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## Profit-Driven Prosecution and the Competitive Bidding Process

Maybell Romero

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# CRIMINAL LAW

## PROFIT-DRIVEN PROSECUTION AND THE COMPETITIVE BIDDING PROCESS

MAYBELL ROMERO\*

“It is difficult to get a man to understand something, when his salary depends upon his not understanding it.”<sup>1</sup>

*Prosecutors are the most powerful organs of the criminal justice system, enjoying discretion in decision-making far beyond that of law enforcement officials, defense attorneys, and judges. Perhaps due to this exceptional position, contemporary understandings and perceptions of criminal prosecutors have tended to be largely positive; evidence of such a normative understanding of the prosecutor and its role may be found from a variety of sources, from (other) law review articles to pop cultural touchstones in television and movies. The prevailing “prosecutorial norm” in the public consciousness embodies 1) a full-time government employee, 2) who devotes all of their time and professional energies to criminal prosecution, and 3) tries to somehow do or affect some vague notion of*

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<sup>1</sup> UPTON SINCLAIR I, CANDIDATE FOR GOVERNOR, AND HOW I GOT LICKED 109 (photo. reprint 1994) (1935).

*“justice.” Such norms, however, are regularly challenged and flouted when the prosecutorial function is outsourced. Although the outsourcing of nearly every function of the criminal adjudicative process has attracted great attention among scholars and policymakers, a greater critical lens must be focused on prosecutors.*

*The hazards of prosecutorial outsourcing have largely been neglected because existing prosecutorial scholarship focuses on the United States Attorney or district attorneys’ offices in large, metropolitan areas. Not all prosecutorial offices are created equal, however. Cities, towns, and other small political subdivisions throughout the country frequently hire prosecutors on a part-time basis through a competitive bidding process, releasing requests for proposals (RFPs) in an effort to procure bids. This practice, however, may be observed not only in small or rural municipalities, but also in cities located near larger population centers. Examples of such municipalities include Ferguson, Missouri, and Kyle, Texas. Such local governments often work with budgets that are not expansive enough to hire a full-time city attorney or prosecutor. Beyond demonstrating the qualifications, the applicant attorneys or firms vying for a prosecution contract may have to serve as good prosecutors, applications from such applicants must also demonstrate cost effectiveness by detailing what budget and compensation is required during the term of service specified by the RFP.*

*Although engaging in a competitive bidding process may seem like a smart way to handle the problem of governmental waste and financial inefficiencies, it introduces a host of challenges and negative externalities. This Article sheds light on the problems caused by introducing an overtly economic calculation (how cheaply and how profitably the prosecutorial function may be fulfilled) into the criminal adjudicative process. This practice not only flouts American Bar Association and National District Attorney Association prosecutorial standards, but also undermines the prosecutorial norms described above in ways that are likely to destabilize confidence—and the social cohesion born of such confidence—in local criminal justice systems. This practice has the risk, however, of expanding beyond the reach of non-metropolitan jurisdictions to larger counties, cities, and local governments as budgets continue to shrink across the board and devolution and privatization continue to be advanced as cure-alls to economic woes.*

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## INTRODUCTION

The shooting death of Michael Brown, an unarmed 18-year-old African American man, at the hands of Darren Wilson, a white Ferguson, Missouri police officer, prompted not only riots and protests in Ferguson and beyond, but also wide-spread debates and soul searching as to the nature of American criminal justice, especially focusing on issues such as

law enforcement militarization, limits on the use of deadly force, and interactions between police and people of color.<sup>2</sup>

A little less than a month after Michael Brown's death, the Civil Rights Division of the Department of Justice initiated its own investigation of the Ferguson Police Department pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the Safe Streets Act, and Title VI of the Civil Rights Act of 1964.<sup>3</sup> The Department of Justice's investigation, in a subsequent report released on March 4, 2015, catalogued and scrutinized a wide array of problematic law enforcement practices perpetrated by the Ferguson Police Department against the public.<sup>4</sup> One of the practices highlighted in the report was the Ferguson Police Department's stubborn focus on generating revenue for the city: "City and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the City budget."<sup>5</sup>

In stark contrast to the intense public scrutiny of the profit-motivated Ferguson police officers, the role of city prosecutor Stephanie Karr in Ferguson's criminal justice system was largely ignored. The Civil Rights Division investigation, however, revealed that she engaged in a pattern of

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<sup>2</sup> Similar calls for soul-searching have been issued after the untimely deaths of Trayvon Martin, Eric Garner, Walter Scott, and, even a generation ago, Latasha Harlins. See, e.g., Susan Crabtree, *The Limits of Obama's Baltimore Soul-Searching*, WASH. EXAM'R (Apr. 29, 2015), <http://www.washingtonexaminer.com/obama-still-soul-searching-on-racial-unrest/article/2563750>; Andrea Ford & Tracy Wilkinson, *Grover Is Convicted in Teen Killing: Verdict: Jury finds Korean Woman Guilty of Voluntary Manslaughter in the Fatal Shooting of a Black Girl*, L.A. TIMES (Oct. 12, 1991), [http://articles.latimes.com/1991-10-12/news/mn-152\\_1\\_voluntary-manslaughter](http://articles.latimes.com/1991-10-12/news/mn-152_1_voluntary-manslaughter); John Fritze, *Obama Calls for 'Soul Searching' in the Wake of Gray's Death*, BALT. SUN (Apr. 28, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-freddie-gray-obama-20150428-story.html>.

<sup>3</sup> See Joint Statement of United States Attorney Richard G. Callahan, Acting Assistant Attorney General for The Civil Rights Division Molly J. Moran and FBI SAC William P. Woods, U.S. Dep't of Just., United States Attorney's Office Eastern District of Missouri (Aug. 13, 2014), <https://www.justice.gov/usao-edmo/pr/joint-statement-united-states-attorney-richard-g-callahan-acting-assistant-attorney>; U.S. DEP'T OF JUST., JUSTICE DEPARTMENT ANNOUNCES FINDINGS OF TWO CIVIL RIGHTS INVESTIGATIONS IN FERGUSON, MISSOURI (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

<sup>4</sup> See generally U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf).

<sup>5</sup> U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

“recommending higher fines [on high volume offenses] and recommending probation only infrequently,”<sup>6</sup> as well as encouraging police officers to cite individuals with every charge possible per incident in an effort to obtain the “correct volume of cases” on the Ferguson municipal court docket.<sup>7</sup> Karr started in the part-time position of City Prosecutor in April 2011.<sup>8</sup> At the time of this appointment, she was already serving as Ferguson’s city attorney, providing representation on civil matters.<sup>9</sup> Ms. Karr was hired on as the city’s prosecutor by way of contract after a competitive bidding process: Missouri state law mandates that such positions, not only at the state level, but at the local level as well, be filled through a competitive bidding process in which a low-bidder—an attorney or a firm who has submitted the bid with the lowest cost—is automatically awarded the contract.<sup>10</sup> Given this statute, Ferguson has historically “contract[ed] for legal services, so it [issued] a [new] request for proposals on June 1[, 2016].”<sup>11</sup>

For other counties, cities, towns, and local governments of similar size, hiring a full-time prosecutor or district attorney is often cost-prohibitive, if not impossible, given scarce financial resources.<sup>12</sup> In cities like Ferguson, which are generally too small to justify hiring a full-time district attorney, a

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<sup>6</sup> *Id.* at 14–15. The Department of Justice’s report discussed the pressures upon the Ferguson City Prosecutor to engage in revenue generation:

Court staff [is] keenly aware that the City considers revenue generation to be the municipal court’s primary purpose. Revenue targets for court fines and fees are created in consultation not only with [the police chief], but also the Court Clerk. In one April 2010 exchange with [the police chief] entitled “2011 Budget,” for example, the Finance Director sought and received confirmation that the Police Chief and Court Clerk would prepare targets for the court’s fine and fee collections for subsequent years. Court [S]taff take steps to ensure those targets are met in operating court. For example, in April 2011, the Court Clerk wrote to Judge Brockmeyer (copying [the police chief]) that the fines the new Prosecuting Attorney was recommending were not high enough. The Clerk highlighted one case involving three Derelict Vehicle charges and a Failure to Comply charge that resulted in \$76 in fines, and noted this “normally would have brought a fine of all three charges around \$400.” After describing another case that she believed warranted higher fines, the Clerk concluded: “We need to keep up our revenue.” There is no indication that ability to pay or public safety goals were considered.

*Id.*

<sup>7</sup> *Id.* at 11.

<sup>8</sup> Complaint at 6, *United States v. Ferguson*, (E.D. Mo. 2016) (No. 4:16-cv-00180).

<sup>9</sup> *Id.*

<sup>10</sup> MO. REV. STAT. § 105.458.2(1) (1998). Such requirements may be waived if the amount to be paid for the service is less than \$5,000 a year.

<sup>11</sup> Fiona Ortiz, *Ferguson Attorney Steps Down After Criticism*, REUTERS (May 24, 2016), <http://www.reuters.com/article/us-missouri-ferguson-idUSKCN0YF2NO>.

<sup>12</sup> See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 418 (2009).

prosecutor may be appointed to the post, often by a mayor or a city council. Candidates for such outsourced prosecution positions are often required to go through a competitive bidding process in which cost-savings, fine generation, and outbidding competitors are prioritized over other evaluative concerns, submitting a bid in response to a request for proposal (RFP) issued by the jurisdiction in question.<sup>13</sup>

The prosecutors hired pursuant to this method of outsourcing the prosecutorial function have little in common with the popular cultural conception of district attorneys and other criminal prosecutors in the United States. In the popular imagination, a prosecutor is a practitioner who has been elected to the position, who leads an office in an attempt to seek justice on behalf of either “the People” or “the State.” Pop culture is rife with such examples, ranging from the ADAs of *Law and Order* to the bumbling yet consistently honest Hamilton Burger of *Perry Mason*, who (with his extraordinarily bad record at trial) described his work as requiring him merely to “do justice, and justice is served when a guilty man is convicted and when an innocent man is not.”<sup>14</sup>

Outsourcing prosecution through RFPs also creates serious tensions with the professional standards that bind prosecutors. For example, the American Bar Association has promulgated prosecution function standards “to be used as a guide to professional conduct and performance.”<sup>15</sup> Under these standards the “duty of the prosecutor is to seek justice, not merely to convict.”<sup>16</sup> It is also incumbent upon the prosecutor to “seek to reform and improve the administration of criminal justice.”<sup>17</sup> The Model Rules of Professional Conduct, which have been adopted in whole or part by all 50 states,<sup>18</sup> also bear upon the ethical obligations that are incumbent upon

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<sup>13</sup> See *infra* Section II.C.

<sup>14</sup> *Perry Mason: The Case of the Deadly Verdict* (CBS television broadcast Oct. 3, 1963); see also *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. (statement of Judge Sotomayor (2009) quoting Hamilton Burger). Justice Sotomayor also discussed her fondness and admiration for Hamilton Burger in her autobiography: “I liked that he was a good loser, that he was more committed to finding the truth than to winning his case.” SONIA SOTOMAYOR, *MY BELOVED WORLD* 101 (2013).

<sup>15</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.1 (AM. BAR. ASS’N 2015) [hereinafter “ABA PROSECUTION STANDARDS”].

<sup>16</sup> *Id.* at Standard 3-1.2(b).

<sup>17</sup> *Id.* at Standard 3-1.2(f).

<sup>18</sup> AM. BAR ASS’N, *Alphabetical List of States Adopting Model Rules*, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited July 31, 2016).

prosecutors.<sup>19</sup> The National District Attorneys Association has similarly promulgated its own ethical standards for prosecutors, which are more detailed than those from the ABA.<sup>20</sup>

While it helps to examine the issues raised as a result of relying on outsourced prosecutors through the lenses of formulaic rules—seen by many who practice law as the only requirements necessary to consider when reflecting on their own comportment—this Article endeavors to hold our nation’s prosecutors, especially local prosecutors, to the higher standards that are popularly expected of them by the public, and that the need for accountability and justice demand. While “[e]fficiency gains are the major reason that governments enter into privatization agreements,”<sup>21</sup> the use of outsourced prosecution services, particularly those hired through an RFP or competitive bidding process is dangerous, subjecting the hired prosecutors to much of the same political pressure as elected officials while also generating unusual and significant pressures to prioritize budgets and fine or fee generation.<sup>22</sup>

Even in the recent years during which criminal justice system reform has been discussed by both political liberals and conservatives alike, there is still a general belief that wrongfully prevails—that local prosecutors are elected.<sup>23</sup> A piece published by *The Atlantic* stated that “[i]n all but four states, prosecutors are elected to office—about 2,400 of them[.]”<sup>24</sup> In his recent address to the Democratic National Convention, President Barack Obama exhorted voters that if they “want more justice in the justice system, then we’ve all got to vote—not just for a president, but for mayors, and sheriffs, and state’s attorneys, and state legislators. That’s where the criminal law is made.”<sup>25</sup> While helpful to those who have long been

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<sup>19</sup> MODEL CODE OF PROF’L CONDUCT r. 3.8 (2016).

<sup>20</sup> NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS, (3d ed. 2009), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

<sup>21</sup> Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2226–28 (2013).

<sup>22</sup> See generally Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265 (2010).

<sup>23</sup> JOHN M. SCHEB, II, CRIMINAL PROCEDURE 27 (7th ed. 2014); Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 512 (1975).

<sup>24</sup> Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), <http://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>.

<sup>25</sup> President Barack Obama, Remarks by the President at the Democratic National Convention (July 27, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/28/remarks-president-democratic-national-convention>.



advocating for greater focus on local criminal justice system reform, both statements exhibit a long-standing lack of knowledge regarding the criminal justice system on a much more local level than that of federal or state government: Not all prosecutors are elected.<sup>26</sup>

This Article builds on the work of Professor Roger Fairfax, who has previously studied the ills that arise from varying methods of outsourcing the prosecutor's role to private actors, providing useful general overviews.<sup>27</sup> This Article, however, examines and highlights the particular risks inherent in hiring prosecutors through RFPs. It identifies the specific incentives, both personal and institutional, that arise in smaller, often rural but also suburban and urban, jurisdictions throughout the country when prosecutors are procured by way of RFPs, which tend to focus the prosecutor's attention on efficiency and revenue generation, rather than justice—a focus compounded by the relatively short-term nature of many outsourcing contracts and the concomitant need for the prosecutor to reapply (and demonstrate cost-effectiveness) on a regular basis.<sup>28</sup>

The Article proceeds as follows: Part I examines the history of the American prosecutor's role by focusing on scope of work as well as historical methods of compensation, demonstrating that the prosecutorial role of a full-time public servant paid on a salary basis arose for a number of reasons. It also details the evolution of these norms from a pop culture perspective as well as that from the more formalized, yet mainly aspirational, rules outlined in both American Bar Association and National District Attorney Association Standards.

Part II describes the outsourcing of prosecution generally, with Part II.A examining the challenges that may force local governments to outsource their criminal prosecutors. Part II.B provides more background on the concepts of outsourcing and privatization, while Part II.C introduces the RFP and competitive bidding process. Part II.D analyzes the RFP language from a small selection of local governments from around the nation, highlighting language that creates greater pressure and incentives for prosecutors not only to save costs but also to generate revenue.

Part III examines multiple incentives and disincentives both on the part of an individual prosecutor as well as local government councils, mayors,

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<sup>26</sup> Christina Santos, Comment, *An Analysis of Austin Lawyers Guild v. Securus Technologies, Inc.: The Constitutional and Ethical Implications of Using Illegally Recorded Attorney-Client Telephone Conversations as Derivative Evidence*, 6 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 304, 329 n.139 (2016).

