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Regulating Mass Prosecution

Irene Oritseweyinmi Joe[*]

Efforts to address our nation's criminal justice crisis have hit a standstill; legislative solutions have proven inadequate and increased funding for public defenders is politically impractical. Virtually everyone agrees that there is a problem: we incarcerate more people than any other developed nation and that imposes a significant cost on society. The conventional solutions to this crisis focus on the legislative or public defense side of the equation — urging decriminalization of certain behaviors by state legislatures and increased funding for indigent defenders. These proposed

 Assistant Professor of Law, Martin Luther King, Jr. Hall Research Scholar, and Affiliated Faculty of Aoki Center for Critical Race and Nation Studies at the University of California, Davis School of Law. The author would like to extend her sincerest thanks to R. Richard Banks, Guy-Uriel Charles, Kami Chavis, Stephen Cody, Christopher S. Elmendorf, George Fisher, Brandon Garrett, David Horton, Eisha Jain, Courtney Joslin, Martha Minow, Jaya Ramji-Nogales, Deborah Rhode, Shayak Sarkar, Aaron Tang, Jordan Blair Woods, Ronald F. Wright, and Ellen Yaroshefsky for detailed feedback on earlier drafts of this Article. The author also benefitted greatly from the following workshops: Southwest Criminal Law Scholars Workshop, Duke Law School's Culp Colloquium, the Law and Society Annual Meeting in Mexico City, AALS Criminal Law Midyear Meeting/Crim Fest, the UCLA Ethics Schmooze, the AALS Annual Meeting Professional Responsibility Section's Works in Progress, and the International Legal Ethics Conference in Australia. The author received extraordinary research assistance from Kendra Clark, as well as in-depth insight and research support from Deanne Buckman, Lusine Chinkezian, and Peter Younghoon Lee. Thanks also to Dean Kevin Johnson and the UC Davis School of Law for financial support given to this project in the Summer of 2017.

solutions are important but, alone, insufficient, for reasons that are all too predictable: a lack of political will to do right by indigent defendants.

In this Article, I advance a solution that is simultaneously novel and achievable. My proposed solution is novel because it focuses on an institutional actor that has, to this point, received comparatively little attention in the debates over public defender resourcing — the prosecutor. It is achievable because it does not require new legislation that would, in turn, depend upon political support that is unlikely to materialize. Instead, the solution is already a part of our legal backdrop: prosecutors should be required to comply with the same ethical rules that govern all other lawyers. And those rules, I argue, are violated when prosecutors exercise their charging discretion in ways that contribute to massive public defender caseloads.

Prosecutorial discretion allows the prosecutor, with few limitations, to choose which of many potential criminal charges she will pursue. This means that prosecutorial discretion gives prosecutors a degree of control over the size and scope of the criminal court docket that other criminal court actors do not possess. If we seek a solution to our nation's problem of mass incarceration, then we must recognize that public defenders with massive caseloads compromise that goal. This Article proposes that public defender overload, and the mass incarceration to which it contributes, is not simply a constitutional crisis limited to individual rights for individual defendants. Instead, it defines the problem as an ethical one, with central concerns about how the legal profession is situated in the criminal justice domain.

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INTRODUCTION

The criminal justice system is enormously overburdened. Prisons are bursting at the seams, with the United States prison occupancy level standing above 100%.[1] In some states, this means prisoners are being housed in what formerly were the prison gyms.[2] In others, the rate of violence that inmates experience is tremendously heightened because there are simply not enough guards to oversee the inmates.[3]

Just like its prisons, the United States' public defense system is operating well over capacity.[4] Some defendants "serve" their maximum

[1] *See* Niall McCarthy, *The World's Most Overcrowded Prison Systems [Infographic]*, FORBES (Jan. 26, 2018, 7:00 AM), https://www.forbes.com/sites/niallmccarthy/2018/01/26/the-worlds-most-overcrowded-prison-systems-infographic/#198ead551372 [https://perma.cc/U6ZK-ZRRX].

[2] *See, e.g.*, *Metro Corrections to House Inmates in Gyms Because of Overcrowding*, WDRB (June 27, 2016), https://www.wdrb.com/news/metro-corrections-to-house-inmates-in-gyms-because-of-overcrowding/article_6dcffba0-4119-5767-a32b-5d47df8a1984.html [https://perma.cc/LP89-LFMB] (documenting the overcrowding crisis in Louisville, Kentucky); Jeff Williams & Associated Press, *IL Prison Overcrowding Forces Inmates to Sleep in Gyms*, WSIU PUB. BROADCASTING (Feb. 14, 2013), https://news.wsiu.org/post/il-prison-overcrowding-forces-inmates-sleep-gyms#stream/0 [https://perma.cc/R3SP-JE5N] (documenting the overcrowding crisis in Illinois); *see also* Sara Mayeux, Opinion, *The Unconstitutional Horrors of Prison Overcrowding*, NEWSWEEK (Mar. 22, 2015, 2:55 PM), https://www.newsweek.com/unconstitutional-horrors-prison-overcrowding-315640 [https://perma.cc/ZZ7N-Z2TN] (detailing how the United States Supreme Court held that California's prison overcrowding, including housing inmates in gyms, is unconstitutional).

[3] *See, e.g.*, Morag MacDonald, *Overcrowding and Its Impact on Prison Conditions and Health*, 14 INT'L J. PRISONER HEALTH 65, 65 (2018) (discussing the impact that overcrowding has on the health and safety of inmates); *St. Clair Correctional Facility: Dangerous Conditions and High Rate of Violence Leads to Federal Lawsuit*, EQUAL JUST. INITIATIVE, https://eji.org/st-clair-correctional-facility-lawsuit-violence [https://perma.cc/DKV2-RV9F] (last visited Jan. 29, 2018) ("The potential for violence is exacerbated by new policies that have eliminated or severely cut back mental health and drug treatment services and rehabilitative programming, limited recreation, and removed books and other constructive activities from housing units.").

[4] Some in the media have extensively documented this phenomenon. *See, e.g.*, Corin Hoggard, *"Crisis" at Public Defender's Office Delays Justice, Costs Taxpayers*, ABC 30 ACTION

potential time in jail before they even have the opportunity to meet with their attorney, much less have their day in court.[5] Others are assigned attorneys who represent hundreds of indigent clients for a flat fee of as low as $180 per case.[6] In jurisdictions like Colorado, Missouri, and Rhode Island, the typical public defender has two to three times the workload a public defender should have in order to provide an adequate

NEWS (Feb. 17, 2018), http://abc30.com/politics/crisis-at-public-defenders-office-delays-justice-costs-taxpayers/3080562/ [https://perma.cc/4P9C-9J66] (exposing that Fresno County public defenders are refusing to take on "serious cases" because their caseload is too high and they do not have attorneys equipped to handle those kinds of cases); Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, GUARDIAN (Sept. 7, 2016, 6:55 AM), https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system [https://perma.cc/CC69-GA8D] (documenting, in detail, the caseload crisis); Maggie Shepard, *Public Defenders Plead for Relief, Claim Continuing Caseload Crisis*, ALBUQUERQUE J. (Jan. 19, 2018, 6:51 PM), https://www.abqjournal.com/1121713/public-defenders-plead-for-relief-claim-continuing-caseload-crisis.html [https://perma.cc/86MG-KV4Q] (documenting the argument in New Mexico about whether there is a caseload crisis, especially in rural counties).

[5] *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1035 (2006) ("An attorney was found to have entered pleas of guilty for more than 300 defendants without ever taking a matter to trial. In one case from Mississippi, a woman accused of a minor shoplifting offense spent a year in jail, before any trial, without even speaking to her appointed counsel. . . . Some attorneys went to trial without ever meeting their clients outside the courtroom."). Even when defendants are released before the completion of their sentence, they are often subjected to pervasive correctional surveillance through advanced surveillance technologies that limit their full reintegration into society. *See* Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399, 400-01 (2018).

[6] This is the flat rate for handling a misdemeanor case in New Mexico. JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, GIDEON AT 50: RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 27 (2013), https://www.nacdl.org/Document/GideonI-RationingJusticeUnderfundedAssignedCounsel [https://perma.cc/QU3B-QNU7]. For an in-depth analysis of state-level fee schemes, see *id.*

defense.[7] These examples are not isolated. The public defender crisis is pervasive.[8]

While the last two decades saw a decrease in crime,[9] public defenders witnessed a dramatic increase in their caseloads.[10] Since 1995, the

[7] Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?mtrref=www.google.com&assetType=REGIWALL [https://perma.cc/CHM5-P7G4]. For a rich discussion of the public defense crisis, see Laughland, *supra* note 4 (exposing that public defenders in Cole County, Missouri, work more than 225% above recommended caseload limit); Matthew Teague, *Why New Orleans Public Defenders Will Not Take Criminal Cases of City's Poorest*, GUARDIAN (Jan. 22, 2016, 10:07 AM), https://www.theguardian.com/us-news/2016/jan/22/new-orleans-public-defenders-refuse-criminal-cases-aclu [https://perma.cc/4HQA-55WG] (noting that public defenders in states like Louisiana and Michigan have such excessive caseloads that they are only able to spend minutes, sometimes as little as seven, preparing for each case); Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015, 7:30 AM), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked [https://perma.cc/89HU-MT4U] (detailing that the annual caseload per public defender in the state of Florida in the year 2009 was 500 felonies and 2,225 misdemeanors).

[8] *See, e.g.*, Backus & Marcus, *supra* note 5, at 1031-34 (including examples of clients who were underserved by public defenders due to their caseloads in Texas, Georgia, Louisiana, Massachusetts, Virginia, Montana, and Florida); John Pfaff, Opinion, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html [https://perma.cc/E4KU-P9GW] [hereinafter *A Mockery*] (detailing public defenders in at least five states, who are now refusing to take cases because their caseloads are too high, and the resulting costs to the defendants); *see also* Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 333 (2009) (describing the public defender caseload crisis as "national in scope").

[9] Violent crime is down 12.3% in the last decade, and property crime has steadily decreased for the last fourteen years. However, violent crime has been rising since 2012. *2016 Crime Statistics Released*, FED. BUREAU INVESTIGATION (Sept. 25, 2017), https://www.fbi.gov/news/stories/2016-crime-statistics-released [https://perma.cc/XTP6-G429]. Criticism of the Uniform Criminal Reports Act is prevalent, which matters because it may undermine the reliability of this data. *See, e.g.*, Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1206-07 (2014) ("The UCR system is not without flaws. It relies exclusively on reports to police which means that, by the very nature of the system, unreported crimes are not included. . . . Further, the system relies on police officers to make UCR classifications with neither proper training nor guidance."). The report, however, remains an accepted accounting of the reduced crime rate. *See* John J. Donohue, *Comey, Trump, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297, 1298-99 (2017).

[10] *See, e.g.*, Kristina Goetz, *Public Defense: Thin Ranks, High Risks*, COURIER J. (Nov. 19, 2015, 1:26 PM), http://www.courier-journal.com/story/news/crime/2015/11/19/kentucky-public-defenders-risks/76046976/ [https://perma.cc/VK3L-QAS5] (noting

number of felony cases filed in criminal court has risen by almost 40%.[11] In the same period of time, the budgets that state governments ascribed to indigent defense fell by 2%.[12] There has been an even more substantial growth in the quantity of, and a similar deficiency in defense funding for, misdemeanor cases.[13] This reality is extremely troubling, as public defenders handle nearly 80% of criminal court cases and are, for the most part, entirely dependent upon the government for funding.[14] The simultaneous increase in caseloads and reduction in

that from 2006 to 2015, cases assigned to the public defender rose from 137,923 to 153,358 although crime in Kentucky had decreased during the same period).

[11] Pfaff, *A Mockery*, *supra* note 8. It should be noted that there is significant criticism amongst scholars about the methodology that Pfaff uses in drawing these statistical conclusions. For example, Katherine Beckett notes that, while Pfaff has contributed several important ideas to the scholarly debate about caseloads, these conclusions are "undermined by methodological flaws, logical errors, and conceptual limitations." Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOC. 11, 16 (2018). Additionally, Jeffrey Bellin criticizes Pfaff's conclusions on the grounds that they rest on two logical flaws. *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018). The first flaw Bellin identifies is that Pfaff bases his conclusion upon his finding that increased sentence lengths do not significantly contribute to mass incarceration, a supposition which purportedly has been criticized by several empiricists. *Id.* He also states that the "boom in state felony filings" cited by Pfaff is likely an artifact of changes in state court reporting practices. *Id.* It should be noted, however, that Pfaff responded to these criticisms and exposed his methodology. *See* John F. Pfaff, *Prosecutors Matter: A Response to Bellin's Review of* Locked In, 116 MICH. L. REV. ONLINE 165 (2018). While I do not wish to enter this debate, I do find Pfaff's explanations of his data collection persuasive and will reservedly assume, for the purposes of this Article, that his data are correct.

[12] *See* Pfaff, *A Mockery*, *supra* note 8 ("Worse, since 1995, real spending on indigent defense has fallen, by 2 percent, even as the number of felony cases has risen by approximately 40 percent.").

[13] The National Association of Criminal Defense Lawyers ("NACDL") issued a report laying out the problematic increase of misdemeanor cases and subsequent lack of adequate representation. *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11, 14-15 (2009), https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf [https://perma.cc/YYU7-N5Z4]; *see also* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090, 1115 (2013). *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (describing how the public defense system is overwhelmed with misdemeanor cases and how this creates unfairness for indigent defendants).

[14] *See* Carrie Dvorak Brennan, Note, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 243-44 (2015); *see also* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*,

funding are significant contributing factors to the public defense crisis. There simply are not enough attorneys to provide indigent defendants with adequate representation in criminal courts.[15]

Three institutions have been the central focus in existing scholarship exploring both mass incarceration and the public defender crisis. First, some scholars have focused on the role legislatures play.[16] This popular train of thought reasons that it is the legislature that reduces funding for public defenders while increasing criminal sanctions and the range of behaviors they cover.[17] This twin responsibility thus renders the legislature an understandable target for frustrations about the high caseloads that increasingly burden an ever-diminishing number of public defenders.[18]

Second, scholars with criminology or social science expertise often look to the role that bias in policing behaviors and tactics play in increasing the number of criminal cases.[19] These scholars note that

52 ARIZ. L. REV. 219, 241-46 (2010) (describing additional funding streams for public defenders); Van Brunt, *supra* note 7.

[15] *See infra* Part II.A.

[16] *See, e.g.*, Justine Finney Guyer, Note, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335 (2009) (suggesting that the Missouri legislature must provide more funding in order to combat its caseload crisis); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13 (1994) (addressing the underfunding problem in indigent defense and suggesting a more balanced allocation of government funding as a solution); Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2013) (suggesting legislative solutions to the caseload problem).

[17] *See, e.g.*, Dylan Walsh, *On the Defensive*, ATLANTIC (June 2, 2016), https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165 [https://perma.cc/L3UE-E7PZ] (reporting that the state of Louisiana cut budgets for public defenders).

[18] Data on the dwindling number of public defenders is sparse but I am conducting a number of research projects that are meant to update the data provided by the Bureau of Justice Statistics in 2007. For the data contained within the 2007 report, see LYNN LANGTON & DONALD FAROLE, JR., BUREAU JUST. STAT., STATE PUBLIC DEFENDER PROGRAMS, 2007, 17-19 (2010), https://www.bjs.gov/content/pub/pdf/spdp07.pdf [https://perma.cc/4NNP-QG7L].

[19] *See, e.g.*, Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1323 (2002) (studying participants' reaction time to ethnically different targets and finding that racial bias affects people's interpretation of things); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (describing how "implicit biases may influence the rationing of defense entitlements"); *see also* Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case – To the Governor*, NPR (Aug. 4, 2016, 12:34 PM), https://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-govern [https://perma.cc/

aggressive policing occurs more often in poorer communities.[20] The increased police presence and activity leads to more contact with the criminal justice system for individuals in these communities. Because these over-policed communities lack financial resources, they are then more likely to require state-funded representation when facing state criminal charges that risk more than six months of incarceration.

Finally, some scholars examine public defenders themselves and question whether they should shoulder some of the blame for the criminal justice caseload crisis.[21] One example of such a criticism is that some public defenders have failed to adopt an accurate screening system to ensure that they only represent defendants that are truly indigent.[22]

8E6D-6YMW] (referencing a study that found that Missouri needs "an additional 270 public defenders in order to adequately represent the state's poorest defendants").

[20] *See* Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469, 469-70 (2005); Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 242-43 (2014); Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1361 (2011/2012).

[21] *See, e.g.*, Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005) ("[J]udges have too often selected court-appointed lawyers precisely because the lawyers are incompetent, and can be counted on to move the courts' calendars quickly by entering hasty guilty pleas in virtually all cases."); John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925, 925-26 (2005) [hereinafter *In (Slightly Uncomfortable) Defense*] (asserting that public defenders might not be "as talented and with as many supporting resources" as other types of lawyers); *see also* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 738 (2017) [hereinafter *Rethinking Misdemeanor Neglect*] (arguing that allocating misdemeanor offenses to the most junior public defenders proves problematic for clients); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 389 (2016) [hereinafter *Systematizing*] (critiquing the practice of triaging clients); Richardson & Goff, *supra* note 19, at 2626 (condemning the "triage" strategies of public defender offices as disadvantageous to people of color).

[22] Jurisdictions vary on which agent or institution manages the qualification process for a public defender. In some courts, it is the judge or other court office who conducts an initial inquiry into the defendant's financial status. *See, e.g.*, William L. Bernard, *Something's Gotta Give: Minnesota Must Revise Its Procedures for Determining Eligibility for Appointment of Public Defenders*, 37 WM. MITCHELL L. REV. 630 (2011) (mentioning that MN's office of the Legislative Auditor found that trial judges have "a great deal of discretion" in determining a defendant's eligibility for public defender services). In other jurisdictions, the defendant fills out an application with the public defender. *See, e.g.*, LA. STAT. ANN. § 15:175 (2007) (providing that "[t]he accused shall be responsible for applying for indigent defense counsel and for establishing his indigency and entitlement to appointment of counsel"). Although there are no empirical studies to ascertain how many jurisdictions engage in either practice, it is reasonable to assume that the speed with which representation often occurs, for example the "meet-em-and-plead-em" practice that garners criticism, may allow for otherwise solvent defendants to obtain representation by a public defender for a short period of time. For a related

This processing failure can artificially increase the public defender caseload by forcing the institution to represent more clients than it is constitutionally required to represent.

Each institution listed above — the legislature, the police, and public defenders — shares some responsibility for the disorderly, assembly line-like mass incarceration that has come to reflect the nation's criminal justice system. The solutions proposed by the existing literature — urging decriminalization of certain behaviors or increased funding for public defender offices — are important parts of the reform movement. But, critically, these solutions alone are insufficient. There is an essential part of the problem that has, heretofore, gone mostly unexamined — the role of the prosecutor.

Noticeably absent from the existing literature about public defender caseloads is a full examination of the impact this caseload crisis has on the *prosecutor* and the role that the *prosecutor* plays in creating it. Some prosecutors proclaim that their role in the criminal justice system is to do justice on behalf of the community.[23] However, to adequately perform this duty, prosecutors depend upon the public defender's adherence to her own duties. It is only when the public defender is able to fulfill her own mandates that a defendant can be justly convicted in fair legal proceedings.[24] To some extent, prosecutorial decisions have begun to reflect the national conversation and concern about the criminal justice crisis, with elected prosecutors campaigning on their plans to reduce the problem.[25] A comprehensive analysis of the prosecutor's role in creating the caseloads that overwhelm public defenders tasked with serving as a barrier between indigent defendants and incarceration remains to be seen.

discussion of the difficulty in establishing indigency status in federal proceedings, see Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1478 (2019).

[23] *See, e.g.*, Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (discussing how prosecutors thinking highly of themselves could have negative effects on the criminal system); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) (saying that "the prosecutor's duty is to do justice").

[24] Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1021 (2000).

[25] *See, e.g.*, Farah Stockman, *How 'End Mass Incarceration' Became a Slogan for D.A. Candidates*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html [https://perma.cc/6LZL-TTZC] (discussing how district attorneys have been trying to address the national concern about mass incarceration in their electoral messages).

