

# Essays

## THE STATE (NEVER) RESTS: HOW EXCESSIVE PROSECUTORIAL CASELOADS HARM CRIMINAL DEFENDANTS

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INTRODUCTION.....	262
I. PROSECUTORS IN LARGE JURISDICTIONS OFTEN HAVE EXCESSIVE CASELOADS ....	266
A. <i>Standards Suggest Prosecutors Should Not Handle More than 150 Felonies or 400 Misdemeanors per Year</i> .....	266
B. <i>Prosecutors in Large Counties Are Regularly Tasked with Hundreds or Even Thousands of Felony Cases per Year</i> .....	267
C. <i>Inadequate Support Staff</i> .....	275
D. <i>Why Has So Little Attention Been Paid to the Overburdening of Prosecutors?</i> .....	276
II. HARM CAUSED BY EXCESSIVE PROSECUTORIAL CASELOADS .....	279
A. <i>Harm to Criminal Defendants</i> .....	279
B. <i>Harm to Victims</i> .....	292
C. <i>Harm to the Public at Large</i> .....	293
III. SOLUTIONS TO THE EXCESSIVE CASELOAD PROBLEM.....	297
A. <i>Simply Appropriating More Money for More Prosecutors Is the Wrong Approach</i> .....	297
B. <i>Providing Additional Resources for both Prosecutors and Indigent Defense Lawyers Is the Better Approach</i> .....	299
CONCLUSION.....	301

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## INTRODUCTION

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

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<sup>1</sup> For a sampling of the dozens of excellent articles, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006); 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 N.Y.U. ANN. SURV. AM. L. 783; Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615 (2002); 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); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835 (2004); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006); Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367 (2004); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000).

<sup>2</sup> See, e.g., BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (1997); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (3d ed. 2003); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); 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); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191 (2006); Carissa Hessick, Note, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255 (2002); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083 (1994).

<sup>3</sup> We do not criticize 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) [hereinafter Gershowitz, *Prosecutorial Shaming*]; Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007) [hereinafter Gershowitz, *Raise the Proof*].

<sup>4</sup> A few scholars have made passing references to “extreme docket pressure[s]” 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, 601 (2005) (“Extreme docket pressure characterizes DAs’ offices, particularly in the large cities where crime rates tend to be highest.”).

cases per year.<sup>5</sup> Prosecutors often have hundreds of open felony cases at a time<sup>6</sup> and multiple murder, robbery, and sexual assault cases set for trial on any given day.<sup>7</sup> Prosecutors in many large cities have caseloads far in excess of the recommended guidelines that scholars often cite to criticize the caseloads of public defenders.<sup>8</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>9</sup> While some of these cases involve unscrupulous prosecutors,<sup>10</sup> far more often the errors are 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>11</sup>

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

<sup>5</sup> See *infra* notes 43–53 and accompanying text.

<sup>6</sup> See *infra* notes 43–53 and accompanying text.

<sup>7</sup> See *infra* Part I.B. (discussing the number of cases handled by many prosecutors). Given that there are fewer than 250 weekdays per year on which cases can be tried, it is clear that, in many instances, multiple cases must be set for trial on any given day.

<sup>8</sup> See *infra* notes 26–30 and accompanying text.

<sup>9</sup> See Gershowitz, *Prosecutorial Shaming*, *supra* note 3, at 1061–62.

<sup>10</sup> See, e.g., *Banks v. Dretke*, 540 U.S. 668, 674–76 (2004) (reversing a death sentence because the prosecutor deliberately withheld that a key witness had been paid and failed to inform the court that other witnesses had testified untruthfully).

<sup>11</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. 395, 401–04 (2009).

<sup>12</sup> See, e.g., Lise Olsen, *Thousands Languishing in Cramped County Jails*, HOUS. CHRON., Aug. 23, 2009, at A1 (finding that 200 currently incarcerated inmates in the Harris County jail had already served the minimum jail sentence for the crimes with which they were charged).

<sup>13</sup> See, e.g., Steve McVicker & Anita Hassan, *Cruel and Unusual Punishment for Inmates?: Over the Past Six Years, at Least 101 Inmates Have Died at the Harris County Jail*, HOUS. CHRON., Feb. 22, 2007, at A1; cf. Steve McVicker, *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 . . .”).

are awaiting trial.<sup>14</sup> Worse yet, excessive prosecutorial caseloads delay trials for months or even years, leading some defendants who would have exercised their trial rights to simply plead guilty and accept a sentence of time served.<sup>15</sup> Some innocent defendants plead guilty to crimes they have not committed simply to get out of jail.<sup>16</sup>

Because they are overburdened, prosecutors—who are sworn to achieve justice, not to win at all costs<sup>17</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, 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 those 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, the indigent defendant is represented by an overburdened defense lawyer who did not conduct any investigation or who lacked the time to bring the relevant information to the prosecutor's attention.<sup>18</sup> When prosecutors are overburdened, there is less chance that they will separate out the least culpable defendants.<sup>19</sup>

Excessive prosecutorial caseloads also harm victims. Here the problem is easy to visualize. Overburdened prosecutors have little time to meet with victims and thus may not receive factual information from them that would help to convict or sentence the guilty party. If they do have the opportunity to contact victims, overburdened prosecutors may be rushed for

<sup>14</sup> See, e.g., *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at \*1, \*80–81 (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).

<sup>15</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 counterintuitively inaugurate freedom.” (footnote omitted)).

<sup>16</sup> See Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1199 (2004) (noting that time-served plea offers may “be too good to ignore”).

<sup>17</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (“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>18</sup> See *supra* note 1. 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 132–40 and accompanying text.

<sup>19</sup> See *infra* notes 132–40 and accompanying text.

time and seem aloof or uncaring. Victims thus may be denied the therapeutic justice they seek from the criminal justice process.<sup>20</sup>

Finally, excessive caseloads harm the public 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>21</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 be convicted go free because prosecutors lack 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 may sometimes grudgingly allocate greater funding for prosecutors, appropriating more money to prosecutors can unfairly disadvantage already underfunded indigent defense lawyers,<sup>22</sup> who are unlikely to receive comparable funding increases.<sup>23</sup> Additionally, because prosecutors' offices are so drastically understaffed, modest budget increases would have little impact on the enormous overburdening 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 for their individual offices.

Part I of this Essay reviews the caseloads of prosecutors in some of the largest district attorneys' offices in the nation. While not every large prosecutor's office is overburdened, Part I also demonstrates that many offices are woefully understaffed. Part II then explains how excessive prosecutorial caseloads harm defendants, victims, and the public at large. Part III offers an approach for reducing prosecutorial caseloads to more manageable levels.

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<sup>20</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 pointing out that most victims do not receive an opportunity to discuss their cases with prosecutors).

<sup>21</sup> See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xxi (1982) (famously remarking that Rule 1 of the justice game is that "[a]lmost all criminal defendants are, in fact, guilty").

<sup>22</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 87 (noting that prosecutors' offices already receive greater funding than public defenders' offices do).

<sup>23</sup> See, e.g., Scott Wallace, *Parity: The Failsafe Standard*, in 1 BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS* 13, 17 (2000), available at <http://www.mynlada.org/defender/DOJ/standardsv1/welcome.html> ("Congress appropriated \$100 million for fiscal year 2001 to allow states to hire 'community prosecutors' . . . [but did not] include matching funds for the constitutionally mandated provision of legal representation services in the new cases which will be filed by the new prosecutors.").

## I. PROSECUTORS IN LARGE JURISDICTIONS OFTEN HAVE EXCESSIVE CASELOADS

Although there are more than 2300 prosecutors' offices throughout the United States,<sup>24</sup> a comparatively small number of district attorneys' offices in major cities handle a huge number of America's criminal prosecutions.<sup>25</sup> Though these large district attorneys' offices are all organized somewhat differently, they 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 do 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>26</sup> In subsequent years, these guidelines have been widely endorsed by criminal justice organizations,<sup>27</sup> the American Bar Association,<sup>28</sup> and academic commentators.<sup>29</sup> While the recommended

<sup>24</sup> See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 2 (2006) [hereinafter PROSECUTORS IN STATE COURTS, 2005], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf>.

<sup>25</sup> See *infra* Table 1 (showing prosecution caseloads for large district attorneys' offices in the United States).

<sup>26</sup> See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, TASK FORCE REPORT ON THE COURTS, Standard 13.12 (1973).

<sup>27</sup> See NAT'L LEGAL AID & DEFENDER ASS'N, DEFENDER LEGAL SERVS., [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_NLADA](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA) (last visited Dec. 31, 2010).