<sup>27</sup> See generally Fairfax, Jr., *supra* note 22. See also Fairfax, Jr., *supra* note 12, at 416.

<sup>28</sup> See Frederick C. Thayer, *Regulation is Inevitable: Legal Planning or Illegal Collusion?*, 32 AM. U. L. REV. 425, 443 (1983).

and executives to concern themselves with their bottom lines rather than providing services focused on providing justice to the public. Part III also demonstrates that prosecutorial outsourcing by way of RFP is substantially different and uniquely problematic compared to procurement for other services or goods, as doing so amounts to selling the concept of “justice” to the lowest bidder.

## I. THE AMERICAN PROSECUTOR’S EVOLVING ROLES

### A. FROM PRIVATE ACTOR TO PUBLIC SERVANT

Although the usual norms characterizing a criminal prosecutor most often encompass in the public consciousness, a full-time government attorney elected directly by the people of a particular political subdivision, such a norm is unique to the United States and is of recent invention.<sup>29</sup> Criminal prosecution processes in the colonies quickly came to diverge from those in England, where victims themselves funded prosecutions by hiring their own attorneys.<sup>30</sup> Due to Dutch influence—for example, the position of “attorney general” was introduced in a Dutch colony in 1686<sup>31</sup>—public prosecutors with varying titles such as “state’s attorney,” “district attorney,” “county attorney,” and “attorney general” proliferated; thus, public prosecutors came to dominate American criminal justice systems far ahead of any English counterparts.<sup>32</sup> These prosecutorial positions were initially filled by appointment,<sup>33</sup> as were many other positions in state and local government, with great variance from state to state as to who exercised this power of appointment.<sup>34</sup>

American criminal prosecutors were also not originally full-time government employees, given that criminal prosecutions had originally been victim-funded, but usually took such positions to supplement income from private practices or other business ventures.<sup>35</sup> As such, attorneys

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<sup>29</sup> Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1530 (2012) (“The United States is the only country in the world where citizens elect prosecutors.”).

<sup>30</sup> The Crown Prosecution Service, *History*, <http://webarchive.nationalarchives.gov.uk/20070205205701/http://www.cps.gov.uk/about/history.html> (last visited June 16, 2016).

<sup>31</sup> GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE 43 (2014).

<sup>32</sup> Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

<sup>33</sup> Ellis, *supra* note 29.

<sup>34</sup> *Id.* at 1537.

<sup>35</sup> *Id.* at 1539.

employed as public prosecutors were often “young, inexperienced attorneys or older, generally incompetent ones.”<sup>36</sup> Prosecutorial budgets in the early republic were often anemic, resulting in complaints of overwork for too little pay.<sup>37</sup> Talented, experienced criminal law attorneys, therefore, were disincentivized from considering such work, choosing to work as either defense counsel or private prosecutors hired by victims.<sup>38</sup>

Andrew Jackson’s assumption of the presidency in 1829 began a period of rampant political patronage and reward, also widely known today as the “spoils system”<sup>39</sup> in which government jobs and positions were doled out to friends and family for their support.<sup>40</sup> Although rewarding loyal supporters with posts and positions had certainly been done before, Jackson’s presidency ushered in a period of American politics in which the system of political patronage reached a never-before seen zenith.<sup>41</sup> As explained by the late Professor Merrill D. Peterson,

Abuse of the patronage power had been the first public outcry against the [Jackson] administration. Patronage was a partisan issue, but it assumed theoretical significance when Jackson himself extended the old idea of “rotation in office,” applicable to elected officials, to appointive officials . . . and, reasoning that because office is not “a species of property,” therefore removals for political cause were perfectly appropriate.<sup>42</sup>

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<sup>36</sup> Ireland, *supra* note 32, at 43.

<sup>37</sup> *Id.* at 44–45.

<sup>38</sup> *Id.* at 45 (citation omitted).

One of Kentucky’s more able prosecutors admitted in 1879 that in his district it was “almost impossible to get anyone to take office. . . .” In the same year, a Kentucky federal district judge remarked that “in almost every criminal trial in this state there is on the side of the Government youth and inexperience . . . whilst on behalf of the accused is arrayed all the learning . . . experience, and . . . talent.”

*Id.*

<sup>39</sup> University of Virginia Miller Center, *Andrew Jackson: Domestic Affairs*, <http://millercenter.org/president/biography/jackson-domestic-affairs> (last visited Oct. 5, 2016).

<sup>40</sup> The name of the “spoils” system is derived from remarks by William Macy, who was criticizing the political patronage rampant in Jackson’s administration, stating:

It may be, sir that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy.

8 Reg. Deb. 1325 (1832) (remarks of Sen. Macy).

<sup>41</sup> Note, *The Ineligibility Clause’s Lost History: Presidential Patronage and Congress, 1787-1850*, 123 HARV. L. REV. 1727, 1742 (2010).

<sup>42</sup> MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 253 (1987).

An unprecedented number of public offices were filled through this system of patronage, including prosecutors and other government attorneys.<sup>43</sup> In reaction to this system, a greater public support for popular election of district attorneys and prosecutors took hold; “electing prosecutors also allowed communities to maintain control over the functions of local government.”<sup>44</sup> By 1877, every state had adopted the use of elected prosecutors at one level or the other, as would every other state admitted to the Union thereon.<sup>45</sup>

Simply because every state adopted some form of the elected prosecutor—either at the state attorney general level or district or county attorney level—however, does not mean that all positions handling criminal prosecutions were elected. Particularly in small, rural jurisdictions (cities, towns, counties, etc.) that neither had the budget to pay a full-time criminal prosecutor much in the same way that many jurisdictions did in the early days of the Republic, nor the population to make an election a practical option due to a lack of attorneys, alternatives to the public election of prosecutors have persisted.<sup>46</sup> These mainly break down into three models: 1) the part-time prosecutor model, under which attorneys are elected to serve on a part-time basis while also allowed to engage in a private law practice or other venture<sup>47</sup>; 2) victim retained prosecution<sup>48</sup>; and 3) the prosecution outsourcing model<sup>49</sup> (hereinafter the “outsourcing model,” or “outsourcing”), under which local governments contract with law firms or individual attorneys for (usually part-time) prosecutorial services for a term of years. Attorneys operating under the third model—an outsourcing model—are often selected after responding to posted requests for proposals.<sup>50</sup>

## B. PROSECUTORIAL NORMS

The widely accepted norm that prosecutors should not be influenced

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<sup>43</sup> Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 787 (1991).

<sup>44</sup> Ellis, *supra* note 29, at 1558.

<sup>45</sup> *Id.* at 1568–69.

<sup>46</sup> Fairfax, *supra* note 22, at 280–81.

<sup>47</sup> Susan W. Brenner & James Geoffrey Durham, *Toward Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 420–27 (1993).

<sup>48</sup> DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 154 (1979). Some states still allow for victims to hire and fund their own prosecutors.

<sup>49</sup> *See generally* Fairfax, *supra* note 22.

<sup>50</sup> Fairfax, Jr., *supra* note 12, at 416–17.

by concerns apart from serving the public's interest arose in the United States much earlier than in the United Kingdom. For example, in *Commonwealth v. Knapp*,<sup>51</sup> both the attorney-general and solicitor-general of Massachusetts were working together to prosecute a murder.<sup>52</sup> The attorney-general sought to have a private prosecutor appointed to the prosecution team to assist in the case.<sup>53</sup> On appeal, Knapp argued that pursuant to Massachusetts's statute delineating the roles of prosecutors at the time, any prosecutor engaged in private practice should not have been allowed to assist in the case.<sup>54</sup> The *Knapp* court stated:

In cases where civil rights are in controversy and the form of proceeding is by indictment or information, the Court do[es] not perceive any objection against permitting the party in interest to employ counsel in aid of the law officers. The same reasons would not apply to cases involving public considerations only. In such cases the statute supposes that the prosecution will be conducted by the law officers, for their salaries, and without any other compensation whatever. . . . [T]his case presents the question, whether a counsellor may, at the request of the attorney-general, be admitted to aid him in the prosecution, without any pecuniary consideration being paid to him, or any other consideration which may be supposed to influence him, excepting a disinterested regard for the public good.<sup>55</sup>

Here, when considering the policy implications of private sector attorneys' help on prosecutorial criminal matters, the *Knapp* court made an important and early distinction between cases in which there was a discernable "party of interest," such as a victim, versus cases that involved a larger injury to "the public good."<sup>56</sup>

A multitude of other states addressed the further question of whether attorneys engaged in private practice should be allowed to handle criminal

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<sup>51</sup> *Commonwealth v. Knapp*, 27 Mass. 477 (1830).

<sup>52</sup> *Id.* at 490.

<sup>53</sup> *Id.* at 489.

<sup>54</sup> *Id.* at 489. Mass. St. 1807, c. 18, required county attorneys to act on behalf of the state "provided, that the attorney-general, when present, and, in his absence, the solicitor-general, if present, shall, in any court, have the direction and control of prosecutions and suits [o]n behalf of the Commonwealth." *Id.* It also provided that "no attorney-general, solicitor-general or county-attorney shall receive and fee or reward from or in behalf of any prosecutor, for services in any prosecution, to which it shall be his official duty to attend." *Id.* The appellant operated under the assumption that the attorney that the Commonwealth sought to appoint was being privately compensated; the attorney in question, however, explained that he was not working for any pecuniary inducement at all. *Id.* at 491.

<sup>55</sup> *Id.* at 490–91.

<sup>56</sup> *Id.* at 491. The *Knapp* court held that the private prosecutor who assisted the attorney general should have been allowed to do so as 1) he did so at the attorney-general's request for the murder case alone and 2) the private prosecutor was doing the work pro bono. *Id.* at 487.

actions on behalf of certain jurisdictions, and many of these cases were heard by state supreme courts throughout the 1800s.<sup>57</sup> For example, the Michigan Supreme Court held that that appointment of an additional prosecutor during the pendency of a forgery case was permissible given that this attorney “was not employed by any private party, that he had no interest in the matter, that he was associated in business with the prosecuting officer, and had attended the prosecution on behalf of the people in the justice’s court.”<sup>58</sup> Such cases present the early formation of a normative standard that prosecutors are expected to meet—that they should somehow be shielded from external or private interests and should only concern themselves with the public good and with the fair administration of justice rather than deal with the external pressures that come from running separate legal practices.<sup>59</sup>

While meeting such ethical expectations would initially appear to create additional burdens upon prosecutors, prosecutors have attempted to use these higher standards to their tactical advantage, suggesting that they should be afforded greater deference. For example, prosecutors have variously argued their greater trustworthiness in comparison to other actors in the criminal justice system, such as defendants or defense attorneys, or have pressed for troublingly expansive roles.<sup>60</sup> In oral argument for *Miranda v. Arizona*, Gary K. Nelson, assistant Arizona attorney general, attempted to bolster the state’s argument (that allowing for counsel at

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<sup>57</sup> Ireland, *supra* note 32, at 49 (“By the end of the nineteenth century, the high tribunals of Alabama, Florida, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, Texas, Utah, Vermont, and Virginia had upheld the legality of privately funded prosecutors.”).

<sup>58</sup> *People v. Foote*, 93 Mich. 38, 39–40 (1892).

<sup>59</sup> The prosecutor’s position was conceived as “one involving a duty of impartiality not altogether unlike that of the judge himself.” *Meister v. People*, 31 Mich. 99, 104 (1875); *see also Berger v. United States*, 295 U.S. 78, 88 (1935). Speaking in the context of federal prosecutions:

The United States Attorney is the representative not of an ordinary party to a controversy, but a sovereign 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 should not escape or innocence suffers. 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.

*Id.*

<sup>60</sup> Professor Bruce Green noted a similar point in his article *Why Should Prosecutors “Seek Justice”?* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L. J.* 607, 614–15 (1999).

interrogations would unduly hamper investigative efforts) by relying on the prosecutor's perceived duty to do justice:

Our adversary system as such is not completely adversary even at the trial state in a criminal prosecution because Canon Five of the Canons of Ethics<sup>61</sup> of the American Bar Association which are law in Arizona by rule of court says that the duty of the prosecution is not simply to go out and convict but is to see that justice is done.

I know, I've talked to many prosecutors myself in my short time, I've gotten as much satisfaction out of the cases when I – which I was compelled to confess error in a case where a man has been deprived of his rights by due process that I've gotten satisfaction in being upheld in a tight case in court.<sup>62</sup>

Prosecutors have also, for example, attempted to leverage high ethical expectations when vouching improperly for themselves,<sup>63</sup> witnesses,<sup>64</sup> or even a combination thereof.<sup>65</sup> The heightened duty placed upon prosecutors

<sup>61</sup> Canon 5 of the original ABA Canons of Professional Ethics stated that with respect to the prosecution function, “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.” CANONS OF PROFESSIONAL ETHICS Canon 5 (1908). The language regarding the suppression of exculpatory evidence is very much outdated since *Brady* mandated the disclosure of exculpatory evidence. *See generally* *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>62</sup> Oral Argument at 55:37, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759), <https://www.oyez.org/cases/1965/759>.

<sup>63</sup> Prosecutors vouch improperly for themselves or witnesses when they “place[] the prestige of [his or her] office behind the government’s case by, for example, imparting [their] personal belief in a witness’s veracity or implying that the jury should credit the prosecution’s evidence simply because the government can be trusted.” *United States v. Perez-Ruiz*, 353 F.3d 1, 9 (1st Cir. 2003) (citing *U.S. v. Figueroa-Encarnación*, 343 F.3d 23, 28 (1st Cir. 2003)). For an additional example of a prosecutor improperly vouching for themselves, see, e.g., *Shelton v. United States*, 983 A.2d 363, 373 n.22 (D.C. 2009) in which a prosecutor attempted to bolster the government’s case by emphasizing the first prosecutor’s ethical duties:

At another point the prosecutor asked:

**Prosecutor:** In fact, [the first prosecutor] told you that the last thing he wanted to do was to have the wrong person in jail; isn’t that right?

**[Witness]:** He told me that but I didn’t believe him . . . .

*Id.*

<sup>64</sup> *See, e.g., Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir. 1960).

To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing.

*Id.*

<sup>65</sup> *See, e.g., United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (quoting statements made by the prosecutor at trial in which the prosecutor offered improper

to do justice may function as an additional advantage the government can wield against defendants, often paired with greater material resources as well as the assistance of law enforcement.

Pop cultural representations of prosecutors are also illustrative of prevailing prosecutorial norms both past and present (as well as other social mores, customs, and beliefs).<sup>66</sup> There still is, of course, a great deal of debate as to what extent pop culture instigates change on its own, a question which this Article will not attempt to address or answer but which cognitive psychologists have addressed extensively through the formulation and debate surrounding cultivation theory.<sup>67</sup>

In the first decades of the 1900s, as prosecutors began to take on a more central and powerful role in the criminal justice system,<sup>68</sup> they also began to take on a greater pop cultural role. In the 1930s, prosecutors joining police in the fight against organized crime also boosted the prestige and visibility of the job throughout the nation.<sup>69</sup> This new spotlight helped inspire the proliferation of fictitious prosecutor and district attorney roles in popular media.<sup>70</sup> A fascinating example of an early fictitious district attorney can be found in the 1940s radio drama *Mr. District Attorney*, which Professor David Ray Papke noted was generally “free of complexity, and character motivation and the conflict between lawbreakers and law enforcement are easy to understand.”<sup>71</sup> *Mr. District Attorney*, who otherwise was nameless for the majority of the show’s many years on the

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statements at trial, vouching for himself and law enforcement by referring to the prestige and veracity of the government).

