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## EXCESSIVE CRIMINAL JUSTICE CASELOADS: CHALLENGING THE CONVENTIONAL WISDOM

*Jerold H. Israel\**

Since the mid-1960s, no element of the criminal justice environment has received more attention and been accorded greater importance, in both popular and professional commentary, than has the pressure of heavy caseloads. The lack of sufficient resources to deal with overbearing caseloads has been widely characterized as the most pervasive and most critical administrative challenge faced by police, prosecutors, public defenders, and courts.<sup>1</sup> National commissions have regularly complained that the criminal justice system is “overcrowded, overworked, [and] undermanned,” and must be given “substantially more money” to cure those ills if it is ever to perform all of the tasks assigned to it.<sup>2</sup> Academicians have maintained that expectations for the process will never be met so long as it is “confronted by quantitative demands that exceed the capacities of its resources and procedures” and leave it “groan[ing] under a stifling and increasing weight of numbers.”<sup>3</sup> Administrators have rated excessive caseloads as their “number one” problem,<sup>4</sup> and have warned that the weight of caseloads have placed the

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1. No mention is made of corrections only because the caseload difficulties faced by corrections agencies are somewhat distinct. I do not mean to suggest that they also do not face caseload pressures. *See, e.g.*, Christopher J. Mumola & Allen J. Beck, *Prisoners in 1996*, in U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN 8 tb1.10 (NCJ-164619, June 1997) (stating that state prisons in the 1990s have operated between 116-118% of the highest measure of their maximum capacity and 124-131% of the lower measure of their maximum capacity).

2. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* x, 12-13, 281-82 (1967); *see also* NATIONAL ADVISORY COMMISSION ON THE CAUSES OF AND PREVENTION OF VIOLENCE, *STAFF REPORT: LAW AND ORDER RECONSIDERED* 286-87 (1969); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: *A NATIONAL STRATEGY TO REDUCE CRIME* 95 (1973) (recommending “decriminalization, screening, and diversion” to reduce caseloads). The American Bar Association’s Special Committee on Criminal Justice in a Free Society took a similar position in its report. *SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY*, ABA, *CRIMINAL JUSTICE IN CRISIS* 39 (1988) (stating that more resources must be allocated to the criminal justice system).

3. Francis A. Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 818 (1977); *see also* Edward Barrett, *Criminal Justice: The Problem of Mass Production*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 85 (Harry Jones ed., 1965).

4. *See* Stephen Gettinger, *Assessing Criminal Justice Needs*, in U.S. DEPARTMENT OF

system "on the verge of collapse."<sup>5</sup> Political leaders have even suggested that excessive caseloads have contributed to an increase in crime.<sup>6</sup>

The conventional wisdom on excessive caseloads holds caseload pressures largely responsible for a variety of administrative shortcomings found at almost every stage in the criminal justice process. Supporters of the conventional wisdom do not claim that any one of those shortcomings is present everywhere (although some arguably are to be found in the vast majority of at least mid-sized and large-sized urban communities). As might be expected in an administrative structure dominated by localism, administrative cultures of different communities have produced a variety of ways of coping with the pressures of heavy caseloads. The conventional wisdom simply maintains that all of these shortcomings can be found in at least a fair number of communities, that

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JUSTICE, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF 2 (June 1984) ("Overcrowded institutions are the end product of a tidal wave of cases that has flooded all agencies in the criminal justice system. When asked to name the most pressing problem facing their own agency, administrators generally cited their version of the same phenomenon. Variations on the response 'Too large a caseload' were given by prosecutors, public defenders, court officials, and heads of probation and parole departments. Police talked about having too few officers.").

5. Hinds, *Philadelphia Justice System Overwhelmed*, N.Y. TIMES, Aug. 15, 1990, at 1; see also Kaufman, *Crisis in the Courts*, CAL. LAW., Aug. 1990, at 28; *The Criminal Court: A System in Collapse*, N.Y. TIMES, June 26, 1983, at 1.

6. See, e.g., 121 CONG. REC. 34386 (1975) (statement of Sen. Edward Kennedy).

The result in all too many cases is that "crime does pay." Even if the policeman on the beat catches up with you, the courts will let you go. Of the 730,000 adult felony arrests in New York in the past decade, only 31% were indicted; of those indicted, only 33% were convicted; and of those convicted, only 38% were sentenced to jail. You do the arithmetic. The extraordinary result is that 97% of all adults actually arrested for a felony in New York were filtered through the law enforcement system and escaped a prison term.

. . . .  
The reason for these astounding figures has almost nothing to do with noble principles like the presumption of innocence or noble goals like the rehabilitation of offenders. The reason is court congestion. . . . Defendants are processed at breakneck speed through a system where bargains must be offered at every turn if the system is to stay afloat—what bail can be agreed to, what hearing can be postponed, what charge can be dismissed, what plea bargain can be made, what sentence can be suspended? . . .

Effective crime control requires much more than that. The vast majority of criminals are rational. They play the odds. Effective deterrence requires that the odds must be reduced. A prospective criminal must believe that if he is caught, the chances are high that he will be swiftly and surely punished.

*Id.*

all are a product, at least in part, of the excessive caseloads, and that taken together, they prevent the process from performing as it should.<sup>7</sup>

Caseload pressure is said to have its initial impact in a variety of investigative omissions, driven by costs, that result in many offenders escaping prosecution. Police departments, for example, will refuse to carry investigations of misdemeanors (and even of some felonies) beyond filling out a crime report unless the offender was caught in the act or was identified by a witness. When investigations are carried forward, resource limitations make certain more costly investigative techniques (e.g., random interviewing of persons in the crime vicinity and careful inspection of the crime scene for forensic traces) available only for the most serious crimes. So too, it is argued, for all but the most serious offenses, police commonly make little more than a superficial attempt to locate known offenders who have fled or are "missing." Limited resources force police departments to leave apprehension of the offender in such cases to the chance that the offenders will "fall into their laps" as a result of a traffic stop or an arrest on another matter.

