial caseloads is to suggest that district attorney's offices simply hire more prosecutors. Such a proposal is a difficult sell (because money is finite and legislatures have many competing concerns), but it is at least plausible. Politicians' interests are often aligned with prosecutors' needs because the former want to be tough on crime and take credit for incarcerating criminals.<sup>173</sup> Thus, while legislatures would rather enact symbolic measures that look

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<sup>171</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007) (exploring the effects of mass imprisonment on young black men and their families).

<sup>172</sup> See MARC MAUER, RACE TO INCARCERATE 92 (2006) (explaining that the United States spends \$60 billion per year on incarceration).

<sup>173</sup> See Stuntz, *Pathological Politics*, *supra* note 55, at 534. ("[A]t the most basic level, elected legislators and elected prosecutors are natural allies. Both need to please voters in order to

good and cost no money,<sup>174</sup> if district attorney's offices place enough pressure on legislatures to fund greater staff and resources, there is a plausible chance that district attorneys will get some of what they request.

The bigger objection to simply hiring more prosecutors is that it will have adverse effects on the rest of the criminal justice system. Increasing the number of prosecutors without a corresponding increase in public defenders exacerbates the indigent defense problem. Defense lawyers will still be overburdened and will be in a worse position because they will now be facing prosecutors who are better resourced and thus better prepared for trial and less interested in plea bargaining.<sup>175</sup>

A second objection to simply appropriating money for new prosecutors is that there is no guarantee that allotting money for more prosecutors will be used to reduce existing caseloads. Prosecutors' offices may use the added manpower to simply file more charges. At present, overburdened prosecutors' offices likely decline charges for minor criminal infractions that they simply lack the manpower to prosecute.<sup>176</sup> Increasing the number of prosecutors may thus result in more low-level drug or prostitution cases being prosecuted, without any real reduction in the caseloads of existing prosecutors.

A third objection is that elected district attorneys in large offices (who are primarily administrators and typically do not handle actual cases) may view new staff as an opportunity to enhance their political reputations rather than reduce existing caseloads. At present, most local district attorneys have no choice but to use almost all of their budgets to handle violent crime.<sup>177</sup> A sudden influx of new staff might lead elected prosecutors to create new departments or to allocate new lawyers to pet projects that will make political hay. For example, very few county district attorney's offices have the resources to handle long-term, paper intensive, white-collar crime cases.<sup>178</sup> Yet, in today's political climate, many elected district attorneys would surely like to

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survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished.”).

<sup>174</sup> See *id.* at 526, 532.

<sup>175</sup> For example, in Las Vegas, Nevada, 102 prosecutors are responsible for roughly 30,000 felonies and more than 40,000 misdemeanors in a single year. See Email from Cara Campbell, *supra* note 53. Public defenders in Las Vegas are also terribly overburdened, closing about 215 felonies per year in addition to other cases. See Maimon, *supra* note 51. Simply increasing prosecutor resources fails to create a more just system.

<sup>176</sup> See Brown, *Democracy and Decriminalization*, *supra* note 96, at 257 (explaining how budget constraints prevent prosecutors from enforcing all the crimes on the books).

<sup>177</sup> See Richman & Stuntz, *supra* note 4, at 600 (“[T]here are enough of these politically mandatory crimes to occupy all or nearly all of local prosecutors' time and manpower. This has not always been true; there have been periods in American history when district attorneys' offices had a good deal of slack. But any slack has long since disappeared . . .”).

<sup>178</sup> See *id.* at 601-02 (explaining that “high-end white-collar crime is (with a few rare exceptions) a federal preserve; only the feds have the manpower to deal with the long, intricate paper trails, and only the feds can afford to initiate and pursue major investigations without being certain that those investigations will turn up evidence of serious crimes”).

have robust white-collar divisions that focus on high-profile (and traditionally federal) issues such as mortgage fraud or investment malfeasance.<sup>179</sup> Similarly, as it has become politically popular to go green, elected prosecutors might like to expand the size of their environmental divisions. Or district attorneys may simply be animal lovers who want to expand departments that focus on animal cruelty. All of these are worthwhile projects, but directing resources to new areas will do little to reduce the enormous caseloads facing existing prosecutors.

In sum, simply appropriating extra money for district attorney's offices to hire extra staff without restrictions is not necessarily a good approach. If the money is used to reduce prosecutor caseloads (without a corresponding offset for indigent defense lawyers), criminal defendants will be unfairly disadvantaged. Or if the money is used to file more charges or create new departments, the problem of excessive caseloads will not be remedied.

### ***B. Providing Additional Resources for Both Prosecutors and Indigent Defense Lawyers Is the Better Approach***

A far better approach to dealing with the over-burdening of prosecutors is for legislatures to provide additional funding for both prosecutors and defense attorneys. This approach has the virtue of guaranteeing that resources will be used to help over-burdened prosecutors without disadvantaging indigent defendants. This, of course, is easier said than done.

The first key obstacle, as noted above, is that legislatures are often unreceptive to spending any money, even for prosecutors. Yet, this problem can be overcome when prosecutors can convince politicians that additional funding is in the public interest or that additional funding will bolster the politicians' law and order credentials.

The second obstacle – procuring complementary funding for indigent defense and maintaining it into the future – is much more difficult. Despite decades of indigent defense scholarship arguing that a large influx of money is needed<sup>180</sup> and even court rulings demanding greater funding,<sup>181</sup> legislatures have been hostile to funding increases.<sup>182</sup> And even when legislatures do provide greater funding, the increases are

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<sup>179</sup> See Elaine Silvestrini, *Feds Announce Surge in Mortgage Fraud Prosecutions*, TAMPA TRIB., Nov. 3, 2009.

<sup>180</sup> See *supra* note 1.