<sup>66</sup> MICHAEL ASIMOW & SHARON MADER, LAW AND POPULAR CULTURE 153–80 (2004).

<sup>67</sup> Cultivation theory examines the interaction between media and society, specifically operating as

“a theory of media’s role in social control. That is, it examines how media are used in social systems to build consensus . . . on positions through shared terms of discourse and assumptions about priorities and values.” . . . Crucially, cultivation theory assumes that, since mass media is produced by cultural elites in a commercial system, “the system works so as to benefit social elites.”

Cynthia D. Bond, *We, the Judges: The Legalized Subject and Narratives of Adjudication in Reality Television*, 81 UMKC L. REV. 1, 16 (2012) (quoting JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 15 (1999)).

<sup>68</sup> See Allen Steinberg, *The “Lawman” in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 753 (2003).

<sup>69</sup> *Id.* at 755.

<sup>70</sup> David Ray Papke, *Mr. District Attorney: The Prosecutor During the Golden Age of Radio*, 34 U. TOL. L. REV. 781, 782 (2003).

<sup>71</sup> *Id.* at 788.



air, was depicted as “honest, brave, and devoted to his work.”<sup>72</sup> The show’s opening lines, intoned by the show’s announcer (known as the “Voice of the Law”) proclaimed that Mr. District Attorney was the “[c]hampion of the people, defender of truth, guardian of our fundamental rights—life, liberty, and the pursuit of happiness.”<sup>73</sup>

Such opening lines may strike today’s listeners as simultaneously quixotic, wooden, and misleading—they are not, however, much different than those uttered in the opening scenes of every episode of the longest-running crime drama in the United States, *Law & Order*: “In the criminal justice system, the people are represented by two separate, yet equally important groups: The police who investigate crime and the District Attorneys who prosecute the offenders.”<sup>74</sup> The contrast between this public perception of prosecutors and the public perception of defense attorneys is telling. While prosecutors hold a greater position of trust and authority not only in pop culture but also their communities, defense lawyers conversely “generally toil amid a culture of scorn” and “are often perceived as amoral gunslingers who thrive on the thrill of beating the system and defending the guilty.”<sup>75</sup> Comparing state prosecutorial budgets versus indigent defense budgets also illustrates the extent to which the prosecution function is publicly prioritized over that of *Gideon*-mandated indigent defense<sup>76</sup>: in 2007 the total operating budget of state prosecutors’ offices throughout the country was \$5.8 billion,<sup>77</sup> while states in 2012 only spent \$2.3 billion on public defense.<sup>78</sup>

However, lately there has been a chipping-away, if not crisis, of public confidence in the criminal justice system.<sup>79</sup> Long-standing features of

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<sup>72</sup> *Id.* at 790.

<sup>73</sup> *Id.* at 781.

<sup>74</sup> *Law & Order* (NBC television broadcast, Sept. 13, 1990).

<sup>75</sup> Rod Smolla, *The Best Defense*, SLATE (Nov. 2, 2005), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/11/the\\_best\\_defense.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/11/the_best_defense.html).

<sup>76</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>77</sup> STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 2 (2011), <http://www.bjs.gov/content/pub/pdf/psc07st.pdf>. The 2007 operating budget was a decrease from the 2001 total of \$6.1 billion (amounting to a 5% decrease).

<sup>78</sup> ERINN HERBERMAN & TRACY KYCKELHAHN, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, *STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012 – UPDATED* (2015), <http://www.bjs.gov/content/pub/pdf/sgide0812.pdf>. I rely on the most recent statistics from the Bureau of Justice Statistics for both figures on prosecutorial and defense spending. Studies examining both rolls are not usually conducted nor release simultaneously nor based on the same years, unfortunately.

<sup>79</sup> As noted by Carolyn B. Ramsey back in 2002, which is still the status quo, “[e]mpirical scholarship on the relationship between public opinion and criminal justice has

American criminal law and justice, such as the death penalty, have been reconsidered in the public consciousness.<sup>80</sup> Confidence in prosecutors has lately been shaken as well, with notable examples arising from the deaths of Michael Brown in Ferguson and Eric Garner in Staten Island. In both cases prosecutors sought indictments before grand juries against police officers Darren Wilson and Daniel Pantaleo, respectively, and in both of these cases, the prosecutors failed.<sup>81</sup> The burden of proof for obtaining a grand jury indictment is the exceptionally low probable cause standard<sup>82</sup>; the laxity of this standard was perhaps most familiarly styled by Sol Wachtler in Tom Wolfe's *The Bonfire of the Vanities*: "[A] grand jury would 'indict a ham sandwich,' if that's what you wanted."<sup>83</sup> The inability to secure indictments against Wilson and Pantaleo ignited weeks of civil unrest, with many alternately doubting the competence or vigilance of the prosecutors involved.<sup>84</sup>

While there has been a greater recent push toward bipartisan criminal justice reform, much of that effort has been focused, understandably, on the roles of law enforcement and defense counsel.<sup>85</sup> One can, at best, speculate

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not focused primarily on prosecutorial ethics." Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1319 (2002).

<sup>80</sup> See Richard C. Dieter, Death Penalty Info. Ctr., *A Crisis in Confidence: Americans' Doubts About the Death Penalty*, (2007), <http://www.deathpenaltyinfo.org/CoC.pdf>.

<sup>81</sup> Erin McClam, *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC NEWS (Nov. 25, 2014, 2:21 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391>; Ray Sanchez & Shimon Prokupecz, *Protests After N.Y. Cop Not Indicted in Chokehold Death; Feds Reviewing Case*, CNN (Dec. 4, 2014), <http://www.cnn.com/2014/12/03/justice/new-york-grand-jury-chokehold/>.

<sup>82</sup> *Kaley v. U.S.*, 134 S.Ct. 1090, 1103 (2014) ("Probable cause, we have often told litigants, is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act." (internal quotations and citations omitted)).

<sup>83</sup> TOM WOLFE, *THE BONFIRE OF THE VANITIES* 603 (1987).

<sup>84</sup> See, e.g., Travis Andersen et al., *Thousands Protest Eric Garner Case in Downtown Boston*, BOS. GLOBE (Dec. 4, 2014), <http://www.bostonglobe.com/metro/2014/12/04/protest-planned-christmas-tree-lighting-common/875sx4ZA1JcHliKte9UyCJ/story.html>; Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2015), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>; Brandt Williams, *Protests Shut Down Part of I-35W for Over an Hour*, MPR NEWS (Dec. 4, 2014), <http://www.mprnews.org/story/2014/12/04/protesters-close-i35w>; Editorial Board, *A Crisis in Confidence in Prosecutors*, N.Y. TIMES (Dec. 8, 2014), [http://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html?\\_r=0](http://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html?_r=0).

<sup>85</sup> See, e.g., *Criminal Law Reform*, ACLU, <https://www.aclu.org/issues/criminal-law-reform> (last visited Oct. 5, 2016); *SMU Announces Deason Family Criminal Justice Reform Center in Dedman School of Law*, SMU.EDU (Apr. 26, 2016), <https://www.smu.edu/News/>

as to the reasons for those emphases. Perhaps latent acceptance of the prosecutorial norms thus far described has shielded the prosecutorial role from the spotlight. Perhaps prosecutors are so aligned with law enforcement in the public mind that efforts to reform police and policing somehow feel like they must address potential evils arising amongst their prosecutorial counterparts. Moreover, any criticism of prosecutors, both from the legal academy and other sources, largely falls on those operating in the federal system; this disproportionate focus on federal criminal prosecution is easily explained by the greater homogeneity of the federal system, which renders it correspondingly more straightforward to study, especially with tools of data collection and analysis.<sup>86</sup> This Article makes a unique contribution to prosecution-focused scholarship by departing from the usual federal focus and instead concentrating on the prosecutorial functions of those smaller jurisdictions such as counties and municipalities that often go neglected by scholars and the wider, popular media.

### C. GOVERNANCE OF PROSECUTORS UNDER ABA AND NDA STANDARDS AND ABA MODEL RULES

Both the federal government and every state in the nation has the authority, to differing degrees, to prosecute criminal offenses generally committed within their borders. Engaging in a study of criminal law on a state level is often challenging given the great variance in laws and policies between all the states. To some degree, however, there is great unity in the promulgation of each state's rules of professional conduct as applied to prosecutors; each state has to some extent adopted the American Bar Association's Model Rules of Professional Conduct (Model Rules).<sup>87</sup> The

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2016/deason-koch-gift-26april2016 ("Policy makers across the ideological spectrum are talking about the need for criminal justice reform . . . [f]rom the adequacy of defense counsel, to police uses of force, to wrongful convictions and the racial disparities in the criminal justice system.").

<sup>86</sup> Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in *DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT* 27, 31 (Michele Caianiello & Jaqueline S. Hodgson eds., 2015).

The United States is a federal system, and both the federal government and the states have the authority to define and punish criminal violations. This division of responsibility permits significant difference between federal and state practice, and . . . between and within individual states. This variability is enhanced by traditions concerning the training and selection of both individual prosecutors and chief prosecutors. In general, the U.S. systems promote some form of democratic accountability, and the fragmentation of authority virtually guarantees that different offices will develop different priorities and practices.

*Id.* at 31.

<sup>87</sup> AM. BAR ASS'N, *States Making Amendments to the Model Rules of Professional Conduct Dates of Adoption*, [http://www.americanbar.org/groups/professional\\_responsibility/](http://www.americanbar.org/groups/professional_responsibility/)

bar associations of each of the states, with the exception of Wyoming, issued public ethics opinions in an effort to educate attorneys about the proper application of their respective ethical rules as well.<sup>88</sup> The ABA has also promulgated its Criminal Justice Standards for the Prosecution Function (ABA Prosecution Standards) serving as a complement to the Model Rules and providing greater specificity than the Rules regarding concerns unique to prosecutors.<sup>89</sup> The National District Attorneys Association (NDAA) has also circulated its own set of National Prosecution Standards (National Prosecution Standards).<sup>90</sup> These National Standards are much more comprehensive than the Model Rules as well as the ABA Standards,<sup>91</sup> likely due to the National Standards being written for prosecutors by prosecutors.<sup>92</sup> Both sets of standards are similar in that they both encourage and urge their adoption in not just a formal, but also a practical sense<sup>93</sup>, and begin by grounding themselves in an exhortation to prosecutors to “seek justice,”<sup>94</sup> whatever that may mean.

Both sets of standards from the ABA and NDAA forthrightly express an overwhelming preference for full-time attorneys of the sort that follow traditional prosecutorial norms as described in Part I.B above. The ABA Prosecution Standards provide that

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publications/model\_rules\_of\_professional\_conduct/chrono\_list\_state\_adopting\_model\_rules.html (last visited June 12, 2016).

<sup>88</sup> See AM. BAR ASS’N, *Links to Other Legal Ethics and Professional Responsibility Pages*, [http://www.americanbar.org/groups/professional\\_responsibility/resources/links\\_of\\_interest.html#States](http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#States) (last visited Oct. 5, 2016).

<sup>89</sup> The ABA Prosecution Standards explain that:

[T]hese Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a prosecutor’s obligations under applicable rules, statutes, or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-1.1(b).

<sup>90</sup> Similar to the ABA Prosecution Standards, the National Standards were “intended to supplement rather than replace the existing rules of ethical conduct that apply in a jurisdiction.” NAT’L PROSECUTION STANDARDS (NAT’L DIST. ATT’YS ASS’N 2009).

<sup>91</sup> Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53, 56 (2008).

<sup>92</sup> NAT’L PROSECUTION STANDARDS, *supra* note 90.

<sup>93</sup> See Stephens, *supra* note 91.

<sup>94</sup> NAT’L PROSECUTION STANDARDS, *supra* note 90, at Standard 1-1.1; ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-1.2(b).

(a) The prosecution function should be performed by a lawyer who is

- (i) a public official,
- (ii) authorized to practice law in the jurisdiction,

and

- (iii) subject to rules of attorney professional conduct and discipline.<sup>95</sup>

A brief justification for limiting the preferred organization of the prosecutorial function is also provided: “Prosecutors whose professional obligations are devoted full-time and exclusively to the prosecution function are preferable to part-time prosecutors who have other potentially conflicting professional responsibilities.”<sup>96</sup> The National Prosecution Standards also encourage a full-time rather than part-time scheme in even stronger terms than those found in the ABA Prosecution Standards:

The chief prosecutor in a jurisdiction should be a full-time position. A full-time prosecutor, whether the chief prosecutor or otherwise, should neither maintain nor profit from a private legal practice. A chief prosecutor may serve part-time in those jurisdictions that are unable or unwilling to fund a full-time prosecutor, but while serving as a part-time prosecutor may not engage professional conduct that is inconsistent with the need for prosecutorial independence.<sup>97</sup>

Both sets of standards explicitly warn against deviating from the prosecutorial norm of full-time government employment and representation for the very salient reason of avoiding the inevitable conflicts of interest that will arise by both serving the government as well as serving private clients while focusing on perceptions of propriety, several of which are discussed in this Article, below. The NDAA Standards hint at potential issues of public accountability and transparency, divided loyalties, and other potential conflicts of interest, with the Commentary to the NDAA standards explicitly stating that:

[T]here are many part-time prosecutors in the United States. This situation is generally created by the societal preference for local accountability and control in locations where the sparse population, geographic size of the jurisdiction, budget and caseload do not warrant that the position be approached as a full-time one. The position of this standard is that the office be approached on a full-time basis insofar as that is possible in any jurisdiction.<sup>98</sup>

Both sets of standards also, however, envision circumstances under which hiring by jurisdictions of part-time prosecutors is, unfortunately, an

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<sup>95</sup> ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-2.1(a).

<sup>96</sup> *Id.*

<sup>97</sup> NAT'L PROSECUTION STANDARDS, *supra* note 90, at Standard 1-1.3.

<sup>98</sup> *Id.* at Standard 1-1.6 cmt.

inevitability.<sup>99</sup>

## II. OUTSOURCING OF PROSECUTORIAL SERVICES

Part II introduces readers to the challenges faced by smaller jurisdictions that render them unable to either hire a full-time city or county prosecutor, or have elections to fill such a position, leading them to depend upon prosecutors hired on a part-time, contractual basis. This section then goes on to give an operational definition of “outsourcing” for purposes of this Article and to describe the RFP competitive bidding process more fully. Subsequently, this Part describes and analyzes prosecutorial RFPs issued from ten different local governments throughout the United States, with particular focus on language that would drive prosecution to become more profit-motivated, as well as other relevant factors such as clauses regulating future removal of the aspiring part-time prosecutor/RFP applicant.

The vast majority of scholarship exploring criminal law does so at a federal or state level; small local governments such as cities, towns, or counties in which municipal or justice courts, as well as their city attorneys/prosecutors, mostly handle misdemeanors<sup>100</sup> and are rarely examined by the media, let alone by legal scholars. Such a paucity in scholarship presents a significant gap; if local governments are placed in positions in which they must choose a method by which to hire a prosecutor, they should be aware of the risks that come with privatizing the function through the RFP process. David Carroll, executive director of the Sixth Amendment Center in Boston, spoke to the importance of this neglect, noting that “[m]isdemeanors matter. For most people, our nation’s misdemeanor courts are the place of initial contact with the criminal justice systems. Much of a citizenry’s confidence in the courts as a whole – their faith in the state’s ability to dispense justice fairly and effectively – is framed through these initial encounters.”<sup>101</sup>

The most recent (and possibly only widely available) national survey of prosecutors in smaller jurisdictions was undertaken by the Department of Justice’s Bureau of Justice Statistics (BJS), which released its findings on

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<sup>99</sup> *Id.*; see also ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-2.1(a).

