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OVERLOADED PROSECUTORS

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Prosecutors across the United States often are assigned many more cases than they can competently handle. In this column, we first look at the prevalence of such prosecutorial overloading. We then describe the negative practical consequences such overloading is likely to have on defendants, victims, and the public. Finally, we examine the perverse impact such heavy caseloads are likely to have on prosecutorial ethics, undermining adherence to the many critical ethical obligations we place on prosecutors.

The fact that public defenders in many parts of the country often are assigned a much larger caseload than they can competently handle has long been recognized and given a great deal of attention. Academics have created an extensive scholarly literature both documenting and lamenting the lack of public funding that results in these caseloads. This literature has thoroughly and thoughtfully analyzed the many negative practical and ethical consequences of underfunding and overloading public defenders. Defender caseloads also have been the subject of multiple lawsuits. At times, overloading has led public defenders to stage protests to draw attention to how case overloads negatively affect their ability to represent their clients. For example, lawyers with the State of Missouri Public Defender System’s Kansas City office “showed up en masse” to a court hearing in October 2017 “to express their unhappiness over being appointed to take on new cases while laboring under crushing caseloads.” (Dan Margolies, *Kansas City’s Public Defenders Stage Courtroom Protest over Caseloads*, KCUR 89.3, Oct. 19, 2017, <https://tinyurl.com/y8k4ubwe>.)

Maximum annual caseload targets of 150 felonies or 400 misdemeanors for full-time public defenders, first established by the National Advisory Commission on Criminal Justice Standards and Goals in 1973, have long been endorsed by scholars, organizations concerned with the criminal justice system, and the criminal defense bar. No such caseload limitations for individual prosecutors have been established or endorsed. But the defense caseload targets described above provide a useful frame of reference in assessing the magnitude of the overloading of individual prosecutors in various parts of the United States, in some places as high as 1,500 felony cases per year—10 times the maximum target accepted for an individual public defender. The most severe overloading tends to take place in large cities that experience the largest number of annual criminal filings.

In contrast to the overloading of public defenders, the excessive prosecutor caseloads have received little attention and created little criticism or comment. One exception is an excellent article by Adam Gershowitz and Laura Killinger. (*The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. L. REV. 261 (2011).) This article prompted us to devote this column to prosecutorial overloading and its consequences. We have relied on it in writing this column and recommend reading it to anyone interested in further exploring the issues raised in this column.

The Problem

The data gathered for and set forth in the 2011 Gershowitz and Killinger article are disturbing, to say the least. Here is some of what they found. In Harris County, Texas, individual prosecutors were found to be handling an average of 1,500 felonies a year with 500 felony cases open at any one time. In Cook County, Illinois, individual prosecutors averaged 800 to 1,000 felony and misdemeanors a year, with 300 felonies open at any one time. A prosecutor in Clarke County, Nevada, where Las Vegas is located, handled 800 felony and misdemeanor cases a year.

Items in the news recently indicate that such overloading has not been resolved. Rather, it may well have become exacerbated in recent years by budget cuts in some counties and cities. An October 23, 2017, *Chicago Tribune* article, for example, reported that Cook County officials were proposing a 10% budget cut to both the Cook County State's Attorney and Public Defender offices, compounding existing overloading. (Steve Schmadeke, *Public Defender, State's Attorney Raise Alarm About Steep Cook County Budget Cuts*, CHI. TRIB. (Oct. 23, 2017), <https://tinyurl.com/yapgw7lw>.) Both Cook County State's Attorney Kim Foxx and Cook County Public Defender Amy Campanelli complained that these cuts would leave both offices woefully underfunded. State's Attorney Foxx stated that from 2010 to 2017 her office was reduced from 1,000 to 719 prosecutors, a 25% loss. In Dane County Wisconsin, the district attorney's office has added only one new prosecutor in 33 years, despite adding nearly 200,000 more residents. (*No New DA Office Prosecutors for Dane County Despite Shortage*, CHANNEL3000.COM (Feb. 23, 2018), <https://tinyurl.com/ycu6tcff>.) The Wisconsin State Assembly recently funded more prosecutors for counties operating below 79 percent of recommended staffing, but under the state's staffing scheme Dane County does not stand to gain another prosecutor. (*Id.*)