After police have made an arrest, the pressures of excessive caseloads are shifted to the prosecutors. Caseload limitations are said to force prosecutors to restrict prosecutions for misdemeanors and non-violent felonies to cases in which there is such a high probability of establishing guilt that the case can be characterized as "slam dunk" or "open and shut" (or very close to it). Other potentially winnable cases will be rejected on speculative difficulties—e.g., a witness who is likely to have a change of heart—because the docket will hold only so many

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7. This contention is supported by a series of studies that examine criminal justice administration as practiced in specific large and mid-sized cities. *See, e.g.*, THOMAS W. CHURCH, JR., EXAMINING LOCAL LEGAL CULTURE: PRACTITIONER ATTITUDES IN FOUR CRIMINAL COURTS (1982); JOHN E. ECK, SOLVING CRIMES, THE INVESTIGATION OF BURGLARY AND ROBBERY (1985); JAMES EISENSTEIN ET AL., THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS (1988); JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); FLOYD FEENEY ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY (1983); ROY B. FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES (1992); PETER W. GREENWOOD ET AL., THE CRIMINAL INVESTIGATION PROCESS (1975); JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980); NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES (James J. Alfini ed., 1981); PETER I. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS (1988); JOHN P. RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE (1980); JEFFREY SLOVAK, STYLES OF URBAN POLICING: ORGANIZATION, ENVIRONMENT AND POLICE STYLES IN SELECTED AMERICAN CITIES (1986); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968).

cases and can readily be filled with cases that either are far stronger or involve offenses or offenders that present more serious crime control demands. In a similar vein, preliminary hearing magistrates may reject bindovers under a more rigorous standard than the legally prescribed probable cause standard in order to keep the caseload before the court of general jurisdiction within acceptable limits.

Once the decision is made to proceed with the case, the conventional wisdom holds that resource limitations immediately push police and prosecution to practices that are aimed at minimizing the effort needed to achieve a favorable disposition. Police are pushed to emphasize obtaining confessions through interrogation of the suspect because that is the shortest route to developing incriminating evidence and the route most likely to produce evidence so damning that the defendant will be left with little choice but to plead guilty. So too, because the process of obtaining a search warrant is often time-consuming, resource restraints push police in the direction of utilizing searches that generally are exempt from the warrant requirement—e.g., automobile searches—and relying upon obtaining consent of the suspect or a third party for searches otherwise requiring warrants.

As for prosecutors, major practices to obtain sanctions against offenders with limited expenditure of resources include diversion agreements and plea bargaining. The use of both is said to be heavily influenced by excessive caseloads. Pretrial diversion programs allow prosecutors to obtain dispositions in minor cases roughly similar to court-imposed probation or restitution without having to take the case through the judicial process. Prosecutors are said to use diversion to lighten their caseloads without regard to the public interest in tagging guilty offenders with criminal records and in obtaining jail sentences where appropriate.<sup>8</sup> Through plea bargaining, prosecutors can utilize concessions—or threats—to gain guilty pleas and thereby avoid trials. Of course, in some instances, as a result of a mutually agreed upon evaluation of the strengths and weaknesses of the case, a plea would be entered in any event. The extremely heavy reliance upon guilty pleas found in most jurisdictions, however, clearly exceeds that level. That

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8. Consider in this connection the complaint of a former Los Angeles Police Chief:

[I]t is a flat matter of policy that an auto theft is never prosecuted as a felony [in our jurisdiction]. Most of them are not prosecuted at all, they are "no papered" and the accused placed on probation, to avoid clogging the court's docket with stolen auto cases when it is impossible to get robbery cases tried.

MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL 69 (Charles H. Whitebread, II ed., 1970) (statement of Chief Wilson).

excess is attributed to concessions offered solely in response to caseload pressures. So too, it is noted, even in those occasional jurisdictions that do not rely so heavily upon guilty pleas, the primary alternative will be another judicial proceeding that falls short of the fully contested jury trial.<sup>9</sup> The system simply lacks the resources to provide full jury trials in all but a small portion of the caseload.

Heavy caseloads also are deemed critical in fostering judicial practices designed to promote less time-consuming dispositions. Thus, in jurisdictions in which judges have broad sentencing discretion, caseload pressures are said to contribute to sentencing patterns that convey the implicit message that concessions will be granted to defendants who plead guilty or are willing to accept a bench trial.<sup>10</sup> The implicit message further suggests that defendants who insist on lengthy jury trials notwithstanding strong cases against them will receive a harsher sentence for wasting scarce resources. Judges also are said to seek less time-consuming dispositions by reducing felony charges to misdemeanors where the likely sentence on a felony conviction would fall in the misdemeanor range, and by imposing in misdemeanor cases bail conditions that make it less costly for the defendant to immediately enter a guilty plea than to meet the bail condition and await trial.

Throughout the process, caseload pressure also is seen as contributing to "routinized" and often uninformed administrative decisionmaking. In an effort to keep the "assembly line" moving, judges and prosecutors have rejected as too costly and time-consuming a decisionmaking process that requires examination of a large mass of information and that seeks to tailor each ruling to the unique characteristics of the individual case. They have sought instead to promote managerial efficiency. They categorize offenders and offenses in general classes so such decisions as prosecutorial charging, magistrate bail-setting, and judicial sentencing can be made in a routine, fairly automatic fashion. Moreover, it is argued, in applying such generalized standards,

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9. See RAYMOND T. NIMMER, *THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN CRIMINAL COURTS* 38-39 (1978). Some of these procedures may constitute in effect, a slow plea of guilty, while others may simply be a less formal bench trial. See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1046-50, 1062-87 (1984) (concluding that, in the jurisdiction studied, a bench trial did not consume much more time than a guilty plea, as the pretrial effort was similar, and bench trials averaged 45 minutes of the court's time while the plea acceptance averaged 20 minutes).