<sup>100</sup> Deviating from this trend and demonstrating the difficulty of being able to describe local criminal justice systems by way of generalization, prosecutors who are hired to represent counties, for example, may have the ability and need to prosecute more serious felony offenses.

<sup>101</sup> Sixth Amendment Center, *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services*, X (2015), [http://sixthamendment.org/6ac/6AC\\_utahreport.pdf](http://sixthamendment.org/6ac/6AC_utahreport.pdf).

state and local prosecutors' offices in January 2003.<sup>102</sup> While most popular media such as television or movies depict prosecutors in large and gritty cities, about 23% of the nation's prosecutors' offices have a chief prosecutor who was hired on a part-time basis, running counter to the usual public perception of the job.<sup>103</sup> The median budget for offices with part-time prosecutors was only \$95,000.<sup>104</sup> Nearly 9 in 10 of the nation's prosecutors practice in an office servicing populations of less than 250,000: This figure represents almost 40% of the nation's population.<sup>105</sup> The prosecutors' offices in these smaller districts overwhelmingly have had difficulties hiring new attorneys given their scant budgets and inability to offer competitive salaries to new attorneys.<sup>106</sup> Although this data is interesting and hints at the challenges posed to prosecutors in small districts, including those where a city, county, or other governmental subdivision is unable or unwilling to find a full-time prosecutor, the BJS survey unfortunately only covered, "all chief prosecutors that tried felony cases in State courts of general jurisdiction."<sup>107</sup>

Data regarding the operation of criminal justice systems on a more localized level, including cities, towns, and counties, is desperately needed. Although the BJS survey was certainly extensive, receiving responses from most of the 2,341 prosecutors' offices that handled felonies, it is no wonder that a widespread survey of prosecutors in myriad cities, counties, towns, and other districts that have their own prosecutors has not yet been accomplished.<sup>108</sup>

#### A. SPATIAL INEQUALITY, DWINDLING TAX BASES, AND DEVOLUTION

Additional challenges face small, rural jurisdictions that might be inclined to hire a full-time prosecutor but for their isolation<sup>109</sup> and poor tax

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<sup>102</sup> CAROL J. DEFRANCES, STATE COURT PROSECUTORS IN SMALL DISTRICTS, 2001, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS 2 (2013), <http://www.bjs.gov/content/pub/pdf/scpsd01.pdf>. ("Even though they constitute the majority of the prosecutors' offices nationwide, little information has been reported about prosecutors' offices serving smaller districts with a population under 250,000. The 2001 [National Survey of Prosecutors] provides the first opportunity to comprehensively examine these offices.")

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1.

<sup>106</sup> *Id.* at 3–4.

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *See id.* at 10.

<sup>109</sup> "Rural places are often defined by their 'relatively sparse populations and relative isolation from urban areas,' sometimes referred to as the 'ecological component' of rurality." Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural*

bases.<sup>110</sup> There has recently been desperately needed focus on access to justice in rural and smaller communities in legal scholarship.<sup>111</sup> Much of this scholarship has understandably focused on issues such as access to attorneys and access to justice generally for people living in smaller jurisdictions, as well as examining access to other constitutionally protected services, such as abortion.<sup>112</sup> In the context of criminal justice, this focus turns to public defense funding and availability, given that the Sixth Amendment right to counsel is arguably the most important of rights afforded to a criminal defendant as it would be an especial challenge to assert any other rights without an attorney's assistance.<sup>113</sup>

Greater scrutiny, however, should fall upon the prosecutorial systems of local governments, particularly smaller counties, cities, and towns. In a recent survey conducted in 2007, "eighty-seven percent of local government respondents stated that their primary reason for choosing privatization" of a variety of services was "an attempt[] to decrease cost."<sup>114</sup> Many of the same factors germane in examining access to justice or public defense in such jurisdictions are also important when considering the prosecutorial side of criminal adjudication. These include lack of personal wealth due to a paucity of development and other economic opportunities, thereby limiting potential tax revenues, especially when "many states underfund municipal and county governments."<sup>115</sup>

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*America*, 59 S.D. L. REV. 466, 485 (2014) (quoting Frank L. Farmer, *The Definition of "Rural"* in ENCYCLOPEDIA OF RURAL AMERICA: THE LAND AND THE PEOPLE 833 (Gary A. Goreham ed., 2d ed. 2008)).

<sup>110</sup> "[N]onmetropolitan county governments and small municipalities generally struggle to provide all sorts of services and functions because of the inability to achieve economies of scale, and because they typically depend on local sales or property taxes, which are less robust than in urban locales." *Id.* at 501 (citing Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 242–46 (2010)).

<sup>111</sup> See, e.g., Pruitt & Colgan, *supra* note 110; Pruitt & Showman, *supra* note 109; Lisa R. Pruitt, J. Cliff McKinney, II, & Bart Calhoun, *Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It*, 37 U. ARK. LITTLE ROCK L. REV. 573, 573–74 (2015); Hillary A. Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 MONT. L. REV. 225, 229 (2015).

<sup>112</sup> See, e.g., Pruitt & Showman, *supra* note 109, at 467; Robin Runge & Christyne J. Vachon, *Planting the Seeds and Getting into the Field: The Role of Law Schools in Ensuring Access to Justice in Rural Communities*, 59 S.D. L. REV. 616, 617–22 (2014).

<sup>113</sup> See, e.g., Pruitt & Colgan, *supra* note 110, at 219.

<sup>114</sup> Epstein, *supra* note 21, at 2236 (quoting Sam Dolnick, *At Penal Unit, A Volatile Mix Fuels a Murder*, N.Y. Times, June 18, 2012, at A1).

<sup>115</sup> Pruitt & Colgan, *supra* note 110, at 228–29 (arguing that nonmetropolitan local governments often have smaller budgets with which to serve needier populations).



An additional challenge facing local governments and prompting greater outsourcing of their services<sup>116</sup> generally is the trend toward devolution of government obligations and responsibilities.<sup>117</sup> Devolution of responsibilities from state to local government has, especially in recent decades, been championed as a prospective measure to increase efficiency and allow for public policy decisions more customizable to such local governments and the populaces that they serve in a variety of industries and contexts.<sup>118</sup> Devolution, however, has not always been the panacea that it

Nonmetropolitan (nonmetro) communities have also generally suffered from higher rates of poverty than metropolitan (metro) communities. The federal Office of Management and Budget has defined metropolitan communities as:

broad labor-market areas that include: 1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people. 2. Outlying counties that are economically tied to the core counties as measured by labor-force community. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out of the central counties – the so-called “reverse” commuting pattern.

U.S. Dep’t of Agric. Econ. Research Serv., *Rural Classifications: What is Rural?*, USDA, <http://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural.aspx> (last visited July 14, 2016).

There has been a higher incidence of nonmetro poverty versus metro poverty since official poverty rates were recorded in the 1960s. In nonmetro communities compared to metro areas, this rate was 4.5% higher in the 1980s, 2.6% higher in the 1990s, and 2.7% higher from 2000 to 2009. U.S. Dep’t of Agric. Econ. Research Serv., *Rural Poverty and Well-Being: Poverty Overview*, USDA, <http://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/poverty-overview.aspx> (last visited July 14, 2016). In 2010, this gap reached its second narrowest since such data was recorded—a 1.6% difference, with the uneven recovery following the recession of 2007–2009 accepted as the cause of this narrowing. *Id.* For purposes of producing subnational and subpopulation poverty estimates, use of the American Community Survey, with its dramatically larger sample size than required by the Current Population Survey (CPS), is encouraged by the Census Bureau. Poverty rates for the most recently available year (2014) were 18.1% nonmetro and 15.1% metro, perhaps reflecting the same sort of trends that were observed before the Great Recession. *Id.*

<sup>116</sup> Epstein, *supra* note 21, at 2213.

<sup>117</sup> Patricia M. Wald, *Looking Forward to the Next Millennium: Social Preview to Legal Change*, 70 TEMP. L. REV. 1085, 1098 (1997).

<sup>118</sup> See Richard P. Nathan & Thomas L. Gais, *Is Devolution Working? Federal and State Roles in Welfare*, BROOKINGS INST. (June 1, 2001), <https://www.brookings.edu/articles/is-devolution-working-federal-and-state-roles-in-welfare/> (“[S]ome states have devolved considerable control and responsibility for developing programs down to localities”). These issues are wide ranging, from greater local control of transportation, school choice, and, especially in the western United States, greater control of lands that are currently federally controlled. See also Robert Tannenwald, *The Devolution: The New Federalism—An Overview*, NEW ENG. ECON. REV., at 2 (May/June 1998); Martin Wachs, *Local Option Transportation Taxes: Devolution as Revolution*, ACCESS (Spring 2003), at 9; Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 930 (2015); *Devolution:*

has been made out to be. Foisting responsibilities upon local governments has raised concerns that not only would a lack of funds present challenges, but that the “technical, and civic capacity of many communities can pose a serious problem for meeting local needs,” including the need for prosecutors who seek justice.<sup>119</sup>

#### B. DEFINING “OUTSOURCING” AND “PRIVATIZATION”

There are, of course different manners in which local governments and small political subdivisions, such as counties, cities, and towns, may provide essential services to their citizens and residents. These would include any number of governmental functions, such as utility services, park maintenance, and waste management. As discussed above in Part I.B, many smaller jurisdictions, for reasons that will be discussed below, prefer to privatize, to some extent, their prosecution functions.<sup>120</sup> Such arrangements may take myriad forms, but can be roughly categorized as consisting of 1) contracting out for prosecution services, 2) hiring on part-time prosecutors, or 3) utilizing private prosecutors who are funded exclusively by victims.<sup>121</sup> This Article focuses exclusively on those cities, counties, and other political governmental subdivisions below the state level that rely on “contracting out” prosecutorial services by way of a competitive bidding process.

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*A Canadian Solution to Excessive Federal Ownership of Public Lands*, AM. LEGIS. EXCH. COUNCIL (Apr. 17, 2015), <https://www.alec.org/article/devolution-a-canadian-solution-to-excessive-federal-ownership-of-public-lands/>.

Greater federal control over functions such as social welfare was asserted with the Great Depression and advanced throughout the 1960s. See Jeffrey S. Sharp & Domenico M. Parisi, *Devolution: Who is Responsible for Rural America?*, in CHALLENGES FOR RURAL AMERICA IN THE TWENTY-FIRST CENTURY 353, 354–56 (David L. Brown & Louis E. Swanson eds., 2003). A greater move toward devolution and local control, however, began under the Nixon administration, partly in response to growing concern over a large, centralized federal government, a cultural preference for greater local control, and increased difficulties local, state, and national governments experienced while trying to cooperate together to tackle the issues of the day. See *id.*

<sup>119</sup> *Id.* at 353.

<sup>120</sup> Fairfax, *supra* note 22, at 267 (“Government engages in a substantial amount of privatization. Privatization is a word with many different meanings, but it typically is used to characterize the phenomenon in which government delegates to the private sector functions formerly performed by the state and deemed to be public.”).

<sup>121</sup> This Article does not venture to examine closely victim-funded prosecution given its relative rarity. While more common in the eighteenth and nineteenth centuries, the proliferation of “public order” types of crimes in the nineteenth century led to decreased numbers of victim-funded prosecutors and to the growth of more professionalized prosecution services hired by governments. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 16 (2012).

This specific form of outsourcing, however, does not consist of “complete privatization”<sup>122</sup> so much as “partial privatization,” under which the government retains the responsibility to prosecute crime but “contracts with a private actor to perform it.”<sup>123</sup> Although maintaining an increased level of (hyper) local control could make utilizing a contracting-out model more appealing to certain communities—rather than relying on a corresponding state agency for the vast majority of jurisdictions contracting out—the major concerns are budgetary. As explained by Professor Fairfax:

Jurisdictions with relatively small populations may not have the tax base to support a public prosecutor. In addition, the crime rate in a sparsely populated community may not justify the expenditure for a traditional full-time public prosecutor. Furthermore, privatizing criminal prosecution in these jurisdictions can increase criminal prosecution capacity, which, in turn, might enhance efficiency, public safety, and fairness by speeding criminal case processing, reducing crime, saving court administration costs, and diminishing the human and financial costs of pretrial detention.<sup>124</sup>

Jurisdictions using a contracting out model are usually limited in their options, as noted by Professor Fairfax.<sup>125</sup> The extreme budgetary limits and shortfalls seen in smaller and/or rural jurisdictions, however, have also begun to manifest themselves in larger jurisdictions, as well. To effectively manage the great demands placed upon them through increased devolution of responsibilities, local governments require sufficient funding and administrative capacities. It should not be surprising that in a country and culture in which free markets are prized that “private providers are assumed to be more efficient and innovative than government because they operate in competitive markets.”<sup>126</sup> Such privatization, however, can lead to greater disparities between wealthier local governments versus economically depressed ones, and smaller local governments versus larger ones; approaching privatization on unequal footing will often lead to unequal results: “Local governments that lack the fiscal capacity to respond to development challenges will be caught in a vicious circle. Poor economic development leads to limited government revenues, which in turn limit

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<sup>122</sup> BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 15 (1998) (explaining that “complete privatization” would consist of exclusive private sector control over resource allocation).

<sup>123</sup> Fairfax, *supra* note 22, at 268.

<sup>124</sup> *Id.* at 282.

<sup>125</sup> Fairfax, *supra* note 12, 416–17.

<sup>126</sup> Mildred E. Warner, *Competition, Cooperation, and Local Governance*, in CHALLENGES FOR RURAL AMERICA IN THE TWENTY-FIRST CENTURY 252, 253 (David L. Brown & Louis E. Swanson, eds. 2003) (citing Emanuel S. Savas, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* (2000)).

government investment, in turn reducing future economic development.”<sup>127</sup> Although there has, justifiably, been much scholarship and media coverage focusing on public defense budgets and funding, prosecutors’ offices have likewise had to find ways to cut costs and manage in a more restrictive financial landscape.<sup>128</sup> With the challenge of poor economic conditions for local governments potentially spreading to larger cities as discussed in Part II.A above,<sup>129</sup> the outsourcing of the criminal prosecution function may, unfortunately, continue to spread in a deleterious way and be employed in shortsighted attempts to boost economic efficiencies while ignoring the long-term risks and damage.

### C. THE COMPETITIVE BIDDING/RFP PROCESS

Although it is next to impossible to discuss the procurement process for every local government throughout the United States within the expanse of one article,<sup>130</sup> there are steps and requirements that, generally, every jurisdiction strongly encourages, if not mandates, when hiring for services. One of these usual requirements, competitive bidding, is intended to make hiring processes transparent and fair for applicants and to keep costs to local government low while still attracting the most qualified candidates. However, both state and local governments will “often require proof of cost savings prior to permitting” services or goods to be procured through the RFP/bidding process, as well as through other privatization methods.<sup>131</sup> Local governments commonly enjoy much discretion and flexibility in determining their own procurement processes<sup>132</sup>; such processes are usually

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<sup>127</sup> *Id.* at 252, 255.

<sup>128</sup> See, e.g., Madelyn Beck, *Ketchikan DA’s Office Feeling Budget Cuts*, KRBD FM (Aug. 25, 2015), <http://www.krbd.org/2015/08/25/ketchikan-das-office-feeling-budget-cuts/>; Kimberly Jackson, *State Budget Cuts Impact Public Safety*, KTUL.COM (Jan. 20, 2016), <http://ktul.com/news/local/state-budget-cuts-impact-public-safety>; Greg Land, *Fulton County District Attorney and Public Defender Say Budget Cuts Force Furloughs*, DAILY REPT. (Mar. 16, 2016), <http://www.dailyreportonline.com/id=1202752402986/Fulton-County-District-Attorney-and-Public-Defender-Say-Budget-Cuts-Force-Furloughs>; Lawrence Specker, *Mobile County DA Cuts Staff, Blames Funding Crunch*, AL.COM (Apr. 14, 2016), [http://www.al.com/news/mobile/index.ssf/2016/04/mobile\\_county\\_da\\_cuts\\_staff\\_bl.html](http://www.al.com/news/mobile/index.ssf/2016/04/mobile_county_da_cuts_staff_bl.html).

