

## PHYSICIAN, HEAL THYSELF: DISCRETION AND THE PROBLEM OF EXCESSIVE PROSECUTORIAL CASELOADS, A RESPONSE TO ADAM GERSHOWITZ AND LAURA KILLINGER

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I applaud Adam Gershowitz and Laura Killinger for identifying and exploring an almost unconsidered problem: excessive prosecutorial caseloads.<sup>1</sup> Their premise is that in many large jurisdictions, prosecutors are so overworked that they cannot adequately individualize guilty pleas, assess eligibility and need for rehabilitative programs, comply with disclosure obligations and speedy-trial rules, and (more generally) separate the legally and equitably innocent from the guilty. Consequently, excessive prosecutorial caseloads have the capacity to burden not only district attorneys' offices but also criminal defendants.

It is no easy feat to recognize a fresh and practically important problem in a criminal justice system that—though shot-through with pathologies—has no shortage of critics on the lookout to spot them. For that reason alone, their article is a valuable contribution to the literature. It is all the more impressive that they chart this new territory so well. Nevertheless, I have three principal concerns. First, I sense that the problem is not nearly as pervasive as they take it to be. Second, I believe that prosecutors do not so much lack the *ability* as the *will* to manage ballooning caseloads (and, if I am right, this profoundly changes the takeaway). Third, I foresee a number of reasons—many of which the authors leave unaddressed—to worry far more about excessive public-defender caseloads than prosecutorial caseloads.

### I. THE EMPIRICAL CLAIM

My first question is whether prosecutors are genuinely overtaxed and, if so, to what extent. On that score, I do not read the data to adequately support the authors' central claim that the problem is chronic. Of course, we must first settle on a benchmark for what constitutes an excessive prosecutorial caseload. According to the authors, the prosecutorial standard

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<sup>1</sup> Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (link).

ought to track the standard for public defense. On these terms, a prosecutor should carry “no more than 150 felonies *or* 400 misdemeanors.”<sup>2</sup>

As an initial matter, I am not certain that I agree. As I discuss in Part III, it may not be necessary (or even proper) to apply the same aspirational standards to both prosecutors and public defenders. Nevertheless, for present purposes, I take the measure as appropriate. As such, I gather that the authors would agree that a mixed-caseload prosecutor (who splits her time evenly between felony and misdemeanor cases) ought to handle no more than 75 felonies *and* 200 misdemeanors—in other words, half of each of the maximum standalone figures. If that is correct, then the authors have a problem: in *more than half* of the twenty-four counties examined in a national study on which the authors heavily rely, prosecutorial caseloads were radically under one figure and/or the other, or nominally under both. And in an additional four counties, prosecutorial caseloads just barely exceeded the recommended maximums—Orange County (76 felonies, 202 misdemeanors), San Bernardino County (92 felonies, 176 misdemeanors), Tarrant County (99 felonies, 179 misdemeanors), and Bexar County (70 felonies, 221 misdemeanors). Remarkably, in only two counties—Harris County and Clark County—were prosecutors, on balance, handling more than the 150-felony figure (and, even there, not by much: 165 and 166 felonies per prosecutor, respectively). More striking, in *no* county were prosecutors averaging more than 400 misdemeanors.<sup>3</sup>

The authors seem to anticipate the objection that the national study leaves the empirical question open. In response, they cite to email and telephone conversations with prosecutors to back their claim that the caseload figures are, in fact, far higher.<sup>4</sup> I see no good reason to prefer anecdotal self-reports to the empirics of the national study. First, even good-faith estimates are less likely to be accurate than hard findings. Second, prosecutors (and, for that matter, public defenders, judges, court staff, police officers—almost all employees, really) have vested interests (e.g., maximizing resources and leisure, minimizing stress) in perpetuating perceptions that they are overworked and underfunded.