Prosecutors have discretion in deciding whether to file charges against an indigent defendant.[26] What has been insufficiently addressed to date is the cumulative effect that these discretionary charging decisions have on the public defender's ability to provide ethical and professional representation, and how that effect should inform the prosecutor's charging analysis. Even if a prosecutor were unconcerned about the public defender's caseload crisis, she should be concerned about her own ability to fulfill her duties as the caseload crisis can also affect the prosecutor's ability to comply with her own professional and ethical mandates.[27]

This Article takes an original approach to the Model Rules of Professional Conduct, casting them as both a sword and a shield for reformist prosecutors to use in addressing the caseload crisis in indigent defense. It makes sense to view the mass prosecution problem through an ethical lens, not only because ethics provides a different resource to address the problem, but because it is descriptively accurate and normatively desirable to consider the mass prosecution problem as a problem of decision-making in the legal profession. Ultimately, this Article articulates a novel theory of prosecutorial discretion that suggests the prosecutor should consider public defender caseloads in her charging decisions.

This Article proceeds in three parts. Part I describes the formal and informal processes prosecutors use to make their charging decisions and the impact these charging decisions have on the public defender's caseload. Part II begins by discussing the indigent defender's ability to provide counsel ethically given the amount of cases she must represent pursuant to the prosecutor's charging decisions. This Part continues by articulating the impact these charging decisions have on the ability of the *prosecutor* to also comply with ethical guidelines in a system marked by overwhelmed public defenders. It concludes by turning to the constitutional implications of overextended public defenders to add additional support for the theory that prosecutors should consider public defender caseloads in their discretionary charging decisions. Part III first examines what metric should be used to determine when public

[26] *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION r. 3-4.4. (AM. BAR ASS'N 2018). In some jurisdictions, private citizens are permitted to file citizen complaints in misdemeanor cases but that is rarely exercised. *E.g.*, David Boerner, *Prosecution in Washington State*, 41 CRIME & JUST. 167, 173 (2012).

[27] For a rich discussion of the systemic problems of mass incarceration and the prosecutor's ethical duty to reduce incarceration rates for all defendants, see Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1064 (2016).

defenders are overwhelmed by their caseload and then formalizes the concept of how a prosecutorial institution could make meaningful charging decisions that do not abdicate the prosecutor's primary function to address criminal behavior while still considering public defender caseloads in the analysis. This final Part then looks at two primary methods for accomplishing this objective — conciliatory and concerted efforts between the two institutions and targeted prosecutions that turn to the community for guidance on prioritizing criminal prosecutions.

I. PROSECUTORIAL DISCRETION IN THE CHARGING DECISION

One cannot overstate how important the prosecutor's initial charging decision is to the ability of the public defender institution to operate meaningfully.[28] The charging decision initiates a series of events and procedural protections for the indigent defendant that the public defender agency must then fulfill. Legal scholars and practitioners alike have criticized the prosecutor's charging decisions, for example, when they are questioning who is at fault for wrongful convictions[29] and whether the criminal justice system marginalizes the lives of black and brown citizens.[30] This scholarly conversation seems to focus primarily on innocent people — both the defendants that were wrongfully charged or convicted and the lack of process for the most oppressed members of society.[31] The fundamental role that the prosecutorial charging decision has in creating and maintaining excessive public defender caseloads, and the resulting limits these decisions place on both the public defender and the prosecutor's ability to comply with ethical and professional guidelines, has yet to be adequately examined.

It is useful to understand the prosecutorial charging process in two steps. In the first step, the prosecutor evaluates whether they *can*, using the formal guidelines prescribed by law, charge a suspected offender

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[28] *See, e.g.*, Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 753-54 (2016) ("[T]he decision to charge a suspect is often tantamount to a conviction.").

[29] *See, e.g.*, Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010) [hereinafter *Emotionally Charged*] (arguing that prosecutorial misbehavior in the charging decision plays a role in wrongful imprisonment).

[30] *See, e.g.*, Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515, 522 (2016) [hereinafter *Access to Criminal Justice*] ("Particularly in the context of police shootings of unarmed Black civilians . . . members of the public and media increasingly have inquired into prosecutors' responsibility for apparent criminal injustices.").

[31] *See id.*; Medwed, *Emotionally Charged*, *supra* note 29.

with a particular offense.[32] In the second step, the prosecutor, using extra-legal and other factors, decides whether she *should* charge the offense.[33] In their seminal empirical piece, Bruce Frederick and Don Stemen found that this framework leads to the charging decision being "influenced by case-level factors, several internal and external constraints, and a balancing of several practical goals of prosecution."[34] From this study, it is clear that discretion in the charging process means that prosecutors not only operate within boundaries prescribed by law, but also take into account many other case-specific criteria.[35] The following Sections detail both the formal and informal processes that prosecutors can use to make their charging decisions. It then describes the significant consequences these decisions have on the public defender's ability to fulfill her ethical duties.

A. Formal Guidelines

Prosecutors primarily use a probable cause standard to make their charging decisions.[36] This standard requires the prosecutor to have an objective belief that the defendant has committed a crime.[37] The standard exists at the most elementary level, particularly in comparison to other standards in both the civil and criminal court processes. For

[32] *See* BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING — TECHNICAL REPORT, at iii (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf [https://perma.cc/42NU-MC9R].

[33] *See id.*

[34] *Id.* at 286; *see also* Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 525 (2012) (finding that several extra-legal considerations influence the prosecutorial charging decision in sexual assault cases); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 186, 192 (2007) (analyzing how the "amount of passion" that prosecutors feel in each case affects plea bargaining); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 598-615 (1985) (finding that prosecutorial charging decisions in homicide cases are likely influenced by the defendant's race).

[35] *See* FREDERICK & STEMEN, *supra* note 32, at 275-86.

[36] For a richer discussion of the role probable cause determinations have on prosecutorial decisions, see generally Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961 (2010) (discussing the "probable cause" requirement for the prosecution process"); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 268 (2001) (mentioning that the ABA imposes a "probable cause" restriction on a prosecutor's ability to prosecute); John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755 (2009) (discussing the probable cause requirement for prosecution).

[37] *See* Illinois v. Gates, 462 U.S. 213, 236-37 (1983).

example, the applicable standard for a civil case to even enter into a court proceeding is whether a plaintiff can demonstrate that her claim is plausible,[38] which, in practice, often bars even meaningful cases from litigation.[39] In contrast, the prosecutor does not necessarily have to consider whether she can prevail at trial; instead, her analysis that there is some evidence of a crime by a particular defendant is often the only threshold in determining which cases may be litigated.[40]

The basic procedural rules that attach to formal determinations of probable cause in the early stages of the criminal process add to the relative ease of meeting the charging standard. Prosecutors are entitled to use their own, nearly unbridled, discretion to determine what charges can be filed out of many possible charges. They are required to support it in the early stages of the proceedings only with a broad brushstroke of possible evidence.[41] For example, the judge tasked with making the

[38] This is colloquially referred to as the Twiqbal test. It refers to two separate Supreme Court cases — *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 (2013) (discussing the Twiqbal test, referring to *Twombly* and *Iqbal*).

[39] Engstrom, *supra* note 38, at 1206.

[40] The nominal nature of the probable cause standard is even starker when comparing it to the standards for prevailing on a court matter. Preponderance of the evidence is the typical standard for deciding civil cases. This standard requires proof that the fact alleged is "more likely than not." Colloquially, this standard is considered to be a likelihood of greater than 50%. *See, e.g.*, Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1297-98 (2008). Clear and convincing evidence is used in cases that involve civil liberties — such as cases concerning a judgment about restraining orders, dependency, and conservatorships. The clear and convincing standard requires an abiding conviction that the alleged behavior is highly and substantially more likely than not. *See* Colorado v. New Mexico, 467 U.S. 310, 316 (1984). Criminal guilt requires that the prosecution establish the defendant's guilt "beyond a reasonable doubt," the highest legal standard. This standard requires that the evidence is so convincing that there is no reasonable argument that could call into question the defendant's guilt. In the criminal arena, the only standard of proof that provides a lower barrier to success than probable cause is "reasonable suspicion," the degree of proof necessary for a police officer to conduct a brief stop on an ordinary citizen. Administrative hearings, which review the decisions of government agencies, use a "substantial evidence" standard. *See* Richardson v. Perales, 402 U.S. 389, 401 (1971). This standard is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and falls between probable cause and preponderance of the evidence. *Id.*

[41] For a rich discussion of the unbridled nature of prosecutorial discretion, see generally John A. Lundquist, *Prosecutorial Discretion — A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485 (1971) (discussing the danger of unlimited prosecutorial discretion). The actual process for filing charges moves in one of two directions. After a person is arrested by the police, the prosecutor can file a charging document, referred to as an "information," formally

probable cause finding is not formally required to consider the defendant's claims or the credibility of any witnesses.[42] There are also no evidentiary rules to control what information can be introduced to aid in this initial assessment. Even at later stages of the proceedings, a prosecutor is permitted to present any evidence to the court that she deems relevant to satisfying the required standard.[43]

The interplay between the probable cause standard and the prosecutor's wide-reaching discretion is particularly concerning since the defendant has no formal mechanism for countering the claims against her until some amount of time later in the proceedings. The defendant, through her defense attorney, does not have an opportunity to address the initial claims against her until she appears before a judge or magistrate in a preliminary hearing.[44] The right to a defense attorney often does not attach until after stages in the proceedings where important decisions central to the initial charging decision have already

listing the charged offenses. The other alternative is for the prosecutor to seek an indictment from a grand jury before proceeding to trial. The grand jury is popularly considered just a puppet arm of the prosecutor, agreeing with any charges the prosecutor puts before them, but by rule, they do make an independent determination of whether there is sufficient basis for charges against the defendant to proceed. One common criticism of the grand jury is that it would even go so far as to indict a ham sandwich. *See, e.g.*, Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2335-36 (2008).

[42] *See, e.g.*, FED. R. CRIM. P. 5.1 (enumerating the requirements for a preliminary hearing by a magistrate in the federal criminal system).

[43] *See* Medwed, *Emotionally Charged*, *supra* note 29, at 2189. It is also interesting to note that the criminal process includes both the highest and lowest standards of proof in the legal system. This range likely exists because of the different stages of the proceedings. It takes relatively little to initiate the criminal process but takes the most to reach its conclusion.

[44] Preliminary hearings play a role similar to that of the grand jury in terms of existing as an additional barrier to charging practices. *See* Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 670 (1981). At a preliminary hearing, the prosecutor must establish before a judge that there is probable cause that the defendant committed the crime at issue to move the case forward. *See id.* The defendant is entitled to an attorney at this stage of the proceedings and a more active, if not quite entirely thorough, challenge of the initial claims of criminal behavior. *See* W. Brent Woodall, *"Your Time Is Up": Time Limitations in Criminal Trials*, 30 AM. J. TRIAL ADVOC. 569 (2007) (noting that time limits can impact the defendant's access to this procedural safeguard). The defendant often waives preliminary examinations if prosecutors do not completely bypass the process using the grand jury. *See* BRUCE A. CARLSON, CRIMINAL JUSTICE PROCEDURE 67 (7th ed. 2005) (stating that defendants waive preliminary hearings in roughly one-half of cases). It follows, then, that an overwhelmed attorney, or a client assigned to an overwhelmed attorney, may be more likely to waive the hearing because of a lack of preparation by the attorney or a lack of confidence in the attorney.

been made. This is the case even though those decisions may have resulted from bias or mistake on the part of the prosecutor or police.

Other rulemaking institutions impose additional formal boundaries on the prosecutor's discretion in the charging decision. Individual states sometimes have their own nonprofit prosecutor associations that provide guidelines for the prosecutor's charging decision.[45] In fact, several states have gone so far as to adopt their own charging standards.[46] The United States Department of Justice provides similar guidance for prosecutorial charging decisions in its Principles of Federal Prosecution.[47] Tellingly, these federal standards state specifically that probable cause should not be the only metric guiding prosecutorial charging decisions.[48]

[45] The National District Attorneys Association ("NDAA") has also adopted standards for charging in which it lists factors to consider and factors not to consider. *See* NAT'L PROSECUTION STANDARDS § 4-1.2 to -1.4 (NAT'L DIST. ATTORNEYS ASS'N 2009).

[46] *See, e.g.*, PAMELA B. LOGINSKY, WASH. ASS'N OF PROSECUTING ATTORNEYS, CHARGING MANUAL (2004), http://waprosecutors.org/wp-content/uploads/2019/04/2004-CHARGING-MANUAL.pdf [https://perma.cc/QN8V-GNEQ] (discussing the Washington standards); *see also* Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 6 (2012) ("A few jurisdictions, preeminently the federal system acting through the US Sentencing Commission, enacted 'mandatory' sentencing guidelines."). In its rules, the NDAA adds to the fundamental probable cause requirement by calling for an initial screening of charging decisions that "eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest." NAT'L PROSECUTION STANDARDS, *supra* note 45, at § 4-1.3. This language still relies upon the prosecutor's own perception of the facts, which may be affected by bias, but does provide more context for the charging decision.

[47] U.S. DEP'T OF JUSTICE, *Principles of Federal Prosecution*, *in* U.S. ATTORNEY'S MANUAL § 9-27.230 (1988) [hereinafter *Principles of Federal Prosecution*]. These factors include federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, the person's history with respect to criminal activity, the person's willingness to cooperate in the investigation or prosecution of others, the interests of any victims, and the probable sentence or other consequences if the person is convicted. *Id.* Although this Article is concerned primarily with the duties and responsibilities of state court prosecutors, the standards set forth by federal prosecutors are useful for understanding the nation's overall approach to prosecutorial charging decisions.

[48] *Id.*; *see also* Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53, 57-58 (2008). Instead, a given prosecutor should use all "relevant considerations" in determining whether a formal charge is justified. Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 733-34 (2002); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 934-35 (2000). Attorney General Eric Holder applauded the correct use of this standard when he announced that federal prosecutors had shifted away from pursuing mandatory minimum sentences against nonviolent drug offenders and were reserving stricter

Even when a prosecutor believes she has probable cause, the federal principles require that she also consider whether the prosecution would serve a federal interest and whether there exists an "adequate non-criminal alternative to prosecution."[49] For example, there may be no federal interest in prosecuting a case where federal resources would be wasted because the case is inconsequential or based on a technical violation.[50] Holding state prosecutors to these principles as well could lead to a reduction in charges and on the burden on public defenders by forcing prosecutors to consider whether each case will provide only a minor environmental effect.

The American Bar Association's ("ABA") Model Rules of Professional Conduct also add to the probable cause standard in its formal rules on the prosecutorial function. The ABA's Special Responsibilities of a Prosecutor in Rule 3.8 require, among other things, that the prosecutor rely on more than just evidence that furnishes probable cause in making their charging decisions, specifically that the defendant has been

sentences for more serious offenders. *See* Press Release, U.S. Dep't of Justice, Attorney General Holder Delivers Remarks at the National Press Club (Feb. 17, 2015), https://www.justice.gov/opa/pr/attorney-general-holder-delivers-remarks-national-press-club [https://perma.cc/L4R3-UW3B]. Holder himself issued changes to departmental charging policies that called for a fairer, more practical approach. *See* Memorandum from Eric Holder, Attorney General, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf [https://perma.cc/5WK4-H3CV]. In his Department Policy on Charging and Sentencing from May 19, 2010, Attorney General Eric Holder further outlined the specific criteria that federal prosecutors should use in their individualized assessments of defendants and offenses. *See id.* (citing the May 19, 2010 memorandum). This list stated that prosecutors should consider the needs of the community, federal resources, and official priorities. Attorney General Jeff Sessions has also issued prosecutorial charging guidelines, but his guidelines are focused primarily on mandatory minimum sentences. Memorandum from Jefferson Sessions, Attorney General, Department Charging and Sentence Policy (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download [https://perma.cc/L5UE-5H8Y]. Sessions strongly discouraged prosecutors from seeking lower sentences than mandatory minimums. *See id.* However, he did not comment upon the charging decision. *See id.* Allowing prosecutors to consider a variety of factors in their charging decisions provides some leeway for prosecutors to account for some of the bias that may problematize charging decisions, as discussed *supra*, but the lack of clear and specific guidelines may also provide enough discretion for prosecutors to continue to allow suspect reasons to cloud their decision-making.

[49] *Principles of Federal Prosecution*, *supra* note 47, § 9-27.220.

[50] *See id.* § 9-27.230.

afforded certain procedural rights.[51] The ABA's Prosecution Function Standard Section 3-3.9(b) adds further that a prosecutor should file charges for crimes only when she believes those crimes are related to the charges that have been filed.[52] All of these formal standards together

[51] *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2008). In addition to only bringing charges known to be supported by probable cause, the rule states the prosecutor shall make reasonable efforts to make sure the defendant has been advised of his right to an attorney and has been given a chance to obtain an attorney. *See id.* r. 3.8(b). This rule repeats the probable cause standard that already exists in both federal and state rules of criminal procedure. *See id.* This fact reinforces Rule 3.8's position as a supplement to already existing constitutional standards. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N, Discussion Draft, 1983). Rule 3.8 relegates its guidance over the initial charging decision to only one sentence at the beginning of the text — "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause" — and it also provides prosecutors wide latitude in applying it. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2008). As the primary governing body for ethics of the legal profession, one could reasonably expect the ABA to provide more information regarding the initial charging decision. Instead, the available rules leave the prosecutor with extensive discretion, in favor of focusing on the more general admonition to practice in a manner that is fair to defendants. Part III of this Article explains how other rules can be used to inform our general understanding of the prosecutor's ethical obligations with regards to instituting formal charges against criminal defendants. The remainder of the text clarifies the prosecutor's role in ensuring a fair criminal process for the defendant by enjoining prosecutors from pursuing unfair advantages over the defendant during the trial process.

[52] This statement seems to reinforce an objective belief requirement to establish probable cause by putting the prosecutor in the position of an objective decisionmaker. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9 (AM. BAR ASS'N 1993). However, it also states that a prosecutor should rationally address the harm caused by the nature and scope of the criminal behavior. The ABA's rules provide model guidance for individual states but have no legal power unless a governing state authority adopts them. PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 27 (2016). State regulation of lawyers can arise through various means, including court rulings and legislative statutes, but most states simply adopt the ABA's Model Rules for their own ethical and professional guidelines. *See, e.g.*, David Schwendiman, *The Charging Decision: At Play in the Prosecutor's Nursery*, 2 BYU J. PUB. L. 35, 37, 37 n.13 (1988) (describing how the state of Utah's prosecutorial charging guidelines are essentially those promulgated by the ABA). *See generally* AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8: SPECIAL RESPONSIBILITIES (2017). Those that do not formally adopt the Model Rules may, nonetheless, mimic the proscriptions in the Model Rules for prosecutors in its jurisdiction. *See, e.g.*, *id.* Thus, there is not much variation in the guidelines set forth by the ABA and those adopted by the states. *See* Schwendiman, *supra* note 52. Accordingly, many state ethical rules guiding the prosecutor's charging decisions simply reiterate the probable cause standard and the expansive scope of prosecutorial discretion. *See, e.g.*, *id.* at 38, 41 (noting that Utah adopts the ABA rules for its guidelines). This second requirement thus calls on the prosecutor to go further

provide additional considerations for the prosecutor's charging decision in addition to the standard probable cause metric.[53]

The prosecutor has broad discretion to operate within the probable cause framework for charging decisions because there is a general and accepted understanding that not every crime, or criminal behavior, should be formally charged.[54] Government resources are finite and criminal statutes do not always address the offenses that most affect or concern modern communities. It is up to the prosecutor, then, to further reduce the broad behavior that is subject to criminal sanctions to a more manageable load for the criminal court process. The various formal guidelines are insufficient tools for culling this large body of criminally sanctionable behavior, so prosecutors may also rely on informal standards to aid them in choosing which offenses are most deserving of the criminal process. The following Section details the informal standards that can influence the prosecutors' charging decision.

B. Informal Objectives

In addition to the formal guidelines promulgated by statutory and professional organizations, prosecutors can also consider informal factors in making their charging decisions. In most jurisdictions, the elected District Attorney employs line attorneys who are tasked with handling the daily criminal practice.[55] These line prosecutors are responsible for most, if not all, of the office's charging decisions, formal filings, and case dispositions.[56] They can sometimes hold nearly unfettered discretion, limited only by formal limitations and any guidance the elected District Attorney puts into place.[57] The expansive nature of this discretion allows for informal, and even subconscious factors, to affect a prosecutor's charging decision. These informal factors

and consider whether the criminal process is the appropriate venue for the unlawful behavior.

