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Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization

Roger A. Fairfax, Jr.[†]

ABSTRACT

In an era of scarce public resources, many jurisdictions are being forced to take drastic measures to address severe budgetary constraints on the administration of criminal justice. As prosecutors' budgets around the nation are being scaled back and enforcement capacities are being narrowed, one conceivable response is the outsourcing of the criminal prosecution function to private lawyers. Indeed, prosecution outsourcing currently is utilized in surprising measure by jurisdictions in the United States. This Article, prepared for the University of Chicago Legal Forum Symposium on Crime, Criminal Law, and the Recession, argues that the outsourcing trend in criminal justice—seen most prominently in the area of private prisons and policing—should not extend to criminal prosecution because such outsourcing is in tension with the constitutional and positive law norms regulating the public-private distinction. Furthermore, concerns about ethics, fairness, transparency, accountability, performance, and the important values advanced by the public prosecution norm all militate against the outsourcing of the criminal prosecution function to private lawyers.

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INTRODUCTION

The private role in criminal justice has grown considerably over the past three decades, particularly in corrections and policing. The most common form of privatization in this arena has been outsourcing, an arrangement in which the government contracts with a private entity to render goods or services previously provided by the government. Advocates of outsourcing cite efficiency, enhanced service, and cost savings as rationales for the private performance of these criminal justice functions.

Many of these same perceived benefits presumably could be derived from the outsourcing of the prosecutorial function to private lawyers—a particularly tempting solution in an era of diminished public resources prompted by the current economic crisis. In fact, the prosecutorial function already is being outsourced to private lawyers in smaller jurisdictions across the United States. This phenomenon is poised to expand as larger jurisdictions are forced to slash already tight law enforcement budgets. This Article argues that such prosecution outsourcing is in tension with the constitutional and positive law norms governing outsourcing and privatization.

Part I of the Article examines the growing trend of privatization and outsourcing in the criminal justice system through the prism of private prisons and private policing. Part II provides the contours of what is the central focus of the Article's critique and analysis—the outsourcing of the criminal prosecution function. Part II sets out two thought experiments to serve as a point of departure for the subsequent discussion of the nature, extent, and future prospects of government delegation of criminal prosecution to private actors.

Part III then argues that prosecution outsourcing is in tension with norms regulating the public-private distinction, including those gleaned both from constitutional constraints on the delegation of governmental functions to private actors, and from the positive law of government outsourcing. Part III also raises a number of ethical, performance, and accountability concerns with the government practice of contracting with private attorneys to prosecute criminal cases.

I. CRIMINAL JUSTICE PRIVATIZATION

Government engages in a substantial amount of privatization.¹ “Privatization is a word with many different meanings,”² 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.³ The state privatizes functions for a variety of reasons, ranging from entity diversity and interest representation to expertise, cost savings, and efficiency.⁴ Of the various species of privatization engaged in by American governmental entities,⁵ the most common type of

¹ See Jody Freeman, *The Contracting State*, 28 Fla St U L Rev 155, 155 (2000) (“In the United States, federal, state, and local governments now routinely employ contracts with private providers to furnish services, deliver benefits, and perform significant (and sometimes traditionally ‘public’) functions.”); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum L Rev 1367, 1369 (2003) (“Recent privatization efforts, particularly in health care and welfare programs, public education, and prisons, reveal a trend of greater discretion and broader responsibilities being delegated to private hands.”); Scott Shane and Ron Nixon, *In Washington, Contractors Take On Biggest Role Ever*, NY Times A11 (Feb 4, 2007); Jeff McDonald, *City Looks at County’s Outsourcing as Blueprint*, SD Union-Trib A1 (July 23, 2006).

This privatization trend, which, as Professor Freeman notes, has been developing over the past half-century, is unlikely to cease in the near future. See Freeman, 28 Fla St U L Rev at 161–62 (cited in note 1). See also Richard J. Pierce, Jr., Book Review, *Outsourcing Is Not Our Only Problem*, 76 Geo Wash L Rev 1216, 1227 (2008). However, recent political changes may lead to the eventual scaling back of federal reliance on contractors. See The White House, *Memorandum for the Heads of Executive Departments and Agencies Re Government Contracting*, 74 Fed Reg 9755 (Mar 4, 2009); Daniel Zwerdling, *Obama to Tackle Explosion in Federal Contracts*, National Public Radio Morning Edition (Dec 1, 2008). See also Daniel Zwerdling, *New President Faces Powerful Federal Contractors*, National Public Radio Morning Edition (Dec 2, 2008).

² Metzger, 103 Colum L Rev at 1377 (cited in note 1). See also Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (Yale 2009).

³ See Metzger, 103 Colum L Rev at 1377 (cited in note 1) (observing that the term “privatization” “is conventionally understood to signify a transfer of public responsibilities to private hands”); Ellen Dannin, *To Market, To Market: Legislating on Privatization and Subcontracting*, 60 Md L Rev 249, 258 (2001) (describing privatization as “a blanket term that includes different forms of shifting from publicly to privately produced goods and services”); David M. Lawrence, *Private Exercise of Governmental Power*, 61 Ind L J 647, 647 (1985) (defining privatization as “turning formerly governmental responsibilities over to the private sector”); Laurin A. Wollan, Jr., *The Privatization of Criminal Justice*, in *Proceedings of the 29th Annual Southern Conference on Corrections* 111 (Florida State 1984) (defining privatization as the “non-governmental performance of a function”).