<sup>28</sup> See, e.g., AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 17–18 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

<sup>29</sup> See Hashimoto, *supra* note 1, at 504–05 (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 the benchmark frequently cited and relied upon to this day” (footnotes omitted)); see also Catherine Greene Burnett, Michael K. Moore & Allan K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 678 n.408 (2001) (criticizing caseloads falling outside the suggested guidelines); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 894 (2009) (“Annual caseloads for public defenders can range between 500 and 900 felony matters or over 2,000 misdemeanors. Such workloads vastly exceed the standards of the National Advisory Commission on Criminal Justice, which set ceilings of 150 felonies and 400 misdemeanors.” (footnote omitted)).

caseloads are far from perfect,<sup>30</sup> there is widespread agreement that, 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 these guidelines for criminal defense caseloads were established, no organization has stepped forward with comparable caseload limits for prosecutors.<sup>31</sup> It is beyond the scope of our project to offer an ideal caseload limit for prosecutors, 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, which 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 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 or 600 annual cases per lawyer as a “[n]ational [c]risis”<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, surveyed the largest district attorneys’ offices in the nation to determine the sizes of their staffs and

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<sup>30</sup> Some experts have suggested developing more nuanced guidelines that provide for weighted caseloads based on the types of cases being handled by defenders. See NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 192–94 (2009) [hereinafter NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED], available at <http://www.constitutionproject.org/pdf/139.pdf>.

<sup>31</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 AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 27–29 (2002), available at <http://www.ndaa.org/pdf/How%20Many%20Cases.pdf>.

<sup>32</sup> For a discussion of other considerations in comparing prosecutor and defender workloads, see Wright, *supra* note 1, at 236–38.

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

<sup>34</sup> See *id.* at 1031, 1057.

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

the numbers of cases they handle.<sup>36</sup> Although the data showed that a few offices have reasonable workloads, many large counties had caseloads far in excess of recommended guidelines for public defenders.

TABLE 1: CASES PER PROSECUTOR IN LARGE DISTRICT ATTORNEYS' OFFICES IN 2006<sup>37</sup>

<i>County</i>	<i>Prosecutors</i>	<i>Felonies</i>	<i>Misdemeanors</i>	<i>Felonies per Prosecutor</i>	<i>Misd. per Prosecutor</i>	<i>Total Filings per Prosecutor</i>
Los Angeles, CA	1020	68,654	125,580	67	123	190
Cook, IL (Chicago)	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	40,000	5000	117	15	132
San Diego, CA	310	18,888	27,654	61	89	150
Miami-Dade, FL	283	36,286	54,974	128	194	322
Philadelphia, PA	283	15,515	54,485	55	193	247
Queens, NY	276	5274	57,938	19	210	229
Orange, CA	249	19,011	50,233	76	202	278

<sup>36</sup> In August 2006, Kristin Guiney, an Assistant District Attorney in the Harris County District Attorney's Office, contacted the largest prosecutors' offices in the country by e-mail and phone to ascertain the number of attorneys, paralegals, and support staff they employed. Coupling this information with publicly available data on felony and misdemeanor filings, she was able to determine an average number of case filings per prosecutor for each office. The authors are unaware of any comparable nationwide data set compiled before or since the 2006 Harris County study.

<sup>37</sup> The data for Table 1 are drawn from CHUCK ROSENTHAL, HARRIS CNTY. DIST. ATTORNEY, 2006 PERSONNEL PRESENTATION 1 (2006) [hereinafter ROSENTHAL PRESENTATION] (slide entitled "Statistics Used for Comparative Analysis") (on file with authors).

Harris, TX (Houston)	238	39,154	69,494	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
Wayne, MI (Detroit)	188	13,000	4000 <sup>38</sup>	69	21	90
Sacramento, CA	185	11,491	20,759	62	112	174
Santa Clara, CA	185	8729	25,164	47	136	183
Suffolk, NY (Long Island)	177	2930	33,889	17	191	208
King, WA (Seattle)	163	9815	16,000	60	98	158
Tarrant, TX (Fort Worth)	155	15,328	27,752	99	179	278
Alameda, CA (Oakland)	151	9731	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

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<sup>38</sup> The data for Wayne County underestimate the number of felony and misdemeanor filings per year. The data likely consider only charges handled by the warrant division, and do not include the 30,000 to 40,000 additional cases handled by specialty divisions. See E-mail from Maria Miller, Assistant Prosecuting Attorney, Wayne Cnty. Dist. Attorney's Office, to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (July 12, 2010, 15:49 CST) (on file with authors). Accordingly, the number of cases per prosecutor is considerably higher than the table indicates.

Middlesex, MA (Cam- bridge)	113	720	38,000	6	336	343
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As Table 1 demonstrates, prosecutors in many large counties handle far more cases than guidelines recommend. 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, Texas prosecutors was even higher, with an average of 165 felonies *and* 292 misdemeanors for each prosecutor in the office.

Unfortunately, the data in Table 1 vastly understate the scope of the problem by assuming that every prosecutor in the office handles an equal number of cases. This assumption is not correct. Each large district attorney's office has numerous prosecutors and attorneys whose specialized roles leave them handling very small caseloads or no cases at all. In turn, the overwhelming bulk of cases are handled by a smaller core group of "in-the-trenches" prosecutors, whose case numbers are drastically higher than the averages listed in Table 1. 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, there are management prosecutors who are responsible for supervisory functions and do not personally handle many cases. Such management prosecutors include the elected district attorney,<sup>39</sup> the first-assistant district attorney who fills the role of chief operating officer and handles day-to-day management matters,<sup>40</sup> and bureau chiefs who oversee departments and are personally responsible for only a handful of very high-profile cases.<sup>41</sup> Second, in many large district attorneys' offices, there are line prosecutors, or assistant district attorneys, whose sole responsibilities include revoking bonds for defendants who have failed to show up for court or performing "intake" by drafting warrants and answering police officers' questions. These prosecutors handle isolated pieces of cases, but they do not have to prepare cases for trial. Finally, there are prosecutors who exclusively handle complicated

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<sup>39</sup> See, e.g., Brian Rogers, Mike Glenn & Rosanna Ruiz, *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 (quoting an elected district attorney who had agreed to personally prosecute a case as saying "he could not recall the last time he helped prosecute a case, but guessed that it ha[d] been several years").

<sup>40</sup> Cf., e.g., SANTA CLARA DISTRICT ATTORNEY ADMINISTRATORS SALARY SURVEY 4 (2006) (on file with authors) (listing the Chief Assistant D.A. as an executive attorney).

<sup>41</sup> Such departments include trial, appellate, white collar crime, consumer fraud, asset forfeiture, and check fraud, to name but a few.

matters, such as white-collar fraud or death-penalty cases and therefore have unusually low caseloads.<sup>42</sup>

In sum, while large district attorneys' 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. 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 for trial.<sup>43</sup> It is this group of in-the-trenches prosecutors who are particularly overburdened. In some jurisdictions, the workload of these prosecutors is truly staggering. One extreme example is Harris County, Texas, where some prosecutors are handling upwards of 1500 felonies per year and over 500 felonies at any one time.<sup>44</sup> 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 about 2000 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 that court's 2000 felony cases are split between the other two prosecutors. The second-most senior prosecutor (the "number two prosecutor") is responsible for the more serious crimes: noncapital 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 about 500 serious felonies. The remaining 1500 felony cases—drug offenses, burglaries, assaults, and various other crimes—are assigned to the most junior prosecutor. At any one time, this junior prosecutor, who typically has about two years of prosecutorial experience under his belt, has about 500 open cases to handle. While these cases are less complicated, over the span of a year, a junior prosecutor in a felony courtroom handles ten times the number of felony cases than is recommended for public defenders.<sup>45</sup>

The situation is similarly dire in other large district attorneys' offices. In Cook County, Illinois, the average felony prosecutor has 300 or more

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<sup>42</sup> These descriptions are based on the office structure of the Harris County District Attorney's Office, where the second author serves as an assistant district attorney. Based on informal discussions with prosecutors from other large offices, many other offices employ a similar, though by no means identical, organizational structure.

<sup>43</sup> See E-mail from Colleen E. Bauer, Paralegal, Trial Div., Phila. Dist. Attorney's Office, to Sachiv P. Mehta (Mar. 9, 2010, 08:32 CST) [hereinafter E-mail from Colleen E. Bauer] (on file with authors).

<sup>44</sup> These and other facts regarding the Harris County District Attorney's Office are based on the experience of the second author, who has served as a felony prosecutor in the Harris County District Attorney's Office for several years.

<sup>45</sup> See *supra* note 26 and accompanying text (describing the recommended workload of 150 felony cases for public defenders).

open cases at any one time.<sup>46</sup> In a given year, many felony prosecutors there handle between 800 and 1000 total cases.<sup>47</sup> In Tarrant County, Texas, home of Fort Worth, prosecutors handle upwards of 150 felony cases at any one time, and misdemeanor prosecutors juggle between 1200 and 1500 matters apiece.<sup>48</sup> In Philadelphia County, Pennsylvania, prosecutors working in the Major Trials Unit or the Family Violence Sexual Assault Unit have open caseloads of 250 cases.<sup>49</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>50</sup> Almost any reasonable observer would conclude that Clark County public defenders are overburdened. The Nevada Supreme Court even contemplated imposing caps on public defenders' caseloads.<sup>51</sup> Yet very little attention has been paid to the fact that prosecutors in Clark County have more cases than public defenders. In 2009, the District Attorney's Office filed more than 70,000 felonies and misdemeanors.<sup>52</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 70,000 filings,<sup>53</sup> a ratio of nearly 800 cases per prosecutor.