<sup>129</sup> Governing the States and Localities, *Bankrupt Cities, Municipalities List and Map*, (2015), <http://www.governing.com/gov-data/municipal-cities-counties-bankruptcies-and-defaults.html>.

<sup>130</sup> This task would require a great deal of data collection and synthesis, as well as the publication of that data into what would likely be a rather unwieldy tome.

<sup>131</sup> Applicants may even be required to demonstrate that they can provide the goods or service more cheaply than the local government itself could. Epstein, *supra* note 21, at 2237.

<sup>132</sup> There are occasions, however, in which a specific project or position is underwritten partly or wholly by separate grant funding. Oftentimes such grants may require their own

more onerous for more important positions that need filling or tasks that need to be accomplished.<sup>133</sup> The formality of the procurement process employed may also depend on the approximated value of the contract, with the most rigorous process being competitive bidding.<sup>134</sup>

To initiate the competitive bidding process a local government will draft a document known widely as a request for proposal.<sup>135</sup> Commonly, public notice statutes require the publication of a legal notice, usually in a major (for the respective jurisdiction and readership) daily newspaper announcing the solicitation of RFPs.<sup>136</sup> The RFP is much more than the usual job vacancy announcement or help wanted sign; it usually consists of a public invitation to submit a proposal to provide a service that an agency has identified is needed.<sup>137</sup> The issuer of the RFP is, theoretically, then able to best judge each proponent's experience, qualifications, and approach in evaluating who would best be best equipped to provide the needed service with the greatest value.<sup>138</sup> RFPs will often include or ask for the following: 1) a statement of what services are needed, 2) a schedule for the project or the term of years for which the service is being solicited, 3) qualifications needed and evaluation criteria, and 4) a request for a budget, including salary, supplies, assistants, and any other costs that may be envisioned while serving as prosecutor.<sup>139</sup> Although this often-convoluted process is meant to allow local governments to best determine each applicant's experience, qualifications, and other merits, contracts are generally awarded to the lowest bidder, with other factors often playing at best, a secondary role in the decision.<sup>140</sup>

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prescribed procurement requirements that will necessarily limit how a local government makes its decision. *See, e.g.*, U.S. DEP'T OF JUST., VIOLENCE AGAINST WOMEN GRANT PROGRAMS, at <https://www.justice.gov/ovw/grantees#s1> (last visited May 1, 2016).

<sup>133</sup> JON M. WALTON ET AL., BEST VALUE IN GOVERNMENT PROCUREMENT: CONCEPTS AND PRACTICES 3–5 (2013), [http://www.nigp.org/docs/default-source/New-Site/position-papers/150105\\_best-value\\_position-paper-complete\\_updated.pdf?sfvrsn=4](http://www.nigp.org/docs/default-source/New-Site/position-papers/150105_best-value_position-paper-complete_updated.pdf?sfvrsn=4) (discussing Best Value Policies).

<sup>134</sup> *Contracting and Competitive Bidding*, MUN. RES. & SERVS. CTR., <http://mrsc.org/getdoc/99fac994-e481-44dd-8639-c557b887893c/Contracting-and-Competitive-Bidding.aspx> (last visited Oct. 5, 2016) (“The most rigorous and time-intensive competitive processes are known as formal competitive bidding.”).

<sup>135</sup> *Request for Proposal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>136</sup> *See, e.g.*, IDAHO CODE § 67-2806 (2005).

<sup>137</sup> *See, e.g.*, MASS. GEN. LAWS ch. 30B, § 6 (2016).

<sup>138</sup> *See generally* WALTON, *supra* note 133, at 4.

<sup>139</sup> *See generally* *A Guide to Writing a Request for Proposal*, WAREHOUSING EDUC. & RES. COUNCIL, <http://www.werc.org/assets/1/assetmanager/rfpwritingguide.pdf> (last visited Oct. 5, 2016).

<sup>140</sup> *See* *Lowest Price Technically Acceptable (LPTA) Selection Process vs. Best Value*

#### D. SAMPLES OF PROSECUTORIAL OUTSOURCING RFPs THROUGHOUT THE UNITED STATES

One needs to be familiar with examples of RFP language to understand the conflicts such solicitations by local governments pose, along with the often perverse economic incentives to depart from the prosecutorial norm of “doing justice.” Although these cities and their RFPs have been included as examples that could give rise to the perverse economic incentives that this Article examines, their inclusion certainly is not meant to imply that there has been any malfeasance—past or present—committed by the employees of any of these localities.

##### 1. *Green River, Wyoming*

The City of Green River recently released an RFP for a city prosecutor.<sup>141</sup> Proposals were due on February 16, 2015 for a term to run through January 31, 2019, subject to early termination if needed.<sup>142</sup> The duties assigned to the city prosecutor consisted, in broad terms, of enforcing city ordinances in the Green River Municipal Court.<sup>143</sup> The qualifications sought were exceptionally minimal, consisting of 1) a Juris Doctor, 2) membership in the Wyoming State Bar, and 3) a license to practice in state and federal court; the third factor effectively duplicated the second.<sup>144</sup> Applicants were required to “detail the compensation requested to perform” the duties described, with potential compensation packages to be arranged in one of three ways: 1) a monthly retainer as well as an hourly rate for services that went beyond the usual monthly scope, 2) an annual salary including city health insurance, and 3) an annual salary excluding health benefits.<sup>145</sup> The city explained that review “of all proposals will include, but is not limited to, overall cost to the City . . . .”<sup>146</sup> Although language regarding the importance of overall cost certainly encourages attorneys to underbid each other as much as possible, it also impliedly encourages a profit-driven approach: an applicant may be successful in having their contracts continuously renewed if they generate enough in the way of fines

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*Evaluation Bid Protest*, WATSON & ASSOC., <http://blog.theodrewatson.com/lowest-price-technically-acceptable-versus-best-value-bid-protest/> (last visited Oct. 5, 2016) (“The LPTA evaluation approach is more popular nowadays.”).

<sup>141</sup> CITY OF GREEN RIVER, WYO., CITY PROSECUTOR REQUEST FOR PROPOSAL 1 (2015) (on file with author).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.*

and fees to counteract the cost of their contract.

## 2. *Lakeville, Minnesota*

Lakeville released an RFP seeking to fill two vacancies—one for a city attorney and another for a prosecutor.<sup>147</sup> The RFP submittal deadline was April 8, 2016, with final approval to have taken place on June 6, 2016.<sup>148</sup> The city prosecutor’s duties consist, mainly, of prosecuting misdemeanors in Lakeville’s municipal court.<sup>149</sup> In addition to describing prior experience and explaining how the applicant planned to make themselves “readily accessible to City personnel, especially police officers,” applicants were required to provide “a detailed description and explanation of all fees and/or charges that may arise for provided prosecution and related legal services.”<sup>150</sup> This explanation was not to be limited only to the attorney’s services, but for proposed staff, as well.<sup>151</sup> When evaluating proposals the city made it clear that it intended to “award a contract to the proposer(s) evaluated to be best qualified to perform the work for the City, cost and other factors considered.”<sup>152</sup> Although the city anticipated hiring a prosecutor for a minimum of three years, a new contract was required each year with expected annual renewals and either party could terminate the relationship with 90 days’ notice.<sup>153</sup> The constant threat of removal outlines in the RFP places a great deal of pressure on any applicants to do exactly what the city would want.

## 3. *River Falls, Wisconsin*

River Falls released its RFP for a municipal prosecutor on March 6, 2015.<sup>154</sup> The duties of the municipal prosecutor were limited to prosecuting city-issued citations in the River Falls municipal court.<sup>155</sup> The municipal prosecutor was also responsible for handling appeals from the municipal to

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<sup>147</sup> CITY OF LAKEVILLE, MINN., LEGAL SERVICES REQUEST FOR PROPOSALS 2 (2016) (on file with author).

<sup>148</sup> *Id.* at 1.

<sup>149</sup> *Id.* at 6.

<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> CITY OF LAKEVILLE, MINN., LEGAL SERVICES REQUEST FOR PROPOSALS 8 (2016) (on file with author).

<sup>154</sup> CITY OF RIVER FALLS, WIS., REQUEST FOR PROPOSAL, MUNICIPAL PROSECUTOR 5 (2015) (on file with author).

<sup>155</sup> *Id.* at 1.

county level circuit court.<sup>156</sup> Although the required personal qualifications of applicants were relatively minimal (i.e., references, descriptions of training, and experience), the RFP requested a “methodology for how the individual or firm will bill the City for its services,” with the city entertaining only “hourly or flat fee approach[es].”<sup>157</sup> Applicants were to include the costs of all support staff and other overhead expenses.<sup>158</sup> Oddly enough, proposals were to first be evaluated by the municipal judge in whose court the new prosecutor would appear, as well as city staff.<sup>159</sup> The judge’s recommendation was to then be forwarded to the city council.<sup>160</sup> It was the city’s priority to select the attorney or law firm that would provide “the best value,” specifically considering physical availability, prior experience, and “the proposed price.”<sup>161</sup> The city wished to enter into a two-year contract, with either party able to cancel with 90 days’ notice.<sup>162</sup> Once again, a successful applicant would be placed in a precarious situation with the city, with removal from the position by way of cancellation of the contract relatively easy.

#### 4. Ephraim City, Utah

Ephraim City recently solicited proposals by way of RFP; proposals were due on February 27, 2015 with the position to start on July 1, 2015.<sup>163</sup> Ephraim is an especially small city with a population of 6,431 and, as such, has combined the duties of civil city attorney with city prosecutor into one position.<sup>164</sup> The proposed contract was specified to run for two years, with the potential to extend at its conclusion for an additional two years.<sup>165</sup> Along with providing city attorney services,<sup>166</sup> the applicant hired would be tasked with prosecuting misdemeanors arising in Ephraim.<sup>167</sup> Although

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 6.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 9.

<sup>160</sup> CITY OF RIVER FALLS, WIS., REQUEST FOR PROPOSAL, MUNICIPAL PROSECUTOR 9 (2015) (on file with author).

<sup>161</sup> *Id.* at 9–10.

<sup>162</sup> *Id.* at 3.

<sup>163</sup> EPHRAIM CITY, UTAH, REQUESTS FOR PROPOSALS FOR LEGAL SERVICES—CIVIL AND CRIMINAL 1 (2015) (on file with author).

<sup>164</sup> *Id.* at 3.

<sup>165</sup> *Id.* at 4.

<sup>166</sup> These include tasks such as attending city council meetings, drafting ordinances, and reviewing all contracts entered into by the city (including, presumably, those for outsourced public defense work).

<sup>167</sup> EPHRAIM CITY, UTAH, *supra* note 163.



more rigorous screening is prescribed by this RFP, including a minimum requirement of five years of legal experience and knowledge and experience in municipal law,<sup>168</sup> this RFP also requires the most detailed fee proposal of all the RFPs examined in this piece thus far. Applicants were required to provide an hourly or monthly retainer rate (unsurprisingly Ephraim City preferred a retainer rate “in an effort to manage costs effectively”), as well as account for all extra potential costs, including providing estimates for “minimum increments of time billed for each service including phone calls, correspondence and personal conferences” as well as reimbursable expenses “including travel (per mile), telephone, printing, photocopying, etc.”<sup>169</sup> providing a chilling effect for those who might have asked for greater resources when the need arose to do prosecutorial job well. Perhaps the most troubling aspect of this RFP are its provisions for removal: any contract a successful applicant and the city would agree upon was required to specify that the attorney serves as “an independent contractor serving at the will of the City Council,” and that it was the city’s “right to terminate the agreement, at its sole discretion, upon the provision of notice.”<sup>170</sup> An attorney could be, practically speaking, fired at any time, for any reason, with no such reciprocal right offered to cancel the contract.

### 5. Kyle, Texas

The city of Kyle is located in Hays County and is only twenty miles south of Austin and fifty miles northeast of San Antonio.<sup>171</sup> Located on the 35 Freeway, Kyle cannot be characterized in any respect as being geographically isolated or rural so much as a suburb of Austin. Kyle, however, is presented here as an example of the RFP process for choosing a criminal prosecutor spreading outside of the rural localities in which the practice is usually found.

Kyle was founded in 1881 at its respective site along the International-Great Northern Railroad line.<sup>172</sup> Since 2000, Kyle’s population has grown dramatically, from 5,314 in 2000 to 28,016 in 2010 and an estimated 35,733 in 2015, reflecting the rapid growth happening throughout many Texas cities.<sup>173</sup> Such massive growth in formerly small, rural towns and cities

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 6.

<sup>170</sup> *Id.* at 7.

<sup>171</sup> Kyle, Texas, CITY-DATA.COM, <http://www.city-data.com/city/Kyle-Texas.html> (last visited Oct. 5, 2016).

<sup>172</sup> City of Kyle, Texas, *History of Kyle*, <http://www.cityofkyle.com/community/history-kyle> (last visited Oct. 5, 2016).

<sup>173</sup> U.S. Census Bureau, American Fact Finder, Kyle City, Texas, Annual Estimates of

often left such local governments in difficult positions in which they would not possess the authority to enact policy to handle such changes.<sup>174</sup>

Kyle recently issued an RFP seeking proposals by May 23, 2016 for a prosecutor in its municipal court, with a contract start date of July 1, 2016.<sup>175</sup> Kyle's municipal court handled "approximately 6,000 cases annually," consisting mainly of "moving violations and a small number of cases pertaining to code and juvenile violations."<sup>176</sup> The qualifications for such a prosecutor as listed in the FRP were perfunctory, stating that a candidate should be "qualified and capable" and, oddly, should never have filed for nor have been adjudged bankrupt.<sup>177</sup> According to the RFP, the evaluating factors in screening through proposals was "1) Completeness of the proposal submitted, 2) Understanding of the scope of work and services provided, 3) Individual attorney's or law firm's experience and of its assigned personnel, 4) Availability and accessibility, 5) Compensation."<sup>178</sup>

Although experience may seem like a significant factor to consider, especially compared with some of the RFPs discussed above, in a geographic setting with proximity to Austin and El Paso, finding attorneys with five or more years of experience would likely not narrow the field prohibitively as doing so in an area with only two or three active attorneys. Apart from the experience and compensation factors, completeness of a proposal, understanding of the nature of the job itself, and being physically present for the job are not particularly demanding factors for any attorney proponents for the City using the factors. The terms regarding cancellation of the contract, however, are more illuminating:

The City reserves the right to terminate the contract if the successful Offeror does not perform to the City's satisfaction.

The City of Kyle is a home-rule municipal corporation operated and funded on an October 1 to September 30 basis; accordingly, the City reserves the right to terminate, without liability to the City, any contract (or renewal option) for which funding is not available.<sup>179</sup>

The focus of cancellation of a contract under the RFP rests on the satisfaction of the town council, rather than voters; termination should also

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the Resident Population: April 1, 2010 to July 1, 2015, <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2015/PEPANNRES/1620000US4839952> (last visited July 15, 2016).

<sup>174</sup> See Sharp & Parisi, *supra* note 118, at 255.

<sup>175</sup> CITY OF KYLE, TEX., REQUEST FOR PROPOSALS, RFP NO. 2016-03-PM, PROSECUTION SERVICES FOR MUNICIPAL COURT 2 (2016) (on file with author).