10. In some courts, the message is conveyed by the assignment system. See HARRY SUBIN, *CRIMINAL JUSTICE IN A METROPOLITAN COURT* 113 (1966) (noting assignment to criminal division of "judges who are best able to move the calendar, primarily by guaranteeing light sentences . . . for guilty pleas," and practice of "allowing the defendant who pleads guilty to select an amenable judge").

administrators operate with "one eye on the clock and the other on the checkbook," because their performance is measured largely by their ability to keep abreast of growing dockets. The end result often is a process that is "careless and haphazard"—"decisions are made split-second, information is often incomplete, [and] inferences are drawn from negatives."<sup>11</sup>

Caseload pressure, it is argued, also produces a sense of frustration and disillusionment that adversely affects the performance of police, prosecutors, defense counsel, and judges. This effect on performance contributes, in turn, to an even more widespread loss of respect for the process. Whether innocent or guilty, a defendant is unlikely to hold in high regard a system that seems to be interested primarily in the rapid movement of cases. Victims and witnesses find frustrating a system that is likely to require them to make several trips to the courthouse and then disposes of the case without a judicial proceeding in which they participate. Courtrooms that operate in the fashion of assembly lines are not likely to convey the dignity and decorum that the public expects. A system that is frequently criticized by the media for administrative deficiencies resulting from caseload pressures, but not always explained in that light, will eventually be seen as incompetent, apathetic, and possibly even corrupt.

The conventional wisdom regarding the impact of excessive caseloads has been challenged. Initially, commentators have questioned whether all of the administrative shortcoming attributed to excessive caseloads are truly the product of caseload difficulties. They point to studies of pretrial delay and plea bargaining.

Although the conventional wisdom blames excessive caseloads for the extensive delays in the processing of cases, empirical studies have found no direct relationship between heavy judicial caseloads and lengthy delays between the filing of charges and their ultimate disposition.<sup>12</sup> While caseload size may bear upon the "complex network of interactions" that affects the speed of disposition, the impact varies considerably from one jurisdiction to another. The studies suggest that extensive delay is more the product of the shared perception of the courtroom workgroup—judges, prosecutors, and defense attorneys—that other values are more important than achieving expeditious dispositions.<sup>13</sup>

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11. Malcolm Feeley, Forward, *in* FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK COURTS xii (rev. ed. Vera Institute 1981).

12. See THOMAS CHURCH, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 24-30 (1978); MARTIN LEVINE, URBAN POLITICS AND THE CRIMINAL COURTS 226-45 (1977); NIMMER, *supra* note 9, at 85-87.

13. CHURCH, *supra* note 12, at 36-46; Carolyn Burstein, *Criminal Case Processing from*

Similarly, studies cast serious doubt on the proposition that increased caseloads lead to increased reliance on guilty pleas and therefore to increased use of sentencing or charging concessions to encourage pleas. Those studies have found no support for that proposition. These studies examined the historical fluctuations of guilty plea rates and caseloads in a single court or compared guilty plea rates and caseloads among different courts.<sup>14</sup> They indicate that the high guilty plea rates in many jurisdictions are spurred primarily by other concerns that make resolution by guilty plea appealing to the courtroom participants irrespective of the weight of their caseloads.

Commentators have suggested further that some of the same factors that contribute to delay in case processing and heavy reliance on plea bargaining, without regard to caseload, also produce many of the other practices attributed to caseload burdens. A few commentators have even been bold enough to suggest that a substantial portion of what is credited to caseload pressure just as readily reflects the effort of administrators to serve their own self-interests by maximizing outputs with a minimum effort.<sup>15</sup> A sharp reduction of caseloads, these critics note, will not be enough in itself to bring a halt to these practices.<sup>16</sup>

Challenges claiming that other factors are the true source of many of the administrative shortcomings attributed to caseload pressure are telling, but hardly decisive. That some of the same practices can be found in jurisdictions with lesser caseloads does not mean that heavy caseloads cannot force their use. Administrators may let their self-

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*an Organizational Perspective: Current Research Trends*, 5 JUST. SYS. J. 258 (1980).

14. See Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515 (1975); Peter Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. CRIM. L. & CRIMINOLOGY 89 (1979); FEELEY, *supra* note 7, at 252-77.

15. See FEELEY, *supra* note 7. Explaining why conventional wisdom would naturally prefer to place the blame on caseloads, Malcolm Feeley notes:

Whenever there is discontent there is usually a search for someone to blame. . . . [The safest course] . . . is to find . . . a *nonreactive* agency on whom blame can be placed without fear of reciprocity—to blame a *process* rather than a person. Pointing to factors beyond *anyone's* control avoids not only personal responsibility but also the possibility of retaliation and recrimination engendered by pointing to someone else. Furthermore, it is difficult to counter accusations against processes. In the administration of justice, three types of nonreactive factors have emerged as “the cause” of many problems confronting the system. Heavy caseloads, understaffing, and inadequate funding are all “enemies” which everyone can safely point to as causes for poor performance.

*Id.* at 269-70.

16. See *id.* at 271-72; NIMMER, *supra* note 9, at 21-22. See also the studies cited in *infra* note 51.



interest in minimizing effort lead to these practices even in the absence of caseload pressures. This result, however, does not mean those administrators would not be driven to the same practices by caseload pressures alone even if they were willing to devote as much effort as humanly possible. Indeed, it may well be that practices which originated out of the desire of prosecutors, police, or judges to minimize their efforts have now been continued as a practical necessity because of caseload pressures.

Similarly inconclusive are studies illustrating that jurisdictions with very heavy caseloads can nonetheless avoid some of the shortcomings attributed to caseloads. What the studies do not show is what sacrifices in other areas have been made to avoid that shortcoming. Thus, while we know that significant pretrial delay has been eliminated in courts with the heaviest of caseloads, we do not know whether these jurisdictions achieved that end by cutting corners in other respects, such as offering better bargains for pleas, offering other inducements for bench trials, or simply forcing prosecutors to trial ill-prepared. The studies would be more convincing if they could clearly negate all such possibilities.