I am similarly skeptical of the authors’ assertion that the national study understates the caseload problem by including in the calculation supervisors who handle few, if any, cases.<sup>5</sup> Why should a supervisor be excluded when determining the per capita caseload? Presumably, she is *helping* junior attorneys handle their cases by providing guidance and feedback and by filling in when these prosecutors are on trial on other cases or are otherwise indisposed. If the supervisor is not a valuable part of the team, then she

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<sup>2</sup> *Id.* at 266.

<sup>3</sup> *Id.* at 268 tbl.1.

<sup>4</sup> *See, e.g., id.* at 271 n.43, 272 n.46.

<sup>5</sup> *Id.* at 270.

ought to be fired and her position eliminated—or, at a minimum, she ought to start picking up cases.

In the same vein, I do not buy the authors' claim that we should exclude from the calculation "attorneys whose sole job [i]s to screen cases."<sup>6</sup> Like supervisors, these specialized attorneys perform useful functions. I would think that what is true of the industrial assembly line holds for criminal courts: all else equal, horizontal practice (in which labor is divided) is probably more efficient than vertical practice (in which an assigned lawyer remains with a case from start to finish).<sup>7</sup> If that is not so, then the prosecution office may simply transition to vertical representation. Short of that, I see no reason to exclude from the mix lawyers who handle only discrete tasks.

Nevertheless, I take the authors' general point, and I recognize that—even if we were to focus without caveat on only the national study's data—there remain six of twenty-four counties where caseloads appear to have surpassed the authors' measure of excessiveness. And, significantly, these counties encompass the major metropolitan areas of Chicago, Miami, Fort Lauderdale, Las Vegas, Houston, and Dallas. Thus, the authors have identified a genuine problem that, at a minimum, affects hundreds of thousands of criminal cases each year.

## II. PROSECUTORIAL DISCRETION AND THE MISDEMEANOR CASE

On to my principal concern: I wonder whether even the obviously overburdened prosecutor is truly as helpless as the authors perceive her to be. What the authors appear to have largely missed is the fact that the prosecutor helps make the cases, whereas the public defender only takes them. Thus, the prosecutor has a mechanism to ease her own pain—that is, prosecutorial discretion.

And the authority to exercise discretion matters. It differentiates the reactive public defender, who struggles to keep pace with the assembly line, from the prosecutor, who feeds the machine. More to the point, district attorneys' offices retain almost unfettered legal authority to decline or dismiss charges. Granted, too many declinations or dismissals would ill-serve the public interest and might be politically unpopular (to the extent the public grasped the decisions). But in some types of cases, there may be more play in the joints than in others.

In particular, when it comes to charging discretion, petty order-maintenance cases present something of a puzzle: it is in this context that prosecutors appropriately may decline or dismiss cases to ease their

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<sup>6</sup> *Id.* at 272.

<sup>7</sup> The typical debate is that horizontal representation is more efficient but vertical representation facilitates relationships and communication with clients, witnesses, and victims. See Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 263 (2004) (link).

caseload burden. Yet it is also in this context that prosecutors are particularly unwilling to do so because prosecutors operate under a set of institutional and cognitive biases that motivate them to charge petty cases reflexively.<sup>8</sup> Indeed, in a separate article, I provided data that revealed that—perhaps counterintuitively—prosecutors tended to decline petty order-maintenance charges at rates significantly lower than serious felony charges.<sup>9</sup> There, I offered a number of tentative reasons for this phenomenon.

First, professional prosecutors are trained—by education and experience—to sort cases into legal categories and thereby to resist contextual signals that may set a specific case apart from the mine-run. Significantly, this inclination toward broad categorization over individualization is a particular problem when it comes to petty public-order cases, which tend to appear fungible at first glance. Specifically, public-order cases are almost always products of proactive order-maintenance policing. In these cases, police typically make arrests based on firsthand observation of apparent crime, and prosecutors thereafter typically take at face value the officers' skeletal arrest paperwork (often the only information available at the point of charge). Consequently, prosecutors are less likely to spot legally or equitably atypical petty public-order cases than atypical serious felony cases. Second, even where legal or equitable weakness is apparent, prosecutors carry a presumption of guilt that partially blinds them to potentially good reasons to forego charges. Third, prosecutors are motivated to charge rather than decline petty cases because they can quickly and cheaply bargain for expedient guilty pleas that bolster conviction records—a principal performance measure. Fourth, prosecutors know that in the unlikely event of trial, they can better rely on police witnesses to appear and testify credibly (or, at least, in manners that appear credible). These biases add up to a powerful prosecutorial impulse to file a low-level charge whenever a low-level charge is *merely* cognizable—even in circumstances where the charge is not required (or even warranted) by retributive or instrumental principles.<sup>10</sup>