[53] Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 275-76 (2017) (noting that both Rule 3.8 and the ABA standards serve as extrajudicial tools of constitutional enforcement).

[54] *See, e.g.*, Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1263 (2011).

[55] *See* Medwed, *Emotionally Charged*, *supra* note 29, at 2190.

[56] *See id.* Individual prosecutor offices may also limit the charging decisions to the more senior line attorney in the office. This ensures that office wide policies are closely followed as junior attorneys may not be as familiar with the best ways in which to achieve those goals.

[57] *Cf.* Gershman, *supra* note 54, at 1260 (calling the charging decision a virtually unreviewable and dangerous power).

can range from personal desires and goals, to professional requirements that convey to a superior that the prosecutor is adequately fulfilling their job duties.[58] These informal factors can also remain under the surface because, despite having an overall agenda set forth by a senior prosecutor, a line prosecutor can conduct their work as an independent decision-maker.

The United States is unique among world nations in that most chief prosecutors are elected by a popular vote.[59] This means that a chief prosecutor should be somewhat responsive to, or at least must be deemed acceptable by, the voting public. Thus, despite the amount of discretion individual prosecutors possess, the chief prosecutor's electoral promises and general stance on criminal justice reform can hold significant sway over the charging decisions made by their line prosecutors.[60]

While in many ways, the prosecutor's charging decisions are shielded from public scrutiny, there are ways that the public can play a role in them.[61] Recently, prosecutors have come under scrutiny for the way they have been handling police shootings involving young black victims.[62] In at least one instance, public outrage resulted in weeks of

[58] *See id.* at 1276-79.

[59] Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012); *see also* Amita Kelly, *Does It Matter that 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), http://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white [https://perma.cc/7GSK-7Q83]. *See generally* GEORGE COPPOLO, STATES THAT ELECT THEIR CHIEF PROSECUTORS (Feb. 24, 2003), https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm [https://perma.cc/68DA-LGZZ] (providing a list of states that elect their chief prosecutors).

[60] *See* Gershman, *supra* note 54, at 1276 (arguing that a prosecutor may hold "strong views . . . which the citizens who elected him may well endorse, and his charging decision therefore may be undertaken to further his own personal and political ambitions").

[61] For a comprehensive examination of how prosecutorial decisions influence prosecutor elections, see generally Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002) (discussing why voters might use conviction rates to evaluate prosecutors). For a discussion of possible mechanisms to increase prosecutorial accountability for their charging decisions, see generally Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (arguing that prosecutors must consider prison availability in their charging decisions).

[62] *See, e.g.*, Rashad Robinson, Opinion, *District Attorneys Must Hold Officers Accountable for Shootings*, S.F. CHRON. (Apr. 7, 2018, 1:12 PM), https://www.sfchronicle.com/opinion/article/District-attorneys-must-hold-officers-accountable-12810923.php [https://perma.cc/J95R-V7H4].

protesting the prosecutor's decision.[63] If the public believes that the prosecutor is not pursuing criminal charges consistent with its sense of criminal justice priorities, then the public will simply not elect or reelect the chief prosecutor.[64] In some situations, the public may even initiate and complete an election recall if it is particularly upset by a prosecutor's decisions, actions, or lack of action.[65] Both of these possibilities mean that charging decisions can be informally influenced by whether they are consistent with the elected prosecutor's stated or public approach to the work. That approach will often have been conveyed through claims the elected official, then candidate, made during the election cycle or public proclamations she makes after her appointment to the office.

With some limitations, an elected prosecutor is permitted to emphasize almost any approach to criminal justice during their tenure. For example, some prosecutors, looking to convey a more holistic approach to criminal justice, ask their line district attorneys to consider the defendant's criminal history before making a final decision on whether to charge the defendant with a particular crime.[66] This action, or lack of action, allows first-time offenders an opportunity to rehabilitate outside of the formal criminal court process.[67] District

[63] *See* Sam Stanton, *Targeted by Stephon Clark Protests, Sacramento DA Has Fence Erected Around Building*, SACRAMENTO BEE (Apr. 20, 2018, 10:56 AM), https://www.sacbee.com/news/local/article209445049.html.

[64] Elections make prosecutors subject to the whim of their local constituencies. *See* Ellis, *supra* note 59, at 1565-68.

[65] *See* Rachel Weinstein, Note, *You're Fired!, The Voters' Version of "The Apprentice": An Analysis of Local Recall Elections in California*, 15 S. CAL. INTERDISC. L.J. 131, 156 (2005); *see also, e.g.*, Bruce Vielmetti, *Small Town Wisconsin DA Could Face Recall as Opponents File Signatures with Election Officials,* MILWAUKEE J. SENTINEL (July 24, 2018, 10:55 AM), https://www.jsonline.com/story/news/politics/2018/07/24/wisconsin-da-leave-absence-could-face-recall-election/825762002/ [https://perma.cc/48U9-FDEB]. *See generally* Joshua Osborne-Klein, Comment, *Electoral Recall in Washington State and California: California Needs Stricter Standards to Protect Elected Officials from Harassment*, 28 SEATTLE U. L. REV. 145 (2004) (discussing the history of the recall process in California).

[66] *See* Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System Is Unjust*, 44 HOFSTRA L. REV. 1207, 1219 (2016). For a discussion of holistic prosecution with regards to expungement proceedings, see generally Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2821 (2018) ("Many of the complicated incentives that undermine holistic prosecution during . . . earlier phases exist during the expungement process as well.").

[67] *See* Medwed, *Emotionally Charged*, *supra* note 29, at 2189. These background considerations ordinarily consist of the defendant's criminal history, age, and ability to exist as a law-abiding member of society. Prosecutors can often avoid hard questions

attorneys may also direct their line prosecutors to consider a defendant's role in the crime itself as part of their discretionary charging decision. This means that if a defendant has what the prosecutor deems to be a lower level of culpability or will cooperate with the state against another more culpable perpetrator then the defendant may avoid formal punishment.[68] Some prosecutor offices will even inquire into the type of noncriminal dispositions, such as drug courts or deferred prosecution, that are available for offenses or defendants before pursuing a particular charge.[69] The above policies and approaches to prosecutorial discretionary power are often influenced by the electorate's desire to provide alternative approaches to criminal law enforcement or aid in pursuing defendants the public deems more worthy of criminal punishment.[70]

Attitudes of law enforcement officers can also influence prosecutorial charging decisions.[71] In most criminal cases, the police investigate alleged criminal behavior and make an initial arrest.[72] The police report from the arrest is then sent to the prosecutor so that the prosecutor can file formal charges that initiate the formal criminal process. This creates a symbiotic relationship between prosecutorial decisions and police action. The dexterity of this relationship can lead police officers to expect and believe that "their" prosecutor will trust their assessment of criminal behavior and follow through on their arrests by pursuing

about their charging decisions because prosecutorial immunity serves as a shield. *See id.* For an example of how biased prosecutorial decision-making can be shielded, see Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33, 59-60 (2013).

[68] *See* Medwed, *Emotionally Charged*, *supra* note 29, at 2189 (noting that "[p]rosecutors are generally urged to consider the defendant's role in the crime").

[69] *See, e.g.*, Sarah Lai Stirland, *San Francisco District Attorney Wants to Turn Prosecution from "Art" to Data "Science*,*"* TECHPRESIDENT (June 4, 2013), http://techpresident.com/dastat [https://perma.cc/74E7-MBPP] (exploring a new scientific method district attorneys may use to determine whether alternative sentencing is better suited for a defendant than a criminal conviction and jail time).

[70] *See* Medwed, *Emotionally Charged*, *supra* note 29, at 2189-91. Both law enforcement and the judiciary can also influence prosecutorial charging decisions. This connection is only slight, however, as the public may not pay as much attention to the general charging decisions as it does to trial and plea outcomes.

[71] Gifford, *supra* note 44, at 670.

[72] Federal prosecutors can direct police investigations in some cases. *See* Michael L. Benson, *Investigating Corporate Crime: Local Responses to Fraud and Environmental Offenses*, 28 W. ST. U. L. REV. 87, 106-07 (2001); Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material,* 88 CORNELL L. REV. 1471, 1493-94 (2003).

charges on any matter that the police officer brings before the prosecutor.[73]

Some prosecutors may even become inclined to simply accept any charges the police present to them with little critical analysis.[74] This might be because the prosecutor has grown to trust the police officer's assessment of criminal activity or because the prosecutor's workload is so significant that it is simply easier to farm out the responsibility of determining the appropriateness of criminal charges to the police. In jurisdictions where this type of symbiotic relationship exists, the police officer's discretion is informally supplanting the formal probable cause determination that the prosecutor is expected to make.[75] This substitution can happen with minimal attention or notice by the individual prosecutor or her superiors, and with little concern or even awareness from the public.[76]

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[73] *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 675-76 (1992); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 791-92 (2003). For a comparative assessment of the police-prosecutor relationship, see Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189, 218-22 (comparing the police investigation style in Germany with the adversarial investigation style of the United States).

[74] *See* Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes that Never Happened*, 55 AM. CRIM. L. REV. 665, 659, 667-76 (examining wrongful convictions and concluding that "prosecutors also bear significant responsibility for no-crime convictions, . . . through their complacency in uncritically accepting the original police narrative"). Some prosecutor offices have a screening division, tasked with reviewing initial police reports, following up on any investigative loopholes, and considering the applicable law to determine if a charge would be properly brought against an individual. *See* Melilli, *supra* note 73, at 687. Not all offices have this capability, or desire. In offices without such a division, individual prosecutors could make the decision about whether to move forward on a case presented to them solely by the materials that law enforcement provides to them. *See generally* Adam Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833 (2019) (arguing that giving prosecutors more screening power would better protect innocent defendants).

[75] *See* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 323-26 (2017); Alexandra Hodson, Note, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away with Murder,'* 54 IDAHO L. REV. 563, 582-585 (2018). In some jurisdictions, the police officer actually makes the probable cause determination. *See* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1309-12 (1998) (detailing the problems inherent to police fulfilling the prosecution function in certain jurisdictions).

[76] Police officer corruption is neither a fiction nor a relic of the past. *See, e.g.*, Sanja Kutnjak Ivkovi , *To Serve and Collect: Measuring Police Corruption*, 93 J. CRIM. L. & CRIMINOLOGY 593, 594 (2003) (examining available data regarding police corruption

Prosecutors also have personal motivations, desires, and senses of moral obligation that influence their charging decisions. *In re Pautler*, a case that is popular in law school classes such as Professional Responsibility and Legal Ethics, provides an example of the warring potential identities that prosecutors may embody in their chosen profession.[77] In *Pautler*, a prosecutor pretended to be a defense attorney to get a suspect who had already killed three victims to confess the location of a fourth potential victim whom the suspect had left alive.[78] This case, which resulted in the prosecutor's license being suspended for three months,[79] brings to bear how a prosecutor may have moral reasons for wanting to pursue particular charges. A prosecutor may have a traditional notion of justice or personal sense of morality that pushes her to make decisions a certain way even if those notions and senses cannot be part of the formal decision-making process.

Personal motivations that can influence a prosecutor's charging decisions are not always as understandable or magnanimous as those present in *Pautler*. A prosecutor who seeks higher office, desires fame, or obtains ego gratification from prosecuting certain individuals may make charging decisions that facilitate those desires.[80] The expansive

and "provid[ing] a comprehensive analysis of the existing methods for corruption measurement"). Even without corruption, police officers can make mistakes that result from inadequate training and/or oversight. *See, e.g.*, Daniel N. Haas, Comment, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DEPAUL L. REV. 1035 (2013) (discussing how officer training does not entirely eliminate officer mistakes of fact or law during traffic stops); Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635 (2019) (examining "the danger rates of routine traffic stops to law enforcement officers"). The numerous examples of police corruption and mistakes make it problematic for a prosecutor to rely on a police officer's assessment of a case in making her probable cause determination.

[77] *In re* Pautler, 47 P.3d 1175 (Colo. 2002).

[78] *Id.* at 1176-78.

[79] The fact that this prosecutor received only minimal sanctions is not rare in the criminal justice system. Indeed, prosecutors who engage in illegal behavior rarely lose their bar licenses. For a discussion of this issue, see Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html [https://perma.cc/6GA9-XYD7].

[80] Former prosecutor Mike Nifong is a recent example of egregious prosecutorial misconduct in the charging decision. Nifong filed and maintained charges against three Duke lacrosse players after scientific evidence had excluded them as the perpetrators. Although no one can prove exactly what factored into Nifong's decision to withhold evidence and pursue the charges, the common belief is that his decision was a result of a combination of political ambition and media coverage. *See* Jonathan K. Van Patten, *Suing the Prosecutor*, 55 S.D. L. REV. 214, 215-226 (2010). *See generally* James E. Coleman, Jr. et al., *The Phases and Faces of the Duke Lacrosse Controversy: A*

nature of prosecutorial discretion permits charging decisions to reflect those problematic personality traits because the formal mechanisms that are in place can do little to fully prevent or account for them.

Implicit bias and the role that unconscious negative associations have on all decision-making in the criminal justice system can also informally influence a prosecutor's charging decision. For prosecutors, implicit bias can manifest in the prosecutor's assessment of whether certain behaviors are more deserving of the "criminal" label, or more dangerous than others.[81] Implicit associations can connect certain offenses or punishments with different races or genders. This is true for both the alleged perpetrator and the alleged victim.[82] Because individual prosecutors have so much discretion over whether and how to charge a defendant, and they can also have minimal oversight by superiors, implicit bias can play an undetected role in their charging decisions. While the Fourteenth Amendment prohibits selective prosecution based on race and other suspect classifications,[83] implicit bias operates at the subconscious level, making it difficult to ascertain when or if it influences charging decisions. Researchers in implicit bias are constantly producing data about how salient racial, ethnic, and gender stereotypes are in criminal justice decision-making.[84] This ever-

Conversation, 19 SETON HALL J. SPORTS & ENT. L. 181 (2009) (a panel discussion about the underlying issues in the Duke lacrosse case).

[81] *See* AM. BAR ASS'N, *Even Prosecutors Are Not Immune from Implicit Bias, Says ABA Panel* (Aug. 22, 2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/even_prosecutorsare.html [https://perma.cc/S7D9-VC6E].

[82] *See, e.g.*, Tanya Katerí Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845 (1990) (examining the impact of racial bias upon the prosecutorial charging decision in racially motivated violence cases); Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014) (analyzing the effect of prosecutorial racial bias throughout the criminal justice process); Radelet & Pierce, *supra* note 34, at 615-19 (examining the effect of race on prosecutorial decision making in homicide cases). *See generally* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (discussing how implicit bias can affect the police and judicial process).

[83] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (reasoning that classifications by "race, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

[84] *See generally* R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006) (considering social psychological research about implicit bias in the criminal justice system); Mark W. Bennett,

increasing data provides more certainty about the role that implicit bias plays in prosecutorial charging decisions because these prosecutors are subject to the same implicit association thought patterns held by the general public.

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In sum, the probable cause standard provides only a minimum level of regulation for prosecutorial charging decisions. It provides prosecutors with wide latitude in controlling the size and scope of the criminal justice system because it permits the prosecutor to consider a range of different factors. The low bar of probable cause does little to limit a prosecutor from bringing any case that she deems necessary to advance her own objectives, both personal and professional. It instead relies on the prosecutor to make decisions that are consistent with the rule of law and the any objectives housed by the prosecutorial institution.

Because the reactive posture of the public defender in the criminal process gives her little say or control over the size of her workload, it falls upon the prosecutor to consider the public defender's abilities to provide a certain standard of representation. Prosecutors are able to influence the public defender's caseload to some extent because they do not have to explain why they charge certain defendants and not others.[85] Neither must they justify the particular charges they bring against a defendant when other, less harsh charges would pass the same minimum threshold of probable cause.[86] This discretion is permissible through both formal and informal charging guidelines and, as detailed in the following part, has significant consequences for public defender's caseload, and her ability to meet constitutional safeguards.

Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010) (detailing how implicit bias influences judge-dominated voir dire); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (illustrating the new science of unconscious of unconscious mental processes).

[85] The alleged victim does have some rights in the criminal process, but they do not extend to the prosecutor's charging decision. Instead the victim is protected from harassment and has a right to be notified about certain actions in the case against her alleged assailant. *See, e.g.*, CAL. CONST. art. I, § 28(b) (codifying the provisions under the California's Victim Bill of Rights).

[86] *See* Levine, *supra* note 28, at 753 (discussing charging decisions).

II. CASELOADS AND THE DEFENDANT'S ACCESS TO JUSTICE

This Part outlines how prosecutorial charging decisions that overload the public defender influence each attorney's ability to comply with the ethical and professional rules that guide the legal profession, and the defendant's access to the effective assistance of counsel. The American Bar Association's Model Rules of Professional Conduct impose a duty upon both public defenders and prosecutors to consider how their actions support or undermine the ethical and professional practice of law.[87] As the umbrella organization for attorneys, the ABA seeks to ensure the professionalism of those who practice law.[88] This organization accomplishes this objective by providing both guidelines for entry into the profession and standards of practice.[89] It is the latter ABA objective that is most compromised by prosecutorial charging practices that overwhelm the public defender. Additionally, the United States Constitution guarantees all defendants the right to the effective assistance of counsel.[90] As lawyers sworn to uphold the law, prosecutors must also recognize when their charging decisions have a negative impact on a defendant's ability to receive counsel consistent with that right.

Before engaging in a discussion about the ethical problems arising from prosecutorial charging practices, it is first necessary to discuss how these charging practices affect public defenders.[91] Under contemporary

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[87] *See* MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. (AM. BAR ASS'N 2008) ("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, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."). *See generally* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171 (1988) (discussing the way in which the ABA Model Rules of Professional Conduct apply to defenders).

[88] *See* Don J. Young & Louise L. Hill, *Professionalism: The Necessity for Internal Control*, 61 TEMP. L. REV. 205, 205-09 (1988) (connecting the American Bar Association and the concept of professionalism in the legal profession).

[89] *See id.* at 207-08.

[90] *See* U.S. CONST. amend. VI. *See generally* Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397 (2000) (summarizing the far-reaching influence of the Sixth Amendment's right to the effective assistance of counsel for the nation's adversarial system).

[91] The arguments in this Article are limited to the public defender experience and do not necessarily extend to all attorneys that defend indigent defendants. Private attorneys who take on indigent defendants through a court assignment process can control their caseloads a bit more than institutional public defenders. These attorneys

case law, an accused person charged with an offense that may result in jail time is entitled to an attorney.[92] While not every defendant will use a public defender, a vast majority will. It is estimated that 60-90% of defendants in criminal matters will require representation by a public defender.[93] Because public defenders are performing the constitutional duty of representing clients who cannot afford their own attorneys, they are not at liberty to turn down cases assigned to them after the case has been initiated by the prosecutor's charging decision. That is, because the rate of defendants who cannot afford to hire a private attorney is so high and because public defenders are constitutionally required to represent those defendants, the prosecutorial practice of charging an especially high volume of cases directly impacts the caseloads for public defenders. The following Section details how prosecutorial charging practices can implicate both the prosecutor and the public defender's ability to comply with professional and ethical rules before describing how it can also undermine constitutional guarantees.

A. How Caseloads Undermine Ethical Duties

It is incumbent upon every lawyer to abide by the ethical and professional rules that are promulgated by the rulemaking bodies of her jurisdiction. Despite best efforts, both the public defender and the prosecutor risk violating these requirements when the public defender is tasked with excessive caseloads. The following Subsections detail how the caseload crisis compromises specific ethical obligations for both primary actors in the criminal court process.

1. Ethical Concerns for the Public Defender

As noted above, when a prosecutor files more charges, it creates a larger caseload for public defenders. This is not to say that these charging decisions are unwarranted or lack a legal basis, but that the result of more cases charged in the criminal process is necessarily more

have a say in which cases they can accept and, even if they accept court appointments, can simply remove themselves from any assignment lists. Public defenders do not have the same luxury.

92 *See* Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972) (discussing improper denial of counsel).