The courts, in particular, have not been convinced by the commentary suggesting that the shortcomings that conventional wisdom attributes to caseloads are in fact the product of other, totally unrelated influences. The Supreme Court, for example, has pointed to the practical necessities imposed by caseload pressure in refusing to impose a variety of proposed constitutional restraints. The burden of heavy dockets has been recognized by the Court in the course of justifying its refusal to hold unconstitutional plea bargaining,<sup>17</sup> its rejection of the claim that the Sixth Amendment requires appointment of counsel to assist the indigent defendant in a misdemeanor prosecution that does not result in a jail term,<sup>18</sup> and its rejection of the contention that due process requires the appointment of counsel to assist an indigent probationer or parolee in a revocation proceeding.<sup>19</sup>

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17. *Santobello v. New York*, 404 U.S. 257, 260 (1970) (“‘[P]lea bargaining,’ is an essential component of the administration of justice. . . . If every criminal charged were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

18. *Scott v. Illinois*, 440 U.S. 367, 385 (1972) (noting the substantial costs that would be imposed on the states if appointment were required for all offenses carrying a potential jail sentence, with Justice Brennan, in dissent, suggesting that such a requirement could be handled nonetheless by the use of a public defender system, which “can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically”).

19. *Gagnon v. Scarpelli*, 411 U.S. 778, 788 n.11 (1973) (noting “the practical problem which would be occasioned by a requirement of counsel in all revocation cases” in light of over

Another line of challenge to the conventional wisdom acknowledges that caseloads are excessive, recognizes that excessive caseloads spawn administrative shortcomings, but challenges the conventional wisdom's characterization of the caseload-problem as steadily growing more pervasive and becoming more urgent. It certainly is true that the pressure of heavy caseloads is not a newly discovered phenomena. Excessive caseloads were reported in the 1920s in the State Commission reports that were an outgrowth of The Progressive reform movement.<sup>20</sup> Indeed, those questioning the severity of the post-mid-sixties "caseload crisis" have pointed to the caseload numbers in those early Commission Reports. They claim that those numbers are substantially worse than the numbers complained about in recent years.<sup>21</sup> Critics legitimately ask why a situation that apparently has prevailed since the turn of the century has become over the last few decades a matter of utmost urgency. Supporters of the conventional wisdom respond that two related developments over those decades have made the caseload problem far more pressing today than it was in the past.

First, the extremely high caseload levels found today and in the 1920s have not been a persistent fixture of criminal justice administration. In subsequent decades, caseloads apparently were reduced substantially from the levels of the 1920s, with the system reshaped in that environment, but the caseloads then worsened significantly over the last few decades.<sup>22</sup> A combination of factors—including a crime wave of "epic proportions" that started in the early 1960s and continued through the 1970s,<sup>23</sup> the war on drugs initiated during the 1980s,<sup>24</sup>

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100,000 revocation proceedings each year).

20. See Nardulli, *supra* note 14 (discussing reports of the Cleveland, Missouri, and Illinois commissions relating to caseloads); see also NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 104 (1931) ("The number of members of the staff of the prosecuting attorney necessary to an adequate performance of his functions and the extent to which the existing personnel in any jurisdiction falls short of this requirement, vary so from place to place that, *though inadequacy is probably existent everywhere in this country*, no statement of either fact or opinion can be made which would be applicable generally throughout the country." (emphasis added)) [hereinafter WICKERSHAM COMMISSION REPORT].

21. See Nardulli, *supra* note 14; see also FEELEY, *supra* note 7, at 263-65.

22. This worsening occurred even though reduction of caseloads has been a major reform objective since the 1960s, with efforts made both to increase resources and limit demand (by such measures as decriminalization of public intoxication).

23. See CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 4 (1980); Ted R. Gurr, *Historical Trends in Violent Crimes: A Critical Review of the Evidence*, in 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 295 (Michael Tonry & Norval Morris eds., 1981); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995 at 325 tbl.3.109 (Kathleen Maguire et al. eds., NCJ-158900, 1996).

24. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUG AND CRIME FACTS, 1992, at 9 (NCJ-139561, 1993) (estimated arrests under state law for drug

increased competitive demands for funding from other areas of government,<sup>25</sup> and difficulties in obtaining coordinated spending increases among police, prosecution, and courts<sup>26</sup>—led to an overall failure of funding to keep up with the increase in crime, arrests, and prosecutions.<sup>27</sup> Illustratively, the rate (per 100,000 inhabitants) of Index

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violations increased from 676,000 in 1982 to 1,010,000 in 1991); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUGS, CRIME AND THE JUSTICE SYSTEM 172 (NCJ-133652, 1992) (dramatic growth in drug caseloads in federal and state courts, with a 61% rise in drug convictions from 1986-88 in the 75 largest counties).

25. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE 120 (2d ed., NCJ-105506, 1988). Since almost 90% of criminal justice financing comes from state and local governments, *see id.* at 116, the primary competitors are the government services funded by those governments, such as education, waste disposal, local transportation, and certain aspects of public welfare support. Even though control of crime ranks high in public concern, some elements of criminal justice administration may not be seen as competitive with such other demands. See Alexander Smith & Harriet Pollack, *The Courts Stand Indicted in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 252, 257 (1977).

To advocate more money for the courts, however, is like advocating motherhood. No one will disagree, but no one—not the city, the state or the federal government—will come forth with the money. . . . [F]ew voters, despite their fear of street crimes, care as much for the courts as for the state of the subways, the schools, or even the garbage pickups in their neighborhoods. The courts simply have no political clout in budgetary terms.

*Id.*

26. The different criminal justice agencies tend to have different constituencies supporting their funding, and that funding often comes from different governmental sources, such as state funding for courts, county funding for the prosecutor, and city funding for the police. Accordingly, keeping funding coordinated is a difficult task. Funding increases tend to come in spurts, and spurts often vary for different agencies. See REPORT TO THE NATION, *supra* note 25, at 122 (for 1979-85, per capita, inflation adjusted increases were 34% for corrections, 24% for public defenders, 6% for prosecution, 0.2% for courts, and a negative 1.5% for police). Where those spurts are heavily disproportionate in allocation, with substantial funding increases going to one part of the process and not another, the end result is likely to be a bottleneck. See *No Trial and No Punishment Either*, N.Y. TIMES, Mar. 17, 1986, at 20 (discussing such a bottleneck as a consequence of failure of court funding).