<sup>176</sup> *Id.* at 5–6.

<sup>177</sup> *Id.* at 8.

<sup>178</sup> *Id.* at 10.

<sup>179</sup> *Id.* at 7.

be expected by a prosecutor hired by RFP if they are not able to bring in the funding necessary to keep their jobs, along with keeping the city council satisfied.

### 6. Hortonville, Wisconsin

The village of Hortonville is located on the shores of Black Otter Lake in Outagamie County, Wisconsin. Hortonville's population estimate for 2015 was 2,712.<sup>180</sup> The submitted due date for any proposals was due on September 30, 2014.<sup>181</sup> The winner of the bid was expected to "represent the Village in prosecuting violations of state law" and the applicable municipal code.<sup>182</sup> The village was seeking to contract with a law firm or attorney for two years; no provisions for removal were provided.<sup>183</sup> Hortonville's police department issued, on average, 70 to 75 citations a month.<sup>184</sup>

Hortonville's RFP is an aberration amongst the RFPs examined in this Article. An entire section of the RFP was dedicated to a section entitled "Prosecution Philosophy," which expounded upon the duties of the successful candidate: "The Prosecutor's decisions and dispositions of cases need to be consistent with community concerns about maintaining and improving a positive image of the Village, in addition to promoting peace and order."<sup>185</sup> At no point, however, is serving the interests of justice in any of its incarnations mentioned—the exclusive focus of the "philosophy" outlined in the RFP is a strong, nearly singular emphasis on being cooperative with the police, even to the point of being required to be available on all nights and weekends to them.<sup>186</sup>

Hortonville's RFP was also unusual in that it required all submitted

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<sup>180</sup> U.S. Census Bureau, American Fact Finder, Hortonville Village, Wisconsin, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015 <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2015/PEPANNRES/1620000US5535850> (last visited July 14, 2016).

<sup>181</sup> VILLAGE OF HORTONVILLE, WIS., REQUEST FOR PROPOSAL, MUNICIPAL COURT PROSECUTOR SERVICES 1 (2014 on file with author).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2–3.

<sup>186</sup> "The Prosecutor should have regular and ongoing contact with police officers to communicate charging and filing standards and update officers of the most recent case law and important changes in law. The Prosecutor must be reasonably available for night and weekend (24/7) contact by Hortonville Police Department personnel." *Id.* at 3. The irony seems lost on the drafter of the RFP that many, if not most, attorneys would consider being available "24/7" including weekends for a part-time job an unreasonable request per se.

bids to propose an hourly rate by which the prosecutor would be compensated.<sup>187</sup> There were also other requirements for the proposal that were not evident in the other prosecutorial RFPs covered in this paper such as providing an explanation of service delivery and philosophical approach to prosecution, as well as a list of references.<sup>188</sup> Also odd was the narrowing of candidates through a screening by not only the current village attorney, but also the village administrator, village judge, and village chief of police.<sup>189</sup> Nothing in the RFP discusses the possibility of removal prior to the expiration of the proposed two-year contract.<sup>190</sup>

Hortonville's RFP is troubling, even though it may seem more comprehensive in its requirements than any of the RFPs reviewed in this Article. The strong emphasis on communication and collaboration with the police and the narrowing of proposals by the chief of police as well as the municipal judge presents a host of problems, including a lack of autonomy from the police department rather than any focus upon doing justice, as well as a collapse in the separation of powers by having the municipal judge before whom the new prosecutor would appear participating in any aspect of the hiring decision making.

### III. PROSECUTORIAL BIDDING AND OUTSOURCING IS DISTINCTLY PROBLEMATIC

Thus far this Article has explored, to varying levels of depth, the incentives (and disincentives) at play when outsourced prosecutors have been hired through a competitive bidding process. Is there, however, a real, substantive difference between a prosecutor hired through an RFP and contracting-out basis versus a traditional election for the position of head prosecutor, or appointment of that same position? How is hiring a prosecutor through a competitive bidding process any more problematic than employing a similar mode for procurement of any other service?

One may argue that a mayor or local government council who is elected is just as publicly accountable as would be an elected prosecutor, and that mayors and local government councils appoint individuals to myriad positions every day. Certainly some questions may arise as to how putting prosecutors' jobs out to bid is any different than other sorts of governmental procurement at all. The closest analog to the poor incentives created by putting prosecutorial positions up for public bid may be found in

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<sup>187</sup> *Id.* at 3.

<sup>188</sup> *Id.* at 4.

<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.*

the controversial practice of asset forfeiture by police in which law enforcement seize property suspected to be connected to illegal activity; “[l]ucrative forfeiture opportunities can also warp law enforcement priorities.”<sup>191</sup> Revenue-generated opportunities may also warp prosecutorial priorities, especially when pressured to operate in a profit-driven manner by mayors or local government councils rather than a mandate expressed through popular election. In particular, this section argues that prosecutors hired through a competitive bidding process face increased pressures that could lead to greater risks of 1) self-dealing, 2) facing ethical dilemmas when having to divide their loyalties amongst multiple principals, and 3) unaccountability. There has been some substantial examination of public-private contracting in recent decades.<sup>192</sup> Illuminating distinctions can be made when comparing prosecution function bidding to bidding that occurs in other industries which helps to illustrate why hiring prosecutors through a competitive bidding process leads to unacceptably profit-driven prosecution.<sup>193</sup>

Even the small samples of language from RFPs discussed in Part II.D above should raise red flags; they illustrate the arrangement of a local government contracting out for prosecution services matters implicating dilemmas and creating opportunities for perverse economic incentives. This Section argues, however, that some of those quandaries have been overstated, such as the fear of loyalty to former clients, while others that have been ignored are more deserving of our attention. Concerns that have been overlooked include placing prosecutors in positions in which they have duties to two principals, including the government, causing them to lack the incentives to guarantee they do their jobs well,<sup>194</sup> prosecutorial self-dealing, and local governments shirking their responsibilities of providing quality public services.<sup>195</sup>

Privatization of public services is a risky business, but the reasons for

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<sup>191</sup> David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L. J. 1, 31 (2012).

<sup>192</sup> Epstein, *supra* note 21, at 2215. “The prevailing sentiment in the academic literature is that private, profit-maximizing firms should not be entrusted with providing government services absent safeguards because profit-maximizing goals conflict with public service values.” *Id.*

<sup>193</sup> Much of what makes competitive bidding for prosecution services problematic versus competitive bidding for other services is prosecutions function as a “soft” government service. Such soft services “tend to be more difficult to definite and measure and involve discretion.” “Hard” services, on the other hand, “are easy to specify [and] involve little discretion.” *Id.* at 2219.

<sup>194</sup> *Id.* at 2216.

<sup>195</sup> *Id.*

concern are particularly daunting when examining the contracting out of prosecutorial services to the “lowest” bidders, even when compared to other services that might seem to implicate similar problems such as competitive bidding for private prison construction and operation, as well as bidding for public defense contracts.

The privatization of public services, generally, can be problematic: “The goal of private enterprise—to make a profit—is antithetical to the fundamental goals of public programs—to deliver services equitably, honestly, and cost efficiently,”<sup>196</sup> particularly when paired with the prosecutor’s usual goal of serving as a minister of justice. A wide variety of issues are implicated through any regime of public-private contracting: it allows local governments to be unresponsive and can create concerns regarding “inefficiency, conflict of interest, and abuse.”<sup>197</sup> The prosecutor’s role, in its power and ubiquity in the criminal justice system, as well as its specific purpose of seeking justice rather than lowered crime rates, higher conviction rates, or higher revenue for public coffers, demands a different analysis that would be applied to other services procured through competitive bidding and RFPs.

#### A. THE DANGERS OF BIDDING: SELF-DEALING AND SELF-INTEREST

Self-dealing has been defined in a public sector context as “[a] situation where one takes an action in an official capacity which involves dealing with oneself in a private capacity and confers a benefit on oneself.”<sup>198</sup> Prosecutors, just as defense attorneys or other private sector attorneys, owe a fiduciary duty to their clients and must act in their best interests.<sup>199</sup> The ABA Prosecution Standards attempt to clarify the question of who serves as the prosecutor’s client: prosecutors are to work “solely for the benefit of the client—the people—free of any compromising influences or loyalties.”<sup>200</sup>

There are several factors that might make prosecutors more likely to act on improper self-interest and self-dealing under an RFP-based contracting system rather than the traditional model. For one, prosecutors who have secured a position with a local government through the RFP

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<sup>196</sup> Al Bilik, *Privatization: Selling America to the Lowest Bidder*, 1 LAB. RESEARCH REV. at 2 (1990).

<sup>197</sup> Epstein, *supra* note 21, at 2215.

<sup>198</sup> KENNETH KERNAGHAN & JOHN W. LANGFORD, *THE RESPONSIBLE PUBLIC SERVANT* 142 (1990).

<sup>199</sup> Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 563 (2005).

<sup>200</sup> ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-1.3 cmt.

process have already subjected themselves to the competitive bidding process. In such situations, attorneys interested in the position will have already made some rudimentary calculations regarding the optimal compensation to request in an attempt to undercut competition and secure a contract, especially with the knowledge that efficiencies in cost are the overriding factor in determining to whom to award a prosecution contract.<sup>201</sup>

Prosecutors hired on contract are also much more vulnerable to termination from their positions than elected prosecutors, or even those assistant prosecutors who are hired by an elected prosecutorial supervisor.<sup>202</sup> The contractually outsourced prosecutor's job has a natural "expiration date," coupled with the additional weakness that the local government may cancel the contract, sometimes with the most minimal of notice.<sup>203</sup> Elected, incumbent prosecutors, of course, have the luxury of waiting to be voted out of office (unless they have committed a rather egregious gaffe, in which case states have varying methods of removal<sup>204</sup>), while even assistant prosecutors, usually hired on as at will employees, may often benefit from other protections such as collective bargaining agreements or favorable employee policies and handbooks limiting the process of termination.<sup>205</sup>

Financial pressures faced by contracted prosecutors may cause

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<sup>201</sup> See Thayer, *supra* note 28, at 443 (explaining that inadequate low bids are inevitable whenever a competitive bidding system is used, and that the only force that can keep prices of such contracts from falling is some sort of outside intervention such as a government price supports.”).

<sup>202</sup> Fairfax, *supra* note 12, at 444.

<sup>203</sup> See EPHRAIM CITY, UTAH, *supra* note 163, at 4.

<sup>204</sup> Some states have provisions for recall elections for those elected to public office, such as district attorneys. See, e.g., L.A. County Registrar-Recorder/County Clerk, *A Guide to Recall* (Jul. 2010), [https://www.lavote.net/documents/election\\_guides/GUIDE\\_TO\\_RECALL.pdf](https://www.lavote.net/documents/election_guides/GUIDE_TO_RECALL.pdf) (last visited Aug. 1, 2016); Or. Elections Div., *Recall Manual* (Jan. 2016), <http://sos.oregon.gov/elections/Documents/RecallManual.pdf>.

When appropriate, state bar associations may pursue ethics charges against attorneys, including district attorneys, which may result in disbarment. For example, Michael Nifong, the former district attorney of Durham County, North Carolina, was disbarred by the North Carolina State Bar for “fraud, dishonesty, deceit or misrepresentation; of making false statements of material fact before bar investigators, and of lying about withholding exculpatory DNA evidence, among other violations.” Lara Setrakian & Chris Franciscani, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS (June 16, 2007), <http://abcnews.go.com/TheLaw/story?id=3285862&page=1>.

<sup>205</sup> See, e.g., King County Office of Labor Relations, *King County Labor Contracts: Agreement By and Between King County and King County Prosecution Attorneys Association* (Dec. 2014), [http://www.kingcounty.gov/~media/depts/executive/labor-relation/s/documents/contracts/370C0114\\_scsq.ashx?la=en](http://www.kingcounty.gov/~media/depts/executive/labor-relation/s/documents/contracts/370C0114_scsq.ashx?la=en) (last visited Oct. 5, 2016).

perverse incentives to, on the one hand, over-perform, and on the other, underperform. Just as any other private service provider, prosecutors hired on contract will be “motivated to maximize profit.”<sup>206</sup> The attorney who has advanced an hourly pay arrangement may have a greater tendency, conscious or not, to spend more time “padding” their hours on a prosecution job—in essence making every task take as long as possible. Conversely, attorneys working on flat fee per case or monthly retainer bases may become more lax in fulfilling their duties, doing as little as possible while getting paid as much as possible under the contract. Since government employees are not usually rewarded for cost-saving, some praise competitive bidding as a way to control costs by awarding contracts to those who would purportedly provide services more cheaply. Contracted prosecutors who are chosen because of their cost-saving measures, in reality, “might be even more motivated than government actors to provide low-quality service.”<sup>207</sup>

It is important to acknowledge, however, that prosecutors hired on a more traditional at-will basis, such as deputy district attorneys and elected head prosecutors, also act according to personal motivations.<sup>208</sup> An elected district attorney, just as prosecutors hired through a public bidding process, is subject to many of the same needs and pressures associated with life outside of the job (“e.g., putting food on the table or paying for their kids’ education”<sup>209</sup>). In examining the distinctions and commonalities between employees and contractors, particularly in the contexts of prison privatization, Professor Alexander Volokh argued that there is, in essence, very little difference between the motivations of private firms and individual employees acting according to their private purposes, while challenging the assumption that firms only “act to maximize profit.”<sup>210</sup> He also explained that, “it’s surely true that a firm only acts to maximize profit if some individual or individuals within the firm have taken such an action.”<sup>211</sup> This is, however, precisely the task that prosecutors hired by way of RFP are expected to undertake from the time they apply for an open prosecutorial position, with RFPs stressing cost effectiveness and, implicitly, revenue generation above all else.

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<sup>206</sup> Epstein, *supra* note 21, at 2235.

<sup>207</sup> *Id.* at 2243.

<sup>208</sup> Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 179 (2012).

<sup>209</sup> *Id.* at 183.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*



## B. THE DANGERS OF BIDDING: MULTIPLE PRINCIPALS AND DIVIDED LOYALTIES

Understandably, “prosecution outsourcing raises concerns about accountability and transparency.”<sup>212</sup> Although there are widely acknowledged dangers that arise from relying on publicly elected prosecutors,<sup>213</sup> such prosecutors at least wield a local government’s power against its citizens with the understanding that if such power is abused that their elected position may be in jeopardy, while also comporting with the longstanding prosecutorial norms described in Part II.B. The outsourced, hired-on-contract prosecutor, however, is often much more shielded from public view. Rather than having to seek approval from the public or, in the case of an assistant prosecutor, helping one’s elected supervisor secure wide public approval, the contract prosecutor only needs to perform for those who control renewal of the contract—usually a mayor, city council, county council, or city manager.<sup>214</sup>

While these supervisory positions at the heads of local government usually are publicly elected, the public will almost certainly not pay the same attention to scrutinizing a prosecutor hired on contract as they might to one who has had to campaign and whom they elected themselves.<sup>215</sup> Under such circumstances, the contract prosecutor may feel a greater duty to those who make hiring decisions and to the local government itself rather than the real client to whom they owe a fiduciary duty and a duty of loyalty—the public. A substantial conflict of interest is an inherent feature of a prosecutor’s function when hired by way of RFP. No matter such a prosecutor’s actual intentions and motivations, he or she faces competing duties to the public, to the local government, and often to their own firms.<sup>216</sup>

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<sup>212</sup> Fairfax, *supra* note 22, at 283.