93 ROBERT L. SPANGENBERG ET AL., U.S. DEP'T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 n.1 (2000) (stating that "[i]t is widely estimated that 60 to 90 percent of all criminal cases involve indigent defendants"). While research about the rate of defendants requiring public defendants is sparse, some studies have attempted to characterize that statistic. *See* CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).

cases for the public defender. Without a corresponding increase in resources for the public defender, these defenders are forced to contend with client needs that can surpass an attorney's ability to provide.

As her caseload grows, it becomes increasingly difficult for the public defender to spend the time sufficient to build a meaningful relationship with her client. The public defender's excessive caseload limits the resources she has available to investigate her client's case. It reduces the professional capital the public defender has to advocate strongly in a courtroom before the assigned judge. It even negatively impacts the amount of time the public defender has to spend in court for each client's hearing. These are just some of the examples of the ways that excessive caseloads compromise the public defender's ability to comply with ethical and professional guidelines.[94] In the following Subsections, I will detail how the caseload crisis makes it difficult for the public defender to comply with the duty of loyalty to her client, the duty of competence in representing her client, and the duty to act in a way that maintains the integrity of the legal profession.

a. Duty of Loyalty

The duty of loyalty may be the ethical duty that is most clearly compromised by public defenders tasked with excessive caseloads. Under the current Model Rules for Professional Conduct, an attorney owes so significant a duty of loyalty to her client that she is required to disregard personal morality or personal objectives during legal representation.[95] More than two centuries ago, Henry Lord Brougham issued a description of the lawyer's duty that continues to serve as a guidepost for today's practicing attorneys.[96] Brougham identified an advocate as a person who is solely concerned with the client.[97] He further noted that the lawyer's first and only duty is to the client regardless of the costs to other people, including the lawyer himself.[98] This mentality was housed in earlier versions of the ABA's guiding

[94] For examples of the ways in which heavy caseloads negatively impact clients and have a real impact on public defenders, see Oppel & Patel, *supra* note 7.

[95] Certain aspects of the duty of loyalty are captured in other professional rules, most notably the duty of fairness discussed *infra*, but conflicts dominate the analysis. *See* Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 577-80 (1991).

[96] *See* Monroe H. Freedman, *Henry Lord Brougham — Advocating at the Edge for Human Rights*, 36 HOFSTRA L. REV. 311, 311-12 (2007).

[97] *Id.* at 312.

[98] *Id.* at 312 n.4.

principles as "zealous representation" and continues to frame the approach an attorney should have to her practice.[99]

A lawyer breaches the duty of loyalty when she represents a client despite having a personal or professional conflict of interest with her client's objectives.[100] A conflict of interest exists when there is a "significant risk" that a lawyer's representation will be "materially limited" by that lawyer's responsibilities to another person or personal cause.[101] Oversubscribed public defenders are positioned in such a way that providing representation to one client, or group of clients, can materially limit the representation that the public defender can provide to other clients.[102] Scholars have written much about these conflicts of interest.[103] Most notably, some advocate for implementing triage, or the practice of quick management and organized focus in emergency medicine, from the medical field to the criminal courtroom.[104] With triage, a public defender chooses who will receive a more comprehensive or focused degree of representation from a bevy of clients who are all constitutionally entitled to the same level of representation.

These same scholars proposed various schemes for public defenders to use when resorting to triage to manage their overwhelming caseloads. Professor John Mitchell developed the term "pattern representation" wherein a public defender makes quick assessments of client matters to determine which of them deserve focused and extensive representation

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[99] The word zealous may not remain in the Model Rules of Professional Conduct (in either the 1983 version or the updated 2002 version) but it is referenced in the preamble to the Model Rules. MODEL RULES OF PROF'L CONDUCT, at Preamble (AM. BAR ASS'N 2008) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

[100] *Cf.* Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1037 (2018) (discussing the duty of loyalty in context of fiduciary duties).

[101] MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2008).

[102] *See* Joe, *Systematizing*, *supra* note 21, at 389-90.

[103] *See, e.g.*, Joe, *Rethinking Misdemeanor Neglect*, *supra* note 21, at 738 (discussing the allocation of public defenders between misdemeanor and felony defendants); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1222 (1994) [hereinafter *Redefining the Sixth Amendment*] (discussing the role of public defenders in lower courts); Roberts, *supra* note 13, at 1092 (discussing the professional and ethical duties that public defenders abdicate in order to represent their clients in misdemeanor matters).

[104] *See, e.g.*, Mitchell, *In (Slightly Uncomfortable) Defense*, *supra* note 21, at 925 (responding to a scholar's criticism of triage practices in public defender's offices). *But see* Richardson & Goff, *supra* note 19 (stating that the concept of triage may result in implicit bias playing a large role in deciding which cases to focus on).

and which of them can be resolved with more perfunctory activity.[105] Mitchell's argument is grounded in the requirements of the Sixth Amendment.[106] According to Mitchell, the Sixth Amendment mandate for the effective assistance of counsel does not require a more comprehensive, focused representation.[107] Instead, the Constitution only requires an attorney to provide *effective* representation.[108] Mitchell theorized that effective representation could be achieved through a variety of means, many of which fall short of an extensive, all-encompassing legal review and individual attorney endeavor.[109]

In response to Mitchell's theory, scholars such as Monroe Freedman turned to the rules of professional responsibility to argue that public defenders are required to provide a degree of representation that is much greater than Mitchell's "pattern representation."[110] According to Freedman, pattern representation violates legal ethics because it is the result of decisions made in the presence of inherent conflicts.[111] In determining which client is more deserving of focused representation, the public defender is necessarily prioritizing one client's interests over another client's interest, the very behavior that the Model Rules and its admonition against conflicts of interests seeks to prevent.[112] Freedman argued in response that pattern representation should not be the acceptable default style of practice where a public defender institution is tasked with a caseload that is impossible to manage.[113] Instead, according to Freedman, the public defender in such an environment should spend her time searching for a better approach to representing clients that requires the state to provide the resources necessary for her representation to pass constitutional muster.[114] According to Freedman, it is without question that, as an attorney subject to formal ethical and professional rules, a public defender owes a duty of loyalty to every single client.[115] When this defender is choosing between clients, she is

105 *See generally* Mitchell, *Redefining the Sixth Amendment*, *supra* note 103.

106 *See id.* at 1220.

107 *See id.* at 1246.

108 *See id.* at 1254-55.

109 *See id.* at 1225-26.

110 *See* Freedman, *supra* note 21, at 918-20.

111 *See id.* at 920-21.

112 *See id.*

113 *See id.* at 916-19.

114 *See id.* at 921-23.

115 *See id.* at 920; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. (AM. BAR ASS'N 2008).

inherently unable to meet this duty and must pursue other avenues to address this failure.

b. Duty of Competence

Excessive caseloads also implicate a public defender's ability to comply with the profession's duty to provide competent representation to every client. The duty of competence refers to whether the attorney has and uses the requisite knowledge and skill to represent a client in keeping with the profession's assessment of what is required.[116] Competent representation would also necessarily include consideration on the attorney's part about whether they have the time and resources to meet the client's needs, because an attorney lacking in such time and resources would not be able to gather the knowledge and skill that is required to provide such representation.[117]

Whereas a private lawyer can refuse appointments that render her unable to dedicate sufficient time or resources to existing client caseloads, a public defender is not ordinarily at liberty to do the same. Instead, the public defender must provide effective representation to all her assigned clients.[118] It then falls on the shoulders of the overwhelmed public defender to assess whether her caseload has reached a stage that undermines her ability to provide competent representation to each of her clients. This determination alone is insufficient to cure the problem. To a certain extent, that public defender lacks control over her own caseload because she serves in response to the prosecutor's charging decisions. This cause-and-effect relationship is why prosecutors must be cognizant of the effect their charging decisions have on the public defender.

Even with the best of intentions and capabilities, the sheer size and scope of a public defender's caseload is enough to prevent a public defender from providing competent representation. At least one public defender has stated, as part of a scholarly article, that her excessive caseload means that she is (1) "unable to communicate with her clients," (2) "unable to investigate and adequately prepare cases," and

116 MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2008).

117 RUSSELL PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH (2013).

118 *See, e.g.*, Chris Dandurand, Note, *Walking Out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill*, 76 MO. L. REV. 185, 186-187 (2011) (discussing Missouri's attempt to enact regulations giving public defenders power to manage their caseloads).

(3) "unable to file motions to advocate her clients' positions."[119] These ordinary representative challenges are exacerbated by the regulatory rules of the criminal process in a given jurisdiction, including when court is called to session and when it ends for the day, and the physical layout of the criminal court. If a criminal courthouse has several levels and buildings, and courts are called to order at approximately or exactly the same time each day, it will be very difficult for an overwhelmed public defender to appear next to her client for each court hearing.[120]

Lawsuits abound that allege incompetent representation on the part of public defenders with excessive caseloads. Recently, the Lawyers Committee for Civil Rights ("LCCR") joined with several other high-profile firms to file a class action lawsuit against the Louisiana Public Defender Board ("LPDB").[121] This lawsuit alleged that the Board, the regulatory agency for indigent defense services throughout the state of Louisiana, was not providing the quality of counsel that poor defendants are constitutionally entitled to receive.[122]

The LCCR filed the suit thirty years after *State v. Peart*, a similar case concerning public defender caseloads.[123] *Peart* resulted in a United States Supreme Court decision allowing public defenders to withdraw from death penalty cases when they felt they could not provide the effective assistance of counsel. Since *Peart*, various organizations have filed similar lawsuits alleging system-wide violations in New York,

[119] Heidi Reamer Anderson, *Funding* Gideon's *Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 431 (2012).

[120] Some jurisdictions bypass this problem by assigning a public defender to a particular courtroom.

[121] *See* Press Release, Lawyers' Comm. for Civil Rights Under Law, Class-Action Lawsuit: Louisiana's Public Defender System Systematically Denies Poor People the Right to an Adequate Defense (Feb. 6, 2017), https://lawyerscommittee.org/press-release/class-action-lawsuit-louisianas-public-defender-system-systematically-denies-poor-people-right-adequate-defense/ [https://perma.cc/FX9J-XC42] [hereinafter Class Action Lawsuit].

[122] *See id.*; *see also* Ken Daley, *Louisiana Has One-Fifth as Many Public Defenders as Needed, Study Says*, TIMES-PICAYUNE (Feb. 21, 2017, 12:07 AM), https://www.nola.com/news/crime_police/article_afc21c1d-a1ce-57a3-91c9-91de41c5cf3d.html [https://perma.cc/5ETW-Y3L6] (noting that the state of Louisiana only has one-fifth of the public defenders that it needs to provide the effective assistance of counsel to all defendants).

[123] *See* State v. Peart, 621 So. 2d 780, 789 (La. 1993) (discussing public defenders' representation of indigent defendants in Louisiana courts). For a greater discussion of *Peart*, see *infra* Part II.A.

Missouri, and Florida.[124] The lawsuits have had a variety of outcomes.[125] Some resulted in consent decrees wherein a state agency, without an admission of guilt, formally agreed to adopt or refrain from certain activities that were potentially unlawful,[126] and others, like a previous lawsuit in Louisiana, created a statewide public defender tasked with administering funds and promulgating practice guidelines in recognition of the previous lack of quality counsel.[127]

Appointment refusals like the ones that can occur in Louisiana, and other lawsuits against the providers of indigent defense services, have been a seemingly ineffective way of dealing with the public defender caseload issues. They do not examine or address the role the prosecutor's charging decisions have on system-wide dysfunction and the public defender's ability to practice law ethically.[128] Instead, these

[124] *See, e.g.*, *ACLU Sues Missouri Over Disastrous Public Defender System*, ACLU (Mar. 9, 2017), https://www.aclu.org/news/aclu-sues-missouri-over-disastrous-public-defender-system [https://perma.cc/8XMC-H8GL] (discussing a class-action lawsuit against the state of Missouri claiming that public defenders do not "have time or resources to provide adequate legal representation"); Monique O. Madan, *Lawsuit: Poor Defendants Left to Represent Themselves After Judge Takes Away Lawyers*, MIAMI HERALD (Sept. 28, 2017, 5:36 PM), https://www.miamiherald.com/news/local/community/miami-dade/article175977106.html (discussing a lawsuit in Florida "challenging the removal of public defenders from ongoing criminal cases in Miami-Dade County."); Daniel Wiessner, *New York State to Settle Landmark Suit Over Public Defenders*, REUTERS (Oct. 21, 2014, 2:21 PM), https://www.reuters.com/article/us-usa-lawsuit-newyork/new-york-state-to-settle-landmark-suit-over-public-defenders-idUSKCN0IA2L420141021 [https://perma.cc/Q4H8-EUVR] (discussing a New York lawsuit filed due to the public defense system being underfunded).

[125] *See generally* Heather Baxter, Gideon's *Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341 (2010) (examining the impact of the budget crisis on indigent defense but failing to mention anything about prosecutors); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) (analyzing the different lawsuits that have occurred involving indigent defense reform); Vidhya Reddy, Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the *Gideon* Right to Counsel (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185 [https://perma.cc/P7V2-D9BB] (discussing the "litigative efforts and . . . consider[ing] their significance in the development of . . . the formal 'right to counsel'").

[126] *See, e.g.*, Consent Decree, N.P. *ex rel.* Darden v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. 2015), https://www.clearinghouse.net/chDocs/public/PD-GA-0008-0003.pdf [https://perma.cc/X76J-4ELD] (containing the agreements between the plaintiffs and defendants in a lawsuit regarding constitutional rights for indigent defendants).

[127] *See generally* Richard Drew, Comment, *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 LA. L. REV. 955 (2009) (discussing the way in which litigation influenced indigent defense reform).

[128] *See generally* George E. Bisharat, *The Plea Bargain Machine*, 7 DILEMMAS: REVISTA DE ESTUDOS DE CONFLITO CONTROLE SOCIAL 767 (2014) (Braz.) (discussing the

strategies focus more upon either the legislature's lack of funding or the behaviors the state chooses to criminalize. Using a different approach that questions the prosecutor's charging decisions could be part of a comprehensive strategy to address the seemingly perennial caseload problem.

A public defender only remains assigned to a case so long as the prosecutor continues pursuing the charges. The defendant, and the public defender to a certain extent, have some control over a case because they possess the power to enter into a plea deal, but the power to charge an offense that a defendant is willing to plead guilty to remains solely in the hands of the prosecutor. Thus, it is the prosecutor whose actions most directly contribute to overwhelmed public defenders' failure to provide competent representation because it is the prosecutor that initiates and maintains the formal legal process.[129]

c. Maintaining Professional Integrity

Any "conduct that is prejudicial to the administration of justice" would fall under the provision of the Model Rules that concerns maintaining the integrity of the profession.[130] This Rule makes it incumbent upon all attorneys to practice law in a way that upholds general notions of professionalism. It also requires attorneys to refrain from activities that would undermine the perception of law practice as a renowned enterprise that is held in the public's esteem.[131]

Putting public defenders in a position so as to be overwhelmed undermines the public's confidence in the legitimacy of the criminal justice system.[132] These caseload problems affect both the trust between the lawyer and the client and the public's perception of whether the

adversarial system in the United States); Mitchell, *supra* note 103 (discussing the adversarial relationship between the prosecutor and the public defender).

[129] However, some may argue that, were prosecutors to be more cognizant of public defender caseloads in their charging decisions, public defenders may use delay tactics to drag out existing cases to prevent more cases being filed. While this, of course, may happen, it is ethically unsound under the Model Rules of Professional Conduct.

[130] *See* Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 274-75 (1970). Model Rule of Professional Conduct 8.4 calls upon attorneys to generally maintain the integrity of the legal profession. It defines professional misconduct and specifies that attorneys should refrain from any activity that is prejudicial to the administration of justice. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2008).

[131] Weckstein, *supra* note 130, at 281-84.

[132] *See* Anne M. Corbin, *Policy Report on Public Defender Reputation Among Peers and Clients*, 44 CRIM. L. BULL. 913, 914-16 (2008).

system is fair and managed by professionals.[133] In some jurisdictions, the negative characterization of public defenders as hapless attorneys who are unable to provide adequate defense representation is a direct result of extensive caseloads.[134] In other words, the growing structural problem of excessive caseloads can add to suspicion about public-defender competence by creating attorneys who are so overwhelmed they cannot dedicate sufficient time to fully investigate and litigate their client's case.[135]

General perceptions of the public defender range from respect to downright disdain.[136] Researchers and supporters of the public defender describe these attorneys as hard-working and committed. Alternatively, some clients and critics of the public defender system consider these attorneys to be the lawyers who could not get a job elsewhere.[137] The insults range from referring to a public defender as a "penitentiary deliverer" or "public pretender."[138] In her article, *Defending the Guilty*,

[133] *See id.* at 918-20. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (discussing the "normative factors" that influence individuals decisions to comply with the law); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984) (examining "the relationship of perceived injustice to dissatisfaction with legal authority").

[134] *See* Robert J. Aalberts et al., *Public Defender's Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 547-48 (2002).

[135] *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 88 (1995) ("A public defender burdened with inadequate resources and an unreasonable caseload may not even know the client's name — much less the identity of the witnesses and the theories of the case — until the day of the trial itself."); Derwyn Bunton, Opinion, *When the Public Defender Says, 'I Can't Help,'* N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html [https://perma.cc/HJ5J-RUXG] (discussing the large caseloads in New Orleans and the public defender's office having to refuse new cases); Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 19, 2016), https://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html [https://perma.cc/N5UG-U69P] (discussing a parish in Louisiana in which defendants were being turned away).

[136] *See* BELDEN RUSSONELLO STRATEGISTS, AMERICANS' VIEWS ON PUBLIC DEFENDERS AND THE RIGHT TO COUNSEL 7 (2017) ("53% [of the public] believe public defenders do not take much interest in their clients, and 50% believe public defenders generally provide inadequate legal representation.").

[137] *See Frequently Asked Questions*, SAN DIEGO CTY. OFFICE OF PUB. DEF., https://www.sandiegocounty.gov/content/sdc/public_defender/answers.html [https://perma.cc/GW6B-RDD8] (last visited Sept. 25, 2019).

[138] *See, e.g.*, LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 2 (1987) (quoting Nat Hentoff, *Interview: Eldridge Cleaver*, PLAYBOY MAGAZINE, Dec. 1968, at 89-108, 238) (discussing the institution of public defense as a whole).

Professor Barbara Babcock presents a picture of public defenders as the most maligned and yet most essential members of the criminal justice system.[139] These attorneys must deal with stigmas that can exacerbate the already difficult work that they do.[140]

If one of the chief problems the public defender faces is the public's hesitance to view the institution as a legitimate part of the justice system, it likely results from what appears to be a lack of respect from the other system actors. All attorneys are part of a profession that requires them to straddle three identities — that of an officer of the court, an advocate for a client, and an individual with her own moral and personal objectives.[141] Such a delicate balancing act requires each actor to prioritize between important goals. Within these, access to justice remains a notable system ideal and prosecutors play an important part in conversations about how best to fulfill that goal.[142] Any prosecutorial behavior that places the public defender in a precarious position reinforces the perception of illegitimacy and lack of

[139] Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983).

[140] MCINTYRE, *supra* note 138, at 62-66. It should be noted that public defenders were not always the subject of scorn and ridicule. Clara Shortridge Foltz was the first person to propose a state-funded entity to combat government attempts to use a state-funded prosecutor to criminally punish indigent defendants. Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1270-71 (2006). She formed the idea of a public defender from her own experience as a trial lawyer in California and presented the notion of a public defender for the first time at the Chicago's World Fair in 1893. *See id.* Her image of the public defender involved a capable lawyer with resources and respect that were equal to those of the prosecutor. *Id.* at 1271. This heroic version of the public defender was apparently widespread enough to inspire a comic book — *Public Defender in Action*. The comic book detailed action-packed stories of Richard Manning, a public defender who fought against injustice in all its forms and was printed from March 1956 to October 1957. *See Public Defender in Action*, GRAND COMICS DATABASE, www.comics.org/series/1185 (last visited Dec. 30, 2019) [https://perma.cc/6YAK-SL6R]. Atticus Finch, a fictional character from Harper Lee's classic novel *To Kill a Mockingbird*, is also evidence of the former positive regard for public defenders. *See generally* Carol S. Steiker, *Choosing Our Heroes: Skelly Wright and Atticus Finch*, 61 LOY. L. REV. 125 (2015) ("We public defenders were hardly idiosyncratic in our admiration for Atticus Finch . . . ."). Finch was illustrated as a dignified white defender of justice who represented an innocent black man at a time of extreme public racism in the deep South. *See id.* at 125. This image slowly disappeared as funding became a serious barrier to achieving the public defender mandate set forth in the *Gideon* decision.