27. Data on funding since 1971 can be found in the various Bureau of Justice Statistics (B.J.S.) publications in the series on Justice Expenditures and Employment in the United States. The Census Bureau's statistics on government finance pre-1971 are not broken down into as many categories as the B.J.S. data and therefore do not provide as complete a picture on criminal justice expenditures. See REPORT TO THE NATION, *supra* note 25, at 120-21 (comparison of expenditures dating back to 1960 limited to police protection and corrections); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURES AND EMPLOYMENT, 1990, at 4 (NCJ-135777, 1992) (also including categories of courts, prosecution and legal services, public defense, and total direct expenditures for justice activities). These figures must be adjusted for inflation, which often is not done. *But see* REPORT TO THE NATION, *supra* note 25, at 121.

crimes increased by 278% between 1960 and 1985,<sup>28</sup> while the increased per capita spending on police, accounting for inflation, was only 73% over the same period.<sup>29</sup>

Second, the conventional wisdom contends that the caseload arithmetic tells only part of the story. Adding substantially to the caseload pressure has been a series of procedural changes that made administration of the process far more time-consuming. A 1977 article on “the disastrous state of New York City Courts” is typical of the commentary reflecting this viewpoint.<sup>30</sup> The authors first note that, between 1952 and 1974, the number of felony arrests increased by 500% while the number of police increased by a mere 88%. The authors also note that the number of felony filings increased roughly sixfold while the number of judges barely doubled. This disparity was sufficient in itself to produce a “serious overload in the courts,” but it was “compounded by the fact that a felony trial in 1974 is a far different procedure from the felony trial of 1952”:

Due in large part to a series of Supreme Court rulings which extended rights to indigent defendants which had previously been exercised only by the well-to-do, felony trial procedure has become substantially more complex and

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Crime rates per 100,000 population, as measured by reported Index crimes are reported in the annual reports of the Uniform Crime Reporting Program. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1995, *supra* note 23, at 354-55 tbl.3.127 (collecting rates from 1960-1990). Arrest rates per 100,000 also are included in the Uniform Crime Reporting Program. See *id.* at 423-24 tbls.4.18-.19 (comparison of arrest rates for Index offenses, 1971-1990). Prosecutions in state courts are reported (but not adjusted for population growth) in the annual reports of the Courts Statistics Project on state court caseload statistics. See BRIAN OSTROM & NEAL KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995; A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 51-66 (1995).

Data cited in the above sources suggest an overall failure of funding (adjusted for inflation) to keep up with quantitative increases in workloads over the past three decades. Although there were periods during which the shortfall may not have existed, or may not have been great, there were others during which it was quite substantial, resulting in an overall deficit. See Herbert Jacob, *Keeping Pace: Court Resources and Crime in Ten U.S. Cities*, 66 JUDICATURE 73, 83 (1982); see also HERBERT JACOB & ROBERT LINEBERRY, GOVERNMENTAL RESPONSES TO CRIME—EXECUTIVE SUMMARY (National Institute of Justice, 1982); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1995, *supra* note 23, at 324 tbl.3.109.

28. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1995, *supra* note 23, at 354-55 tbl.3.127.

29. See REPORT TO THE NATION, *supra* note 25, at 120 (discussing state and local spending). Consider also 1 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, NATIONAL MANPOWER SURVEY FOR CRIMINAL JUSTICE 22 (1978) (1960-1974 increase in police protection personnel per 100,000 population was 49% while the increase in the rate of known Index offenses per 100,000 population was 157%).

30. Smith & Pollack, *supra* note 25, at 253.

time-consuming. Even in 1952, all felony defendants in New York State were represented by counsel, but the role of the defense attorney has changed markedly since then. Pursuant to the Supreme Court's decisions in *Miranda v. Arizona*,<sup>31</sup> *United States v. Wade*,<sup>32</sup> and *Terry v. Ohio*,<sup>33</sup> defense attorneys can and do challenge the admissibility of confessions, eye witness identifications, the legality of arrests and attendant searches, and the propriety of many types of police procedures. In previous years, neither assigned counsel nor Legal Aid attorneys had the resources or the appellate court encouragement to undertake such activities. Today they have both. The result is that felony court judges in 1974 sat an average of seven working days longer than in 1952, but they handled only 14.8 trials each as compared to 23.3 trials in 1952, a decrease of 33%.<sup>34</sup>

Whether the Supreme Court rulings noted by the authors added substantially to the length of the process is questionable, because suppression motions tend to be common only in a limited class of cases.<sup>35</sup> Other procedural changes, such as the extension of discovery, the provision of appointed counsel in misdemeanor cases, the expansion of release on bail, and the addition of recordkeeping requirements, might have contributed more significantly to the resources consumed in the processing of cases.<sup>36</sup> In any event, as Malcolm Feeley has observed,

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31. 384 U.S. 436 (1966).

32. 386 U.S. 218 (1967).

33. 392 U.S. 1 (1968).

34. Smith & Pollack, *supra* note 25, at 253.

35. See, e.g., FLEMMING ET AL., *supra* note 7, at 168 (1992) (study of nine counties, with populations from 200,000 to 1 million, found motions of all types filed in only 11% of the sampled cases, and only 7.5% with deletion of one county in which public defender filed motions to suppress in nearly 1/3 of all cases); Peter Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 228 (noting that for motions to suppress, frequency in Chicago was nearly twice that in the nine-county study cited above, though suppression motions still were not made in more than 10% of the cases).

Of course, the availability of such an objection may lead the prosecutor to offer further concessions in return for a guilty plea that would avoid a time-consuming hearing in the particular case. As a result, the full bearing of the Supreme Court decisions on the workload of the courts, prosecutors, and defense counsel will not be reflected solely by the frequency with which motions are made. See MARVIN E. FRANKEL, *PARTISAN JUSTICE* 90 (1980).

