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Sacrificing Quantity for Quality: Better Focusing Prosecutors' Scarce Resources

Stephanos Bibas
University of Pennsylvania, sbibas@law.upenn.edu

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SACRIFICING QUANTITY FOR QUALITY: BETTER FOCUSING PROSECUTORS' SCARCE RESOURCES

Stephanos Bibas[*]

Adam Gershowitz and Laura Killinger rightly explore an important problem that prosecutors face: they are spread too thin trying to prosecute too many cases. Their thoughtful, well-written article is an important contribution to the field and usefully complements the burgeoning literature on the underfunding of criminal defense. As they argue, prosecutorial overwork harms justice in any number of ways. It delays cases, frustrates victims, makes it harder to spot and free innocent defendants, and impedes lowering punishments for sympathetic defendants.[1]

The root problem, however, is not so much a matter of underfunding of prosecutors' offices as it is a matter of skewed priorities and metrics of success. Prosecutors need not pursue every legally supportable charge. They enjoy discretion in deciding which cases to pursue, which charges to file, and which pleas to offer and accept. Though they have that discretionary power, too often they do not think strategically about using it. Indeed, individual prosecutors often reactively prosecute the cases that come before them, instead of proactively setting priorities and focusing on system-wide tradeoffs. Many offices lack hierarchies or office policies that meaningfully direct line prosecutors' efforts. The problem, evinced by the framing of Gershowitz and Killinger's article, is that prosecutors and the public measure prosecutorial success mostly in terms of the number of cases filed and convictions won. Throwing money at this problem would only pour fuel on the fire, encouraging prosecutors to widen their nets in the inexhaustible sea of potential cases.

A surer solution is to refocus prosecutors' efforts to make the best use of inevitably limited money. For instance, as Gershowitz and Killinger rightly point out, prosecutors pay too little attention to victims and communities, failing to solicit their input and take them seriously.[2] We must move from worshipping quantity to prizing quality. Prosecutors need

[*] Professor of Law and Criminology, University of Pennsylvania School of Law. Thanks to Adam Gershowitz, Laura Killinger, Josh Bowers, and the editors of the *Northwestern University Law Review Colloquy* for the opportunity to engage in this conversation.

[1] Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263–65 (2011) (link).

[2] *See id.* at 264–65, 292–97.

to focus not just on *what* to do but also *how* to do it: fairly, respectfully, and effectively.

America's criminal-justice politics are indeed pathological, as the late Bill Stuntz famously argued.[3] Legislatures collude with prosecutors to create new, broad, and overlapping crimes, which gives prosecutors a menu of charging options for a wide array of old and new offenses. Thus, expansive criminal-justice legislation leads to the familiar complaint of overcriminalization.

In a world of overcriminalization, limited budgets are not all bad. The silver lining is that prosecutors cannot possibly pursue all of the new crimes that their legislative allies have created. Resource constraints and scarcity can force prosecutors to rank priorities, mitigating in practice the problem of overcriminalization on the books. Limited funds thus are not a bug but a design feature: they check prosecutors from prosecuting the entire universe of people who are technically guilty of something but do not especially deserve conviction and full punishment. The value of pursuing crimes is a declining curve, and at some point the costs of extra enforcement will exceed the benefits. One cannot know a priori what the optimal level of funding is—that requires much finer-grained data about what crimes prosecutors would pursue if given more money. It seems plausible that budgets are too tight in many places. But the optimal funding level is much less than would be required to try every single alleged crime. That is particularly true because an extra dollar spent on criminal justice is a dollar less for other programs. At some point, criminal justice's bottomless appetite must give way to other needs.

More generally, overall percentages and statistics alone do not tell the full story. Gershowitz and Killinger repeatedly mention violent crimes, correctly implying that some kinds of cases count more than others.[4] But statistics, even Gershowitz and Killinger's own statistics, often lump cases together.[5] Prosecutors rightly feel pressure to prosecute most of the crimes listed on the FBI's index (murder, rape, robbery, burglary, arson, aggravated assault, larceny, and auto theft). But they also pursue a wide range of narcotics cases that cause varying degrees of harm. Street-corner and crack-house drug sales, for example, often blight neighborhoods with violence and signs of decay, as do the smuggling and distribution that precede them. In contrast, discreet sales may have fewer harmful effects. One could draw the same contrast between street-corner prostitution and internet escort services. Yet prosecution and conviction statistics mask whether we are using our drug-enforcement dollars wisely, as we would by focusing primarily on the former cases but not the latter. Community input,

[3] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19, 529–39 (2001).

[4] *See, e.g.*, Gershowitz & Killinger, *supra* note 1, at 263, 271, 287, 288, 296, 298.

[5] *See, e.g.*, *id.* at 268 tbl.1.

and not arrest statistics alone, ought to shape these decisions. Similarly, we would not want to live in a police state that inexorably enforced every law against speeding, jaywalking, littering, false statements, and the like.

Even for crimes that manifestly should be prosecuted, much more matters than the mere fact of prosecution. Gershowitz and Killinger rightly point out that underfunding not only leads to delays and overcrowding, but also impedes sorting the worst defendants for the worst punishment, turning over exculpatory evidence, and working with victims.[6] Again, all of these costs are hidden by quantitative metrics of success. Gershowitz and Killinger begin the process of bringing them to light, but we need a much better empirical handle on the severity of these problems.