More importantly, because prosecutors may underexercise their considerable charging discretion, the problem of excessive prosecutorial caseloads, in fact, may be a problem (at least partially) of prosecutors' own making. This is not to say that prosecutors are to blame for acting rationally in the face of prevailing perverse incentives, but it does not translate that prosecutors are powerless or that the biases are intractable. It does mean that the caseload question is no isolated question—it is

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<sup>8</sup> Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1704 (2010) (link).

<sup>9</sup> *Id.* at 1716 tbl.1, 1717 tbls.2 & 3, 1720 tbl.4.

<sup>10</sup> *Id.* at 1688–1705.

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inexorably bound up with (and, indeed, secondary to) the discretion question.

Notice, however, how the authors gloss over the discretion question by (almost certainly unintentionally) relying on the passive voice. In their terms, prosecutors “*are asked* to commit malpractice on a daily basis” and prosecutors “*are tasked* with handling far too many cases.”<sup>11</sup> But of course, no one *tasks* prosecutors with handling cases (except, perhaps, supervisors who may demand charges).<sup>12</sup> Prosecutors *task themselves* through their own discretionary choices. If the tasks are too large, prosecutors have significant authority—even if they lack sufficient motivation—to change course. Thus, the difficulty for the authors is that they are trying to solve an incomplete puzzle. They foresee only a “lack [of] time and resources” as standing between the prosecutor “achiev[ing] justice” and “win[ning] at all costs.”<sup>13</sup> However, in jurisdictions that focus heavily on public-order enforcement, the problem is more a lack of will—the unwillingness to determine whether a given case is legally or equitably weak or strong.

In such a setting, real reform would require institutional redesign to counteract the biases that produce unreflective charging. To that end, Ronald Wright and Marc Miller have recommended that prosecution offices create in-house “hard screening” units, modeled after the one in place at the New Orleans District Attorney’s Office.<sup>14</sup> For my part, I have suggested an external lay equitable screen that might check otherwise poorly restrained prosecutorial charging discretion.<sup>15</sup> By contrast, Gershowitz and Killinger propose only to throw money at the problem. Such a solution is less likely to succeed because it disregards the pathology that underlies the problem (that is, the underexercise of charging discretion) in favor of treating only the symptom (that is, the consequent excessive caseloads). Worse still, by leaving the underlying problem unaddressed, the authors’ proposal may enable prosecutors to charge *more* cases still, as even the authors seem to

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<sup>11</sup> Gershowitz & Killinger, *supra* note 1, at 263, 266 (emphasis added). Indeed, the phrase “tasked with” appears three times throughout the article. *Id.* at 266, 267, 301.

<sup>12</sup> I recognize that prosecution offices tend to be hierarchical, and, as such, supervisors may constrain the ability of line prosecutors to exercise discretion. But such constraints are *internal* to the office. Critically, if a given district attorney’s office concludes that it would be wiser to give line prosecutors freer reign, it may organize accordingly. Thus, the problem—to the extent one exists—remains *in house*. My whole premise is that prosecution offices have significant—but too often unexercised—authority to minimize their own excessive caseloads. That is to say, prosecution offices have the power to heal themselves (at least partially). Nothing about the hierarchical structure of the typical prosecution office undermines that premise.

<sup>13</sup> *Id.* at 264.

<sup>14</sup> Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 117 (2002).