36. See Kenneth Pye, *Mass Production Justice and the Constitutional Ideal*, in *MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL*, *supra* note 8, at 1, 15-16 (citing, *inter alia*: a 65% increase in all types of motions over 15 years; more defendants who gain pretrial release and "consequently are less interested in a prompt trial"; the "severance of offenders and offenses where joinder would formerly be the rule"; and the extension of "procedures designed for felony cases" to "misdemeanors and petty offenses"); see also CLARENCE C. SCHRAG, *CRIME*

such process changes clearly “established a much higher set of standards for evaluating the administration of justice,” and those higher expectations naturally led “academicians and the media” to give special attention to caseload pressures.<sup>37</sup> Without regard to the additional resources needed to comply with expanded procedural rights (or even the expanding numbers), the weight of caseloads was more than sufficient to become the natural target of groups concerned with the discrepancy between the actuality of criminal justice administration and the now “upgraded” “ideal of due process.”<sup>38</sup>

As Feeley’s observation suggests, determining whether (and to what extent) caseloads exceed an optimal level is keyed to what one expects the process to provide. Surprisingly, most critiques of caseloads fail to clearly set forth this critical point of reference. The most formidable challenge to the conventional wisdom may be a challenge to its underlying assumptions about the goals of the criminal justice process.

Many proponents of the conventional wisdom appear to assume that criminal justice resources should be sufficient to allow for full investigation, full enforcement, and full utilization of the judicial processes in every case. The police should have sufficient resources to investigate every reported crime and to employ proactive methods likely to intercept impending criminality. The prosecution should have sufficient resources to prosecute in all cases where the police make an appropriate arrest. The courts should have sufficient resources to provide appropriate screening and to have “each case . . . naturally . . . resolved by means of heavy combat in the adversary arena.”<sup>39</sup> Each case, in other words, deserves a full-fledged jury trial with the defense and prosecution exercising each and every procedural tool available to them.<sup>40</sup>

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AND JUSTICE, AMERICAN STYLE 173-74 (1972) (also noting increased “maintenance and utilization of court records” respecting a myriad of judicial processing decisions); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2710-12 (1996) (citing a variety of factors that have added to the length of trials, including increased use of expert testimony, increasing use of complex substantive laws, greater leeway granted to counsel on voir dire questioning, and the use of a broader range of evidence).

37. FEELEY, *supra* note 7, at 268-69.

38. Indeed, Feeley suggests that it was the “upgrading of the *ideal* rather than an increase in caseloads [that] probably accounts for the widening ‘gap’ between the ‘ideal’ and the ‘actual practice.’ ” *Id.* at 269.

39. *Id.* at 267.

40. *See id.* (stating, but not supporting, this position); *see also* Subin, *supra* note 10, at 112 (“volume problem” primarily responsible for the disparity between the actual process and an “idealized process” which assumes “that the defendant is lead quickly through the pretrial stage and into the courtroom, where the facts of his case are carefully sifted, and where his guilt can be established only after the prosecution has shown that proof exists beyond a reasonable doubt and that all of the procedural rules for bringing him to trial have been scrupulously

A standard that thus proceeds on the assumption of full exercise of governmental authority and full invocation of defense rights can be faulted for its failure to take account of the element of discretion. In granting discretion to the police, prosecutor, defense, and judiciary, the process has recognized that there are instances in which authority or rights may not be exercised appropriately for a variety of reasons which are unrelated to the limitations of resources. Thus, a modification of the full-exercise model would require that resources be sufficient to handle the caseload as it develops in light of the exercise of discretion on grounds unrelated to a shortage of resources.<sup>41</sup>

Under this second model, the optimal level of required resources can take account of the fact that police may decide not to investigate or arrest, and prosecutors may decide not to prosecute or to reduce charges on various grounds that are consistent with promoting the ends of the criminal law. Those grounds readily can lead to decisions not to proceed because: the violation was technical and did not infringe upon the basic interest that the law sought to protect; the offender has learned his lesson and suffered sufficient harm as to make criminal punishment unnecessary from the perspective of any of its goals; the case depends upon the testimony of witnesses who, for good reason, would prefer not to testify; a prosecution would be a waste of effort in light of the availability and likelihood of prosecution in another jurisdiction; and the greater good could be achieved by dropping the charges in return for the accused's cooperation in gaining the apprehension and conviction of others.<sup>42</sup>

Most importantly, the optimal resource level should recognize that many defendants may desire to enter a guilty plea, rather than contest the charge, and would do so without regard to any extra incentives offered by a prosecutor or court based upon the public resources saved by avoiding trial.<sup>43</sup> A defendant may prefer to plead guilty for several reasons: the case against him is clear and a trial will be a waste of time,

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observed").

41. See *CRIMINAL JUSTICE IN CRISIS*, *supra* note 2, at 40-41 (accepting the legitimacy of plea bargaining "based upon a fair assessment of the likely outcome of the trial and the likely sentence if the defendant should be convicted," but arguing that "[t]he situation is different when a primary motivating factor is the knowledge that available resources will only allow for a very small number of trials").

42. See *A.B.A. STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION* § 3-3.9 (3d ed. 1993); *NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS* § 43.1-43.6 (2d ed. 1991).

43. See *ALASKA JUDICIAL COUNCIL, ALASKA'S PLEA BARGAINING BAN RE-EVALUATED* 102-08, 118-20 (1991) (attributing pleas to defendants' concerns relating to trial stress, wasting resources, and increasing the sentencing judge's exposure to the facts of the case); *CRIMINAL JUSTICE IN CRISIS*, *supra* note 2, at 40-41, 67; *NARDULLI ET AL.*, *supra* note 7, at 210-11.

effort, and the defendant's resources; the defendant feels or wishes to show remorse; the defendant weighs the stress and other costs of a trial more heavily than a possible conviction and sentence;<sup>44</sup> or the defendant prefers to compromise on disputed issues of fact and law and limit his exposure rather than take his chances at trial.

How often would investigations be abandoned, winnable cases not be prosecuted, and prosecuted cases resolved by guilty pleas if these decisions were not influenced by limited police, prosecutorial, and judicial resources? There is no ready point of reference because there has been no time in our history when we had both adequate records and sufficient resources for police, prosecutors, and judges.<sup>45</sup> Certainly, however, the resources needed to avoid caseload pressure in such a world would be significantly less than those in a world with full exercise of governmental authority and full exercise of defense rights.