<sup>213</sup> In particular, engaging in campaigning and relying on public support can politicize prosecutorial functions in such a manner as to force publicly elected prosecutors to approach their jobs ever mindful of future polls.

<sup>214</sup> Fairfax, *supra* note 12, at 443.

<sup>215</sup> The author does not mean to suggest that prosecutorial campaigns or elections are necessarily high- or fair-minded, nor does she intend to somehow fetishize the prosecutorial electoral process as being completely devoid of its own troubling problems. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (“District attorneys’ electoral contests are rarely measured assessments of a prosecutor’s overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal.” (internal citation omitted)).

<sup>216</sup> “Public and private employees both have a duty to their employer. But in the public sector, that duty runs all the way up to The People, whereas in the private sector, the employer itself (the corporation) has conflicting duties, one to its contractual partner (the government and the People) and a fiduciary duty to its shareholders (who want their profits

It is in such situations that a prosecutor may decide to make choices that serve to enrich and benefit a local government rather than the citizens it would purport to serve.

A desire to serve the local government and its leaders may create even greater insidious incentives to either over or underperform.<sup>217</sup> A classic example of over-performance is treating municipal and other misdemeanor and infraction courts as revenue generators for their respective municipal governments.<sup>218</sup> Prosecutors may aggressively pursue fines that many would consider unfair or excessive while threatening jail for non-payment.<sup>219</sup> Along this vein, new categories of fines and fees appear to have been created for the sole purpose of raising revenue; some of these additional fines and fees may appear particularly outlandish, including those for probation supervision, jail “pay-for-stay” plans,<sup>220</sup> and “public defender recoupment” fees.<sup>221</sup> On the other hand is a complementary

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maximized.” Volokh, *supra* note 208, at 185.

<sup>217</sup> It has been noted both in news media and in legal scholarship, especially since the Ferguson case, that criminal justice systems, especially on a local level, have been run very similarly to businesses. See, e.g., *Developments in the Law: Policing*, 128 HARV. L. REV. 1723, 1733–34 (2015):

Using law enforcement to raise revenue is part of a larger trend of thinking about government through the logic of business. In the criminal context, critiques of privatization ha[ve] primarily focused on how these developments transfer state authority to private actors. [No matter if a private actor is involved in a criminal case one can often see] a financial motive structured right into the immense discretion (on the part of police, prosecutors, or judicial officers) that runs law enforcement. These actors then use their considerable discretion to shape not only the substance of criminal law but also its funding structure, in the way a legislature normally would. Budget authorities have even started to cut police funding in response to these departments’ raising their own revenue, in turn spurring police to raise even more money in these ways.

<sup>218</sup> See, e.g., Aaron Falk & Mike Gorrell, *Salt Lake County, Three Others on Track to Close Justice Courts*, SALT LAKE TRIB. (July 16, 2012, 5:04 pm), <http://archive.sltrib.com/story.php?ref=/sltrib/news/54498871-78/county-court-courts-justice.html.csp> (discussing several Utah cities deciding to shutter their justice courts given the fall in filings and revenue steam); City of Bryan, Texas, *Municipal Court*, <https://www.bryantx.gov/municipal-court/> (last visited May 20, 2016) (“The Court processes an average of about 20,000 cases a year. The Court also issues an average of about 5,500 warrants a year. The Court collects more than \$2 million in revenues for the City and State of Texas.”).

<sup>219</sup> See generally Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010).

<sup>220</sup> This is a plan in which an inmate is charged for every day imprisoned in jail, then expected to pay some time after release. Approximately seventy percent of states have authorized counties or other local governments to bill inmates in an attempt to recover costs of incarceration. Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L. J. 57, 57 (2013). See generally Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtor’s Prisons*, 75 MD. L. REV. 486 (2016).

<sup>221</sup> T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary State by State*, 100 CAL. L. REV. 183, 208–12 (2012); Ronald F. Wright &

scenario that receives little, if any, attention. Prosecutors may feel pressured or even encouraged to pursue options requiring that a defendant pay a fine rather than argue for an outcome that would have been beneficial and more rooted in concerns for public safety and justice, such as drug and alcohol treatment or jail, but that would cost the jurisdiction money it does not have or is unwilling to spend.<sup>222</sup>

Certainly an extreme example of rampant fine generating could be found during Stephanie Karr's tenure as Ferguson City Prosecutor, which began in April of 2011, as well as that of the acting prosecutor who preceded her. Since 2014, the City of Ferguson has become infamous; this has been in no small part due to "[c]ity, police, and court officials" with long working relationships, striving to "maximize revenue at every stage of the enforcement process."<sup>223</sup> Ms. Karr's contract, unusual for such an arrangement, provided for compensation of \$150.00 per billable hour, and Ms. Karr, along with deputy prosecutors from her law firm, made sure to keep themselves busy, essentially "padding" hours.<sup>224</sup> Ms. Karr has also recommended disproportionately high fines for what could only be considered very minor offenses—\$77 to \$102 for an overgrown lawn, \$102 for parking fines—while providing a more proper-sounding reason for doing so ("large volume of non-compliance") in an attempt to hide the fact that such recommendations were made in an effort to bring the city greater revenue.<sup>225</sup>

The acting Ferguson prosecutor preceding Ms. Karr—who was also hired via contract—also advised law enforcement to allege every violation of law possible in every case in an effort to boost revenue generation<sup>226</sup>; he

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Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046 (2006).

<sup>222</sup> Working briefly as a contract prosecutor for a small local government in Utah, the author encountered just such a case when prosecuting a defendant who had committed a DUI; the defendant pled guilty. The author recommended that the defendant be sentenced to a weekend in jail to "dry out." The municipal court judge encouraged the author to ask for a large fine, instead. After the author refused to do so, the judge still sentenced the defendant to a very large fine and no jail-time.

<sup>223</sup> U.S. DEP'T OF JUST., *supra* note 5, at 10.

<sup>224</sup> "From 2014 to 2015, the amount prosecutors billed Ferguson rose from \$30,260 to \$61,605. For work during the first three months of 2016, prosecutors charged Ferguson just over \$30,000. If that pace continues, prosecutors could cost the city more than \$120,000 this year." Stephen Deere, *Legal Bills Mount as Ferguson Stands by 'Failure-to-Comply' Cases*, ST. LOUIS POST-DISPATCH (May 2, 2016), [http://www.stltoday.com/news/local/crime-and-courts/legal-bills-mount-as-ferguson-stands-by-failure-to-comply/article\\_2070be9f-99f1-5218-9e3a-cdfaf4dfed5e.html](http://www.stltoday.com/news/local/crime-and-courts/legal-bills-mount-as-ferguson-stands-by-failure-to-comply/article_2070be9f-99f1-5218-9e3a-cdfaf4dfed5e.html).

<sup>225</sup> U.S. DEP'T OF JUST., *supra* note 5, at 10.

<sup>226</sup> This included making sure that summonses for all "correct companion charges

also bragged about his effectiveness at acting as a collection agent for the city rather than as a minister of justice, stating in a 2011 report to the Ferguson City Council that he “denied defendants’ needless requests for continuance from the payment docket in an effort to aid in the court’s efficient collection of its fines.”<sup>227</sup> Even after federal investigations that took place following Michael Brown’s death concluded that Ferguson’s criminal justice system both suffered from systemic racial bias and functioned as a revenue-generating scheme, Ms. Karr continued on in her position, even prosecuting and exacting fines from those protesting the shooting of Michael Brown in 2014 well after the resignations of the Ferguson Municipal Judge, Chief of Police, and City Manager.<sup>228</sup> Ferguson’s local criminal justice system and its catastrophic failures demonstrate, perhaps, the worst-case scenario when every organ of the criminal adjudicatory process: law enforcement, the judge, and the prosecutor, work in concert to make courts a source of revenue. As ministers of justice, prosecutors should be in the vanguard to fight against such injustices.

#### C. THE DANGERS OF BIDDING: BLAME SHIFTING AND LACK OF ACCOUNTABILITY

The hiring of prosecutors through a public bidding process also allows local governments an undue ability to shield themselves from accountability for a prosecutor’s actions, and disincentivizes them from seeking to provide good service. If a hypothetical municipal prosecutor was revealed to be unsuited to the job by way of temperament (perhaps the prosecutor performs poorly in court) or ethical and philosophical approach to the job (the prosecutor engages in an abundance of *Brady* violations or some other problematic behavior), local governments who have hired such a prosecutor have a much greater ability to point to their hiring process and the requirement of accepting a low bid as the source of the mistake rather than having to take on the same accountability when more directly making such a choice, such as by appointing an attorney to the position while offering a figure up front during salary negotiations.<sup>229</sup> This disconnection of mayors

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[were] being issued, such as speeding, failure to maintain a single lane, no insurance, and no seat belt, etc.” *Id.* at 11.

<sup>227</sup> *Id.* at 14.

<sup>228</sup> Mariah Stewart & Ryan J. Reilly, *Ferguson Prosecutor Accused of Misconduct is Still Crusading Against Ferguson Arrestees*, HUFFINGTON POST (July 2, 2015), [http://www.huffingtonpost.com/entry/stephanie-karr-ferguson\\_n\\_7707802](http://www.huffingtonpost.com/entry/stephanie-karr-ferguson_n_7707802).

<sup>229</sup> See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009). Elected prosecutors are held accountable through the political process,

and local government councils from the prosecutors they happen to procure through bidding also introduces an unacceptable risk of lack of oversight in prosecutorial standards.<sup>230</sup>

This dodging of responsibility can be observed in different industries in which outsourcing and competitive bidding predominate.<sup>231</sup> A particularly spectacular example of a failure in outsourcing and corporate responsibility is the recent Boeing 787 production debacle. The 787 Dreamliner was due for completion, maiden flight, and delivery in 2008. The first delivery, to All Nippon Airways, occurred on September 25, 2011.<sup>232</sup> This massive delay was blamed on a number of factors, including

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while prosecutors who are appointed are subject to myriad ways in which they may be terminated their position, with such diversity understandable given the number of unique local governments. *Id.* Given the lack of data collected on the subject it is difficult to ascertain at this juncture how many unelected prosecutors are hired by way of competitive bidding versus those who are merely appointed to their positions.

<sup>230</sup> See generally Sanford C. Gordon and Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002).

<sup>231</sup> Other examples abound, especially in information technology (IT). In late 2007, Queensland, Australia outsourced its health department payroll to IBM, which then bungled the project leading to thousands of employees either not getting paid or getting drastically overpaid, as well as a cost overrun 16,000 percent above projected cost. See Queensland Health Payroll System Commission of Inquiry, *Report* (July 31, 2013), [http://www.healthpayrollinquiry.qld.gov.au/\\_data/assets/pdf\\_file/0014/207203/Queensland-Health-Payroll-System-Commission-of-Inquiry-Report-31-July-2013.pdf](http://www.healthpayrollinquiry.qld.gov.au/_data/assets/pdf_file/0014/207203/Queensland-Health-Payroll-System-Commission-of-Inquiry-Report-31-July-2013.pdf). In 2004, J.P. Morgan Chase & Co. cancelled a seven-year contract with IBM signed in 2002 after determining that it could handle its IT better in-house. Stacy Cowley, *J.P. Morgan Scraps \$5B IT Deal with IBM*, COMPUTERWORLD (Sep. 20, 2004), <http://www.computerworld.com/article/2567074/it-out-sourcing/j-p-morgan-scraps-5b-it-deal-with-ibm.html>.

In 2010 a massive systems failure at Navitaire, which provided Virgin Blue's airline reservation system, disrupted travel for 50,000 customers, with Virgin Blue immediately blaming Navitaire for the issue in a press release. Michael Kringsman, *Cloud-based IT Failure Halts Virgin Flights*, ZDNET (Sep. 27, 2010, 2:38pm), <http://www.zdnet.com/article/cloud-based-it-failure-halts-virgin-flights/>.

In the summer of 2012, a software update left millions of Royal Bank of Scotland, NatWest, and Ulster Bank customers unable to access their funds. Robert Peston, *Is Outsourcing the Cause of RBS Debacle?*, BBC NEWS (June 25, 2012), <http://www.bbc.com/news/business-18577109>.

As [Robert Peston] underst[ood] it, one reason why RBS has not given much detailed information about why its services have been so badly disrupted is that so much of the operational responsibility for IT is outsourced—so there is a sensitive issue of where to attribute the blame. In [his] conversations with RBS bankers, there is an implication that outsourcing contributed to the problems.

*Id.*

<sup>232</sup> Boeing, *ANA Complete Contractual Delivery of First 787 Dreamliner*, BOEING MEDIAROOM (Sept. 25, 2011), <http://boeing.mediaroom.com/2011-09-25-Boeing-ANA-Complete-Contractual-Delivery-of-First-787-Dreamliner>.

Boeing's rampant outsourcing and the resultant lack of supervision and accountability.<sup>233</sup> Even after delivery of the 787 to varying airlines, the aircraft suffered from a variety of defects, including electrical and battery system flaws, fuel leaks, cracked windshields, and brake problems, leading carriers over the world to ground the 787 in 2013, the first "regulatory grounding of an entire fleet . . . since 1979."<sup>234</sup> Production of the 787 had also gone over budget by several billions of dollars.<sup>235</sup>

The ability of a principal to avoid accountability or political fall-out for problems arising from placing prosecution services up for competitive bidding is rather similar. A mayor or local government council can more easily foist any blame or political damage on a prosecutor under such an arrangement.<sup>236</sup> Prosecutors hired through a competitive bidding process may attempt to do the same: "When problems arise, government officials and private contractors can point fingers at each other, leaving the public with little means of knowing who is really at fault."<sup>237</sup> Try as many may, justice, fairness, and public confidence in officials are not things that can or should be quantified or balanced against any other savings that can be measured in dollars.

#### D. ILLUSORY PROBLEMS OF OUTSOURCED PROSECUTION

Although relying on a contract model for prosecution services increases the risks mentioned above, other concerns that have been previously addressed are not the serious evils some would believe them to be. Underperformance of a different sort than that discussed above has troubled some: "The demands of the contractor's private matters could monopolize the attorney's time, leaving the criminal prosecution matters without the appropriate focus and attention."<sup>238</sup> Especially in the context of

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<sup>233</sup> Dominic Gates, *Boeing 787's Problems Blamed on Outsourcing, Lack of Oversight*, SEATTLE TIMES (May 1, 2015), <http://www.seattletimes.com/business/boeing-787s-problems-blamed-on-outsourcing-lack-of-oversight/>; Michael Hiltzik, *787 Dreamliner Teaches Boeing Costly Lesson on Outsourcing*, L.A. TIMES (Feb. 15, 2011), <http://articles.latimes.com/2011/feb/15/business/la-fi-hiltzik-20110215>; J. Lynn Lunsford, *Outsourcing at Crux of Boeing Strike*, WALL ST. J. (Sept. 8, 2008), <http://www.wsj.com/articles/SB122083149762108451>.

<sup>234</sup> Steve Denning, *The Boeing Debacle: Seven Lessons Every CEO Must Learn*, FORBES (Jan. 17, 2013, 10:24 am), <http://www.forbes.com/sites/stevedenning/2013/01/17/the-boeing-debacle-seven-lessons-every-ceo-must-learn/#70368733744f>.

<sup>235</sup> Hiltzik, *supra* note 233.

<sup>236</sup> Epstein, *supra* note 21, at 2242.

<sup>237</sup> Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1210 (2000).

<sup>238</sup> Fairfax, *supra* note 22, at 284–85.

small jurisdiction contract prosecutors on which this Article focuses, it is quite unlikely that attorneys will be dividing their attention between any sort of high power, national or international private practice with an additional local prosecutor job as a supplement to that practice. In those situations, where an attorney may need to meet a minimum number of billable hours as mandated by a firm, it would be unlikely that such an attorney would need (let alone want) to undertake part-time contract prosecution.