<sup>15</sup> Bowers, *supra* note 8, at 1661 n.21.

recognize.<sup>16</sup> In fact, as long as the pathology remains, a lack of resources may be the best available check against overzealous prosecution.

Of course, the power of this charging pathology depends upon the degree to which order-maintenance policing (and thus prosecution) is a priority in a given jurisdiction. The national study's data seems to show that different counties have adopted radically different approaches to misdemeanor enforcement. For example, New York City prosecutors charged *ten times* as many *misdemeanors as felonies*, whereas Phoenix prosecutors took an almost categorically opposite approach, charging *eight times* as many *felonies as misdemeanors*. The authors make no mention of this disparity. They see only excessive caseloads in the data. By contrast, I see a need to parse the cases according to their type and thereafter to pause and ask what decisions inform these startling imbalances. The answer could be benign—say, differences in the substantive law across states. That is, Arizona may treat as a felony the kind of conduct that New York treats as only a misdemeanor. But I am skeptical that this is the case. I suspect the answer has much more to do with an executive policy determination—informed by the “broken-windows” theory—to focus on low-level order-maintenance offenses in New York City.<sup>17</sup>

I understand that the decision to prioritize aggressive order-maintenance enforcement is not indefensible (though I do not support it), but critically, the decision is not inevitable either.<sup>18</sup> In any event, I am willing to table the larger debate and speculate only that New York City's ten-to-one ratio of misdemeanors to felonies seems sufficiently imbalanced to raise serious questions about whether prosecutors are exercising charging discretion appropriately.<sup>19</sup> One further caveat: by this I do not mean to downplay the societal and private costs of the kinds of conduct covered by misdemeanor code law. From a retributive perspective, misdemeanants may be normatively blameworthy. Moreover, from an instrumental perspective, effective crime control may require that we prosecute and punish misdemeanor offenders to some degree. Accordingly, my position is not that a case is dispensable by virtue of being a misdemeanor; rather, just that it might be insofar as misdemeanants are less likely than felons to cause harm that requires prosecution. Thus, especially in misdemeanor cases, some amount of measured discretion is not just permissible, but essential.

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<sup>16</sup> Gershowitz and Killinger, *supra* note 1, at 298 (“Prosecutors’ offices may use the added manpower to simply file more charges.”).

<sup>17</sup> See generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) (describing and criticizing public-order crime enforcement in New York City); Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007) (same) (link).

<sup>18</sup> Indeed, as Gershowitz and Killinger's data reveal, some counties appear to see fit to charge far fewer misdemeanor cases. Gershowitz & Killinger, *supra* note 1, at 268 tbl.1.

<sup>19</sup> Bowers, *supra* note 8, at 1704.

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In that vein, I think the authors should have narrowed their exploration to the counties where prosecutors appear to be overburdened *notwithstanding* measured exercises of charging discretion. It is not possible to say which counties adequately fit this description, but as a rough proxy, we can use the counties where prosecutors exceeded the authors' caseload limit while nevertheless filing a balance of misdemeanor and felony charges.<sup>20</sup> This measure includes the counties encompassing Miami, Houston, Dallas, and Las Vegas—counties in which, on average, prosecutors charged cases in the range of two-to-one or three-to-two misdemeanors to felonies. But, even as to these counties, I would want to know more about whether prosecutors are, in fact, making optimal charging decisions. Only then would I unreservedly join the authors' call to increase funding substantially.

To my thinking, the principal shortcoming of the article is that the authors fail to adequately differentiate between cases that are *mala in se* and *mala prohibita*, between the serious and the petty, between the violent and the non-violent. Consequently, they neglect to sufficiently ask the first-order question of whether prosecutors are justifiably exercising (or failing to exercise) charging discretion. To their credit, the authors do not leave the discretion question *wholly* unaddressed, but notably, they raise it only in the context of the most serious cases. For instance, the authors observe that prosecutors lack the *ability* to eliminate even legally dubious cases because “political pressure and a strong sense of justice likely prevent[] prosecutors from outright dismissing charges against *violent felony defendants*.”<sup>21</sup> Notice the focus on violent felony cases. Admittedly, their analysis of those cases may well be right, but significantly, they are talking only about *certain* cases—a fraction of the whole. The picture they paint is incomplete.