The Effects

One might initially think that underfunding and overloading prosecutors would only benefit those violating the law. For example, lack of prosecutorial resources simply might result in fewer cases being brought and fewer people being arrested, charged, and convicted. If so, some people engaged in criminal activity might escape detection, apprehension, and prosecution. While criminals are likely to see this as a boon, such under-prosecution of crimes is disheartening and demoralizing to the public in general and crime victims in particular, causing them to lose respect for the criminal justice system and be less likely to cooperate with police and prosecutors.

The prosecution, though, may respond to lack of resources in ways other than simply lowering the number of cases handled, ways that are clearly not positive for most criminal defendants. Having too few prosecutors and too many cases pressure—even require—prosecutors to adopt what might be termed “mass production” methods for processing cases rather than tailoring the handling of each case to its facts and merits. Under such a system, prosecutors will

routinely lack enough information about each case to figure out who is guilty and who is innocent. For those who plea or are found guilty, overloaded prosecutors often will be unable to determine a proportional sentence. When prosecutors adopt mass production methods for disposing of cases, disproportionately severe sentences are imposed on some defendants and disproportionately lenient sentences, on others.

Excessive prosecutorial caseloads have other harmful effects on case dispositions. Without adequate investigation and information, prosecutors cannot know, for example, when a defendant is or is not deserving of diversion or assignment to a drug court.

Prosecutors have a constitutional obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to disclose material exculpatory evidence to the defense. A serious psychological barrier already exists to prosecutors fulfilling this obligation. Confirmation bias makes both prosecutors and police less likely to look for and to recognize exculpatory evidence. In other words, when prosecutors and police believe a defendant is guilty, as they typically do, they will tend to look for information that confirms and ignore information that contradicts that belief. When prosecutors are overloaded and denied the time and resources to investigate cases fully, the impact of confirmation bias is compounded. The combination of confirmation bias and unduly heavy caseloads also increases the attractiveness of prosecutors insisting on waiver of disclosure of *Brady* material as a condition to a negotiated guilty plea in order to avoid having to look for evidence that might show the defendant is innocent.

Overloading prosecutors inevitably results in delays in case dispositions. Such delays greatly increase the chances of innocent defendants pleading guilty. An innocent person who is charged with an offense and is poor will be incarcerated pending trial in many parts of the country because he or she cannot make bail. Such a person, who faces further pretrial delay in addition to a possible prison sentence after conviction, is under tremendous pressure to falsely plead guilty if offered a sentence of time served. Some may resist, but many will be unable to because of the financial and psychological pressures to falsely condemn themselves in order to gain their freedom. Nonetheless, such plea offers are attractive to overloaded prosecutors eager to reduce their caseloads.

Pressure for the innocent to plead guilty is compounded when overloaded prosecutors inevitably resort to additional bargaining tactics that put severe pressure on both the innocent and the guilty alike to plead guilty. Often these tactics are aimed at increasing the “sentencing differential,” also known as “the trial penalty,” between the likely outcome after trial versus the outcome after a guilty plea. For example, prosecutors can create great pressure on both the innocent and the guilty by recommending a very lenient sentence if the defendant pleads guilty or a very severe sentence after trial; for example, by charging or threatening to charge offenses that carry a severe mandatory minimum. These tactics are likely to result in some innocent defendants pleading guilty simply to avoid the possibility of a harsh mandatory minimum sentence. These tactics are likely to result in some guilty defendants receiving unduly severe sentences because they took their cases to trial and other guilty defendants receiving unduly light sentences for entering guilty pleas rather than going to trial.

How are overloaded prosecutors likely to fare when plea bargaining tactics fail and they are required to try a case? Without adequate investigation and preparation, the likelihood of them being effective advocates at trial is greatly reduced. They will lack the time to prepare opening statements, closing arguments, and direct examinations. They often will be unable to meet with and prepare witnesses, evaluate credibility, and spot potential testimonial weaknesses. Without

time to prepare, the chances of effective cross-examination of defense witnesses decrease. Similarly, the ability to assess the need for and to obtain expert testimony is undermined.