Still a third model would proceed from a utilitarian perspective, measuring resource needs by reference to a goal of effectively implementing the enforcement of the criminal law while adhering to all legal requirements. From this utilitarian perspective, police investigative resources must be sufficient only to control crime through deterrence and incapacitation.<sup>46</sup> Resources must be devoted to criminal investigation "only up to the point at which the marginal cost of prevention

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44. Defendants in misdemeanor cases often will find that the costs of pursuing a trial—time and wages lost, lawyer's fees, etc.—will outweigh the magnitude of the sentence likely to be imposed, and therefore will prefer a quick disposition through a guilty plea. Indeed, the resources provided to the magistrate court can appropriately anticipate trials as a fairly rare event. See FEELEY, *supra* note 7, at 276-77. Of course, when counsel is provided by the state without charge, the costs to the accused individuals of exercising their rights are altered. One of the difficult policy questions posed by this model is whether it is appropriate for the system to impose different costs designed to deter the exercise of rights by indigents where most accused persons with retained lawyers would view the exercise as not worth its financial cost.

45. See, e.g., WICKERSHAM COMMISSION REPORT, *supra* note 20; see also King, *supra* note 36, at 2680-81 (noting that the lighter dockets of the nineteenth century were often combined with infrequent judicial terms, resulting in considerable caseload pressure as all cases filed in the interim period had to be disposed of in the upcoming term).

46. As I have discussed elsewhere, the goals of the substantive criminal law constitute a key reference in determining what is necessary for "effective" enforcement through the criminal justice processes. The utilitarian model rejects retribution or just deserts as a goal, treats rehabilitation as, at best, a goal considered only in fashioning sanctions, and focuses on deterrence and investigation as the key elements in criminal law and its enforcement aimed at "crime control." See Jerold H. Israel, *Cornerstone of the Judicial Process*, 2 KANSAS J.L. & PUB. POL'Y 5, 6-8 (1993). For those who see the purpose of the criminal law differently, particularly those viewing retribution or "just deserts" as the basic goal, the model obviously fails. *Id.*; see also ANDREW VON HIRSCH, *DOING JUSTICE* (1976); WOJCEICH SADORSKI, *GIVING DESERT ITS DUE* (1985).



equals the marginal cost of the crime prevented."<sup>47</sup> Some crimes may cost more to enforce than the harm caused by the crime. If that is the case, enforcement is needed only if it is valuable in maintaining that respect for the law which also deters other more serious crimes. So too, recognizing that a conviction on a guilty plea to a lesser charge may be more cost effective than a conviction on a higher charge following trial, the prosecution can appropriately offer incentives to defendants who plead guilty and thereby reduce the cost of their conviction.<sup>48</sup> The key is whether the conviction on the lesser charge will undermine the crime control objective of enforcement.

From such a utilitarian perspective, the optimal resource level requires sufficient resources to allow for government exercise of its enforcement authority or defense exercise of its rights only where that exercise is likely to be cost effective to their respective objectives. The prosecutor's objective, for example, requires no more prosecutorial manpower than would be needed to ensure convictions frequently enough, and at an offense level high enough, to meet the preventative—deterrence and incapacitation—goals of the criminal law. This approach obviously requires a trial capacity, but not one that takes even most charges to trial. Thus, one analysis of caseloads that proceeded from this perspective suggested that the prosecutor must have a "credible trial capacity[, which] means being able to bring to trial at least 10 percent of the defendants coming before the court."<sup>49</sup> That capacity would be sufficient to gain guilty pleas from enough other defendants to make criminal prosecution an effective deterrent.<sup>50</sup> As for the defendant's exercise of rights, the defendant must be free to exercise those rights but also free to relinquish those rights in return for leniency if that choice suits his interests, as it will in many cases.

Unfortunately, few empirical studies even begin to ask the questions of what level of enforcement is needed to achieve effective enforcement under a utilitarian model and what level of resources are required to obtain that level of enforcement without shortcutting the rights of the individual.<sup>51</sup> Common sense tells us, however, that some common

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47. Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 316 (1984).

48. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983). But cf. Stephen J. Schulhofer, *Criminal Justice Discretion in a Regulatory System*, 17 J. LEGAL STUD. 43 (1988).

49. DAVID C. ANDERSON, CRIMES OF JUSTICE 176 (1988).

50. *Id.* (noting that caseload pressures in the New York City criminal courts pushed the prosecutor far below this level to "no more than 0.5 percent").

51. See Nimmer, *supra* note 9, at 21. A starting point, as to police resources, has been provided by studies asking the question of whether increased police staffing, above that typically

caseloads in large and mid-sized cities are certainly too high even from the less demanding perspective of a utilitarian model.<sup>52</sup>

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found in American communities, results in reduced crime rates or improved clearance rates. Those studies suggest the answer is “no” as to an increase in itself, without changing the deployment of the officers. See David Shichor et al., *The Relationship of Criminal Victimization, Police Per Capita and Population Density in Twenty-Six Cities*, 8 J. CRIM. JUST. 309 (1980) (number of police per capita negatively related to property crimes without victim contact and to nonproperty crimes and not strongly related to property crimes with contact); see also David F. Greenberg et al., *The Effect of Police Employment on Crime*, 21 CRIMINOLOGY 375 (1983); James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 LAW & SOC’Y REV. 367 (1978). Consider, however, 1 NATIONAL MANPOWER SURVEY, *supra* note 29, at 35 (“studies have yielded mixed and—at times—controversial results”). C. Robert Cloninger, *Crime Rules, Clearance Rules and Enforcement Efforts: The Case of Houston, Texas*, 38 AM. J. ECON. & SOC. 389 (1979) (large changes in police expenditures did have positive effect on clearance and crimes rates).