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 have tended to increase rather than contract.<sup>54</sup> This may be due to new laws being placed on the books,

<sup>46</sup> See Telephone Interview with Randy Roberts, Exec. Assistant State's Attorney, Cook Cnty. State's Attorney's Office (Mar. 2, 2010).

<sup>47</sup> See *id.* Indeed, in some years, Cook County prosecutors have even been paid less than their public defender counterparts while handling more cases. See John Flynn Rooney, *Survey: Public Defenders Earn Slightly More than Prosecutors*, CHI. DAILY L. BULL., Sept. 22, 2008, at 1 (reporting that the public defender's office attributed defenders' higher salaries to the fact that they are unionized).

<sup>48</sup> See E-mail from Marilyn R. Carter, Admin. Specialist, Tarrant Cnty. Dist. Attorney's Office, to Sachiv P. Mehta (Feb. 2, 2010, 15:19 CST) (on file with authors).

<sup>49</sup> See E-mail from Colleen E. Bauer, *supra* note 43.

<sup>50</sup> See Alan Maimon, *Court Stalls over Caseloads: Justices Expected More Guidance from Report*, LAS VEGAS REV.-J., Oct. 7, 2009, at 5B.

<sup>51</sup> See *id.*

<sup>52</sup> See E-mail from Cara L. Campbell, Chief Deputy Dist. Attorney, Training & Recruitment, Clark Cnty. Dist. Attorney's Office, to Sachiv P. Mehta (Feb. 2, 2010, 18:36 CST) [hereinafter E-mail from Cara L. Campbell] (on file with authors).

<sup>53</sup> See E-mail from Cara L. Campbell, Chief Deputy Dist. Attorney, Training & Recruitment, Clark Cnty. Dist. Attorney's Office, to Sachiv P. Mehta (Jan. 29, 2010, 11:44 CST) (on file with authors).

<sup>54</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 . . .").

more aggressive law enforcement with respect to particular crimes,<sup>55</sup> or economic downturns leading to increased crime rates. Whatever the cause, filings in many prosecutors' offices are on the rise. For example, in Dallas County, Texas, felony filings increased by more than 10% between 2005 and 2009.<sup>56</sup> Matters were far worse in Harris County, Texas, where filings rose by more than 20% over a three-year period.<sup>57</sup> In San Bernardino County, California, total case filings rose by more than 20% in just the two-year period between 2006 and 2008.<sup>58</sup> Indeed, in the entire State of California, criminal case filings increased by more than 100,000 between 2005 and 2006.<sup>59</sup> In New York State, criminal case filings rose by nearly 200,000 between 2004 and 2008.<sup>60</sup> As filings have skyrocketed, however, most large district attorneys' offices have not been in a position to hire additional prosecutors to keep pace.<sup>61</sup> The Bureau of Justice Statistics found that, while the number of attorneys in prosecutors' offices nationwide rose consistently during the 1990s, the numbers plateaued in 2001 and actually declined slightly thereafter.<sup>62</sup> Accordingly, as total case filings have increased

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<sup>55</sup> See, e.g., Jane Hadley, *Domestic Violence Cases Overwhelm Prosecutors*, SEATTLE POST-INTELLIGENCER, Nov. 7, 1995, at B1 (citing changes in the law, societal awareness, increased reporting, and increased special domestic violence police units as reasons for a 400% surge in felony domestic abuse cases in King County, Washington, in a five-year period).

<sup>56</sup> Compare DISTRICT COURTS: REPORTED CRIMINAL ACTIVITY BY COUNTY FROM JANUARY 1, 2005 TO DECEMBER 31, 2005, <http://www.dm.courts.state.tx.us/OCA/ReportSelection.aspx> (select "District Court Data Reports" as the Report Type and "Reported Criminal Activity by County" as the Report, and then click "Continue"; then select "January 2005" and "December 2005" as the Month and Year and "Dallas" as the County and click "Run Report") (last visited Jan. 2, 2011) (33,474 felony filings), with DISTRICT COURT: REPORTED CRIMINAL ACTIVITY BY COUNTY FROM JANUARY 1, 2009 TO DECEMBER 31, 2009, <http://www.dm.courts.state.tx.us/OCA/ReportSelection.aspx> (same query, but use "January 2009" and "December 2009" instead) (last visited Jan. 2, 2011) (37,013 felony filings).

<sup>57</sup> Case filings in Harris County rose from 108,608 in 2006, *supra* Table 1 (showing that 39,154 felonies and 69,454 misdemeanors were filed in 2006), to 131,100 in 2009, see E-mail from Jessica Milligan, Assistant Dist. Attorney, Harris Cnty. Dist. Attorney's Office, to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (Mar. 18, 2010, 10:53 CST) (on file with authors) (reporting that 50,004 felonies and 81,096 misdemeanors were filed in 2009).

<sup>58</sup> Compare *supra* Table 1 (showing less than 59,000 cases in 2006), with Telephone Interview with Jane Allen, San Bernardino Cnty. Dist. Attorney's Office (Feb. 11, 2010) (on file with authors) (reporting more than 71,000 cases in 2008).

<sup>59</sup> Compare JUDICIAL COUNCIL OF CAL., 2006 ANNUAL REPORT: PROGRESS THROUGH UNITY 25 (2006) (reporting 1,575,098 filings), with JUDICIAL COUNCIL OF CAL., 2007 ANNUAL REPORT: BUILDING THE BRANCH 22 (2007) (reporting 1,691,790 filings).

<sup>60</sup> STATE OF N.Y., UNIFIED COURT SYSTEM: REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS: FOR THE CALENDAR YEAR JANUARY 1, 2008–DECEMBER 31, 2008, at 18 (2008), available at <http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2008.pdf> (noting an increase from 1,705,369 cases in 2004 to 1,894,925 cases in 2008).

<sup>61</sup> See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554–55 (2004) (explaining how prosecutorial budgets are unable to keep up with increasing caseloads).

<sup>62</sup> See PROSECUTORS IN STATE COURTS, 2005, *supra* note 24, at 2 & fig. 1.

over the past decade, the workloads of individual prosecutors have grown in turn.

Even worse, the economic downturn has led a number of district attorneys' offices to reduce the number of prosecutors through hiring freezes or even layoffs. In Detroit, the Wayne County District Attorney's Office was forced to reduce its total number of prosecutors—through a hiring freeze and layoffs—by a stunning forty-eight people between 2008 and 2010, a 25% reduction.<sup>63</sup> In Las Vegas, the Clark County District Attorney's Office suffered a similarly drastic cut from 135 prosecutors in 2006 to 102 prosecutors by 2010.<sup>64</sup> Budget cuts forced the Cook County State's Attorney's Office to cut forty prosecutors and fifty staff in 2008.<sup>65</sup> In Seattle, the King County District Attorney's Office was forced to cut eighteen prosecutor positions in 2008.<sup>66</sup> In San Bernardino, California, the District Attorney's Office eliminated sixteen prosecutor positions between 2006 and 2010.<sup>67</sup> In Phoenix, the Maricopa County District Attorney's Office has not replaced sixteen prosecutors who have left the office in the last two years.<sup>68</sup> Other counties, including Harris County,<sup>69</sup> Broward County,<sup>70</sup> and Miami-Dade County,<sup>71</sup> have also been forced to cut prosecutors in recent years.

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<sup>63</sup> See E-mail from Maria C. Miller, Assistant Prosecuting Attorney & Dir. of Commc'ns, Wayne Cnty., to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (Mar. 4, 2010, 11:32 CST) (on file with authors) ("Currently we have 142 prosecutors on staff, down from 190 in 2008."); E-mail from Maria C. Miller, Assistant Prosecuting Attorney & Dir. of Commc'ns, Wayne Cnty., to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (Mar. 4, 2010, 16:44 CST) (on file with authors) (attributing the decline in prosecutorial staff to not being allowed to hire new prosecutors when others retired as well as to nine layoffs in response to a budget reduction).

<sup>64</sup> Compare Telephone Interview with Cara L. Campbell, Chief Deputy Dist. Attorney for Training & Recruitment, Clark Cnty. Dist. Attorney's Office (Mar. 1, 2010) (on file with authors) (reporting that prosecutorial staff were cut down to 102 by 2010), with *supra* Table 1 (showing 135 prosecutors on staff in 2006).

<sup>65</sup> See Telephone Interview with Randy Roberts, *supra* note 46.

<sup>66</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>67</sup> See Telephone Interview with Jane Allen, Special Assistant Deputy Dist. Attorney, San Bernardino Cnty. Dist. Attorney's Office (Mar. 4, 2010).

<sup>68</sup> Letter from Debbie MacKenzie, Maricopa Cnty. Dist. Attorney's Office, to Adam Gershowitz (Mar. 30, 2010) (on file with authors).

<sup>69</sup> See Chris Moran, *County Budget Cuts Translate into Layoffs*, HOUS. CHRON., Mar. 26, 2010, at B3.

<sup>70</sup> See E-mail from Renata Annati, Human Res. Dir., Broward Cnty. Office of the State Attorney, to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (Mar. 8, 2010, 08:51 CST) (on file with authors).