Moreover, this focus on felonies focus ultimately leads the authors to make some curious claims. Consider their intimation that dispensable cases are few and far between—that such cases are no more than a “needle-in-the-haystack.”<sup>22</sup> Again, the observation may be true of violent felony cases, but what about the rest of cases—the non-violent, typically non-felony cases? In those cases, the relevant issue may not be to find the needle but to get rid of all of the unneeded hay.

Likewise, consider the authors' suggestion that “most local district attorneys have no choice but to use almost all of their budgets to handle violent crime.”<sup>23</sup> Once again, the focus is on violent crimes to the almost

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<sup>20</sup> As indicated, the authors recommend a caseload limit of 150 felonies or 400 misdemeanors. *See supra* note 2 and accompanying text. By this measure, a balanced caseload would seem to call for two-to-three misdemeanors for each felony.

<sup>21</sup> Gershowitz & Killinger, *supra* note 1, at 287 (emphasis added).

<sup>22</sup> *Id.* at 289.

<sup>23</sup> *Id.* at 298.

categorical exclusion of all else. In any event, the empirical claim is almost certainly wrong, as indicated by the authors' own data that show that misdemeanor cases, in fact, outnumbered felony cases by an aggregate margin of nearly three-to-one in the studied counties. Even more telling, in *all* five counties in which prosecutors, on average, handled the most misdemeanors—that is, the counties encompassing Chicago, Houston, Fort Lauderdale, Miami, and Las Vegas—prosecutors also managed felony caseloads that met or exceeded the seventy-five felony upper limit. Quite simply, in these counties, prosecutors appear to have had no trouble charging misdemeanors *notwithstanding* their already high felony caseloads. Of course, violent crimes probably require greater resource expenditure per case, but the authors provide less-than-zero support for the bold assertion that prosecutors are using “almost all of their budgets” on these serious cases. Rather, the only evidence the authors supply cuts the other way. Here, then, it seems the authors have missed not only the potential significance of misdemeanor cases but also their very existence.

### III. ALLOCATING FINITE RESOURCES

Finally, even if I were convinced that prosecutors were exercising charging discretion appropriately, I am not certain that I would support the authors' proposal to divide additional resources equally between prosecution and defense offices. Specifically, the authors recommend that the system should increase prosecutorial funding in lockstep with funding for public defense.<sup>24</sup> However, as an initial matter, the authors first must demonstrate that there are no preexisting or endemic caseload or resource imbalances that currently favor prosecutors. I am not certain that this is so. To the contrary, my understanding is that—in the main, though not across the board—prosecution offices tend to be better funded than public defender offices and prosecutors are better compensated than public defenders.<sup>25</sup> I do not see much in their article to contradict this notion.

It should not have been difficult for the authors to compile data on respective budgets. But rather than offer such figures, the authors provide only a dubious analytic argument that purports to demonstrate that the defense bar enjoys superior political clout. That is, they observe that defense attorneys are in a “far better position to generate press coverage for themselves” and to thereby generate additional resources.<sup>26</sup> *Really?* A district attorney can more easily call a press conference than a defense

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<sup>24</sup> *Id.* at 267.

<sup>25</sup> See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (link); Press Release, Nat'l Ass'n for Law Placement, *Some Associate Salaries Retreat from Their High but Remain Far Ahead of Salaries for Public Service Attorneys*, 4 (Sept. 9, 2010), <http://www.nalp.org/uploads/PressReleases/2010NALPSalPressRelease.pdf> (noting higher average salaries for local prosecuting attorneys in comparison to public defenders) (link).