The best available comparative caseload statistics are for trial courts of general jurisdiction, where weighted caseloads are used. See OSTROM & KAUDER, *supra* note 27, at 83-97. These statistics generally have not been combined with a comparative analysis of performance apart from type and speed of disposition. Of course, to measure performance, one must first determine what should be achieved through the system and how those objectives will be reflected in the application of the process. The literature does provide some starting points for this task. See HENRY S. RUTH, RESEARCH PRIORITIES FOR CRIME REDUCTION EFFORTS (1977); SORREL WILDHORN ET AL., INDICATORS OF JUSTICE: MEASURING THE PERFORMANCE OF PROSECUTION, DEFENSE, AND COURT AGENCIES INVOLVED IN FELONY PROCEEDINGS (1976).

52. Caseload critiques reflecting the conventional wisdom have concentrated on large and mid-sized cities, as surveys have noted substantial variations tied to the size of the community. See, e.g., JACOBY, *supra* note 7, at 56 (National Center for Prosecution Management’s caseload analysis found a “logarithmic relationship . . . between census resident population and felony caseload leading them to conclude that, despite all definitional and procedural variations . . . , the relationship between population and felony caseload is stable”); DORIS M. PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 138 (1986) (“Caseload [for magistrates], not surprisingly, bears a strong relationship to the size of the community in which a justice sits,” with a correlation between the two of .67); RYAN ET AL., *supra* note 7, at 156 (“Caseload pressures increase as court size increases until the very largest courts, where a slight drop in perceived pressures takes place”). Caseloads for judges and prosecutors in smaller communities can easily be half that of their counterparts in larger cities. See 1 NATIONAL MANPOWER SURVEY, *supra* note 29, at 38 (median felony-equivalent cases per full-time attorney was 390 for prosecutor’s offices with 10 or more attorneys and 206 for offices with 1-4 attorneys); FEELEY, *supra* note 7, at 248 (New Haven Court handled roughly three times as many cases per judge as comparison court in smaller community and its prosecutors handled twice as many per prosecutor); PROVINE, *supra*, at 138 (lawyer-magistrates in larger communities had caseloads over 4 times the median for non-lawyer magistrates in smaller communities). But consider Albert W. Alschuler, Book Review, 46 U. CHI. L. REV. 1007, 1030-31 (1979) (suggesting that use of part-time personnel may produce similar caseload pressure in smaller communities). Cf. OSTROM & KAUDER, *supra* note 27, at 15 (in a state-by-state comparison of unweighted combined civil and criminal filings per judge of courts of general jurisdiction, filings ranged from a low of 596 for Alaska to a high of 3841 for South Carolina).

Studies have cited particular smaller communities in which caseloads were so light that they would not be excessive under even a full-exercise model of optimal resources. Thus, JACOBY,

Magistrate courts can obviously accommodate a high volume of cases if prosecutors are going to divert or dismiss a substantial portion of those cases because criminal prosecution is not needed to achieve efficient crime control and the vast majority of persons who are prosecuted will plead guilty simply because that is in their best interest. Those magistrate courts that have dockets approaching 20,000 cases each year, however, are unlikely to be able either to achieve the preventative goals of an effective criminal law or to allow without sanctions the exercise of trial rights by those defendants who view that course as in their best interest.<sup>53</sup> With only a few minutes to give to each case, the court can hardly ensure that the process will be administered in a way that reinforces respect for the law, that the sentences imposed will appropriately discriminate between different types of offenders, and that defendants will be made aware that their rights will be respected if they should desire to invoke them.<sup>54</sup> Prosecutors similarly are not in a position to draw necessary distinctions between cases when the annual caseload per prosecutor approaches 500 felony cases.<sup>55</sup> In particular, they are unable to take a hard line on offenders requiring lengthy incapacitation, backed up by a willingness to go to trial. Public defenders are not nearly as likely to accept without opposition the wishes of even a small portion of their clients who might want to reject a reasonable plea offer and go to trial when those defenders annually receive over 400 felony cases per defender.<sup>56</sup>

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*supra* note 7, at 56, comments on a prosecutor "with a felony caseload of less than two per month," and FEELEY, *supra* note 7, at 248, cites a magistrate's "daily case/judge ratio" of 4:1. In a survey of misdemeanor courts, 60% of the judges from "small city/rural area" courts characterized their current caseload as moderate (50%) or light (10%), and 22% noted that they "never" encountered caseload pressure (with 32% stating that it was encountered only "infrequently"). See MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES B 11-12 (James J. Alfini ed., 1981).

53. For illustrations of misdemeanor courts with such caseloads, see Pye, *supra* note 21; *Rising Caseload in Manhattan Courts: A View From the Bench*, N.Y. TIMES, Feb. 15, 1987, at 11; REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS FOR THE STATE OF NEW YORK 14 (1988). Compare IOWA STATE COURT ADMINISTRATOR, 1993 ANNUAL STATISTICAL REPORT 42 (1994) (disposition per magistrate ranged from 902 to 2,560); COURT ADMINISTRATOR OF PENNSYLVANIA, 1994 CASELOAD STATISTICS OF UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 10, 141 (1995) (Philadelphia Municipal Court, with 22 judges, had roughly 44,000 misdemeanor/felony filings, 27,000 summary citations and provide criminal complaints, and 127,000 civil cases, for roughly 8,750 per judge).

54. See LEWIS KATZ, THE JUSTICE IMPERATIVE 140-41 (1980); SCHRAG, *supra* note 52, at 170-71; Barrett, *supra* note 3.

55. NATIONAL MANPOWER SURVEY, *supra* note 29, at 38.

56. See Barrett, *supra* note 3, at 99; see also CRIMINAL JUSTICE IN CRISIS, *supra* note 2, at 42 (noting illustrations of caseloads of less imposing numbers that nevertheless were categorized as "unmanageable" in light of the nature of the cases). Compare ABA STANDARDS

The conventional wisdom is far from perfect, but neither is it lightly disregarded as a bureaucratic cover for employee laziness or inefficiency, or another in a line of Chicken Little prophecies of "doom." What is needed are some hard policy choices as to what exactly we want from our criminal justice enforcement process and some hard data as to what it would take to achieve these goals. It could even be the case that here, as elsewhere, the conventional wisdom, with some refinements, is pretty much on point.

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FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 72 (3d ed. 1992) (ABA endorsed caseload standards of no more than 150 non-capital felonies per defender per year or 400 misdemeanors per defender per year).