<sup>71</sup> See E-mail from Lorna Salomon, Senior Emp't Counsel & Records Custodian, Miami-Dade Office of the State Attorney, to Adam Gershowitz, Assoc. Professor of Law, Univ. of Hous. Law Ctr. (Mar. 11, 2010, 12:58 CST) [hereinafter E-mail from Lorna Salomon] (on file with authors).

### C. *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 the secretaries and other basic support staff needed 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>72</sup> but resources are also inadequate in district attorneys' offices.

For example, the four largest counties in Texas handle a combined total of more than 270,000 criminal cases per year.<sup>73</sup> Yet, they have fewer than thirty-five paralegals combined to work on all of those cases.<sup>74</sup> The Cook County District Attorney's Office is the second largest prosecutor's office in the nation and handles hundreds of thousands of cases per year with fewer than ten paralegals on staff.<sup>75</sup>

Although large prosecutors' offices tend to have more investigators than paralegals, the numbers are still woefully inadequate. In 2006, the ten largest prosecutors' offices in the country represented a population of nearly forty million people and handled well over a million cases, but they had a combined total of only 1,043 investigators on staff.<sup>76</sup> On average, then, in those ten district attorneys' offices, there were more than 1000 cases per investigator. In Clark County, Nevada—which had 29,308 felonies and 41,298 misdemeanors in 2009<sup>77</sup>—there are only twenty investigators for the whole office, and most of their time is spent serving subpoenas because the office does not have enough process servers to contact all of the 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.<sup>79</sup> And in Miami-Dade County, there were more than 4500 cases per investigator.<sup>80</sup>

<sup>72</sup> See Backus & Marcus, *supra* note 1, at 1096–103.

<sup>73</sup> See *supra* Table 1 (providing criminal cases filed in 2006 by the prosecutors' offices for Harris, Dallas, Tarrant, and Bexar counties).

<sup>74</sup> See ROSENTHAL PRESENTATION, *supra* note 37.

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

<sup>76</sup> See *id.*

<sup>77</sup> See E-mail from Cara L. Campbell, *supra* note 52.

<sup>78</sup> See E-mail from Cara L. Campbell, Chief Deputy Dist. Attorney, Training & Recruitment, Clark Cnty. Dist. Attorney's Office, to Sachiv P. Mehta (Jan. 29, 2010, 10:58 CST) (on file with authors).

<sup>79</sup> See E-mail from Dan Donohoe, King Cnty. Prosecutor's Office, to Sachiv P. Mehta (Feb. 12, 2010, 03:21 CST) (on file with authors).

<sup>80</sup> See ROSENTHAL PRESENTATION, *supra* note 37.

Worse yet, the total number of investigators in Miami–Dade County has since dropped from twenty to fourteen, resulting in a ratio of more than 6100 cases for every investigator on staff in 2009.<sup>81</sup>

TABLE 2: CASES PER INVESTIGATOR IN THE TEN LARGEST PROSECUTORS' OFFICES IN 2006<sup>82</sup>

<i>County</i>	<i>Population</i>	<i>Total Cases</i>	<i>Investigators</i>	<i>Cases Per Investigator</i>
Los Angeles, CA	9,935,475	194,234	280	694
Cook, IL	5,303,683	325,000	177	1836
Harris, TX	3,693,050	108,648	59	1841
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	4563
Dallas, TX	2,305,454	77,888	59	1320
Queens, NY	2,241,600	63,212	50	1264
<i>Totals:</i>	<i>37,898,573</i>	<i>1,132,257</i>	<i>1043</i>	<i>1086</i>

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

Given that there are dozens of scholarly articles and scores of newspaper features dissecting the indigent defense crisis, skeptical observers might wonder why, if prosecutors' caseloads are in fact so excessive, they have received so little attention from academics and the news media.

Let us begin first with the news media. One overly simplistic explanation for lack of media interest is that reporters are politically liberal and therefore more interested in stories of unfairness to criminal defendants than to overworked prosecutors. Perhaps there is a tiny kernel of truth to this explanation, but by and large it is unsatisfying.<sup>83</sup> A more plausible explana-

<sup>81</sup> See E-mail from Lorna Salomon, *supra* note 71.

<sup>82</sup> The data for Table 2 are drawn from ROSENTHAL PRESENTATION, *supra* note 37.

<sup>83</sup> 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 view them (or at least some of them) as noble public servants. It is therefore dif-

tion for the lack of media attention to prosecutorial 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 declaratory judgment actions seeking structural reform.<sup>84</sup> Although these legal challenges have mostly been unsuccessful,<sup>85</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>86</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 LLP, Arnold & Porter LLP, Kirkland & Ellis LLP, and Davis Polk & Wardell LLP<sup>87</sup>—have public relations experience and media contacts that can be used to create publicity. By contrast, these litigation and publicity options are not available to prosecutors. Even if prosecutors had an interest in filing a suit to contend that their workloads were excessive, they would lack the requisite elements of a case and controversy. While indigent defendants can point to violations of the Sixth and Fourteenth Amendments, which give them access to the courthouse,<sup>88</sup> prosecutors have no such constitutional hook.

More importantly, overburdened prosecutors would be unlikely to file such cases even if they were justiciable. Because elected district attorneys are often politicians who work behind the scenes with state and county bodies to procure funding, they are unlikely to want to provoke a public fight over their budgets and workloads. Rather, elected district attorneys would likely prefer to maintain a good working relationship with the other elected officials that fund them, and line prosecutors who want to keep their jobs must follow this unspoken lead.<sup>89</sup> On the other hand, public defender of-

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ficult to see how reporters would be completely biased toward writing stories that focus only on the problems faced by criminal defendants.

<sup>84</sup> For an overview of the litigation and the stages of reform efforts, see Drinan, *supra* note 1.

<sup>85</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 100–06.

<sup>86</sup> See William Glaberson, *The Right to Counsel*, N.Y. TIMES, Mar. 21, 2010 (Metropolitan Desk), at 1.

<sup>87</sup> See Jim Nolan, *Bills Allow More Pay for Public Defenders: Supporters Say Legislation Is Step Toward Better Va. Justice System*, RICHMOND TIMES-DISPATCH, Feb. 27, 2007, at A1 (discussing Covington & Burling's involvement in Virginia indigent defense reform); Leonard Post, *Indigency Programs Spark Court Clashes: Lack of Lawyers for the Poor Fuel Suits in Six States*, NAT'L L.J., Nov. 1, 2004, at 1 (discussing the other three firms' involvement in Michigan, Mississippi, and New York).

<sup>88</sup> See Drinan, *supra* note 1 (discussing decades of indigent defense lawsuits and varied levels of success in challenging the inadequate funding of indigent defense programs).

<sup>89</sup> Of course, line prosecutors may protest their excessive caseloads by quitting and taking more attractive jobs. Many overworked line prosecutors do just that after only a few years. See, e.g., Ronald

fices typically have more contentious relationships with county and state officials and have less reason to be publicly polite.<sup>90</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 serve instead of doing appointed work.<sup>91</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>92</sup>

The lack of academic interest in excessive prosecutorial caseloads is harder to explain than the lack of litigation. Again, the argument that most academics are liberal and have more interest in criminal defendants than in government agents is superficial and largely unhelpful. A more telling explanation derives from the shared background of many law professors. The traditional route to academia does not run through state prosecutors' offices. While there are undoubtedly numerous criminal law professors who worked as federal prosecutors before entering academia,<sup>93</sup> federal prosecutors have vastly greater resources than their state counterparts.<sup>94</sup> Academics who were formerly federal prosecutors therefore likely 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 in state courts prior to entering the academy.<sup>95</sup> The past experiences of these former

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Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002) (discovering from interviews that the average tenure of line prosecutors (assistant district attorneys) in New Orleans is roughly two years).

<sup>90</sup> Cf., e.g., Pulkkinen, *supra* note 66 (describing how "public defenders are protesting a proposed funding cut that they say would gut legal representation for poor defendants").

<sup>91</sup> For instance, in Virginia, Steven Benjamin, an extremely well-regarded attorney, filed an unsuccessful challenge arguing that appointed lawyers were underfunded. See Gershowitz, *Raise the Proof*, *supra* note 3, at 100 n.85.

<sup>92</sup> While appointed lawyers do need to be concerned about being denied appointed cases in the future, this concern relates to maintaining good relationships with judges. And, in most instances, judges have little reason to be upset with appointed counsel for initiating litigation that challenges excessive workloads. Indeed, the excessive workload of appointed counsel may negatively impact judges by burdening their dockets and slowing down their courtroom proceedings.

<sup>93</sup> For instance, at least four well-known criminal law professors on the faculty of George Washington University Law School—Paul Butler, Roger Anthony Fairfax, Orin S. Kerr, and Stephen A. Saltzburg—were formerly federal prosecutors. See *Faculty Directory*, GW LAW, <http://www.law.gwu.edu/Faculty/List.aspx> (last visited Nov. 1, 2010).

<sup>94</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").