<sup>26</sup> Gershowitz & Killinger, *supra* note 1, at 277.

attorney, and the public, thereafter, is more likely to give the prosecutor a sympathetic ear. More generally, this notion of prosecutor-as-politically-disempowered-adversary strikes me as a particularly unorthodox account of the dynamic in criminal courts. This is not to say that the authors are wrong (and, if they are right, I find the claim to be a fascinating inversion of the traditional understanding and a worthy premise for a standalone article). However, I need to hear more to adequately dispel the conventional wisdom that prosecutors constitute the more influential interest group.<sup>27</sup>

Nevertheless, I wholeheartedly agree that all facets of the criminal justice system (save corrections) are desperately cash-strapped and that any politically feasible infusion of resources would generate more good than bad. But I wonder whether—even if the authors are correct that prosecutors are as underfunded as public defenders—there might not remain persuasive reasons to direct a *greater* share of additional monies to public defense and, consequently, to leave prosecutors with somewhat bigger caseloads than public defenders. I recognize that for me—a former public defender—this is a somewhat dangerous argument. I open myself up to an *ad hominem* objection—one that the authors rehearse but, to their credit, reject—that criminal law scholars (who the authors maintain are more likely to be former public defenders than prosecutors) push a liberal agenda that benefits their former colleagues and client bases.

However, there are powerful reasons beyond ideology to direct a greater share of additional funding to criminal defense. First, a point that relates directly to my earlier discretion discussion: public defenders need more help because they cannot so readily help themselves through legitimate choices over whether and how to proceed. Concretely, defense attorneys—and not prosecutors—have diminished authority to regulate their own caseloads. The busy prosecutor decides which little fish to throw back. That is, she may forego charges as a matter of generally applicable policy or where a defendant is insufficiently blameworthy or the evidence is unconvincing in the individual case. Perhaps more importantly, she may redirect resources from one set of cases to another. Put simply, a prosecutor has the flexibility to make tradeoffs, and in doing so, she ensures that her money goes further.

The defense attorney, by contrast, is not so fortunate. Professional responsibility rules discourage the zealous defender from playing cases against each other.<sup>28</sup> And, of course, a defense attorney may not abandon a case simply because her client is loathsome, irredeemable, or—more to the point—clearly guilty.<sup>29</sup> Occasionally, practical constraints may provoke a defense attorney to logroll, but critically, she does so looking over one

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<sup>27</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001).

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2006) (link).

<sup>29</sup> See *id.* R 1.16 (2006) (link).

shoulder. At best, it is lamentable (albeit practical) for the defense attorney to sacrifice the well-being of one client to the well-being of another; at worst, it is unprofessional. Thus, a defense attorney must strive to devote time and effort to *each* of her clients to accommodate concrete client interests that almost certainly command more attention, on average, than the abstract interests of the public or even the victim (where there is one).

The defense attorney is more constrained not only by professional responsibility rules, but also by constitutional principles. Defendants—and not victims or society—possess constitutional due process and trial rights. The defense attorney (and the justice system more generally) must remain responsive to these rights. The authors cede this point, but remarkably, take it as a reason to worry *less* about defendants. Specifically, they see the Constitution as something of a self-actualizing instrument that guarantees sufficient resources for public defense.<sup>30</sup> If only that were so. Unfortunately, federal courts have been less than friendly to claims of systemic ineffectiveness. In fact, I am not aware of even one successful federal constitutional claim based on systemic underfunding.<sup>31</sup> To the contrary, courts have held that defense counsel's effectiveness must be measured only in the immediate case and, critically, only in light of *existing* funding conditions.<sup>32</sup> Put simply, the Constitution guarantees effective representation, but federal courts have seen fit to leave discrete funding questions to the political branches.<sup>33</sup> Thus, as a matter of positive constitutional law, due process and trial rights have done very little to keep the money flowing. And because positive constitutional law has failed to guarantee adequate funding for indigent defense, the political branches may need to step up and do more. On this reading, a public policy choice to allocate finite resources to indigent defense promotes not only defendants' interests but also constitutional values that are underprotected judicially.<sup>34</sup>

Second, even putting the discretion question to one side, the authors still may overestimate the administrative costs of cases to prosecutors and

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<sup>30</sup> Gershowitz & Killinger, *supra* note 1, at 277 (“While indigent defendants can point to violations of the Sixth and Fourteenth Amendments, which give them access to the courthouse, prosecutors have no such constitutional hook.” (footnote omitted)).