Many prosecutors with excessive caseloads will realize the barriers they face in being effective at trial. They simultaneously will be more willing to negotiate guilty pleas and in a greatly weakened position in doing so. Lawyers who are less willing to try cases because, due to lack of investigation and preparation, they lack confidence in their ability to do so are much more likely to offer unduly lenient plea bargains.

Overloaded prosecutors are also much less likely to be able to meet with the victim and other witnesses to obtain information useful in evaluating the strength of the case and relevant to ascertaining a proportional sentence. They are also less likely to have the time to keep victims informed and to give them the opportunity simply to be heard, impeding the process of healing for victims and creating in victims both anger at and disrespect for the criminal justice system.

As the previous paragraphs strongly suggest, the overloading of prosecutors has serious negative impacts on the public. Public protection and respect for prosecutors and police are compromised when the guilty are not convicted or receive disproportionately lenient sentences. Public respect also is diminished when the innocent are convicted, as the work of The Innocence Project and its various progeny around the country have shown happens much more frequently than many believed prior to the development of DNA evidence. The public also loses respect for the criminal justice system when the guilty are given disproportionately severe sentences. The public focus on and criticism of “mass incarceration” are driven in large part by disproportionately severe sentences, particularly in drug cases. As discussed above, the overloading of prosecutors greatly increases the chances of the innocent being convicted and the guilty receiving disproportionately severe sentences, especially if they take their cases to trial.

Ethical Ramifications

Competence and Diligence

Model Rules 1.1 and 1.3, respectively, set forth the ethical duties of competence and diligence. As their placement at the very outset of the Model Rules strongly suggests, the obligations to act competently and diligently are the most fundamental and pervasive ethical obligations of a lawyer. Though it appears after competence in the Model Rules, diligence is a necessary precursor to competence. Without the adequate factual investigation and legal research diligence requires, it is impossible for a lawyer to act competently in virtually any situation, whether in the context of counseling or of civil or criminal litigation. Prosecutors are no exception.

It is obvious to any conscientious lawyer, especially one with criminal trial experience, that it is simply impossible to handle 100 cases competently at the same time, much less 300 or 500, as prosecutors in some counties do. Such caseloads make adequate factual investigation, legal research, and basic trial preparation, such as the prosecutor interviewing and evaluating the credibility of potential trial witnesses, in all cases impossible. Therefore, prosecutors operating with these sorts of caseloads simply cannot fulfill the duty of diligence, which in turn compromises their adherence to the duty of competence.

Disclosure

Prosecutors have an ethical duty to disclose exculpatory information that is cognate to the constitutional obligation under *Brady v. Maryland*, described above. This ethical duty is broader than the constitutional obligation. It applies in the context of plea negotiations, has no materiality

limitation, and encompasses all exculpatory information, not just admissible evidence. The same factors that make overloaded prosecutors less likely and less able to fulfill their constitutional disclosure obligation equally undermine fulfillment of their ethical disclosure obligation.

Expediting of Litigation

Prosecutors, like all other lawyers, are ethically required under Model Rule 3.2 to expedite litigation. For the reasons described above, unduly burdensome caseloads make it virtually impossible for prosecutors to meet this obligation.

Delays in litigation due to overloaded prosecutors are harmful both to the accused and to victims. If the defendant is innocent but unable to make bond, the defendant may be incarcerated for a long time before the case is dismissed or the defendant found not guilty. Lengthy delays also undermine victims' views of the criminal justice system by postponing closure and healing.

Conclusion

The most important legal and ethical mandate for prosecutors is to seek a just resolution of a criminal case. This requires prosecutors both to protect the innocent and to prosecute the guilty. It also requires prosecutors to seek appropriate, proportional sanctions for those who are guilty. As both the Gershowitz and Killinger article and this column have shown, overloaded prosecutors are much less likely to be able to fulfill this mandate. Indeed, overloaded prosecutors are often simply unable to fulfill it.