<sup>95</sup> For instance, Professors Erica J. Hashimoto, Norman Lefstein, and Mae C. Quinn all served as public defenders. See ASS'N OF AM. LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS 2007–2008*, at 592, 725, 918 (2008).

public defenders may be the driving force for their passion and some of their indigent defense scholarship.<sup>96</sup>

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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, prosecutors are handling ten times as many cases as criminal justice organizations, the American Bar Association, and academics find acceptable for defense lawyers.<sup>97</sup> Additionally, prosecutors must handle these massive caseloads without adequate 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.

## II. 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 sections B and 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 work on criminal defendants. As we explain below in section A, overburdening prosecutors results in longer sentences for less culpable offenders, longer delays in the dismissal of charges against the innocent, fewer disclosures of exculpatory evidence by prosecutors, and more guilty pleas by innocent defendants in exchange for sentences of time served and release from jail. Somewhat counterintuitively, overburdening prosecutors is more harmful than helpful to criminal defendants.

### A. Harm to Criminal Defendants

Conventional wisdom holds that defendants benefit when prosecutors have huge caseloads. The logic is simple: if prosecutors are overburdened, they will not have time to competently prosecute all of their cases and will not bring many cases to trial. By this logic, prosecutors accordingly must plea bargain cases on terms more favorable to defendants to shrink their

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<sup>96</sup> For examples of their indigent defense scholarship, see Hashimoto, *supra* note 1; Lefstein, *supra* note 1; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001).

<sup>97</sup> See *supra* notes 26–30 and accompanying text.

dockets. To a certain extent, this conventional wisdom is correct. The entire class of criminal defendants—thousands of defendants in large jurisdictions—likely receives better plea deals from overburdened prosecutors.<sup>98</sup> However, many other effects of excessive prosecutorial caseloads tend to harm criminal defendants, particularly those who are less culpable or even wholly 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 for a run-of-the-mill armed robbery is ten years' imprisonment.<sup>99</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 pretrial 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 was being committed, he was actually a minor player in the robbery who had fallen in with a bad crowd after having previously been a good student. 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. On the other hand, looking at Robber *B*'s paper record, prosecutors might initially think he is entitled to a sentencing break as well; he is charged with stealing a relatively small amount of money and has only one prior criminal conviction for a simple assault that occurred over five years ago. If prosecutors had the time to conduct a proper investigation, however, they might discover that Robber *B* pointed his shotgun directly at the victims' heads and that he was the ringleader of the robbery. Moreover, the victim of Robber *B*'s previous crime might inform prosecutors that Robber *B* had broken his nose and cheekbones and that the case was pleaded 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

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<sup>98</sup> See *infra* notes 156–58 and accompanying text (discussing this windfall to undeserving criminal defendants). In some ways, the windfall to the entire class of criminal defendants is a good thing. Given that many defense counsel are overburdened and that legislatures tend to increase sentencing ranges to appear tough on crime, placing time and resource constraints on prosecutors helps to level the playing field somewhat and avoid excessive punishments.

<sup>99</sup> Cf. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at tbl.5.19.2004, available at <http://www.albany.edu/sourcebook/pdf/t5192004.pdf> (listing 105 months as the mean sentence of incarceration for robbery). 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) (footnote omitted).

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 might 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 be closer to eight years because defense attorneys can bargain more aggressively knowing that trial is very unlikely. Even though they are overburdened, prosecutors nevertheless try to differentiate between offenders the best they can. But they must make do with less information. They will not have time to personally interview the bank tellers, meet with Robber *B*’s previous victim, or learn that Robber *A* is regarded in the community as a good kid who was only a passive participant in the robbery. While Robber *A*’s attorney may convey this information, prosecutors may discount the defense attorney’s description as self-serving without neutral witnesses to attest to it. Accordingly, based primarily on the paper record in front of them, overburdened prosecutors might determine that both Robbers *A* and *B* are entitled to slight discounts on the going rate—say, seven years instead of ten. In the case of Robber *A*, the overburdened prosecutor will therefore offer a plea-bargained sentence in excess of what the defendant deserves. And in the case of Robber *B*, the prosecutor will offer a plea-bargained sentence that is far lower than what the defendant deserves. In both cases, overburdened prosecutors fail to achieve the most just result.

A similar problem occurs when prosecutors have little time or information before exercising their broad authority to transfer defendants to specialty drug courts. These courts are designed to treat and rehabilitate nonviolent offenders rather than incarcerate them<sup>100</sup> and have become popular in recent years.<sup>101</sup> For example, consider how prosecutors are likely to handle a defendant who has been charged with prostitution for the third time.<sup>102</sup> On the surface, the defendant may not seem like a good candidate

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<sup>100</sup> As Professor Eric Miller has explained, “The 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.” Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1540 (2004) (footnote omitted); see also Quinn, *supra* note 96, at 57 (“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.” (footnote omitted)).

<sup>101</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>102</sup> This scenario is unfortunately extremely common. See Editorial, *A Trail of Ill Repute: Crack-down 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.”).

for transfer to a specialty drug court because she is a recidivist<sup>103</sup> and is not even charged with a drug crime. A busy prosecutor is therefore likely to spend only a few minutes on the case, offer a plea bargain carrying a short jail sentence, and then 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. Our defendant engages in prostitution only to support her drug habit and has been arrested for crack possession in the past.<sup>104</sup> But for her 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, would participate in 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 appears typical and the overburdened prosecutor has dozens of other cases to manage that day, our defendant may not have the chance to attend drug court. She will almost certainly plead guilty, spend time in jail, and start the cycle all over again following her release. The negative effects of this cycle impact not only the defendant but also the community, which presumably would prefer to transform a drug user into a productive member of society rather than tolerate recidivism.

2. *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 do not necessarily err but are nonetheless unable to achieve the good results that they likely could accomplish with reasonable caseloads. Perhaps more troubling than these failures of discretion is that excessive caseloads lead prosecutors to run afoul of their constitutional obligations and commit inadvertent prosecutorial misconduct. Overburdened prosecutors likely fail to comply with several constitutional and statutory obligations; as explained below, the most pervasive are so-called *Brady* violations.

Under the doctrine established in *Brady v. Maryland*, prosecutors are required to disclose favorable evidence that tends to either exculpate the de-

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<sup>103</sup> See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 798–99 (2008) (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. The Bureau of Justice Statistics reported that in one study 85% of females arrested for prostitution tested positive for drugs. BUREAU OF JUSTICE STATISTICS, 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).

pendant or impeach witnesses against him.<sup>106</sup> This makes *Brady* at once one of the most important obligations imposed on prosecutors and one of the most common claims by criminal defendants in appealing their convictions.<sup>107</sup> Academic commentators are critical of *Brady* violations,<sup>108</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 unintentional and occur because prosecutors are overburdened or have received inadequate guidance from supervising prosecutors, who themselves are overburdened.<sup>109</sup> Of course, inadvertent failure to turn over *Brady* material is still a constitutional violation<sup>110</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 few hypothetical, but all too common, situations illustrate the problem of inadvertent *Brady* violations. Imagine a felony prosecutor in a large district attorney's office with 200 open felony cases, four of which are set for trial each week.<sup>111</sup> Though the prosecutor strives to give the defense attorney in each case notice of *Brady* material (and other more mundane matters<sup>112</sup>) a few weeks in advance of trial,<sup>113</sup> it is difficult to keep up with the

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<sup>106</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

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

<sup>108</sup> For an excellent assessment of *Brady* issues and criticisms of particular violations, see Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

<sup>109</sup> See Corn & Gershowitz, *supra* note 11, at 401–05.

<sup>110</sup> See *Strickler v. Greene*, 527 U.S. 263, 288 (1999) (“[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.”).

<sup>111</sup> This scenario is realistic for many prosecutors. See Hadley, *supra* note 55 (noting that prosecutors handling domestic violence trials “ha[ve] 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”); cf. Kim Smith, *Why Wheels of Justice Roll Slowly in Tucson: Reasons Are Numerous for Lengthy Trial Delays*, ARIZ. DAILY STAR, Dec. 26, 2006, at A1 (explaining that judges “often schedule three or four trials for the same day in the hope one of them will actually move forward”).

<sup>112</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*, PROSECUTOR, Oct./Nov./Dec. 2009, at 40, 41 (noting the “massive hit” prosecutors can take for failing to file witness lists or notices of intent to use defendants’ prior convictions).

<sup>113</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, compare John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001), which cautions against extending the *Brady* doctrine, with Kevin C. McM-

workload, and our prosecutor must make choices about which cases to prioritize. Believing that three of the four cases set for trial on, for example, June 1, will plea bargain, 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 arrives, one of the cases she thought would plea bargain fails to settle. 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. Our overburdened prosecutor might fail to realize in her last-minute meeting that the witness's story now conflicts with something he said when speaking to the police many months ago.<sup>114</sup> Or she may be fully aware of evidence that impeaches government witnesses and decide to delay producing it out of fear that disclosing witness identities too far in advance of trial will lead to witness tampering.<sup>115</sup> In the hectic period before trial, prosecutors may simply forget to turn over evidence of which they are personally aware. The list of possible scenarios is endless,<sup>116</sup> but the key point is the same in each permutation: prosecutors who have hundreds of open cases and are not sure which will actually go to trial will inadvertently overlook *Brady* material as they scramble to be ready for trial at the last minute.