<sup>181</sup> See Drinan, *supra* note 1, at 443-62 (discussing the successful attributes of “second generation” indigent defense litigation).

<sup>182</sup> Although legislative hostility is typically the case, there is cause for optimism. As Professor Ron Wright points out, “[s]ome legislators, particularly those with legal training, may be even more sympathetic to procedural fairness than their constituents. They appreciate that the integrity of an adversarial system depends on adequate resources for both sides.” Wright, *Parity of Resources*, *supra* note 1, at 261.

sometimes rescinded shortly thereafter<sup>183</sup> because public defender offices are an attractive target for cuts in cash-strapped times.<sup>184</sup> There are ways to circumvent this problem though.

One option is to directly tie additional indigent defense funding to the added resources for prosecutors. By coupling prosecutor funding with indigent defense funding, legislatures would find it easier to spend money on indigent defense.<sup>185</sup> In fact, this idea has proved successful in some jurisdictions. As Professor Ron Wright has documented, prosecutors and public defenders in Tennessee were able to convince the legislature to appropriate additional funding for both departments by simultaneously submitting weighted caseload information documenting their workloads.<sup>186</sup>

Admittedly, this approach initially seems counter-intuitive. Like other budget priorities, there is finite amount of money that legislatures have to spend on criminal justice. Money devoted to indigent defense is money not spent on prosecutors, prisons, or judges. Indeed, in collecting the data for this article, we spoke with a number of prosecutors who thanked us for “taking up their fight against the public defenders who are trying to take our resources.”<sup>187</sup> According to these prosecutors, their district attorneys’ offices were being under-funded because legislators were giving money – undeservedly in some of their opinions – to public defenders’ offices. Although we did not survey public defenders, we are confident that they would offer the opposite conclusion and complain that legislators were increasing the funding for prosecutors’ offices when the money rightfully should be spent on public defenders. With this type of bickering, it is easy to see how legislators might deny both departments the funding they have requested and instead appropriate only a fraction of the needed funds.

Accordingly, we suggest that a better approach would be for prosecutors and public defenders to make a concerted pitch arguing that the criminal justice system as a whole is under-funded, rather than focusing exclusively on their individual offices. As Professor Wright has pointed out, in areas such as corrections, legislatures are already accustomed to “hearing the funding requests of related agencies complementary

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<sup>183</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 101-06.

<sup>184</sup> See, e.g., *Public Defenders May Begin Refusing Cases: Caseloads Are So Big, Representing Clients Becoming Impossible*, SOUTH FLORIDA SUN-SENTINEL, Nov. 17, 2008, at 1B (describing a 12.6% budget cut over two years for the Miami-Dade public defenders office).

<sup>185</sup> See Wright, *Parity of Resources*, *supra* note 1, at 263 (“[L]egislators can build momentum for unpopular but necessary measures by linking one set of unpopular choices to a second, more popular set of choices.”).

<sup>186</sup> See *id.* at 239-41.

<sup>187</sup> One large district attorney’s office (that we agreed to keep anonymous) informed us that the public defenders’ office manipulated its caseload statistics by counting cases in which they did no real work and appeared in court only so that they could move to withdraw because of a conflict of interest from previously representing defendants who were victims in the new case. Whether true or not, the animosity between the two sides over funding was palpable.

players in a single system and sometimes require a coordinated budget request from them.”<sup>188</sup>

Scholars have maintained that drips and drabs of additional funding are insufficient to fix the indigent defense problem and that only an enormous funding increase can affect significant change.<sup>189</sup> The same logic applies to overburdened prosecutors. Arguing with county funding boards over trifling funding increases (or fighting to stave off reductions) will not change the status quo for either prosecutors or public defenders. Rather, both public defenders and overburdened prosecutors offices need a game-changing sized funding increase. By making a joint proposal for a huge funding increase, public defenders and prosecutors might be in a better position to shake loose large sums of money that legislatures would otherwise refuse to dole out. Put simply, a simultaneous full-court press from multiple agencies would have more effect than asking legislators to referee funding disputes from two bickering parties.

## V. Conclusion

Although scholars have long decried the excessive caseloads of public defenders and appointed counsel, little attention has been paid to the huge number of cases handled by prosecutors in many large counties. Across the country, many prosecutors are tasked with handling five or even ten times as many cases as guidelines recommend for public defenders. Obviously, excessive prosecutorial caseloads are harmful to victims, who receive little attention to their cases, and the public at large, which must tolerate guilty defendants being acquitted. But the problem is much bigger than that.

Counter-intuitively, excessive prosecutorial caseloads are very damaging to criminal defendants. Because overburdened prosecutors lack adequate time and resources, they fail to recognize less culpable defendants who are deserving of more lenient plea bargains. Busy prosecutors also fail to identify some drug-addicted defendants who would be better served by being transferred to specialty drug courts where they would have a better chance at rehabilitation. From a purely legal standpoint, overwhelmed prosecutors commit inadvertent (though still unconstitutional) misconduct by failing to identify and disclose favorable evidence that defendants are legally entitled to receive. Finally, excessive prosecutorial caseloads harm innocent defendants. Busy prosecutors take far longer to recognize weak cases and dismiss charges against innocent defendants. And excessive caseloads delay trials, leading innocent defendants to plead guilty in exchange for sentences of time-served and an immediate release from jail.

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<sup>188</sup> Wright, *Parity of Resources*, *supra* note 1, at 241.

<sup>189</sup> See, e.g., Backus & Marcus, *supra* note 1, at 1045 (“By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”).

The solution to the problem of overburdened prosecutors is, of course, increased funding. Yet, legislatures must be cautious not to bolster prosecutors' offices at the expense of public defenders. Considerably greater funding is therefore necessary for prosecutors as well as public defenders.