[141] Indeed, these are the three identities that the Model Rules of Professional Conduct seek to address in its rules concerning interactions with the court, duties to a client, and appropriateness of fees.

[142] *See* Anna Blackburne-Rigsby, *Ensuring Access to Justice for All: Addressing the "Justice Gap" Through Renewed Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, 27 GEO. J. LEGAL ETHICS 1187, 1189-90 (2014).

respect for the indigent defense function. The connection between prosecutorial charging decisions and the ability of criminal defendants to have access to an effective lawyer is one example of such a behavior.

The public defender's difficulty or inability to comply with the ethical guidelines detailed above is particularly problematic because she is tasked with representing every indigent defendant within her purview. In other words, public defenders must continue to assume responsibility for cases prosecutors bring before them even when their caseload has reached an untenable state.[143] By charging offenses that place a public defender in this position, the prosecutor is pursuing a course of action that renders another attorney, the public defender, noncompliant with professional rules. As scholars and practitioners theorize what constitutional responses are available for the public defender facing this herculean task, it is useful to inquire how the prosecutor might reflect upon her own charging decisions within an ethical framework that prohibits her from engaging in behavior that would render other attorneys noncompliant with ethical rules. The following Subsections detail how this same ethical framework calls into question the prosecutor's own ability to comply with certain ethical rules.

2. Ethical Concerns for the Prosecutor

Charging practices that lead to excessive public defender caseloads also place the prosecutor at risk of violating ethical duties set forth by state and national bar associations. Model Rule 8.4 makes it professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[144] As discussed *supra*, a prosecutor

[143] Public defenders in a number of jurisdictions have sought relief from such caseloads with mixed results. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), https://www.nytimes.com/2008/11/09/us/09defender.html [https://perma.cc/C4WG-5M3Q] (describing public defender offices in seven states that were refusing new cases or pursuing litigation to end excessive caseloads).

[144] MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2008). *See generally* Jacob Itzkowitz, *Pants on Fire? Model Rule 8.4's Implications for Lawyers as Candidates for Political Office*, 26 GEO. J. LEGAL ETHICS 741 (2013) (noting the implications Model Rule 8.4 has on lawyers's ability to run for political office); Thomas H. Moore, *Can Prosecutors Lie?*, 17 GEO. J. LEGAL ETHICS 961 (2004) (discussing the way in which Model Rule 8.4 is complicated when prosecutors lie or mislead the investigation). Lawyers are generally not responsible for the impact their client representation may have on third parties. PEARCE ET AL., *supra* note 117. There are, however, exceptions to this rule when the lawyer action could adversely affect respect for and public confidence

who initiates excessive caseloads potentially induces a public defender to violate duties of competence, loyalty, and integrity.[145] Each of these duties is housed in other sections of the Model Rules. Therefore, by implementing charging practices that force public defenders to violate the Rules of Professional Conduct, the prosecutor herself may be violating rules by doing so.

Take, for example, the situation in Fresno County, California. The county was recently sued by the American Civil Liberties Union ("ACLU") for being unable to provide constitutional representation to indigent clients due to excessive caseloads on the part of the public defender.[146] In that lawsuit, it was alleged that "Fresno County deputy public defenders are shouldering caseloads that make it impossible for even the most skilled attorneys to provide meaningful and effective representation."[147] The attorneys in that county, then, were likely culpable for several ethics violations, especially violations of the duty of competency. And, because the prosecutors in that county used their discretion to charge those cases, it could be argued that those prosecutors "knowingly assist[ed]" the public defenders in committing those ethics violations.[148]

A prosecutor could argue that the true culprits in a situation where public defenders are unable to manage their burgeoning caseloads are state governments who do not adequately fund the indigent defense function. There is certainly some room in the discussion to consider the role that legislatures play in the public defender crisis. A prosecutor, however, cannot ignore her unique position in the problem. This is particularly true because the caseload crisis also implicates her ability to comply with her own ethical obligations. Charging decisions that overwhelm the public defender make it difficult to comply with the

in the legal process. For example, a lawyer must refrain from negatively commenting on the court. *See* MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 2008). A lawyer must also act with care if engaged in litigation with an unrepresented person. *See id.* r. 4.3. Lawyers are also required to be truthful in the representation they make to others on a client's behalf. *See id.* r. 4.1. Model Rule 4.4 also provides that a lawyer shall not pursue litigation objectives that are only meant to "embarrass, delay, or burden" or otherwise violate the legal rights of a third person. *See id.* r. 4.4.

145 *See* discussion *supra* Part II.A.1.

146 *See* Complaint at 1, Phillips v. California, No. 15-CE-CG-02201 (Cal. Super. Ct. July 14, 2015).

147 *Id.*

148 *See id.* This is the mindset or mens rea requirement for a finding that an attorney violated Model Rule 8.4. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2008).

professional rules that advocate fairness to the opposing counsel,[149] competence for one's client,[150] and maintaining the integrity of the legal profession.[151] Further, a defendant is entitled to an attorney who complies with both constitutional and professional obligations. Thus, any action by a prosecutor that would limit a defendant's access to that type of attorney would be violation of Rule 8.4 regardless of the effect other actors have on the caseload problem. This Subsection unfolds by first describing how prosecutorial charging decisions complicate the public defender's ability to comply with professional guidelines and limit the defendant's access to a lawyer in compliance with ethical rules. It then moves on to discuss how the prosecutor increases her own likelihood of falling short of ethical norms.

Prosecutors themselves often have excessive caseloads that they find difficult to handle ethically and professionally.[152] The implications of excessive caseloads for prosecutors, however, garner little of the attention that those of the public defenders do.[153] This is likely due to the constitutional and statutory safeguards afforded to the defendant through clearly enumerated rights in state and federal constitutions. Ethical rules apply to prosecuting attorneys, however, and the decisions that lead to excessive public defender caseloads compromise the prosecuting attorney's ability to comply with the rules. The following Subsections detail these rules.

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[149] *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2008).

[150] *See id.* r. 1.1.

[151] *See id.* r. 8.1.

[152] *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266-74 (2011). It is interesting that a prosecutor, who controls the flow of criminal court cases, may continue to charge cases even after she has reached a stage where her caseload is overwhelming. There are several reasons she might do this. The prosecutor may not have sufficient control over her caseload in that she is truly an agent of an elected district attorney. This differs from the public defender experience because even if an individual public defender works as part of a larger public defender's office, she is still an individual attorney who represents an individual client. A prosecutor may also be willing to add to her already overwhelming caseload out of a sense that she must address all criminal behavior that is placed before her by the police. Regardless, it follows from the reality that public defenders have significant caseload issues and that prosecutors may struggle with some of the same problems.

[153] *See id.* at 262-63, 279-97 (detailing the problems presented by prosecutors' large caseloads).

a. Special Rules for the Prosecutor

Model Rule 3.8 calls for prosecutors to comply with a unique set of ethical and professional rules to maintain their identity as ministers of justice.[154] The rule covers seven distinct areas of prosecutorial behavior in the criminal process.[155] It requires prosecutors to, among other things, only move forward on criminal charges against a defendant that are supported by probable cause and to make reasonable efforts to ensure that the accused has been advised of their right to counsel and the procedure to obtain counsel, and has been afforded an opportunity to get counsel.[156] The rule continues by imposing a duty upon prosecutors to refrain from trying to obtain a waiver of important pretrial rights from an unrepresented person.[157]

The comments to Rule 3.8 were amended in February 2008 to reflect the bar's growing concern with the exonerations of criminal defendants and the prosecutor's ability to prevent wrongful convictions.[158] Comment 1 to Rule 3.8 now reads that a prosecutor should take "special precautions . . . to prevent and to rectify the conviction of innocent persons."[159] This addition further supports the notion that prosecutors have a duty to defendants to ensure that the criminal court process is fair and just. This is a rallying cry that has become more pervasive since Michelle Alexander popularized the understanding of "mass incarceration" as a particularly insidious form of Jim Crow segregation.[160] It has also become a rallying cry for concerned parties as more reliable scientific evidence that established innocence has emerged in cases that had previously been relegated to "cold" status in prosecutor offices.[161]

This new comment adds support for a prosecutor to consider how their charging decisions affect an individual defendant's access to

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154 *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2008).

155 Casey P. McFaden, Note, *Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211, 1211 (2001).

156 MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2008).

157 *Id.*

158 *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 55 (2009) [hereinafter *Preaching to the Unconverted*].

159 MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2008).

160 *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101, 106 (2012).

161 *See, e.g.*, Robert Wilonsky, *Craig Watkins Believes Today's Exonerations Could Be "Biggest" Yet for Dallas County*, DALL. OBSERVER (Oct. 21, 2009, 3:48 PM), https://www.dallasobserver.com/news/craig-watkins-believes-todays-exonerations-could-be-biggest-yet-for-dallas-county-7146751 [https://perma.cc/X78B-P7WJ].

counsel. Few prosecutors, however, followed that path. Instead, some prosecutor's offices responded to the new comment by creating conviction integrity units, in which they test scientific evidence from old cases to ensure the previous prosecutorial regime reached the correct result.[162] Others developed community prosecution models that allow for increased involvement of the community in the criminal justice process.[163] There has been little, if any, movement on criticism of the scope of a prosecutor's charging practice and the role that plays in wrongful convictions. This is surprising given the commonsense notion that the more cases a prosecutor must process, the less attention to detail she can provide to individual defendants and charged offenses.

b. Fairness to Opposing Counsel

Lawyers are not required to pursue every advantage on a client's behalf.[164] For example, where a party is facing a request for a continuance, a lawyer may overrule a client's request to oppose the continuance if the lawyer feels that it will facilitate negotiations.[165] Model Rule 3.4, which sets forth this attorney power, emphasizes cooperation while still respecting the competitive nature of the adversarial process.[166]

Under Rule 3.4, a prosecutor has a similar duty to be fair to opposing counsel.[167] A charging practice that overwhelms the public defender risks violating this rule and the rationale that lawyers should not seek every advantage regardless of the impact on the opposing counsel.[168]

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[162] *See, e.g.*, Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1040-41 (2011/2012) (noting that Dallas County has implemented a Conviction Integrity Unit); *see also* Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 370-71 (2015).

[163] *See* Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361, 361-62 (2012).

[164] *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2008).

[165] *See* Marilyn S. Kite, *The Good Guy Actually Does Win*, 10 WYO. L. REV. 397, 400 (2010).

[166] *See* Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837, 850-51 (2013).

[167] *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2008). Note that some states have not adopted Model Rule 3.4. Kentucky's version of the model rules leaves both Rule 3.4(f) and Rule 8.4(d). *See* KY. RULES OF PROF'L CONDUCT r. 3.130 (2008); *see also* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 543 n.246 (2008).

[168] *See* William C. Heffernan, *The Moral Accountability of Advocates*, 61 NOTRE DAME L. REV. 36, 54-57 (1985).

Rule 3.4 specifically prohibits a lawyer from misrepresenting evidence, "unlawfully obstruct[ing] another party's access to evidence," or making frivolous request or delays.[169] This rule includes other practices that could overwhelm an opposing party to a problematic degree.[170] These are some basic, but not exhaustive, guidelines set forth by Rule 3.4 to ensure fairness between opposing parties.

The adversarial nature of the criminal process necessarily includes procedural difficulties for the prosecutor that ensure fairness for the defendant. Not only does the prosecutor have the burden of proving their case beyond a reasonable doubt, the highest burden in the legal system, but they must also respect the individual rights reserved to the defendant.[171] The presumption of innocence means that the defense is always winning a case until the prosecution wins.[172] The defendant also need not say anything in her own defense, whereas the prosecutor must assert allegations against the accused in order to defeat the defendant's presumption of innocence.[173]

Where a public defender has an overwhelming caseload, the prosecutor may more easily circumvent the procedural difficulties, and the defendant's procedural rights, outlined above. For example, plea bargaining, which may be a priority for an overloaded defender or client who has lost faith in the abilities of her overloaded defender, effectively removes the need for a prosecutor to prove their case beyond a reasonable doubt.[174] Additionally, increasingly harsh punishments for

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[169] *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2008).

[170] *See, e.g.*, London, *supra* note 166, 838-39 (citing *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 339 (2009)) (noting that professional rules preclude civil lawyers from using the right to discovery and differing levels of financial and attorney resources to overwhelm the opposing party).

[171] *See* Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1216-17 (2003).

[172] *See id.* at 1200; *see also* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH L. REV. 329, 341-42 (1995).

[173] This reasoning is captured most clearly in the interplay of the presumption of innocence, the burden of proof, and the right to remain silent.

[174] *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84-85 (2011). Some may note, however, that plea bargaining has many benefits to an overloaded criminal justice system. *See, e.g.*, RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 4 (2011) (noting that plea bargaining often provides "extraordinarily lenient" outcomes for otherwise guilty defendants); Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 391-93, 404 (2010) (advocating for implementation of plea bargaining systems in countries facing problems with their criminal justice systems).

statutory offenses encourage more defendants to enter a plea of guilty or no contest as opposed to claiming the presumption of innocence and the right to remain silent against the prosecution's accusations.[175] In other words, the constitutional guarantees for the criminal defendant do little to protect her when her attorney is too overwhelmed by cases to actually employ them.

Also important to note is the reality that excessive caseloads for the public defender may be advantageous to the prosecution. A prosecutor's workload might be lessened if the corresponding public defender is too overwhelmed to conduct a full investigation, file various motions with the court, or otherwise fully prepare for a case.[176] However, Rule 3.4 reads as a prohibition to the prosecution from pursuing objectives that would prevent the public defender from meeting her obligations to her client even if that would decrease the work for the prosecutor.[177] This means that even if a prosecutor were inclined to take advantage of an unprepared public defender, the rules clearly set forth the inappropriateness of such action.

Despite its focus on behavior towards the opposition, Rule 3.4 is predicated on the idea that fairness in legal proceedings is more beneficial to the offending lawyer's own client.[178] This predication is useful for interrogating the appropriateness of prosecutorial charging decisions. The prosecutor's client could be considered the state or the jurisdiction in which the prosecutor operates.[179] It follows then that the

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[175] *See generally* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976) (discussing how prosecutorial plea bargaining allows the prosecutor to avoid the burdens of trial); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000) (detailing how the plea bargain has replaced the jury trial in the American criminal process). Bail also plays a significant role in the defendant's willingness to enter a guilty plea. Bail reform movements, particularly those advocating an end to cash-bail, recognize that consequences of incarceration pending case disposition are often so large that a defendant will choose to enter a guilty plea rather than remain in jail.

[176] Procedural rules do require a baseline provision of rights for the defendant and an unprepared defense attorney does not necessarily or easily dispense with those rights. If the public defender is unable to provide those, then the entire criminal process might be delayed for the prosecutor. But this is only important in the cases where the prosecutor or the court is made aware of, and believes, the public defender's claim that she is unable to meet certain constitutional and ethical thresholds.

[177] *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2008).

[178] *See* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1014 (1998).

[179] Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 895 (2018) [hereinafter *Prosecutor's Client Problem*]; *see* Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415,

duty of fairness to the opposing counsel would include not engaging in a manner that might leave the state or jurisdiction subject to wrongful conviction lawsuits or a waste of limited resources.[180]

c. Duty of Competence

While some prosecutorial behavior may disproportionately contribute to wrongful convictions, prosecutors may avoid scrutiny for such behavior due to a lack of oversight.[181] This lack of oversight means that prosecutors should be particularly sensitive to the role they can play in these unjust situations.[182] The popular belief is that there is no right to a competent prosecution, at least not one that is comparable to the right to a competent defense.[183] Prosecutors make charging decisions behind the scenes — rarely facing scrutiny and sometimes with evidence that is not readily available to the public — and are entrusted to act properly and in keeping with their community's

468-69 (1993); Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1, 22-23 (1992).

180 *See, e.g.*, Miranda v. Clark County, 319 F.3d 465, 471 (9th Cir. 2003) (en banc) (reinstating ruling holding the county public defender liable for Roberto Miranda's wrongful conviction in a 1981 murder case).

181 *See, e.g.*, Maurice Chammah, *When the Innocent Go to Prison, How Many Guilty Go Free?: A Husband and Wife Want to Upend How We Talk About Wrongful Convictions*, MARSHALL PROJECT (Mar. 21, 2018), https://www.themarshallproject.org/2018/03/21/when-the-innocent-go-to-prison-how-many-guilty-go-free [https://perma.cc/DF8H-JQNQ] (stating that prosecutors often escape blame because "recognizing errors in prosecution is hurtful for prosecutors, and therefore bad for victims"); Alan Feuer, *Wrongful Convictions Are Set Right, but Few Fingers Get Pointed*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/nyregion/wrongful-convictions-are-set-right-but-no-fingers-get-pointed.html [https://perma.cc/T97Q-5894] ("[A]ssigning blame, at least in public, doesn't happen often — even in troubled cases."); Murray Weiss, *Wrongful Convictions in Brooklyn Due to 'Systemic Failures,' DA Says*, DNA INFO (Apr. 18, 2016, 7:19 AM), https://www.dnainfo.com/new-york/20160418/gramercy/wrongful-convictions-brooklyn-due-systemic-failures-da-says/ [https://perma.cc/H7VY-QV73] (reporting that district attorney Kenneth Thompson called wrongful convictions a symptom of "whole systemic failure, not just by prosecutors, but by judges, by defense attorneys").

182 *See* Green, *Access to Criminal Justice*, *supra* note 30, at 525. In certain contexts, the Model Rules promote a general standard of care, but the ABA has shown a willingness to provide a more specialized duty in certain contexts and for certain lawyers. We see that clearly in the criminal arena by the ABA creating special duties for the prosecutor that it continues to expand and clarify.

183 *See, e.g.*, Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 16 (2009) (discussing how prosecutorial immunity makes the attorney competence rule a theoretical one for prosecutors).

objectives.[184] This means that prosecutors, unlike public defenders, are not called to provide evidence that they possess the requisite knowledge and skills to bring a certain type of charge, or to conduct a certain type of trial, against a defendant.

The prosecutor does not have the traditional duty of competence to her own client, even though her client could be considered the state or jurisdiction which employs her.[185] Despite this, a general duty of competence, with regards to the prosecutor's practice of law, could be at risk when the jurisdiction in which she practices is marred by excessive public defender caseloads. The prosecutor serves a unique and important gatekeeping function and has a duty to "do justice."[186] Prosecutors are the system actors that initiate criminal charges, thereby triggering a host of constitutional protections and state expenditures. Some may limit this role to concerns about the admissibility of evidence and the duty to inform the opposing party about relevant information that may tend to prove innocence. But the role can also be evaluated in terms of the appropriateness or effectiveness of the overall charging practice. The prosecutor has a duty to use legal resources effectively and the failure to do so could be viewed as a violation of the prosecutor's duty of competence.[187] This requires a greater understanding of what it means to use resources effectively.

Wrongful convictions waste state, attorney, and individual resources. Not only are citizens who would otherwise continue as members of society removed from the fabric of the community, but the state may need to relitigate its claims against a newly accused person. This new litigation requires more investigation by a police department and more time spent by a defense attorney. It may even cost more than the original proceeding due to the reality that evidence becomes harder to find and to rely on with the passage of time.[188] Wrongful convictions also require

184 As stated *supra*, there is no formal designation of a client for the prosecutor. There is some scholarship to suggest that the prosecutor has an obligation to consider the community she serves in her decisions as an attorney would consider a client in any legal practice. *See, e.g.*, Joe, *Prosecutor's Client Problem*, *supra* note 179, at 900 (discussing how the community's power to elect and remove the prosecutor rightly makes the community the prosecutor's client).

185 *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2018).

186 Green, *Access to Criminal Justice*, *supra* note 30, at 527-28.

187 This is particularly true if we determine a specific client for the prosecutor, but it is still nonetheless applicable just in consideration of the prosecutor practicing law.