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nigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989), which advocates *Brady* disclosure during plea bargaining.

<sup>114</sup> See, e.g., *Jamison v. Greiner*, Nos. 02-CV-1351(JBW), 03-MICS-0066(JBW), 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 the statements were not critical enough to merit reversal), *aff'd*, 166 F. App'x 545 (2d Cir. 2006).

<sup>115</sup> See Douglass, *supra* note 113, at 455 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.”).

<sup>116</sup> For example, 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 then learn, as the police officer did, that the witness had previously been convicted of theft. Because theft is a crime of honesty, it is impeachment evidence that should be disclosed. See, e.g., *United States v. Price*, 566 F.3d 900, 912–14 (9th Cir. 2009) (finding a *Brady* violation when the prosecutor failed to disclose, as the police knew, that the key witness had been arrested for theft and theft by deception and convicted of other crimes). And because police officers’ knowledge is imputed to prosecutors under the *Brady* doctrine, this inadvertent mistake amounts to a constitutional violation. 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.”). Similarly, 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, although this information might be contained in the case file or known to the investigating officers.

More disturbing than simple oversights are instances in which junior prosecutors do not even realize they have a legal obligation to turn over evidence. In extremely busy district attorneys' offices, prosecutors are quickly saddled with enormous responsibilities very early on. While these young prosecutors surely learned about the *Brady* doctrine in law school, they may fail to recognize actual *Brady* obligations when they arise in the real world.<sup>117</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. The junior prosecutor may simply not realize that such evidence is *Brady* material. In a properly staffed district attorney's office, a supervising prosecutor likely would catch the error and ensure that the State complies with the *Brady* doctrine's requirements. In overburdened prosecutors' offices, however, supervisors may 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.

3. *Excessive Caseloads Prevent Prosecutors from Promptly Dismissing Cases with Weak Evidence or Cases Where the Defendant Is 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 filed.<sup>118</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 to trial.<sup>119</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 30% of criminal defendants are,<sup>120</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

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<sup>117</sup> Cf. Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 812–13 (2003) (book review) (noting how professors tend to focus on Supreme Court doctrine rather than real-world scenarios).

<sup>118</sup> See Ronald F. Wright, Response, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. PENNUMBRA 68, 73 n.22 (2008), <http://www.pennumbra.com/responses/11-2008/Wright.pdf>.

<sup>119</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>120</sup> See BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 16 (2006) (finding that among the 38% of felony defendants in the largest 75 counties who were jailed awaiting trial, 5 out of 6 did not post bond even though a bail amount was set).

death.<sup>121</sup> While this problem is unavoidable to a certain extent, it is magnified in jurisdictions where prosecutors carry excessive caseloads.

The overarching 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 linger there until the prosecutor has time to focus on the matter. The fewer cases the prosecutor has, the sooner the charges against innocent defendants will be dismissed.<sup>122</sup>

The situation is more nuanced when prosecutors are pushed to dismiss cases by proactive defense attorneys. Often defense lawyers raise legitimate legal or factual questions about a case shortly after charges are filed.<sup>123</sup> While a defense attorney's inquiries and concerns are not enough to justify outright dismissal of a case, they are sufficient to spur the prosecutor to 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>124</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. One might argue that 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

<sup>121</sup> See, e.g., Steve McVicker, *County Jail Deaths on Pace to Double '06 Total*, HOUS. CHRON., Apr. 8, 2007, at A1 (discussing deaths of inmates in the Harris County jail who were awaiting trial and attributing some deaths to poor medical care); see also Bowers, *supra* note 15, at 1133–34 (describing the pretrial process as punishment in itself).

<sup>122</sup> See, e.g., Smith, *supra* note 111 (noting that because Maricopa County, Arizona, has a far greater number of prosecutors per capita than Pima County, Arizona, 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>123</sup> Of course, this assumes that counsel are 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 Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 43–44 (“Rather than waiting several weeks until a lawyer first appears, these weaker charges can be identified at the outset, allowing judges and prosecuting attorneys to avoid squandering valuable time on them.”).

<sup>124</sup> Indeed, because judges are often under pressure to keep dockets small, they pass that pressure onto prosecutors and defense lawyers by expecting them 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.”).

probable cause in order to bring a case forward to a jury.<sup>125</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>126</sup> Thus they have little incentive to push weak cases to trial when they run significant risk of losing.<sup>127</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 evidence is weak, political pressure and a strong sense of justice likely prevents prosecutors from outright dismissing charges against violent felony defendants they believe to be guilty.<sup>128</sup> Thus, it is difficult to see how increased resources will lead prosecutors to drastically decrease the number of cases they dismiss.

In sum, while prosecutors by and large succeed at removing weak cases from the criminal justice system, innocent defendants (and those who are guilty but for which proof is lacking) are charged with crimes every day. Unfortunately, excessive caseloads prevent prosecutors from moving swiftly. Many defendants therefore languish in jail for weeks or months. Excessive prosecutorial caseloads thus harm innocent defendants and exacerbate jail overcrowding and unsafe conditions of confinement.

4. *Excessive Caseloads Lead to the Conviction of the Innocent.*—Innocent defendants are regularly convicted of crimes, both at trial<sup>129</sup> and as a result of their own guilty pleas.<sup>130</sup> Though it is rare that innocence is later established,<sup>131</sup> it seems easy to blame the prosecutors who win wrongful

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<sup>125</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2004). This rule has been the subject of criticism, however. See Bennett L. 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>126</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004).

<sup>127</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.”).

<sup>128</sup> See Bowers, *supra* note 15, at 1152–53.

<sup>129</sup> See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (finding a minimum of a 3.3% wrongful conviction rate in capital rape–murder trials during the 1980s).

<sup>130</sup> See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 84–87 (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 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>131</sup> Although there are multiple paths by which the wrongly convicted can be exonerated, DNA testing receives the most attention. Yet from 1989, when DNA testing began, until 2007, only slightly more than two hundred individuals were exonerated by postconviction DNA testing. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 (2008).

convictions against the innocent. But in the context of excessive caseloads it is just as easy 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>132</sup> Understandably, prosecutors are skeptical of most claims of innocence.<sup>133</sup> And because prosecutors are overburdened, they have little time to devote to each case. The little time prosecutors do have is strategically spent trying to convict defendants they firmly believe to be guilty rather than exploring undocumented theories that could exculpate other defendants. Moreover, even when prosecutors do take the time to inquire into defendants' claims of innocence, they may only have time to conduct cursory investigations that are unlikely to be successful. Prosecutors may try to track down 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 a considerable amount of violent crime is committed in minority neighborhoods where even law-abiding citizens fear the police,<sup>134</sup> witnesses with helpful exculpatory information may be unwilling to come forward.<sup>135</sup> This problem is even worse when the witnesses themselves are involved in criminal activity.<sup>136</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>137</sup> If prosecutors' offices had greater resources to hire investi-

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<sup>132</sup> See DERSHOWITZ, *supra* note 21, at xxi (“Rule I: Almost all criminal defendants are, in fact, guilty.”). For a commentary on this phenomenon, consider the memorable exchange from the 1994 film, *The Shawshank Redemption*:

Andy Dufresne: What about you? What are you in here for?

Red: Murder, same as you.

Andy Dufresne: Innocent?

Red: Only guilty man in Shawshank.

THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

<sup>133</sup> See Scott & Stuntz, *supra* note 99, 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.”).

<sup>134</sup> See RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 1–13 (2006).

<sup>135</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>136</sup> See generally 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>137</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

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

Without sufficient 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>138</sup> ask defense attorneys to find the key witnesses that support their clients' claims 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. The problem, of course, is that many public defenders or appointed counsel representing indigent defendants are overburdened as well.<sup>139</sup> Worse yet, in some jurisdictions, compensation for appointed counsel representing indigent defendants is capped for each case, thereby encouraging defense attorneys to take more cases and creating a financial incentive to avoid spending much time working to prove their client's innocence.<sup>140</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 so that the prosecutors can contact them. Or defense attorneys might ask prosecutors to hear from witnesses who challenge police officers' accountings 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 it may not turn out to be exculpatory at all after it is investigated so it is likely shelved when prosecutors are managing hundreds of other cases. When prosecutors finally find the time to focus on the case, witnesses or key evidence may be gone. Thus the needle-in-the-haystack defendant who

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Thompson, Speech, *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 the Latino community to cooperate with them to report crimes and to testify against criminals." (footnote omitted)).

<sup>138</sup> See DERSHOWITZ, *supra* note 21, at xxi.

<sup>139</sup> See *supra* note 1.

<sup>140</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." (footnotes omitted)).

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 lawyering. Rather, most innocent defendants are convicted because they knowingly and voluntarily pleaded guilty to offenses they did not commit.<sup>141</sup> But why would an innocent defendant plead guilty? The simple answer is that excessive caseloads lead to long trial backlogs and short-sentence plea bargain offers. Innocent defendants thus can plead guilty to sentences of time served and simply leave jail.<sup>142</sup>

When prosecutors have excessive caseloads, it is logistically impossible for every defendant who asserts his innocence to be afforded a timely, quick jury trial. Excessive prosecutorial caseloads therefore lead to many poor defendants who cannot afford bail, including innocent defendants, languishing in jail for months or even years awaiting trial.<sup>143</sup> When innocent defendants are charged with the most serious crimes and face decades in prison, it makes sense for them to wait their turn for trial. If a defendant is found not guilty at trial, the time he spent in pretrial detention will be nowhere close to the sentence he would have received had he pleaded guilty and been convicted.