The difficulty seems to be a variation on the old joke about the drunk who dropped his keys by the front door but looked for them over by the lamppost because that is where the light was the best. Prosecutors and voters focus on a handful of quantifiable, objective metrics, such as the number of prosecutions and convictions, and imagine each of these cases as some hypothetical violent or serious crime. As Josh Bowers's response points out, however, the more typical and numerous cases are low-level misdemeanors, such as quality-of-life offenses.[7] Now, prosecutors cannot simply stop prosecuting all misdemeanors; these charges help to keep our neighborhoods safe, orderly, and clean. But neither do they need to prosecute each one to the hilt simply because there is enough evidence to do so. The charge may be easy to file and the conviction easy to obtain, yet prosecutors can lighten their own workloads by proactively differentiating within this category of cases. Is the offender a known recidivist? Is there a better way to stop the public drunkenness, urination, or littering—say, by trying Alcoholics Anonymous before jail? Or, conversely, was this offender behaving in a violent or belligerent manner, such that tougher-than-usual treatment is fitting?

Gershowitz and Killinger's article is written from the perspective of the overburdened line prosecutor who is up to his eyeballs in cases. But scholars should broaden their field of vision to take in a synoptic perspective. First, supervisory prosecutors matter a great deal, even though Gershowitz and Killinger discount their importance because they do not carry large caseloads of their own. Supervisors are in the best position to compare office priorities and workloads and to adjust intake, screening, deferral, diversion, and dismissal policies to ease workloads. As Ronald Wright and Marc Miller have shown, by carefully screening out weak cases at intake, supervisors can reduce the pressure to plea bargain at all costs.[8]

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[6] *See* Gershowitz & Killinger, *supra* note 1, at 263–64, 279–82, 288–89, 292–93.

[7] Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads*, 106 NW. U. L. REV. COLLOQUY 143, 150 (2011) (link).

[8] Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–33, 67–76 (2002).

Prosecutorial screening also forces police to prepare by doing better up-front investigation and sorting of cases before bringing them, which should disproportionately protect possibly innocent defendants facing weak evidence.

Second, supervisors should calibrate their policies and priorities to the views of their office's constituencies: namely, the local residents who elect district attorneys and need to cooperate with their offices. The community-prosecution movement promised to do this, but it has largely failed to deliver the goods. Neighborhood residents can help police and prosecutors focus on crimes that cause substantial harm and sow fear, in addition to identifying the range of productive responses to them. The media can better publicize the kinds of crimes prosecutors are targeting and the alternative programs, such as deferred prosecution, diversion for drug treatment, and restitution, that are available for less serious offenses.

Third, Gershowitz and Killinger are absolutely right to lament how excessive caseloads harm victims by speeding up individual cases without keeping them abreast and letting them speak their piece.[9] As I argue elsewhere, victims ought to be much more central to criminal justice, as they are most directly injured and thus have concrete stakes in both substantive outcomes and procedures. Having been demeaned by crimes, victims deserve more empowerment in criminal justice, which includes plenty of notice and opportunities to voice their views.[10] Victims do not automatically demand the heaviest sentences, and if the system treats them respectfully, they may gladly agree to alternative dispositions for more minor crimes, instead of traditional prosecutions to the hilt. Victim input can also help prosecutors see the specific injuries inflicted and dangers posed by each defendant. This will discourage prosecutors from lumping all defendants together. Some defendants need to have the book thrown at them, and victims can help prosecutors figure out which deserve more attention and more punishment.

Unfortunately, simply throwing money at prosecutors' offices would not effect these changes. It would instead encourage prosecutors to do more of the same, as long as they continue to view their main job as maximizing case processing. Line prosecutors would proceed on auto-pilot, prosecuting larger quantities of cases without doing much more to include victims and community input. Instead of trying to squeeze drops of efficiency out of the system—doing more with less—we need to rethink what we are doing and why. Our criminal justice system has become a plea-bargaining assembly line, and more money will simply speed up the machinery. Conversely, the current financial crisis is an opportunity to rethink whether we want to keep paying for ever-longer sentences for ever-more people, or how well we can differentiate scary, dangerous, violent

[9] *See* Gershowitz & Killinger, *supra* note 1, at 292–93.

[10] STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE ch. 4 (forthcoming 2012).

felons from the many lower-level offenders. Indeed, we cannot say a priori that more prosecution is better prosecution. Prosecutors should measure their success not just in numbers of prosecutions and convictions, but in victims' and communities' satisfaction and feelings of safety. Those constituencies may rightly demand some quality-of-life enforcement, but they can help prosecutors balance the benefits of enforcement against the substantial costs of prosecution and imprisonment. Victims may also be satisfied with face-to-face conferences, restitution, and apologies for more minor offenses, freeing prosecutors to spend time on more serious cases.

There are many ways to include victims and communities in prosecution. Face-to-face meetings, as well as eBay-style reputational feedback surveys of victims and communities, can appraise past performance and encourage prosecutors to ensure satisfaction in the future. Line prosecutors could learn how to improve their own performance. Supervisory prosecutors could use feedback as part of performance evaluations in awarding raises and promotions, counteracting the bean-counting tendency to focus solely on convictions and docket size. And the media, as well as challengers to incumbent district attorneys, could do a better job of making these measures of satisfaction issues in electoral campaigns.[11]

Although my proposed solutions differ greatly from those offered by Gershowitz and Killinger, they address the same problem. Their article is a welcome reminder that criminal justice is about justice, more broadly conceived, and in many ways our system slights justice as it speeds cases along its assembly line. Speed kills, or at least it deadens us to the price we pay and what is going on along the way. I applaud their contribution to this conversation and hope that policymakers will notice and respond.

[11] I have developed these ideas elsewhere. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 989, 991–92 (2009) (link).