188 This is the underlying premise of television shows such as "The First 48" and one of the supporting arguments for speedy trial rights in criminal cases.

a new charging document or grand jury convening.[189] Finally, this new defendant will go through the same pretrial and trial or plea process that the state had already expended resources on for the previous wrongfully convicted defendant.[190] In a time of diminishing legislative budgets, prosecutors should take any legal and constitutional steps necessary to avoid having to use double resources on one offense. One way to do that is to reconsider the role that the prosecutor's charging decision has in the ability of the public defender to quickly investigate and dispose of cases that could otherwise result in wrongful convictions.

d. Duty of Loyalty

Prosecutors have strong incentives to maximize both convictions and sentences.[191] The very nature of the adversarial system requires competition, and the prosecutor's role is to present evidence that is worthy of establishing conviction or encouraging a guilty plea. This behavior is not by its very nature considered prosecutorial misconduct. However, where the prosecutor's charging practice helps the prosecutor gain wrongful convictions, it is a violation of the duty of loyalty. As the attorney for the government or jurisdiction in which the prosecutor practices, the prosecutor has a greater obligation towards justice and a fair process.

Professional rules regarding disinterested prosecutors contemplate situations where the prosecutor previously represented a defendant, but do not fully contemplate the conflicts that result from the prosecutor's own self-interest in advancement.[192] Such circumstances, however, are not the only way that a prosecutor's personal motivations might impact the practice. Each prosecutor's reputation, political ambitions, and even salary are affected by their degree of success.[193] Because of their occupation as lawyers, prosecutors have a professional interest in, at the

[189] This could take a substantial amount of time as the new defendant will require the same exercise and protection of rights as the wrongfully convicted person.

[190] *See generally* Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1033 (2015) (explaining the drained resources and other injustices that follow from wrongful convictions).

[191] Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 74 (2012).

[192] *See* Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 192-97 (2002).

[193] *See* Laurie L. Levenson, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879, 887 (2011). *See generally* Leonetti, *supra* note 191, at 69 (positing that the mechanisms by which prosecutors are evaluated for job performance create a conflict of interest).

very least, the disposition of their cases in the aggregate. When success is viewed primarily as convictions through plea or trial, then the prosecutor's self-interest can more easily play a role in charging decisions that overwhelm the public defender.[194] This may not be an absolute reality, but the perception should at least be a cause of concern for stakeholders in the criminal justice system.

The rules currently disqualify a prosecutor who has a conflict in an individual case but do not consider whether prosecutors may have conflicts in the aggregate.[195] A prosecutor's screening and charging practice necessarily impacts the breadth of representation and dispositions that are available to a public defender's clients.[196] If a prosecutor knows that charging a high number of cases will render a public defender little more than a plea machine, then the charging practice could be the result of self-interest as guilty pleas result in convictions.

Motivation to obtain more convictions solely for professional advancement may greatly diminish the prosecutor's ability to fulfill her obligation to pursue justice. While it is true that this motivation may result in prosecutors charging cases that they think they *could* win, this does not necessarily equate to charging cases that they *should* win. For example, felony drug defendants are convicted at the highest rates,[197] despite the fact that many advocates and scholars argue that non-violent drug crimes should be decriminalized.[198] Prosecutors, then, may choose to prosecute these types of crimes at higher rates despite the fact that

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[194] *See* Leonetti, *supra* note 191, at 63-64. Prosecutors may also be more likely to charge offenses in ostensibly "winnable" cases. These "winners" are designated as such when there is more readily apparent evidence of guilt.

[195] *See id.* at 66, 69-70.

[196] *See id.* at 73.

[197] *See* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 39 (1994), https://www.bjs.gov/content/pub/pdf/cfjs9403.pdf [https://perma.cc/A6VW-4DL7].

[198] *See, e.g.*, Jag Davies, *4 Reasons Why the US Needs to Decriminalize Drugs — and Why We're Closer than You Think: Drug Possession Arrests Fuel Mass Incarceration and Mass Criminalization*, HUFFPOST (July 10, 2017, 4:37 PM), https://www.huffingtonpost.com/entry/4-reasons-why-the-us-needs-to-decriminalize-drugs-and-why-were-closer-than-you-think_us_5963e1bde4b005b0fdc7926e [https://perma.cc/G6VE-G3HN] (documenting arguments for the decriminalization of drugs); Benjamin Powell, Opinion, *States Should Follow Oregon's Lead and Defelonize Hard Drugs*, HILL (Aug. 7, 2017, 8:40 AM), http://thehill.com/blogs/pundits-blog/crime/345140-states-should-follow-oregons-lead-and-defelonize-hard-drugs [https://perma.cc/VBT2-7F23] (arguing that other states should follow Oregon's lead in adopting decriminalization legislation for drugs).

this choice may directly contradict the urgings of the community they purport to represent.[199]

The very act of seeking convictions to enhance their individual reputations or maintaining their employment can be in conflict with their legally assigned duties. As the nation's highest court has unequivocally stated, the prosecutor's job is not solely to seek convictions.[200] As noted in *Berger v. United States*:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[201]

To be sure, the act of seeking convictions for negative purposes such as advancement or maintaining employment is not automatic or necessarily even prevalent among all prosecutors. Its potential existence, however, provides additional support for why prosecutors should consider public defender caseloads in their charging decisions as such behaviors implicate the prosecutor's compliance with ethical and professional rules.

B. How Caseloads Undermine Constitutional Rights

For most public defenders, their ability to provide just representation to their clients depends on their ability to provide constitutionally sufficient counsel.[202] This is why excessive caseloads can create an

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[199] *Cf.* Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895, 897 (2000) (describing the ways by which the prosecutor represents the interests of the people).

[200] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[201] *Id.*

[202] *See* Jonathan Rapping, *Redefining Success as a Public Defender: A Rallying Cry for Those Most Committed to* Gideon's *Promise*, *in* PERSPECTIVES ON *GIDEON* AT 50, at 30, 36 (2012) (stating that, in his observation as a public defender, public defenders "simply cannot give all clients the representation to which they are entitled by the Constitution,"

environment where defendants are more likely to suffer a wrongful conviction.[203] Wrongful convictions are not limited solely to circumstances where a defendant is factually innocent.[204] Instead, a wrongful conviction can occur any time a defendant is not afforded rights guaranteed to her, such as the right to the effective assistance of counsel guaranteed by the Sixth Amendment.[205] The lack of sufficient resources provides a fertile environment for legal and practical mistakes that result in erroneous convictions and may lead to Sixth Amendment violations.[206] The following Subsections detail the constitutional ramifications of a prosecutorial charging practice that overwhelms the public defender.

1. The Disappearing Adversary

Excessive caseloads create a system that is less adversarial in nature than it is administrative.[207] This is because the caseloads stretch the public defender's resources to their limits, sometimes resulting in systems where a public defender cannot possibly fully examine a client's case enough to determine if a plea is the best option. This failure of opportunity encourages both the public defender and the client to acquiesce to guilty pleas rather than risk the enhanced punishment associated with a negative disposition at trial.[208]

as they have "caseloads that are too overwhelming [and] insufficient resources with which to do their jobs"); Tina Peng, Opinion, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.bfadc7d51404 [https://perma.cc/5C7W-RF86] ("Public defenders . . . try to help our clients achieve justice in an often unfeeling legal system . . . . But the constitutional guarantee of effective representation for all has fallen short.").

[203] *See* discussion *supra* Part I.A.

[204] *See* Clanitra Stewart Nejdl & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography*, 37 N. ILL. U. L. REV. 401, 415 (2017).

[205] James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1326 n.368 (2010).

[206] *See id.*

[207] This framework oftentimes appears to clients as representative of collusion amongst the public defenders and the district attorneys, which may undermine community confidence in public defenders.

[208] *See* Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87, 89 (2010) (noting that overwhelming caseloads for the public defender also create challenging caseloads for the public defender investigator and that one guideline provides that there should be at least one investigator for every three public defender attorneys and at least one investigator for every single public defender office); Gerard E. Lynch, *Our Administrative System of*

For example, the Missouri public defender system is chronically overburdened. A 2014 study found that, to meet its caseload burden, the public defender needed to add 270 more staff to its current workforce.[209] Instead, the office lost 30 staff members and added 12% more cases to its workload.[210] These changes created individual public defender caseloads of around 150 cases at a time.[211] They also resulted in such restricted financial resources that, on average, the office could only afford to spend $350 for each client's case.[212] Although these numbers do not provide a clear analysis of the losses individual clients must bear, such a reduction in staff and increase in caseload suggests that even less is being accomplished for at least some clients than was provided at the time Missouri made its initial call for increasing public defender resources.[213]

To sum up this point, burgeoning caseloads limit the amount of time a public defender can spend on representing each of her clients.[214] A 2009 study by the National Association of Criminal Defense Lawyers revealed that public defenders in New Orleans could only afford to spend seven minutes on each client matter.[215] It also produced information that public defenders in both Michigan and Atlanta could do significantly better in terms of the amount of time an attorney could spend on each client matter.[216] This improvement, however, was still alarming as the public defenders in Detroit could only spend thirty-two minutes on each client throughout the criminal proceeding and the public defenders in Atlanta could only spend fifty-nine minutes.[217]

Criminal Justice, 66 FORDHAM L. REV. 2117, 2122-23 (1998). Empirical research has shown a reality where nine in ten state-based public defender programs and 93% of county-based programs had less than one investigator for every three litigating attorneys. Farole & Langton, *supra* note 208, at 90.

209 Domonoske, *supra* note 19; *see also* AM. BAR ASS'N, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 23-24 (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf [https://perma.cc/P69T-X7EZ].

210 Laughland, *supra* note 4.

211 *Id.*

212 *Id.* These cases also ranged from minor misdemeanors to non-capital murders. *Id.*

213 *See* Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 860-72 (2010).

214 *See* Jaeah Lee et al., *Why You're in Deep Trouble if You Can't Afford an Attorney*, MOTHER JONES (May 6, 2013), http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/ [https://perma.cc/QFD7-TU9Y].

215 BORUCHWITZ ET AL., *supra* note 13, at 21.

216 *See supra* note 214 and accompanying text.

217 *See supra* note 214 and accompanying text.

And, it appears that the caseload public defenders carry across the nation continues to hamper their effectiveness since this 2009 study. A recent study found that in Idaho, public defenders are able to spend only an average of 3.8 hours on a felony case and 2.2 hours on a misdemeanor case.[218] A 2015 survey of North Carolina public defenders revealed that 82% of surveyed attorneys reported that reduction in workload was necessary to provide adequate representation to their clients.[219] In Louisiana, the situation continues to be dire, as a 2017 study revealed that its current public defense system employs only enough attorneys to handle 21% of its annual workload.[220]

While it is true that some cases may not require extensive representation, such small amounts of time spent on each case is problematic. "Meet 'em and plead 'em" cases where the public defender meets a new client who, because they are in jail or because of other personal or professional limitations, decides to enter a plea upon meeting their attorney for the first time, require very little in the way of representative time. Note that even if the client decides to enter a guilty plea upon initially meeting their attorney and at a first appearance, the conversation between the client and the lawyer alone, where the lawyer explains the ramifications of the plea agreement, would seemingly require more than just seven minutes of preparation. This conversation should include a description of the evidence the prosecutor purports to have against the client, an explanation of the applicable law and any future court proceedings, a listing of the options available to the client, and an evaluation of the likely results should the client choose a particular option. Such a conversation would undoubtedly take longer than seven minutes even if a client choose not to go to trial. Indeed, it is difficult to imagine any scenario, whether a plea agreement or not, where so few minutes preparing for client representation would comport with professional standards of competent attorney practice.

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[218] IDAHO POLICY INST., IDAHO PUBLIC DEFENSE WORKLOAD STUDY 14 (2018), https://pdc.idaho.gov/wp-content/uploads/sites/11/2018/03/PDC-WORKLOAD-STUDY-online-version.pdf [https://perma.cc/66TN-9MJQ].

[219] *See* N.C. OFFICE OF INDIGENT DEF. SERVS., STATE DEFENDER SURVEY RESULTS: IMPACT OF BUDGET CONSTRAINTS 15 (2015).

[220] POSTLETHWAITE & NETTERVILLE & AM. BAR ASS'N, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 2 (2017), https://www.americanbar.org/content/dam/aba/images/abanews/LouisianaProjectReportFinal.pdf [https://perma.cc/PU78-S4X4].

2. The Sixth Amendment Implications

An ineffective assistance of counsel ("IAC") claim allows those whose attorneys did not adequately represent them to seek reversal of their convictions.[221] The general standard for an IAC claim requires a petitioner to prove first that their attorney made an unreasonable mistake in their case and second that this mistake prejudiced their case.[222] In other words, a successful IAC suit will require that the petitioner show that their attorney made a mistake that no reasonable attorney would make, and that this mistake changed the outcome of their case. Prosecutorial charging practices that result in high caseloads for both the defense attorney and the county that employs that attorney place both of those bodies at high risk for ineffective assistance of counsel claims.

There has been some public litigation wherein counties are being sued because public defenders across the board are providing inadequate representation.[223] In the Fresno County litigation mentioned *supra*, for example, the ACLU sued Fresno County and the state of California because public defenders were so overburdened by cases that defendants were denied a multitude of their constitutional rights.[224] One of the plaintiffs in the lawsuit did not see an attorney until he had already spent one month in jail.[225] Further, when he was finally

[221] *See* Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 936 (2013).

[222] *See* Strickland v. Washington, 466 U.S. 668, 668 (1984). It should be noted that IAC claims and the standards under which they are evaluated may oftentimes be much more complicated than this simple standard may suggest. For further reading about this standard and the claims themselves, see generally Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (examining ineffective assistance of counsel claims in the public defender context and suggesting reforms); Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007).

[223] For a comprehensive examination of some of these suits, see Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing — and Starting to Win*, ABA JOURNAL (Jan. 1, 2017, 4:10 AM), http://www.abajournal.com/magazine/article/the_gideon_revolution [https://perma.cc/K4TM-QSH6].

[224] *See, e.g.*, Marc Benjamin, *ACLU Lawsuit Says Fresno County Public Defense is Inadequate*, FRESNO BEE (July 15, 2015, 1:05 PM), https://www.fresnobee.com/news/local/article27334588.html; Gabrielle Canon, *Can a Public Defender Really Handle 700 Cases a Year?*, MOTHER JONES (July 27, 2015), https://www.motherjones.com/politics/2015/07/aclu-lawsuit-public-defense-fresno-california [https://perma.cc/4S7R-QTJD]. *See generally* Complaint, Phillips v. California, No. 15 CE-CG-02201 (Cal. Super. Ct. July 14, 2015).

[225] Canon, *supra* note 224.

afforded representation, he had met with nine lawyers between his arraignment and his sentencing, many of whom urged him to enter a guilty plea without investigating his case or determining whether there were viable defenses to his charges.[226] This alarmingly low degree of representation was common in Fresno County, as public defenders there were operating at three times the recommended caseload level.[227]

The Fresno County suit is not the only suit that subjected a county to litigation due to high public defender caseloads. In *Peart*, the defendant was assigned to a New Orleans public defender, Rick Teissier.[228] Teissier, in turn, filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources," claiming that because of his overwhelming caseload he was unable to provide constitutionally adequate defense services to the defendant, Peart, and others. The Louisiana Supreme Court considered the representation provided to Peart and to other defendants, and ultimately held that "because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants . . . are generally not provided with the effective assistance of counsel the constitution requires."[229]

Excessive caseloads not only place counties as a whole at risk of lawsuits alleging the ineffective assistance of counsel, but they also make individual public defenders vulnerable to these suits by asserting individual failures on behalf of the assigned counsel. In *People v. Jones*, for example, the public defender assigned to the defendant's case was unable to get sufficient investigatory information regarding an alleged illegal stop due to the fact that the public defender office could afford to hire only one investigator.[230] A deciding court could view this as a systemic failure. The public defender, however, also failed to contact witnesses whose names and numbers were provided to him by the defendant.[231] This could be considered both a systemic and an individual failure. The First District Court of Appeal held the public defender accountable for these failures, stating that "a public defender who believes there is a genuine basis upon which to make [a] withdrawal motion, but fails to do so, participates in the denial of his or

[226] *Id.*

[227] *See* Complaint, *Phillips*, No. 15 CE-CG-02201 at 2.

[228] State v. Peart, 621 So. 2d 780, 784 (La. 1993). For a discussion of the ramifications of *Peart* and other cases like it, see Charles M. Kreamer, Comment, *Adjudicating the* Peart *Motion: A Proposed Standard to Protect the Right to Effective Assistance of Counsel Prospectively*, 39 LOY. L. REV. 635 (1993).

[229] *Peart*, 621 So. 2d at 790.

[230] People v. Jones, 186 Cal. Rptr. 3d 745 (Ct. App. 2010).

[231] *Id.* at 753.

her client's Sixth Amendment rights."[232] The conviction of the defendant, then, was vacated.

Both the ineffective assistance of counsel suits against governments, and any potential suits or claims against individual public defenders, center on the fact that public defenders' caseloads are so high that they cannot adequately represent their clients.[233] While the suits place the blame either on the counties for not providing the necessary amount of funding to public defender offices or upon the public defenders for not withdrawing representation, they fail to acknowledge that prosecutors also shoulder some of this blame.

The choice to file a sufficient volume of criminal charges that public defenders are tasked with excessive caseloads is solely in the control of the prosecutor. And, as is clear in the aforementioned cases and others, these excessive caseloads can place both governments and individual defense attorneys at risk of being sued for IAC. The results of these suits may lead to vacating convictions and can require costly litigation on the part of the government or the public defender.[234] Because prosecutors (1) rely on county funding to exist, and (2) work to get convictions, successful IAC suits may prove counterproductive to prosecutors.[235] A county being forced to pay an inordinate amount of money to litigate IAC suits results in less available funds that may have been used to fund both prosecutor and public defender offices. Further, vacating previous convictions severely undermines previous prosecutors' efforts to attain those convictions. Therefore, not only do excessive charging practices

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[232] *Id.* at 765.

[233] For a rich discussion of this issue, see generally Craig M. Cooley & Brent E. Turvey, *Ineffective Assistance of Counsel*, *in* MISCARRIAGES OF JUSTICE: ACTUAL INNOCENCE, FORENSIC EVIDENCE, AND THE LAW (2014); R. Rosie Gorn, Note, *Adequate Representation: The Difference Between Life and Death*, 55 AM. CRIM. L. REV. 463 (2018); David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371 (2014).

[234] *See, e.g.*, Jacqueline McMurtrie, *Strange Bedfellows: Can Insurers Play a Role in Advancing* Gideon's *Promise?*, 45 HOFSTRA L. REV. 391 (2016); Alene Tchekmedyian, *After Spending 38 Years in Prison for Wrongful Murder Convictions, Man Wins $21-Million Settlement*, L.A. TIMES (Feb. 24, 2019, 3:05 PM), https://www.latimes.com/local/lanow/la-me-ln-craig-coley-simi-settlement-20190223-story.html [https://perma.cc/DG7Z-4Q57].

[235] *See* Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 25 (2011); Joe, *Rethinking Misdemeanor Neglect*, *supra* note 21, at 761-62; Primus, *supra* note 222, at 683-84 ("Many scholars and judges recognize that the number of criminal convictions that courts reverse due to ineffective assistance of trial counsel is strikingly low when compared to the frequency of ineffective assistance in practice.").

harm public defenders' abilities to do their jobs well, but those practices also harm prosecutors.

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Some scholars argue that the ideal of justice that ought to be pursued by the prosecutorial identity is varied and vague.[236] There is little disagreement, however, that a prosecutor must refrain from activities that undermine confidence in the criminal justice process.[237] The "minister of justice" ideal that describes the prosecutor's role in the criminal justice process arises from a belief that a prosecutor never loses a case provided the outcome of the case is fair.[238] This makes the prosecutor a quasi-judicial officer with a role in the system that drastically differs from that of the public defender even if a public defender, by being a member of the bar, is still considered an officer of the court.[239] This also means that the prosecutor must pursue avenues that facilitate adherence to the professional rules instead of encouraging a departure from them. The next Part discusses possible solutions to the professional and ethical shortfalls that result from excessive public defender caseloads.

III. A STRUCTURAL SOLUTION TO THE AGGREGATE PROBLEM

As detailed above, prosecutorial charging decisions have significant impact on both the public defender's and the prosecutor's ability to abide by professional and ethical norms.[240] The negative results of individual charging discretion are also most salient in the aggregate. In other words, the prosecutor should contemplate the extent to which their charging practice renders it difficult for the public defender to comply with her constitutional and ethical requirements, as this helps determine whether the prosecutor is in danger of violating her own ethical mandates. Should the enterprising prosecutor discover an increasing likelihood of rule violation, she should then adopt methods or schemes for redress.