But when innocent defendants are charged with misdemeanors or low-level felonies, the time in jail while waiting for trial may actually exceed the sentence they would receive if they pleaded guilty.<sup>144</sup> For example, imagine that a defendant is charged with burglary for breaking into a garage and stealing tools. The defendant has no resources with which to post bond. Although prosecutors do not know it, the eyewitness placing the defendant at the scene is mistaken.<sup>145</sup> Moreover, the case against the defendant is so weak that if it proceeded to trial, a decent defense attorney would rip it apart: there was only one eyewitness, it was nighttime, police presented the mug shots in a suggestive fashion, and the defendant was found blocks

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<sup>141</sup> As Professor Bowers has explained, “[A] great many defense attorneys currently counsel their innocent clients to plead guilty even when no judicially sanctioned devices (like equivocal or no-contest pleas) are available.” Bowers, *supra* note 15, at 1174.

<sup>142</sup> *See id.* at 1143 (“[P]rosecutors make frequent offers of pleas to noncriminal violations and time-served dispositions.”).

<sup>143</sup> The same problem exists when defense counsel are overburdened. *See Backus & Marcus, supra* note 1, at 1032 (recounting examples of this type of unwarranted imprisonment due to delay, such as the case of a 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>144</sup> *See Uphoff, supra* note 130, at 798.

<sup>145</sup> For an excellent overview on the inaccuracy of eyewitness testimony generally, see Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1497–1506 (2008).

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 offer a plea bargain for the one month the defendant has already served. While the innocent defendant does not want to admit to a crime he did not perpetrate, he ultimately pleads guilty simply to get out of jail.<sup>146</sup>

Moreover, the collateral consequences of pleading guilty, such as stigma or harm to employment prospects, are unlikely to deter innocent defendants from pleading guilty. If an individual has already spent weeks in jail awaiting trial, any stigma or embarrassment has probably already attached. While pleading guilty may require the defendant to meet with a parole officer or undergo random urinalysis, the added stigma of conviction is likely of little consequence when his family and friends already knew that he was locked up in jail. Perhaps more importantly, defendants who are too poor to post bond 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 elite Fortune 500 companies are unlikely to hire individuals with burglary convictions. Instead, because these individuals are likely competing for manual labor 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>147</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 counterintuitive, excessive prosecutorial caseloads are very damaging to criminal defendants. Overburdened prosecutors have trouble exercising their discretion as effectively as they might 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 courts because overburdened prosecutors fail to recognize worthy defendants. Well-meaning but overburdened prosecutors fail to disclose *Brady* material to defendants and likely run afoul of other constitutional and statutory obligations. Excessive

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<sup>146</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 is really no choice at all.”).

<sup>147</sup> See Adam M. Gershowitz, *Twelve Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases* 16–17 (Univ. of Houston, Public Law & Legal Theory Series 2010-A-5, 2010), available at <http://ssrn.com/abstract=1550733> (noting that the collateral consequences of drunk driving convictions weigh much more heavily on wealthy defendants than on poor defendants).

caseloads hinder prosecutors from promptly dismissing weak cases, leaving innocent defendants imprisoned 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, excessive prosecutorial caseloads may well cause more harm than good to a host of criminal defendants.

*B. Harm to Victims*

Excessive prosecutorial caseloads are also damaging to the victims of crime. When prosecutors are overburdened, they are unable to spend much time with victims or even to meet with them at all. Prosecutors thus fail to acquire useful information that could be used to convict the guilty and ensure that they are adequately punished. Perhaps more troubling, overburdened prosecutors who do not have time to communicate with victims will leave them feeling victimized again, denying victims the therapeutic justice they seek from the criminal justice system.<sup>148</sup>

There are many ways in which victims are ignored by the process. They are not informed that offenders have been arrested or charged. Even if they are aware of an arrest, victims may not be notified when the defendant makes bail. Often, victims are not informed of court settings or plea bargain offers, nor notified, in some jurisdictions, that the defendant has been convicted and sentenced.<sup>149</sup> It is not surprising that victims believe they should be kept informed about what is happening in their cases.<sup>150</sup> Nor is it shocking that victims become upset when key steps in the process occur without their knowledge.<sup>151</sup> Just as crime victims want to receive respect and apologies from the offenders who harmed them,<sup>152</sup> so too do victims want a certain amount of attention and respect from the criminal justice process. 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>153</sup>

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<sup>148</sup> See Bibas & Bierschbach, *supra* note 20, at 136 (“[V]ictims lose control when they are victimized and again when their cases disappear into the criminal justice system.”).

<sup>149</sup> See *id.*

<sup>150</sup> See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20.

<sup>151</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>152</sup> See Bibas & Bierschbach, *supra* note 20, at 138.

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

Many large district attorneys' offices have tried to keep victims better informed by hiring victim–witness coordinators<sup>154</sup> or by instituting policies requiring prosecutors to make contact with victims and seek their input before plea bargaining cases.<sup>155</sup> Yet, these policies face enormous obstacles, largely because of excessive caseloads. When an office has tens of thousands of cases each year but only a handful of victim–witness coordinators, many victims are likely to slip through the cracks. The same is true when prosecutors lack the time to meet with victims or even to talk with them by phone. Even if prosecutors can meet with some victims, the sheer number of cases likely makes it difficult to differentiate among victims and to remember to contact them again. Of course, most prosecutors probably do not intentionally ignore victims. They would likely prefer to have time to meet with them, update them on their cases, and offer encouragement. Whether or not the prosecutor on a given case has the best of intentions, a crime victim who receives minimal attention from an overburdened prosecutor almost certainly leaves the process feeling victimized by the criminal justice system.

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

Although it is fairly obvious, no discussion of excessive prosecutorial caseloads would be complete without mention of the harm such caseloads do to the public at large. Although 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” that actually cause more harm than good.

*1. Overburdened Prosecutors Fail to Attain Convictions for Guilty Defendants at Trial.*—Because the American criminal justice system believes (wisely, in our opinion) that it is better for ten guilty people to go free rather than for one innocent person be convicted,<sup>156</sup> there will always be some guilty defendants who escape justice. Yet, there is a significant difference between freeing the guilty because they were not proven “guilty beyond a reasonable doubt” and letting the guilty escape justice because prosecutors lack the time and resources to properly prepare their cases. Un-

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<sup>154</sup> See Michelle Permenter, *Crime Victims' Rights in Texas*, HOUS. LAW., Jan./Feb. 2009, at 8, 10 (explaining how victim assistance coordinators help victims to maneuver through the Harris County criminal justice system).

<sup>155</sup> See Norm Maleng, *Charging and Sentencing: Where Prosecutors' Guidelines Help Both Sides*, 1 CRIM. JUST. 6, 43–44 (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).

<sup>156</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

fortunately, in jurisdictions with overburdened prosecutors, even 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. Witnesses may need hours of trial preparation that prosecutors lack the time to provide. 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 cases, prosecutors may lack the time to prepare effective presentations of complicated scientific testimony from ballistics to breathalyzer results.<sup>157</sup> 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.

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 mean to assert that just as the lack of defense resources results in the occasional conviction of the innocent,<sup>158</sup> it is also true that the lack of prosecutorial resources sometimes allows the guilty to escape conviction.

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 representation that would be provided by public defenders, in many instances defendants who spend a lot of money on private lawyers get what they pay for. In some cases, prosecutors are simply no match for well-funded defense lawyers with adequate time to devote to their cases.

Drunk driving prosecutions provide a good example. Wealthy defendants who spend \$20,000 or \$30,000 to hire lawyers specializing in drunk driving defense are buying time and attention for their cases. The defense lawyer will have time to visit the scene where the sobriety tests were conducted to check for irregularities. He will be able to blow up photographs or maps to highlight the questionable conditions under which the tests were conducted. The defense will have the chance to 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 be able to retain the services of skilled expert witnesses who can cast doubt on the validity of breathalyzer tests in general and how they were applied in that particular case.

By contrast, an overburdened prosecutor will not have time to personally visit the crime scene, nor will she have an investigator who she can task

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<sup>157</sup> See, e.g., Gershowitz, *supra* note 147, at 17–18 (noting the difficulties that inexperienced junior prosecutors face in trying to debunk scientific challenges to breathalyzer tests).

<sup>158</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 97–98.

to do so. The prosecutor will also lack the time and money to magnify photographs or create helpful visual displays. Worse yet, the prosecution's expert witness is likely to 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 to discuss his testimony in advance of trial. In these circumstances, it is not difficult to see how a factually guilty defendant might evade conviction.