<sup>31</sup> *But cf.* State v. Peart, 621 So. 2d 780, 788–90 (La. 1993) (granting a claim of ineffectiveness based on systemic underfunding but deciding the case under state, not federal, constitutional law) (link).

<sup>32</sup> See Wright, *supra* note 25, at 246.

<sup>33</sup> See Missouri v. Jenkins, 515 U.S. 70, 100–03 (1995) (reasoning that federal courts ought to leave funding questions to the nonjudicial branches, particularly to government agencies) (link); see also *id.* at 112–13 (O’Connor, J., concurring).

<sup>34</sup> Additionally, there is a somewhat more nuanced constitutional point: embedded in the prosecutor’s burden of proof beyond a reasonable doubt is a normative abhorrence for Type I errors (wrongful convictions) as compared to Type II errors (wrongful acquittals). See *In re Winship*, 397 U.S. 358, 361–64 (1970) (link); see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[B]etter that ten guilty persons escape than that one innocent suffer.”) (link). Respect for that principle would seem to demand that we do more to ensure that public defenders are adequately funded.

underestimate the administrative costs to defense attorneys. In particular, the authors make the claim that “prosecutors have many obligations . . . which defense attorneys do not have to shoulder,” most notably the obligation to meet with crime victims.<sup>35</sup> But, of course, prosecutors must coordinate with lay victims only in cases in which there are lay victims. If I am right that a sizable proportion of cases are public-order cases that involve no concrete victims, then the dynamic shifts dramatically. In public-order cases, prosecutors typically need to interact only with professionals—specifically, police officers with whom prosecutors can expect to engage efficiently and predictably in a shared language. For them, the immediate case is just one of many of a set type. At the extreme, the officer and the prosecutor need not even speak in full sentences, but may rely instead on acronyms and jargon designed to streamline the process and push cases down familiar and well-traveled paths.

By contrast, the defense attorney must deal with a typically lay (and perhaps neophyte) client, who may be scared, frustrated, and distrustful—ignorant of the law, procedure, and courthouse norms. It is defense counsel’s job to walk her client through a potentially new world—to explain to him not only his best legal interests, but the nature and function of the process itself. And the obligations to hand-hold have only increased since the Supreme Court’s landmark decision last term in *Padilla v. Kentucky*, which held that effective representation must attend to more than just the legal merits of the criminal case, but also to the immigration consequences (and possibly much more).<sup>36</sup>

Third, the authors claim to be particularly worried that excessive prosecutorial caseloads harm defendants. Indeed, the article’s very subtitle—*How Excessive Prosecutorial Caseloads Harm Criminal Defendants*—indicates that the authors’ animating concern is the potential for such harm.<sup>37</sup> But the authors appear to lack the courage of their convictions. In fact, in some parts of the article they contradict their central claim outright. Specifically, in the latter half of the article, they equivocate and speculate, instead, that excessive caseloads generate “windfalls” for guilty defendants and impose costs on society in the form of chronic

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<sup>35</sup> Gershowitz & Killinger, *supra* note 1, at 267.

<sup>36</sup> 130 S. Ct. 1473, 1486–87 (2010) (link). Although I can speak only to my own experience as a public defender in the Bronx, I often had to devote significant time to defendants in cases involving cut-and-dry criminal-legal issues because those cases also implicated significant social and civil legal issues. I felt that it was my responsibility (even pre-*Padilla*) to address those so-called collateral consequences.