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[236] *See* Stephens, *supra* note 48, at 63; *see also* David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. OF CRIMINOLOGY 451, 464 (2018) (noting that "expectations for prosecutors are varied and conflicting").

[237] *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49-50 (1991) (defining justice and the prosecutor's duty to seek justice in the criminal process); *see also* MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2008).

[238] Medwed, *Preaching to the Unconverted*, *supra* note 158, at 39-40.

[239] *Id.*

[240] *See supra* Part II.

There are structural systems already in place that provide a framework for a type of prosecutorial practice that considers the public defender's caseload. By taking advantage of the ABA's existing metrics for determining too-high caseloads, the prosecutor has the ability to determine that the public defender is overwhelmed. And, if she finds this to be the case, both the courts and existing prosecutorial discretion mechanisms provide solutions to that problem.[241]

A. Measuring Problematic Charging Practices

There is no guarantee that prosecutors will make a decision that is sensitive to the public defender if they are ordered to consider public defender caseloads in their charging decisions.[242] While professional rules require attorneys to engage in a practice of law that is both respectful and considerate of an opponent's ability to practice law ethically, the combativeness of the prosecutor and the defense attorney is apparent in many jurisdictions. Because of this historical combativeness, a metric that would help a prosecutor determine that their charging practice has overwhelmed the public defender would be useful in ensuring a just process.

The ABA has provided some guidance for caseload issues in the past that may serve as a viable framework for developing a way to measure the appropriateness of the prosecutor's charging practice. In 2015, the ABA provided caseload guidelines for public defenders in Texas.[243] In doing so, the ABA utilized what it called a "weighted caseload study," by which it determined "guidelines for establishing a maximum allowable caseload for a criminal defense attorney that . . . allows the attorney to give each indigent defendant the time and effort necessary

[241] This Article recognizes the need for more funding but does not examine that issue at length due to the substantial existing discourse regarding that issue. For in-depth examinations of the need for increased public defense funding, see generally Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, 51 LAW & SOC'Y REV. 313 (2017); John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253 (2017); Guyer, *supra* note 16, at 340; Ogletree, *supra* note 135.

[242] *Cf.* Mitchell Pearsall Reich, *Incomplete Designs,* 94 TEX. L. REV. 807, 814-17 (2016) (outlining how institutional decisions are delegated to downstream actors and explaining that, when this occurs, the initial problem sought to be corrected by redesigning the institution may remain).

[243] *See* DOTTIE CARMICHAEL ET AL., PUB. POLICY RESEARCH INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS 3 (2015), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_04_texas_study_full_report.authcheckdam.pdf [https://perma.cc/UT7H-HX66].

to ensure effective representation."[244] From this study, the ABA developed formal caseload recommendations for each level of defense attorney.[245]

These caseload recommendations represent a potential threshold for determining whether a public defender is overwhelmed. Should the public defender's caseload exceed the maximum recommendations, they should inform the court and the prosecutor of this fact. Any of these actors would possess an ethical responsibility to inform the state bar. Upon calling attention to the problem, the state bar could move further by providing declaratory relief. Such declaratory relief may come in the form of either allowing the public defender to refuse further appointment until their caseload is reduced. This declaratory relief could also serve as a warning to the corresponding prosecutor's office and result in more targeted charging decisions. If a prosecutor's office knows that the state bar has indicated an awareness of the problem and a willingness to accept allegations of misconduct associated with it, the office may be more inclined to pursue avenues for reducing the cases it accepts for the criminal process.

Any system that adopts a more cohesive approach to criminal justice, wherein the prosecutor considers the public defender caseload in her charging decisions, would also need a system for reviewing public defender decisions that would still pass constitutional muster. Public defenders could take advantage of prosecutors who pursue such paths for respecting the public defender's ethical obligations by extending cases far beyond their ordinary completion dates. Perhaps, a jurisdiction could use data and other assessment tools to determine the ordinary or regular length of case dispositions for a variety of cases to guard against such gamesmanship. This data could then be used by the prosecutor when considering whether her charging decisions are placing the public defender at risk of ethical and professional violations or if the public defender herself is engaging in dilatory schemes.[246]

B. Sanctions for Rules Violations

State bar associations could assume a significant position in policing the implementation of prosecutorial strategies to minimize public

[244] *Id.* at 9.

[245] *Id.* at 34.

[246] This might also be difficult if a particular dilatory scheme would benefit an indigent defendant. In such a situation, however, the public defender could be at risk of violating ethical rules concerning her behavior with the court and respecting the court process.

defender caseloads. This would be a necessity in many jurisdictions as courts are especially ill-equipped to manage caseload issues. For instance, in some jurisdictions the judicial branch serves as an umbrella for the jurisdiction's provision of indigent defense services yet can encounter significant barriers due to its role as neutral decision-maker.[247] Judge Clifford Wallace, for instance, writes that, in the midst of the caseload crisis, judges must "stand separate from the political process."[248] The state bar, on the other hand, is a body that regulates the practice of law in each state and that may, therefore, participate more fully in criminal justice reform efforts.

As discussed *supra*, prosecutorial charging practices may contribute to, if not force, public defenders to commit rules violations because of their inability to manage caseloads that are, in large part, determined by prosecutorial bodies.[249] Therefore, there is a very real possibility that, under Model Rule 8.4, a prosecutor may be culpable for knowingly assisting or inducing public defenders to commit rules violations.[250] And, because of this, prosecutors who do not consider public defender caseloads in their charging decisions may be subject to sanctions by their state bar associations.[251]

However, it is important to consider what state bar monitoring of prosecutorial charging practices would look like. While disciplinary measures are implemented at the state level, all states generally follow the same procedure for evaluating claims of attorney misconduct.[252]

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[247] *See* Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 982-83 (2008).

[248] J. Clifford Wallace, *Tackling the Caseload Crisis: Legislators and Judges Should Weigh the Impact of Federalizing Crimes*, 80 A.B.A. J. 88, 88 (1994).

[249] *See supra* Part I.

[250] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2008).

[251] While it is important to note that no action alleging misconduct by a prosecutor in this way has occurred, there is a cause of action, though rarely used, for discovery violations on the part of prosecutors. *See generally* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 UC DAVIS L. REV. 1059 (2009); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV 693 (1987); David E. Singleton, Brady *Violations: An In-Depth Look at "Higher Standard" Sanctions for a High-Standard Profession*, 15 WYO. L. REV. 139 (2015). This cause of action, like that proposed in this Article, may serve a deterrence function that provides "a valuable pedagogical lesson for junior attorneys, and at the same time signal[s] to judges that they are dealing with prosecutors who need to be monitored more carefully." Gershowitz, *supra* note 251 at 1104-05.

[252] *See* Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CTR. FOR PUB. INTEGRITY (Jan. 24, 2018), https://publicintegrity.org/accountability/misconduct-and-punishment/ [https://perma.cc/KZF4-DGAL].

Upon receiving a complaint, the judicial body responsible for the regulation of lawyers then initiates an investigation to determine whether there is probable cause to believe that misconduct occurred.[253] If the body concludes that this standard is met, then it may either proceed to trial to determine whether an attorney actually violated the model rules or, in the case of minor misconduct, dispose of the issue without a full trial.[254] At the trial, a lawyer may receive disciplinary sanctions if it is found by clear and convincing evidence that they have committed misconduct.[255]

Rule 8.4 states that an attorney commits misconduct when that attorney *knowingly* assists or induces another attorney to commit misconduct.[256] Therefore, if a state bar were to require prosecutors to modify their charging decisions upon a finding, by their standards, that the public defender is operating above the recommended caseload, they may enforce this requirement through this rule. In other words, once a prosecutor *knows* that the public defender is likely committing ethical violations due to an increased caseload, it will become their own ethical duty to ensure they are not assisting in this ethical violation. If they do not modify their charging practices, then, sufficient grounds could exist to proceed with disciplinary proceedings against that prosecutor.

This framework is both proactive and reactive. Because prosecutors will be conscious that their charging decisions may subject them to sanctions, they may engage in proactive mechanisms to reduce caseloads.[257] For example, they may realign their charging practices to charge only crimes that their office determines are important.[258] Or, they may choose to offer more favorable plea deals earlier on in the

[253] *See* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 16 (AM. BAR ASS'N 2017).

[254] *See* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 11 (AM. BAR ASS'N 2017).

[255] *See id.* r. 18(c).

[256] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2008).

[257] For a rich discussion of the ways that prosecutorial accountability may be increased through deterrence measures, see generally Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573 (2017).

[258] In light of the recent attention that criminal justice system reform has been getting, many prosecutorial bodies are being encouraged to stop charging certain crimes. For example, a 2018 report from the MacArthur Foundation indicates "some crimes should not be crimes, and some felonies should not be felonies." MACARTHUR FOUND., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE 13 (2018). It cites public sentiment and encourages prosecutors to use their discretion when deciding whether or how to charge crimes like prostitution, drug trafficking, and grand theft. *See id.*

litigation process.[259] Additionally, this framework allows for a means by which mandates about prosecutorial charging decisions can be enforced.

C. Avoiding Sanctions by Joining the Public Defender

Another way that prosecutors could avoid unconstitutionally or unethically contributing to the public defender caseload crisis while still maintaining some separation of their dual, and often competing functions, would be to join in public defender motions that seek relief from the courts because of excessive caseloads. In fact, one could read the Model Rules and the prosecutor's individual obligations to require the prosecutor to join in those motions.[260] At the very least these rules could require prosecutors to refrain from opposing the motions, as recognition that they should facilitate the public defender's ability to comply with ethical rules.[261]

Despite the adversarial nature of the criminal justice system, prosecutors actually have a rich history of supporting the rights of criminal defendants.[262] In their *amicus curiae* brief in *Gideon v. Wainwright*, for example, the Massachusetts Attorney General, joined by his Assistant Attorney General, argued passionately in favor of

[259] However, it should be noted that this practice may also lead to innocent individuals entering into plea deals simply to avoid worse consequences down the line. Gershowitz & Killinger, *supra* note 152, at 290-91.

[260] *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2002) (noting the special duties of the prosecutor and providing commentary about the prosecutor's role to safeguard the defendant's procedural rights).

[261] One might argue that there is an equal protection problem with this proposed solution. Ostensibly, criminal cases that could otherwise go forward would be dismissed because the defendants were poor. This means that wealthy defendants who do not have access to the public defender would not be subject to the same treatment. Whether or not this would rise to the level of an equal protection violation is beyond the scope of this Article. Regardless, the solution to a potential violation would be to develop a mechanism for facilitating the same basis for decision-making for wealthy defendants who may be subject to the same unethical representative process as an indigent client represented by an attorney with an overwhelming caseload.

[262] One can look to the historical underpinnings of *Gideon* for a clear example. Before the Supreme Court issued its decision in *Gideon* affirming an indigent felony defendant's right to counsel at the state's expense, thirty-five states had already captured that obligation in their regulatory guidelines. Bruce A. Green, Gideon's *Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?* 122 YALE L.J. 2336, 2340-41(2013) [hereinafter Gideon's *Amici*]. With the case pending before the Court, twenty-three attorneys general — the chief prosecutors and law enforcement officers of a state — joined to submit an amicus brief in support of the indigent defendant's right to counsel. *Id.* at 2340. This rest of the paragraph details this process.

ensuring indigent defendants the right to counsel.[263] Their argument that the right to appointed counsel was both fair and feasible was so persuasive that more than twenty other prosecutorial bodies joined in their brief.[264] Noted ethics scholar Bruce Green theorizes that the Attorneys' General involvement in the *amicus* brief is symptomatic of the fact that "publicly expressing honest, balanced views about how the law should develop is a legitimate role for state attorneys general and district attorneys."[265] And, while involvement such as that of the prosecutors in *Gideon* has never been repeated,[266] prosecutors continue to show support for criminal defendants in other ways.

In Philadelphia, for example, Larry Krasner, a lifelong civil rights attorney, was elected as the District Attorney in 2017.[267] Upon entering the office, he immediately altered the policies and procedures "in an effort to end mass incarceration and bring balance back to sentencing."[268] Execution of these policies included immediately firing thirty-one deputy district attorneys, instructing the remaining attorneys to cease charging marijuana offenses and prostitution-related crimes, and, perhaps most groundbreakingly, to begin plea bargaining with the most lenient sentencing deal.[269]

And, such behavior on the part of District Attorneys is growing increasingly prevalent. These types of philosophies have been endorsed by district attorney candidates for across the nation.[270] The now former

[263] *See* Brief for the State Government Amici Curiae as Amici Curiae Supporting Petitioner at 2-3, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), 1962 WL 115122.

[264] *See id.*

[265] Green, Gideon's *Amici*, *supra* note 262, at 2343.

[266] For a rich discussion about the *amici* in *Gideon* and prosecutorial involvement in defendants' rights since, see generally *id.*

[267] Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 12:59 P.M.), https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/ [https://perma.cc/3ZE7-LJG7].

[268] Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration [https://perma.cc/CP6D-Y338].

[269] *See id.* The office now requires its line prosecutors to "state on the record their reasons for requesting a particular sentence, and to identify the unique benefits and costs of that sentence, including safety benefits, the impact on victims, interruption of defendant's connections to family, employment, needed public benefits, and the actual financial cost of incarceration." *Philadelphia District Attorney Advances Criminal Justice Reforms*, EQUAL JUSTICE INITIATIVE (Mar. 19, 2018), https://eji.org/news/philadelphia-district-attorney-advances-criminal-justice-reforms/ [https://perma.cc/EC4R-FRHN].

[270] *See* Trey Bundy, *Prosecutor Candidates Support 'Restorative Justice'*, N.Y. TIMES (Sept. 17, 2011), https://www.nytimes.com/2011/09/18/us/prosecutor-candidates-support-restorative-justice.html [https://perma.cc/MS28-UF4J].

District Attorney of San Francisco, George Gascón, noted that alternative sentencing programs are important because "the social impact [of incarceration] has been resonating with some for many years."[271] Kim Foxx, District Attorney for Cook County, also embodied this notion. Running on a reformist platform, Foxx ultimately made good on several of her promises, including reducing overcharging and increasing voluntary dismissals.[272] These examples, then, indicate that we may be entering a new era of prosecutors who advocate consideration of the criminal defendant to a higher extent. It remains to be seen, however, just how effective these progressive leaders are in making the changes to the justice system that they seek.[273]

In *Brady v. Maryland*, the Supreme Court summarized the beliefs underlying this prosecutorial support for the defendant's ability to obtain a fair process when it held that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair, our system of the administration of justice suffers when any accused is treated unfairly."[274] Even as many prosecutors strive to live up to this principle, unjust processes continue to plague the criminal justice system. This is perhaps because prosecutors inadvertently, or unknowingly, fail to recognize the role their charging decisions play in creating and perpetuating the public defender caseload crisis.[275]

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[271] *Id.*

[272] *See* Maya Dukmasova, *Kim Foxx Gets a Report Card*, CHI. READER (Dec. 7, 2017, 4:27 PM), https://www.chicagoreader.com/Bleader/archives/2017/12/07/kim-foxx-gets-a-report-card [https://perma.cc/SX3Y-28CW].

[273] For a review of Larry Krasner's first year in office, see Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html [https://perma.cc/HUB3-G5XV].

[274] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[275] *See, e.g.*, Baxter, *supra* note 125 (examining the impact of the budget crisis on indigent defense but failing to mention anything about prosecutors); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (exploring the dark side of misdemeanor decriminalization while remaining silent upon the issue of whether the prosecutor can play any role in decreasing the number of misdemeanor cases); Taylor E. Whitten, Note, *Under the Guise of Reform: How Marijuana Possession Is Exposing the Flaws in the Criminal Justice System's Guarantee of a Right to a Jury Trial*, 99 IOWA L. REV. 919 (2014) (examining the effects of marijuana decriminalization on indigent defense but not mentioning the role of prosecutors). In September 2016, the United Kingdom's daily newspaper, *The Guardian*, teamed with the Marshall Project to issue a three-part series detailing the human toll of America's public defender crisis. *See* Laughland, *supra* note 4. It described how decades of budget cuts had left public defenders with extraordinary caseloads and the nation's poor with a grossly unequal and inadequate representative in the criminal justice system. The article was noticeably

Although our criminal justice system is an adversary system, the prosecutor's fundamental identity as a minister of justice requires her to practice in a way that maintains fairness and the orderly administration of justice.[276] This requirement, and the complications that excessive charging practices add to the public defender's ability to comply with ethical and professional norms, encourages the prosecutor to support the public defender in endeavors that improve the criminal process while still maintaining her separate identity as the state's primary executive arm.

The Public Defender for the Eleventh Circuit of Florida could have benefited greatly from a prosecutor who assumed this proposed position. In July 2008, the Eleventh Circuit Federal Public Defender applied for relief from excessive caseloads to the local trial court.[277] The office of the public defender claimed that its caseload had reached a level where it found it difficult to comply with the Sixth Amendment mandate for the effective assistance of counsel.[278] The public defender presented testimony from its general counsel, two assistant public defenders, and an expert witness to fully convey their caseload crisis.[279] The Eleventh Circuit prosecutor then appeared on behalf of the state to oppose the motions.[280] The judge denied the prosecutor status as a party to the litigation but did permit the prosecutor to file an amicus brief asserting her opposition to the public defender's motion for relief.[281] The prosecutor, however, was permitted to fully participate in all court proceedings, including the evidentiary hearing.[282]

Fighting against a public defender's assertion that caseloads are too high does not seem to be in keeping with the prosecutor's duties to refrain from encouraging another attorney to violate ethical duties. Nor does it seem consistent with the prosecutor's role as caretakers of a fair criminal process. Instead, the prosecutor in the Florida example should have accepted the public defender's claims that he had reached caseload capacity and encouraged the court to grant the motion. At the least, the

silent on the prosecutor, failing to turn a critical eye towards the role of the prosecutor in the public defender caseload problem. *Id.*

[276] *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2008).

[277] Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261, 261 (2013).

[278] *See id.* It is important to note that a public defender who may violate the Sixth Amendment would not necessarily violate professional and ethical rules although the absence of effective assistance of counsel suggests the absence of competent representation.

[279] *Id.* at 284.

[280] *See id.* at 265.

[281] *See id.*

[282] *See id.*

prosecutor should have remained on the sidelines and allowed the public defender to make its case without treating it like an adversarial proceeding in which the prosecutor was attempting to "win" in the caseload discussion.

The prosecutor's unwillingness to grant or agree with the public defender's assertion that their caseload was overwhelming may have been a result of their own concern about future proceedings.[283] One could argue that, if the public defender is not able to represent indigent defendants, the criminal justice system could grind to halt.[284] An indigent person charged with a criminal offense that risks jail as punishment is entitled to the effective assistance of counsel.[285] If counsel is not available, then the prosecution of that defendant can be held in abeyance until counsel becomes available provided the delay does not infringe upon other constitutional rights such as the defendant's right to a speedy trial.[286] If the prosecution is paused for too

[283] The lack of support by the prosecutor may also be because excessive caseloads compromising the public defender's ability to comply with professional ethics are not the sole creation of prosecutorial charging decisions. A declining economy at the turn of the 21st century led to lower state budgets than normal. *See* Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/ [https://perma.cc/GQS7-3WH8]. In response to dwindling state funds, public defender institutions commenced attorney layoffs and hiring freezes that drastically affected the caseload per attorney in some offices. *See* Rudovsky, *supra* note 233, at 373-74. Nevertheless, an increase in cases brought by prosecutors further compounded this caseload problem. *See, e.g.*, *Complex Court Filings Continue to Rise*, CAL. CTS. (Sept. 22, 2015), http://www.courts.ca.gov/33183.htm ("Felony filings increased by 4 percent in fiscal year 2013–14 . . . ."). Whether it was purposeful or simply ignorant of the public defender staffing troubles, these prosecutors continued to bring forward cases with little regard for the impact they would have on the public defender's ability to comply with critical professional and ethical rules. The Sections *infra* detail each of these fundamental rules.