2. *Overburdened Prosecutors Plea Bargain the Cases of Some Guilty Defendants for Sentences That Are Far Too Low.*—While excessive prosecutorial caseloads lead to some 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 above, some defendants receive lighter plea deals than they deserve because prosecutors lack the time to thoroughly investigate an offender's case and criminal history to discover that he is deserving of considerably greater punishment. We do not repeat that analysis here but instead extend it to cases in which prosecutors know that a defendant deserves a longer sentence but lack the time and resources to staunchly advocate for that penalty. 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 because of the caseload pressures that they face.

Consider again the typical prosecutor who has multiple cases set for trial on a given day and is carrying hundreds of other open felony matters. 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 defendant will receive at least a fifteen-year sentence if he is convicted at trial. The prosecutor thus should hold firm on her plea bargain offer and proceed to trial if the defendant refuses to accept ten years' incarceration. If the prosecutor proceeds to trial on this robbery case, however, 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. The defense lawyer, if he is remotely worth his salt, is aware of this problem.<sup>159</sup> The defense lawyer will therefore respond to the prosecutor's bottom line plea bargain with a lower counteroffer. If that counteroffer 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 only slightly lower—say seven years instead of the prosecutor's bottom line offer of ten

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<sup>159</sup> Indeed, in large cities, many defense lawyers are former prosecutors who switched sides likely in part to escape the crushing caseloads that they shouldered for government pay. See Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223, 231 n.38 (2005).

years—it is easier for the prosecutor to acquiesce and to accept a deal below her bottom line than for her to sacrifice three days of her time.

The prosecutor can justify accepting the much lower plea bargain by telling herself that if she had insisted on going to trial, it would have hindered her from managing the hundreds of other cases on her docket and would have made it nearly impossible to prepare her other trial cases. This rationalization is even more persuasive to a prosecutor if her other defendants committed more serious offenses such as murders and rapes.<sup>160</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 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” That Are Actually Harmful.*—When guilty defendants are acquitted at trial or receive lighter-than-justified plea bargains, the harm extends beyond those offenders themselves. Windfalls to obviously guilty defendants fuel the ratcheting up of criminal law by encouraging legislatures to add new crimes to the books and increase punishments.<sup>161</sup> In turn, this trend causes the United States to lock up more people and spend more money on jails and prisons, all while ignoring the underlying problem of the underfunding of prosecutors and indigent defense lawyers.

In the vast majority of cases where prosecutors agree to lighter plea bargains than defendants actually deserve, the cases disappear into the system never to be heard from again. But in a few rare 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 can seize on the issue.<sup>162</sup> For example, a news story may announce that today’s vehicular manslaughter defendant never received jail time for her previous drunk driving charges.<sup>163</sup> In short order, politicians may come forward with legislation to increase punishment ranges or impose mandatory minimums.<sup>164</sup>

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<sup>160</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006) (describing how criminal justice insiders, like prosecutors, become jaded, noting that “[a]fter one has seen many armed robberies, for example, unarmed burglaries and thefts pale in comparison”).

<sup>161</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>162</sup> See, e.g., Jacqueline Soteropoulos, *Nov. 21 Trial Date Is Set for Gohman’s DUI Case*, PHIL. INQUIRER, Sept. 15, 2005, at B4.

<sup>163</sup> See *id.*

<sup>164</sup> See, e.g., Press Release, Governor Mitt Romney, Gov. Romney Pushes for Tougher Drunk Driving Penalties (Oct. 26, 2005), available at 2005 WLNR 17359633 (proposing “Melanie’s Bill,” which

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>165</sup> Longer punishments separate offenders from their families, thus increasing the number of children in urban areas who go through their entire childhoods without male parents.<sup>166</sup> The public must spend more tax money on jails and prisons.<sup>167</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 simply to note that excessive prosecutorial caseloads can result in unanticipated backlashes for sentencing policy.

### III. 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 underfunded. Moreover, it is not beneficial for prosecutors and public defenders to each complain to legislative bodies that the other is undeserving 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*

An initial reaction to data showing excessive prosecutorial caseloads is to suggest that district attorneys' 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 viewed as "tough on crime" and therefore want to take credit for incar-

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included tougher punishments and mandatory sentencing minimums, after thirteen-year-old Melanie Powell was killed by a repeat drunk driver).

<sup>165</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).

<sup>166</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 85–167 (2006) (exploring the effects of mass imprisonment on young black men and their families).

<sup>167</sup> See MARC MAUER, RACE TO INCARCERATE 92 (2006) (explaining that the United States spends \$57 billion per year on incarceration).

cerating criminals.<sup>168</sup> Thus, while legislatures would rather enact symbolic measures that look good and cost no money,<sup>169</sup> if district attorneys' offices place enough pressure on legislatures to fund greater staff and resources, there is a chance that district attorneys will get some of what they request.

The biggest problem with simply hiring more prosecutors is that doing so would have adverse effects on the rest of the criminal justice system. Increasing the number of prosecutors without a corresponding increase in public defenders would exacerbate the indigent defense problem. Defense lawyers would still be overburdened and would be in a worse position because they would then be facing prosecutors who were better resourced and thus better prepared for trial and less interested in plea bargaining.

A second objection to simply appropriating money for new prosecutors is that there would be no guarantee that the allotted money would 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>170</sup> Increasing the number of prosecutors may thus result in increased prosecution of low-level drug or prostitution cases 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>171</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 attorneys' offices have the resources to handle long-term, paper-intensive, white-collar crime cases.<sup>172</sup> Yet, in today's political climate, many elected district attorneys would surely like to have robust white-collar divisions that focus on high-

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<sup>168</sup> See Stuntz, *supra* note 54, at 534 (“[A]t the most basic level, elected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished.”).

<sup>169</sup> See *id.* at 526, 532.

<sup>170</sup> See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 257 (2007) (explaining how budget constraints prevent prosecutors from enforcing all the crimes on the books).

<sup>171</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.”).

<sup>172</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” (footnote omitted)).

profile issues such as mortgage fraud or investment malfeasance.<sup>173</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 case-loads facing existing prosecutors.

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

A far better approach to dealing with the overburdening 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 overburdened 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 un-receptive to spending any money, even on 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>174</sup> and even court rulings demanding greater funding,<sup>175</sup> legislatures have been hostile to funding increases.<sup>176</sup> And even when legislatures do provide greater funding, the increases are sometimes rescinded shortly thereafter<sup>177</sup> because public defenders’ offices are an attractive target for cuts in cash-strapped times.<sup>178</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 likely would find it easier to spend

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<sup>173</sup> After all, white collar prosecutions bring significant favorable media attention. See, e.g., Elaine Silvestrini, *Feds Announce Surge in Mortgage Fraud Prosecutions*, TAMPA TRIB., Nov. 3, 2009, <http://www2.tbo.com/content/2009/nov/03/031717/feds-talk-about-surge-mortgage-fraud/news-realestate/>.

<sup>174</sup> See, e.g., sources listed *supra* at note 1.

<sup>175</sup> See Drinan, *supra* note 1, at 443–62 (discussing successes in “second generation” indigent defense litigation).

<sup>176</sup> Although legislative hostility is the typical response, there is cause for optimism. As Professor Ron Wright points out, “Some 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, *supra* note 1, at 261.

<sup>177</sup> See Gershowitz, *Raise the Proof*, *supra* note 3, at 100–06.

<sup>178</sup> See, e.g., NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED, *supra* note 30, at 52–60.

money on indigent defense.<sup>179</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>180</sup>

Admittedly, this approach initially seems counterintuitive. Like other budget priorities, there is a 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 Essay, we spoke with a number of prosecutors who thanked us for taking up their fight against the public defenders who are trying to take “their” resources.<sup>181</sup> As opposed to further bickering between the prosecutors’ and defender’s offices, which only makes it easy for legislators to deny both departments the funding they have requested, we suggest that a better approach would be for prosecutors and public defenders to make a combined pitch, arguing that the criminal justice system is underfunded as a whole. As Professor Wright has pointed out, in areas such as corrections, legislatures are already accustomed to “hearing the funding requests of complementary players in a single system and sometimes require a coordinated budget request from them.”<sup>182</sup> Scholars have suggested that drips and drabs of additional funding are insufficient to fix the indigent defense problem and that only an enormous budgetary increase can effect significant change.<sup>183</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 funding increase. By making a joint proposal for a large funding increase, public defenders and prosecutors might be in a better position to shake loose the large and much-needed sums of money that legislatures would otherwise refuse to dole out.

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<sup>179</sup> See Wright, *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>180</sup> See *id.* at 238–41.

<sup>181</sup> According to these prosecutors, their district attorneys’ offices were underfunded because legislators were giving money—undeservedly, in some of their opinions—to public defenders’ offices. One large district attorney’s office informed us that the public defender’s office in their city 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 from representation on conflict of interest grounds. Although we did not survey public defenders, we are confident that many would have complained just as loudly that legislators were increasing funding for prosecutors’ offices when the money should have been spent on indigent defense.

<sup>182</sup> Wright, *supra* note 1, at 241.

<sup>183</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.”).

## CONCLUSION

Although scholars have long decried the excessive caseloads of public defenders and appointed counsel, little attention has been paid to the huge caseloads 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.

Excessive prosecutorial caseloads are also 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 or 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.

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.