<sup>37</sup> The claim reappears throughout the text—for example, “excessive prosecutorial caseloads are very damaging to criminal defendants” and “overburdening prosecutors is more harmful than helpful to criminal defendants.” Gershowitz & Killinger, *supra* note 1, at 279, 291.

underconviction and underpunishment.<sup>38</sup> But, of course, underconviction and underpunishment are decidedly defendant-friendly outcomes.<sup>39</sup>

To my thinking, the authors' ambivalence is probably not misplaced (though it is reason enough to change the article's title). Excessive prosecutorial caseloads—like speedy-trial rules and other administrative rules, standards, practices, and conditions—may produce a cacophony of outcomes, hurting some defendants but helping others.<sup>40</sup> Of course this is speculation on my part, but that is just the point: any claim about whether the defendant is harmed or helped is ultimately empirical. The authors also speculate, leaning heavily one way before listing slightly the other. But they offer their claims as fact, not supposition. Hence, my criticism is twofold: they make no effort to falsify their empirical claims, and they fail even to make these claims consistently.

Nevertheless, for present purposes, I will take the article's title on its own terms and assume that excessive prosecutorial caseloads do, in fact, harm defendants. The question then becomes whether providing more funding to prosecutors is the best solution. I am not convinced. The authors' contention seems to be that overburdened prosecutors may lack the time and resources to examine the legal and equitable merits of the immediate case. I share their concern, but I sense that the most efficient way to address the problem may be to allocate more money to public defense, not to the prosecution.

Consider the authors' example—a robbery case. The authors deem relevant a number of equitable factors: whether the defendant had “a very low IQ”; whether “he stole to support his family”; whether he “had fallen in with a bad crowd after having previously been a good student”; and whether he has “ties to the community, a high school degree, and . . . [is] capable of handling a regular job.”<sup>41</sup> The authors believe that prosecutors could and would turn to these questions, if only they had enough resources to learn the answers. As I indicated earlier, prosecutors are perhaps more *unwilling* to individualize than unable. In any event, my immediate point is subtler: the defense attorney is probably better positioned to discern the equitable particulars because she has more ready access to the sources of such information—that is, to the defendant and his family and acquaintances. Put simply, the defense attorney is more able to speak directly and openly with the people who have firsthand knowledge about

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<sup>38</sup> *Id.* at 293–97.

<sup>39</sup> Particularly, toward the end of the article, Gershowitz and Killinger observe that “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.” *Id.* at 293; *see also id.* at 294 (“[P]rosecutors are simply no match for well-funded defense lawyers with adequate time to devote to their cases.”).

<sup>40</sup> *See* *Barker v. Wingo*, 407 U.S. 514, 519–21 (1972) (link).

<sup>41</sup> Gershowitz & Killinger, *supra* note 1, at 264, 280, 282.

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the offender. Thus, if individualization is a principal goal (and I think it is a good and worthy goal), then we ought to make sure that the *defense attorney* has sufficient resources to glean the relevant information so that she can educate the prosecutor thereafter. All else equal, we ought to allocate money to the actor who can most efficiently engage in the requisite investigation.

Again, I concede that this argument is speculative. I may be wrong; it may be that the prosecutor is better situated to learn at least some of the most relevant information—for example, information about the incident itself, as opposed to information about the social circumstances of the offender. (Or perhaps not, if we assume that the defendant is guilty and therefore has firsthand knowledge about what transpired.) The question is open, but critically, it is the right question to ask and answer before we start allocating resources.

### CONCLUSION

The authors explore a major failing of American criminal justice—the fact that too many players are asked to do too much with far too little. But at least when it comes to prosecutors, it is unclear how significant the problem is. In any event, prosecutors have at their disposal a mechanism to keep more money in place for the cases that matter to them most. Put simply, prosecutors can charge fewer cases, and the logical place to start is with the millions of petty public-order cases that inundate the nation's criminal courts each year—cases for which the charge and disposition are sometimes more bookkeeping ritual than warranted crime-control or retributive device.<sup>42</sup>

To do something about excessive caseloads, prosecutors first must overcome the incentive structure that has motivated them to reflexively charge the flood of petty cases that have come to clog the criminal justice system's pipelines.

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<sup>42</sup> Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 273 (2009) (link).