[284] *Cf.* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/JVZ2-LJHE]. Scholars like Michelle Alexander have actually called for something like this proposal in response to mass criminalization, although her argument is to force every case to go to trial. Under her theory, the criminal justice system only operates because defendants waive their procedural rights, opting to enter a plea of guilty rather than take their criminal court matter to trial. If defendants did not waive their rights and demanded each benefit that is constitutionally afforded to them, for example the right to counsel, the right to confront your accuser, and the right to a speedy trial, the criminal justice system would "crash" much like any overloaded entity. *Id.*

[285] John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 3 (2013).

[286] *Id.*

long, then speedy trial rights may lead to complete dismissal of otherwise warranted criminal charges.

It is true that cases could be dismissed, much to the dismay of those who perceive our criminal justice system as already too lenient, but that reality does not necessarily have to prevent reform from occurring. The enterprising prosecutor could take a larger view of her approach to her practice that prevents any dismissed cases from including behavior that is too harmful to the public. If the prosecutor prioritized pursuing the criminal process for certain offenses, then she could ensure that the public defender is not overwhelmed by having to provide representation for improper citizen behavior that could be addressed through other legal institutions. Additionally, if crime begets crime, because of the criminological effect certain convictions create, then using other mechanisms to address certain behaviors could reduce the overall crime rate.[287] This possibility, at the very least, suggests that prosecutors should consider a new more collaborative approach to their charging decisions.

There are examples of prosecutors working with public defenders, however, to improve defendant representation. In 2011, the process by which a defendant's case was randomly assigned to one of the thirteen judges at Orleans Parish Criminal District Court went under review.[288] The Orleans Public Defenders had noted that the traditional way that the court assigned cases to particular judges made it difficult for public defender to engage in vertical representation, the practice of representing a client from the start of the legal proceedings until the disposition.[289] Public defender best practices list vertical representation as the ideal way to staff cases.[290] In contrast to vertical representation, horizontal representation assigns different attorneys to different stages of legal proceedings.[291] This can include one attorney handling the defendant's representation pre-formal charging, another handling motions hearings, and yet another handling a defendant's trial. Vertical

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[287] *See* David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1952 (2012).

[288] Laura Maggi, *Orleans Criminal Judges, Prosecutors, Defenders Squabbling over Case Assignments*, TIMES-PICAYUNE (Jan. 11, 2011, 5:15 AM), https://www.nola.com/news/crime_police/article_14b0c732-37db-5ec9-ac8a-77143b86dca6.html [https://perma.cc/M4VT-G9KR] [hereinafter *Orleans Criminal Judges*].

[289] *See id.*

[290] *See* AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002).

[291] Joe, *Systematizing*, *supra* note 21, at 414; *see also* David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 985 (2001); Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1254-55 (2006).

representation allows an attorney to more easily develop a strong relationship with a defendant and pursue various paths to the defense because the attorney is not required to familiarize herself with the case at different stages.[292]

Maintaining vertical representation in New Orleans before the 2011 review was difficult as cases were not assigned to a specific courtroom until formal charging took place.[293] Formal charging could occur up to 120 days after arrest.[294] Once the case was assigned to a courtroom, the public defender responsible was required to litigate the case in any of the thirteen courtrooms.[295] Assignment at arrest could mean that a public defender would find themselves responsible for defendants in all thirteen courtrooms, which added the physical exertion of transitioning from room to room and judge to judge to an already taxing caseload. In 2011, the public defenders and the prosecutors joined in concert to request a change to court rules whereby a defendant would be assigned to a specific courtroom at arrest and that judge would maintain jurisdiction of the case throughout the life of the proceeding.[296]

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[292] Vertical representation on the defense side has proven beneficial to the defendant in maintaining the constitutional right to the effective assistance of counsel. This assignment process could be similarly beneficial if pursued by the prosecution. In federal court, a prosecutor may work in conjunction with federal agents to investigate and prepare a case against an alleged criminal actor. This type of vertical representation common in federal court could be applied at the state level. A prosecutor would inform the police about the individual elements of the violated law and then instruct the agents on how to execute search warrants and comply with other procedural safeguards. She would then take any evidence obtained by the police and seek an indictment by a grand jury before pursuing a conviction on the government's behalf for the duration of the charges against the defendant. State courts that use screening mechanisms can prove more reactive than involved with the police investigative process. It is true that state criminal offenses often occur before police attention, and prosecution is not instituted until later in the process than the types detailed in federal court.

[293] *See* Maggi, *supra* note 288.

[294] *See* LA. CODE CRIM. PROC. ANN. art. 701 (2010).

[295] *See* Maggi, *Orleans Criminal Judges*, *supra* note 288.

[296] *See id.* Interestingly, vertical representation could also prove helpful to the prosecution. There is a certain degree of difficulty for victims who navigate the criminal justice process alone. Although the prosecutor is litigating a claim that involves them, a victim has no legal representation in criminal court proceedings. They may not understand their rights or role in the criminal process and may be forced to converse with many different prosecutors as a case is adjudicated over months or years. This is particularly true for cases involving domestic violence. Domestic violence cases are notoriously difficult for prosecutors because of the victim's tendency to recant or unwillingness to cooperate. This could be due to the victim's belief that he or she is alone in navigating the complex judicial system. This mentality of isolation is likely only exacerbated when a victim is assigned different attorneys at different stages in the early parts of the criminal process. If the initial stages of the criminal process were

In response to the joint move by the prosecutor and public defender, the criminal district court judges took a public position in opposition to this rule change.[297] These judges cited the potential arbitrary increase to each judge's workload as the primary reason for their opposition.[298] This move by the judges was particularly interesting because it created an environment where the chief public defender and the district attorney joined together against the bench to seek a procedural shift that would streamline operations and help cases move more efficiently throughout the system. The combined effort of the public defender and district attorney institutions proved successful later that year, and the judges agreed to adopt the formal case assignment system championed by both parties.[299] It is true that cooperating to change the case process is very different than agreeing not to charge cases, but this joint effort by the prosecution and the defense in Louisiana can serve as a model to locate other areas of agreement that could lessen the caseload burden.

D. Pursuing a Client's Choice for Prosecution

Instead of charging a broad swath of offenses, prosecutors could turn to a targeted practice that considers more accurately the offenses or offenders that most plague the communities they serve and focuses their charging decisions on those offenses. Targeted prosecution is a more natural remedy than other operations because it would encourage the prosecutors to engage in a more formal probable cause determination.[300] Once a public defender realizes that their caseload has

handled by the same prosecutor, then it might help the victim by establishing a more structurally sound relationship with the attorney involved in prosecuting her alleged assailant.

297 *See id.*

298 *See id.*

299 Laura Maggi, *Criminal District Court Changes Case Distribution Rules at Request of DA and Public Defenders*, TIMES-PICAYUNE (May 8, 2010, 12:55 AM) https://www.nola.com/news/crime_police/article_52b2929c-68b3-5fc4-84b3-40098942fdb1.html [https://perma.cc/4LBG-NHQB]. Another example arose in Alameda County, California. In that jurisdiction, Superior Court officials proposed a plan to realign the jury pool process that would be hugely hurtful to defendants. Alameda County District Attorney Nancy O'Malley joined the public defender in opposing this change and the plan was eventually abandoned. Angela Ruggiero, *Plan to Assign Jurors to Any Alameda County Courthouse for Misdemeanor Cases is Scrapped*, EAST BAY TIMES (May 22, 2018, 11:01 AM), https://www.eastbaytimes.com/2018/05/22/plan-to-assign-jurors-to-any-courthouse-for-misdemeanor-cases-is-scrapped/ [https://perma.cc/CX2H-46AX].

300 In his book *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, Professor John Pfaff contends that prosecutors and not the increase in drug convictions has led to America's burgeoning prison population. Pfaff points to perverse incentives for prosecutors whereby success is measured by convictions and not,

reached an excessive number that violates national guidelines, the prosecutor would then pursue other avenues for addressing the social harms they would ordinarily seek to prosecute in criminal court.[301]

However, one may argue that selective prosecution risks violating constitutional law.[302] Due process and the equal protection clause

necessarily, societal improvement. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 7 (2017). An enterprising prosecutor could look to other measures to evaluate the value of individual prosecutors. For example, if prosecutors were assigned cases by type of alleged offense, then statistical measures on the reduction of crime in a particular jurisdiction could be a useful metric. This would reflect the joint effort of both the police and the prosecutor in community law enforcement. If prosecutors measure their efficacy by a reduction in crime and not the number or percentage of convictions, it could shift charging decisions in a way that reduces public defender caseloads. Prosecutors would use their charging discretion to focus on the offenders that have the highest risk of recidivism or the largest impact on the ongoing nature of crime in the community. Criminal court caseloads currently hover at approximately 80% misdemeanors. *See* NATAPOFF, *supra* note 13, at 2. This prosecutorial emphasis may rest on misdemeanors as the most prevalent crimes in the community; conversely, it may focus on repeat offenders or decision-makers higher in the chain of command who contribute to increased crime in the community.

301 Misdemeanors seem to be a good starting point for targeted prosecution. These lower level offenses have garnered an extraordinary amount of attention in the last decade. Scholars have noted the prevalence of misdemeanor convictions that have resulted from broken windows theory policing. They have also shown the bevy of consequences on various parts of the criminal justice system. Public defender caseloads have grown exponentially because of expanded misdemeanor dockets. Convicted persons have also had to face a second-class citizenry because of the collateral consequences associated with misdemeanor convictions. Professor Eisha Jain even noted that in many cases, a conviction is not even necessary to initiate serious consequences for some misdemeanors. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 809 (2015). The arrest alone can initiate immigration consequences and limit access to public benefits. *Id.* at 824-44. Interestingly enough, the Model Rules are silent about the prosecutor's duties to a particular client. The author has a forthcoming piece in the Boston University Law Review that details the prosecutor's client dilemma and the ethical rules that can be implicated by the charging decisions a prosecutor can make in consideration of her client's objectives.

302 One concern of targeted prosecutions is preventing personal biases from playing a role in the decision to charge a defendant. *See* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM L. REV. 1071, 1085 (1997). To prevent this from occurring, the particular policies of a prosecutorial office should be stated formally and be consistent with the aims of the community the prosecutor serves. Any client gets to determine the extent of the work they seek a lawyer to complete on their behalf so it follows that the community the prosecutor litigates on behalf of should have a say in what cases are prioritized. This insight does not need to be provided through a formal notice and comment period as per administrative law, although such a period could be useful. Instead, the election process could serve as the community's comment on its stated goals.

prohibit discrimination based on suspect classifications.[303] One could argue that a prosecutor seeking to reduce the public defender caseload may be operating in a way that is discriminatory or infringes upon the rights of another group, namely those defendants who can afford to hire private counsel would not benefit from the strategic prosecutorial decisions to alleviate the public defender's caseload.

However, this argument is unfounded for several reasons. First, if implemented correctly, targeted prosecution should involve being selective about which types of crime to prosecute across the board, and not merely in the case of public defender clients. Further, prosecutorial discretion is a fundamental and accepted part of our criminal justice process.[304] Legislatures enact a multitude of criminal statutes and it is the prosecutors who determine which of the available cases go forward in the criminal process. This, in some ways, comports with available resources as arrests are only available when police officers are available to make arrests and charges are only filed when prosecutors are available to file charges.[305] But within those, the prosecutor still has the protected ability to determine which, if any, charges go through the criminal process. In fact, most of these decisions are shielded from public view. In many ways, as the shield from public oversight demonstrates, our system of laws prefers this discretion.[306] Selective enforcement is a common, expected, and necessary component of the criminal justice process.[307]

The Orleans Parish District Attorney gives us a prime example of how collaborative efforts with the public defender that depend on the

303 *See* Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 691 (2008) (describing how due process and equal protection protect against discrimination based on suspect classifications).

304 Poulin, *supra* note 302, at 1072.

305 *See id.* at 1084.

306 *See id.* at 1080-81 (discussing the backlash of federal sentencing guidelines as limiting prosecutorial discretion).

307 *See* Gifford, *supra* note 44, at 666. Perhaps prosecutors could instead de-prioritize victimless crimes — the status offenses and drug possession crimes that often clog prosecutor and public defender dockets. The criminal justice system may not set overt ranking systems with regards to crimes, but a look at potential punishments set forth by the legislature could provide a window into what offenses are most concerning to the community. Crimes involving violence and multiple offenders are assessed the highest punishment. If prosecutors prioritized bringing charges against defendants who were facing subsequent offenses or defendants who had committed a crime of violence against another person that could reduce overall caseloads for the public defender to a more manageable level. Such a move would also likely find support among a public that is both fearful of crime and frustrated with the costs of the criminal justice system.

prosecutor can change upon actions by non-public defender entities. In December 2016, the Orleans Parish District Attorney reversed a four-year decision of prosecuting state misdemeanors in municipal court, a move that had previously reduced delays and incarceration for defendants charged with misdemeanor offenses.[308] This change was made in reaction to the city council's decision to reduce the district attorney's budget by $600,000 after disagreeing with the district attorney's charging practices.[309] This reduction amounted to 10% of the prosecutor's budget.[310]

This move by the prosecutor was a stark reminder of the role that politics play in prosecutorial administration and the lack of control that public defenders have when the prosecutor has unbridled charging authority. At the time of the initial move to prosecuting these offenses in municipal court, the district attorney argued that misdemeanors could be resolved quickly and efficiently in the secondary court, reducing the strain on resources throughout the criminal justice system, including the defense attorney.[311] Shifting misdemeanors back to state criminal court reintroduced screening prosecutors, and their subsequent delays, to the misdemeanor process.[312] For a period of time,

[308] *See* John Simerman, *Orleans DA Moving State Misdemeanor Cases to Criminal Court After City Budget Cut*, NEW ORLEANS ADVOC. (Dec. 15, 2016, 7:30 PM), http://www.theadvocate.com/new_orleans/news/courts/article_e7e66312-c31a-11e6-b751-2ff3a84f4e70.html [https://perma.cc/C47V-844L].

[309] The practices that the city council disagreed with included the district attorney's approach to the prosecution of juveniles, "reliance on habitual-offender sentencing laws," and prosecutorial tactics used to compel witnesses to testify. *See* Matt Sledge, *New Orleans City Council, DA Trade Barbs Over Budget; Cannizzaro is 'Fearmongering,' Councilman Charges*, NEW ORLEANS ADVOC. (Sept. 20, 2017, 1:59 PM), https://www.theadvocate.com/new_orleans/news/politics/article_d4f2d8ca-9e35-11e7-b4fe-63ddc449084d.html [https://perma.cc/6L2K-43RR]. It should be noted, however, that this budget decrease is set to be reversed in the 2019 fiscal year, with the intention that the funds be used to "bolster the district attorney's pretrial diversion program." Michael Isaac Stein, *DA to Use Most of City Budget Bump for Prosecutors, Not Diversion Program*, LENS (Nov. 20, 2018), https://thelensnola.org/2018/11/20/da-to-use-most-of-city-budget-bump-for-prosecutors-not-diversion-program [https://perma.cc/C2K6-JW9L]. However, despite the intention for the funds, District Attorney Leon Cannizzaro has since said that he will not use the majority of the funds for the diversion program and will instead use it "to keep very qualified, skilled, and experienced personnel in the office." *Id.*

[310] *See* Stein, *supra* note 309.

[311] Simerman, *supra* note 309.

[312] These screeners can sometimes take up to a month to determine if a case should go forward and are statutorily permitted to take up to forty-five days if a person is incarcerated and up to ninety days if a person in not incarcerated. This delay increased not only the amount of time a defendant is part of the criminal process but also increased the amount of time a particular case remains in the public defender's caseload.

the Orleans District Attorney engaged in a practice that lessened the caseload burden for the Orleans Public Defenders, but almost as quickly returned to the practice that had proven so difficult in the past in response to a third party's decision.[313] This situation serves as a warning that any changes should be controlled by institutions that are not influenced by non-court actors.

While it is certainly difficult to reconcile society's view that crime must not go unpunished with limiting the number of cases a prosecutor may charge, some basic changes in charging principles may be a step in the right direction. Larry Krasner's efforts in Philadelphia provide a viable framework.[314] In charging crimes, Krasner forbids his office from pursuing charges for (1) marijuana possession, no matter the weight; (2) sex workers; and (3) retail theft under $500.[315] Krasner also created a panel that meets with the public defender's policy director to work towards implementing other systemic changes.[316] These efforts, while still preserving many charges that may be important to the public, would decrease public defenders' caseloads in a massive way and better ensure that defendants receive constitutional representation.[317]

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313 In a future article, the author will develop metrics for measuring the prosecutor's success. These metrics will go beyond the rate of conviction or dismissal to include the health and stability of the community that the prosecutor represents.

314 Maura Ewing, *Philadelphia's New Top Prosecutor is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018, 5:47 PM), https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html [https://perma.cc/52RL-4TXD].

315 *Id.*

316 *Id.*

317 It is important to note that Krasner's election to district attorney occurred at a juncture in the history of Philadelphia in which citizens of that city were particularly interested in criminal justice reform. Journalist Ben Austen notes that prior to Krasner's election, "a commitment to criminal-justice reform [had] come to pervade the city." Austen, *supra* note 273. Other parts of the country which are particularly concerned about criminal justice reform are also seeing election of progressive district attorneys. In North Carolina, for example, Satana Deberry, whose campaign centered upon "a culture change in the prosecution of crimes by addressing racial bias" beat out the incumbent candidate in her county's 2018 election. Lara Bazelon, *Should the Movement to Oust Bad Prosecutors Go After Judges Next?*, SLATE (June 1, 2018, 5:50 AM), https://slate.com/news-and-politics/2018/06/the-criminal-justice-reform-movement-comes-for-the-san-francisco-judiciary.html [https://perma.cc/ZYZ4-8AML]. And, cities such as Oakland, San Diego, Charlotte, Dallas, Baltimore, and St. Louis have seen similar candidates. *Id.* However, it should also be recognized that this sort of change occurs for a variety of reasons. For an extensive examination of issues that may affect the public's desire for change, see generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (describing how both conservative and liberal voices promote criminal justice reform but actually do so for different reasons). In Philadelphia, for example, City Councilman Curtis Jones Jr., the

CONCLUSION

Prosecutorial charging practices that overwhelm the public defender place our adversarial system's hallmark of balance and protection of the defendant's core rights at risk.[318] Even though one formal mark of an acceptable criminal justice system concerns constitutional compliance, the legal profession and its ethical guidelines provide an additional important tool for evaluating prosecutorial decision-making.[319] It is the prosecutor's responsibility and ethical duty to refrain from engaging in practices that overwhelm the public defender.[320] Only when a prosecutor acts in this manner can they comply with national and state ethical guidelines while maintaining the executive function in the criminal justice system.

There is a general duty upon the prosecutor not to formally introduce too many cases into the criminal process where there is a finite number of lawyers available to represent the opposing party. This is particularly the case when such lawyers are required to represent the opposing side. The professional and ethical rules consider this duty for individual attorneys but have yet to apply it in the aggregate to prosecutorial charging decisions. Public defenders are in the unique position of having to represent whatever number of cases the prosecutor brings before them.

Perhaps the prosecutor's duty to seek justice is simply a duty to avoid sanctionable misconduct, not to treat individual defendants fairly.[321] One could argue that no professional rule clearly requires the prosecutor to consider the positioning of the public defender institution. If so, that is a failure on the part of the ethical guidelines. The prosecutor has a duty to pursue justice. This obligation requires her to consider how her discretionary charging power undermines that pursuit. This Article premises its theory on more than just the individual rights of the defendant and the duties the public defender owes to each individual client to include the duties that the legal profession places on the system actors at the institutional level. Considering public defender caseloads in charging decisions is plausible and achievable.[322] Prosecutors can anticipate potential problems for the

co-chairman of the Special Committee on Criminal Justice Reform states, "I've got two kinds of colleagues on the council: tree-hugging, thug-loving liberals who want to save souls and fiscal conservatives who want to save budgets." Austen, *supra* note 317.

318 *See supra* Part II.A.

319 *See supra* Part II.A.

320 *See supra* Part II.B.

321 Green, *Access to Criminal Justice*, *supra* note 30, at 520.

322 *See supra* Part III.

public defender. This would allow for greater adherence by both sides to ethical and professional rules and a noteworthy solution to the mass incarceration problem. This type of prosecutorial intervention is a necessary supplement to existing proposals to reform a modern criminal justice system that occupies a unique space in history because of its size and scope.