Both the ABA and National Prosecution Standards anticipate severe conflict of interest traps when criminal prosecutions are outsourced. In prescribing full-time prosecutors over part-time ones who have been hired by contract, the National Prosecution Standards explain that no prosecutor should “engage in professional conduct that is inconsistent with the need for prosecutorial independence.”<sup>239</sup> The ABA Prosecution Standards exhort prosecutors to “not be involved in the prosecution of a former client.”<sup>240</sup> There also exists in some trepidation that contract and/or part-time prosecutors may prosecute former clients (and potentially be overly lenient with criminals who need harsher treatment, presumably), or that such prosecutors may try to use information gained during a prosecution or investigation against other actors when practicing civilly in an improper way while trying to derive some sort of advantage.<sup>241</sup>

The practical reality that the ABA and NDAA Prosecution Standards, as well as legal scholars, have seemed to ignore is that the danger of conflicts of interest involving the prosecution of either current or past clients is overstated. In those jurisdictions small enough that hiring one full-time prosecutor is impossible, or, even the case of affluent small communities in which hiring one full-time or multiple prosecutors is not deemed necessary, every attorney and any resident with involvement with the courts will know who the prosecutor has previously represented or whether the prosecutor is attempting to improperly utilize superior knowledge.<sup>242</sup> These communities are able to a greater degree to police themselves in an effort to avoid any of the more traditional conflicts

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<sup>239</sup> NAT'L PROSECUTION STANDARDS, *supra* note 90, at Standard 1-1.3.

<sup>240</sup> ABA PROSECUTION STANDARDS, *supra* note 15, at Standard 3-1.7.

<sup>241</sup> *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.6 (2016). This sort of behavior is also traditionally prohibited by ethical rules that have been adopted throughout the country Fairfax, *supra* note 12, at 438–41.

<sup>242</sup> *See* Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 L. & SOC. INQUIRY 87, 125 (2003) (discussing and describing small jurisdiction practice as “living in a fishbowl”).

of interest that may arise for a prosecutor in a larger market.<sup>243</sup>

#### E. COMPARISONS WITH OTHER RFP PROCESSES

Local governments fulfill many of their needs for both goods and services by way of competitive bidding processes,<sup>244</sup> and, as such, it may seem that if certain service needs may be fulfilled by a such a procurement process, then prosecution should be no different. The fact that prosecutors, however, provide a uniquely important public service that should not be subject to competitive bidding, however, becomes clearer when comparing such prosecutorial outsourcing with competitive bidding in two other criminal justice functions—the construction and operation of private prisons and the hiring of public defenders.

##### 1. *Bidding for Prosecutorial Services versus Private Prisons*

One useful reference point for thinking about the risks of outsourcing prosecution is the privatization of prisons. The growth of privatized prisons has been astronomical in the past few decades: “In 1999 private prison contracts existed in 31 states. That figure grew to 33 states by 2004, before declining to 30 by 2010.”<sup>245</sup> Contracts for the building and operation of private prisons are usually granted to an applicant after a similar public bidding process as that examined thus far in this Article, offering a useful comparative analogy from a different sector of the criminal justice system.<sup>246</sup> Privatization of prisons has been advocated for the same reasons as privatizing many other government and public services—cost savings, superior quality for greater value, and job generation have all been advanced as reasons for the bidding and outsourcing of both construction

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<sup>243</sup> See, e.g., *Utah v. Brown*, 853 P.2d 851, 856–57 (Utah 1992). In an example geographically close to home for the author, the Utah Supreme Court decided that the “vital interests of the criminal justice system are jeopardized when a city prosecutor is appointed to assist in the defense of an accused. Consequently, we hold that as a matter of public policy . . . counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons.”

<sup>244</sup> See, e.g., Kenneth M. Roberts & Nancy C. Smith, *Design-Build Contracts Under State and Local Procurement Laws*, 25 PUB. CONT. L. J. 645, 648–97 (providing a state-by-state analysis showing a proliferation of competitive bidding requirements in the construction arena).

<sup>245</sup> Cody Mason, The Sentencing Project, *Too Good to be True: Private Prisons in America* (Jan. 2012), <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf>.

<sup>246</sup> See Lauren Galik, et al., *Annual Privatization Report 2014: Criminal Justice and Corrections*, REASON (June 2014), <http://reason.org/files/apr-2014-criminal-justice.pdf>.



and operation of private prisons.<sup>247</sup> Perhaps unsurprisingly, however, unique issues arise with the privatization of prisons; it is often difficult to maintain “all the services necessary to maintain[] safety in prisons” as the “services that receive comparatively less funding in order to contain costs” are both “personnel and programs.”<sup>248</sup> Corrections Corporation of America (CCA) made it clear in their 2010 Annual Report that their main goal is profit-making and cost savings:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correction and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.<sup>249</sup>

Although prosecutors competing for contracts and CCA (and, presumably, other firms in the privatized prison trade) may not seem alike on their surfaces, both are subject to some of the same vicissitudes effecting their abilities to secure business for themselves, such as crime rates, appetites for the bidding and privatization processes in different jurisdictions, and stringency in law enforcement not just on the policing side but also the drafting and amending of criminal codes to be either more lax or more restrictive.

Private prison contractors such as CCA and the GEO Group, however, are engaged to provide services whose aspects are quantifiable and, as such, possible to evaluate.<sup>250</sup> There are often concrete standards that such companies are expected to meet, including staffing requirements,<sup>251</sup>

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<sup>247</sup> See Adrian Moore, *Private Prisons: Quality Corrections at a Lower Cost*, REASON (April 1998), at 10–15, 23–29, <http://reason.org/files/d14ffa18290a9aeb969d1a6c1a9ff935.pdf>.

<sup>248</sup> Mason, *supra* note 245, at 10.

<sup>249</sup> *Id.* at 12 (internal quotations omitted).

<sup>250</sup> Information on private prisons, however, is becoming more difficult to obtain. Rep. Sheila Jackson Lee of Texas introduced for the sixth time the proposed Private Prison Information Act of 2015, which endeavored to have records regarding private prison operations subject to FOIA in the same manner as records maintained by any other federal agency. See H.R. 2740, 114th Congress (2015). The bill was referred to the Crime, Terrorism, Homeland Security, and Investigations Subcommittee on June 16, 2015, and had not seen any progress since. See *All Bill Information (Except Text) for H.R.2470 – Private Prison Information Act of 2015*, <https://www.congress.gov/bill/114th-congress/house-bill/2470/all-info> (last visited July 21, 2016).

<sup>251</sup> Forrest Wilder, *World's Largest For-Profit Prison Blasted in Federal Audit*, TEX. OBSERVER (Apr. 23, 2015), <https://www.texasobserver.org/worlds-largest-for-profit-prison->

maintenance of facilities and equipment,<sup>252</sup> food service protocols,<sup>253</sup> square footage depending on the type of room and its proposed occupancy.<sup>254</sup> Prosecutors, on the other hand, are charged, as has been discussed throughout this Article, with a special “duty to do justice,” a duty which can best be described as—employing Professor Bruce Green’s words—“protean as well as vague.”<sup>255</sup> “Unfortunately, the worth of justice cannot be accurately quantified.”<sup>256</sup> Justice is a concept and ideal that cannot survive quantification; attempts to do so would provide results and measurements for different concepts altogether, such as crime or conviction rates.<sup>257</sup> It is precisely due to the unquantifiability and ineffable character of “justice” that its minister should not be put up for competitive bid by any level of government, local or otherwise, to be auctioned off to the lowest bidder. Given the nature of justice, it becomes all the more incumbent on a prosecutor to not put themselves in situations, including securing employment by way of public bidding, that may call their motives to question.

On a more practical level, it is exceptionally difficult to evaluate uses of prosecutorial discretion in an objective fashion as one might the performance of a private prison operator. The important roles and duties of a prosecutor also demand that applicants inherently have some disposition to doing justice on behalf of the clients—in this case, the public. Although a very unlikely scenario given that attorneys preferred to be paid, even nominally, for the work they do, throwing open the hiring process through a

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blasted-in-federal-audit/ (discussing a private prison company’s violation of staffing requirements set by the federal Bureau of Prisons).

<sup>252</sup> Caroline Isaacs, *AFSC White Paper: Private, For-Profit Prisons in Arizona*, at 2 (2015) <https://morrisoninstitute.asu.edu/sites/default/files/content/products/AFSC.pdf> (discussing security failure related to equipment and facilities maintenance problems, such as “malfunctioning cameras, doors, and alarms; holes under fences; [and] broken perimeter lights and cameras”).

<sup>253</sup> OHIO DEP’T OF REHAB. & CORR., FULL INTERNAL MANAGEMENT AUDIT OF THE LAKE ERIE CORRECTIONAL INSTITUTION 8 (2012), <http://www.dispatch.com/content/downloads/2012/10/prison-audit-report.pdf> (listing food service concerns such as not taking food product temperatures regularly, lack of proper sanitizing of pots and pans, and a lack of extra clean clothing that was supposed to be provided to inmate food service workers).

<sup>254</sup> See 501 KY. ADMIN. REGS. 3:050.

<sup>255</sup> Green, *supra* note 60, at 608.

<sup>256</sup> Thomas E. Bilek, *Accountants’ Liability to the Third Party and Public Policy: A Calabresi Approach*, 39 SW. L. J. 689, 702 (1985).

<sup>257</sup> “[J]ustice and mercy both have roles in the criminal justice system; mercy cannot be precisely quantified and institutionalized or it ceases to be mercy and becomes leniency; mercy is the trump that can capture equality’s ace and allow punishment at the bottom range of a deserved punishment.” NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 180 (1982).

public bidding and RFP process could hypothetically lead to candidates attempting to purchase the ability to “do justice” and serve as a prosecutor from a local government. Again, although unlikely, nothing in the RFPs reviewed (and one may venture to guess that no RFPs currently existing) explicitly prevents an applicant from attempting to pay a local government for the privilege of serving as a local prosecutor. The caliber of a candidate would certainly be suspect in such a situation; the applicant willing to not only underbid but either work *pro bono* or to pay for such a position would almost certainly be doing so for political clout, for the sheer enjoyment of prosecuting individuals and exerting the government’s power over defendants, or for some other ignoble purpose.<sup>258</sup>

## 2. *Bidding for Prosecutorial Services vs. Indigent Defense*

Another important reference point for evaluating the risks of contracting out prosecutorial services is the competitive bidding of our indigent defense<sup>259</sup> services. Providing for indigent defense services, much like prosecution services, is also difficult for small local governments, especially those located in nonmetropolitan areas.<sup>260</sup> Given that public defense would seem to be the other side of a coin shared with the prosecution function, one may initially believe that all of the same problems exist for public defender positions that are contracted out after an RFP/bidding process as for contracting out prosecution. The roles of the defense attorney versus the prosecutor, however, affect the analysis of which, if any, actors in the criminal justice system at a local level should be hired by way of RFP.

Defense attorneys, for a variety of reasons, may be seen as being held to a much lower aspirational bar than that imposed on the prosecution function. First, rather than representing the public or effectuating “justice,”

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<sup>258</sup> Harvard Law School, *Clinical Program*, <http://hls.harvard.edu/dept/clinical/clinics/> (last visited Oct. 4, 2016); University of Virginia School of Law, *Prosecution Clinic*, <http://www.law.virginia.edu/html/academics/practical/prosecutionclinic.htm> (last visited Oct. 4, 2016). Students participating in such clinics, however, often receive experience that will boost their chances of employment after law school, as well as credits that may be applied toward graduation, and, as such, students participating in prosecution clinics are not providing free services at all. *Id.*

<sup>259</sup> For purposes of this paper, indigent defense refers broadly to publicly funded criminal defense counsel, including those operating outside of the more familiar public defender office model.

<sup>260</sup> See David Paul Cullen, *Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions*, 17 OKLA. CITY U. L. REV. 311 (1992); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Pruitt and Colgan, *supra* note 110.

a defense attorney's loyalty and fiduciary duty run to his client and his client alone.<sup>261</sup> Second, while it has been held that the "right to counsel is the right to the effective assistance of counsel,"<sup>262</sup> it is particularly difficult, if not nearly impossible, to make the requisite showing necessary to establish ineffective assistance of counsel.<sup>263</sup> Though defense attorney performance is to be assessed using an "objective standard of reasonableness," courts are "highly deferential" when reviewing a defense attorney's performance.<sup>264</sup> Strategic choices by defense counsel are "virtually unchallengeable," including "reasonable decision[s] that make[] particular investigations unnecessary."<sup>265</sup> Any defendant attempting to make a showing that his attorney rendered ineffective assistance of counsel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>266</sup>

As elucidated by *Strickland* and its progeny, the burden on a defendant seeking to demonstrate ineffective assistance of counsel is, in most circumstances, insurmountably high. Conversely, the standard for sufficient defense attorney performance is very low, for good or ill: the only legal concern when putting public defense contracts up for bid is hiring an attorney who can surpass the low standard set for "effectiveness."<sup>267</sup> On the other hand, however, this low bar is a bar that has been more firmly defined than a prosecutor's duty to "seek justice." This Article certainly does not advocate that the public defense bar should seek only to meet its rather low minimal obligations to clients; it does, however, argue that public defenders

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<sup>261</sup> "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)).

<sup>262</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

<sup>263</sup> There are two factors to consider when attempting to establish ineffective assistance of counsel: 1) deficient performance, and 2) the deficient performance resulting in prejudice serious enough to bring the outcome of the proceeding into question. *Strickland*, 466 U.S. at 687.

<sup>264</sup> *Id.* at 688–89.

<sup>265</sup> *Id.* at 691.

<sup>266</sup> *Id.* at 694.

<sup>267</sup> Public defenders hired on a contractual basis by way of RFP may, however, feel some similar economic pressures and incentives as prosecutors, including overbilling when hired on an hourly basis, and underperforming so as not to run over any set budgets set by the local governments that have contracted with them. Kelly A. Hardy, *Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney's Ethics*, 80 MARQ. L. REV. 1053, 1075–76 (1997).

have clear, articulable standards to follow by which their performance may be more easily assessed and for which they must be accountable, in contrast to the vague but important goal to “do justice” incumbent upon a prosecutor. In this sense, public defenders have a more objective standard by which to judge themselves, and procurement of their services by way of RFP and competitive bidding is not nearly as problematic.

#### CONCLUSION

Although most contract prosecutors hired through an RFP and competitive bidding process likely believe themselves to be devoid of any form of destructive tendency to over or underperform, contracting out for prosecution services, especially as a method for saving resources rather than hiring a prosecutor on a salaried basis, should be abandoned. This Article demonstrates that incentives for prosecutors to engage in self-interested behavior by under or over-performing while engaging in revenue generation, as well as the incentives for local governments to prioritize profit-driven prosecution, are too great. Apart from the perverse incentives that operate upon prosecutors and local governments when employing competitive bidding and RFPs in prosecution service procurement, the public is also deprived of a prosecutor who exemplifies long-standing prosecutorial norms: 1) a government employee, 2) who devotes all of her time and professional energies to criminal prosecution, and 3) tries to somehow do or effect some vague notion of justice.

This Article is the first of its kind to examine the pitfalls of employing RFPs on the local and municipal prosecutor level. Although the problems that arise from this process may initially seem far removed to many, especially those living in large cities, with greater budget shortfalls and pushes for devolution of governmental responsibilities to local governments occurring nationwide, the problems described in this Article are very likely to spread. Further investigation into potential interventions on local government levels will be necessary to stanch and prevent this increase.