⁴ See Pierce, 76 Geo Wash L Rev at 1227 (cited in note 1) (“The number of government functions that can only be performed effectively by highly skilled people is steadily increasing. The market for such highly skilled people has changed to the point at which the salaries they can command in the private market vastly exceed the maximum salary the government can pay.”); Lawrence, 61 Ind L J at 651–57 (cited in note 3) (suggesting that pluralism, interest representation, flexibility of private entities, expertise, and cost are all justifications).

⁵ See Jody Freeman, *Extending Public Law Norms through Privatization*, 116 Harv L Rev 1285, 1287 (2003).

privatization is outsourcing—the “contracting out with a private firm for the production of some good or service that was previously exclusively produced by a public-sector agency or bureaucracy.”⁶

Importantly, under the “outsourcing” or “contracting-out” model of privatization, the government does not cede the fundamental duty or responsibility for the performance of the function. The government maintains the duty to ensure the function is performed, but simply contracts with a private actor to perform it.⁷ As criminal justice privatization proponent Bruce Benson notes, under a “contracting-out” regime “[t]he determination of what is going to be demanded from and produced by the firm under contract remains in the political arena, under the influence of interest groups and public officials rather than under the

⁶ Bruce L. Benson, *To Serve and Protect: Privatization and Community in Criminal Justice* 15 (NYU 1998); see also Metzger, 103 Colum L Rev at 1378, 1378 n 17 (cited in note 1); Freeman, 116 Harv L Rev at 1287 (cited in note 5).

A significant amount of recent scholarly commentary has focused on contemporary and historical American privatization in the military and foreign policy arena. See generally Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (cited in note 2); Benedict Sheehy, Jackson Maogoto, and Virginia Newell, *Legal Control of the Private Military Corporation* (Palgrave Macmillan 2009); Simon Chesterman, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford 2007); Steven L. Schooner and Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J Cont Mgmt 209 (Summer 2008). See also Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J Marit L & Comm 221 (2009); William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 Wash & Lee L Rev 895 (2009).

For a broad introduction to the topic of privatization from various perspectives, see generally Simon Chesterman and Angelina Fisher, eds, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford 2009); Jody Freeman and Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard 2009); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge 2007); Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Beacon 2002); Metzger, 103 Colum L Rev at 1371 (cited in note 1); Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 595 (2000).

⁷ This can be contrasted with the other major model of privatization, in which the government “remov[es] certain responsibilities, activities, or assets from the collective realm.” Metzger, 103 Colum L Rev at 1378 (cited in note 1), quoting John D. Donahue, *The Privatization Decision: Public Ends, Private Means* 215 (Basic 1989) (“[T]wo concepts share the same word—*privatization*. The first concept . . . involves removing certain responsibilities, activities or assets from the collective realm. . . . [T]he second . . . [involves] retaining collective financing but delegating delivery to the private sector.”). See also Stan Soloway and Alan Chvotkin, *Federal Contracting in Context*, in Freeman and Minow, eds, *Government by Contract* 195–97 (cited in note 6).

A common example of this type of public-private partnership can be found in the many road, bridge, or tunnel construction public works projects that are privately financed in exchange for the private entity’s right to extract tolls to recoup costs and turn a profit.

direct control of private citizens acting as individual buyers.”⁸ Benson terms this approach “partial privatization.”⁹ In contrast, “complete privatization” entails “private-sector control over all of the decisions regarding the use of resources devoted to the protection of persons and property.”¹⁰

Although some have theorized that government could engage in complete privatization in the criminal justice arena,¹¹ most criminal justice outsourcing can be characterized as “partial” privatization. For example, government might privatize certain aspects of the provision of a service (for example, a prison contracting out the preparation of meals for inmates) or even the entire provision of a service (for example, contracting with a private corporation to operate a prison),¹² but would not simply withdraw from the duty of providing corrections and leave it to the private market to determine whether and how individuals will be incarcerated. As Professor Metzger explains:

[P]rivatization is poorly characterized as government withdrawal or disinvolvement from an area of activity. . . . In many instances of privatization, the overall context remains one of significant government endeavor; . . . the government provides the funds, sets programmatic goals and requirements, or enacts the regulatory scheme into which private decisionmaking is incorporated. But the government relies on private actors for actual implementation. Rather than government withdrawal, the result is a system of public-private collaboration, a “regime of ‘mixed administration’” in which both public and private actors share responsibilities.¹³

While acknowledging the rich complexity attending the concept of government outsourcing, this Article uses the terms “outsourcing,” “contracting out,” and “privatization” in the spirit of

⁸ Benson, *To Serve and Protect* at 15 (cited in note 6).

⁹ *Id.*

¹⁰ *Id.* See also Metzger, 103 *Colum L Rev* at 1370 (cited in note 1).

¹¹ Criminal justice scholar Laurin Wollan describes this as the “step back and let it go’ strategy,” which entails “going beyond mere substitution of private for public performance under contractual or other constraints.” Wollan, *The Privatization of Criminal Justice* at 124 (cited in note 3). Wollan ponders whether criminal justice privatization can expand to full and complete privatization by “boldly going to the point—and without provision for such controlled substitutions—of simply letting the function be, to see if it gets performed at all.” *Id.*

¹² See Part I.A.1.

¹³ Metzger, 103 *Colum L Rev* at 1394–95 (cited in note 1) (internal citations omitted).

Benson's "partial" privatization definition. Under this conception, the government entity never cedes the prerogative of directing the efforts of the private actor and never disowns the fundamental duty to ensure the function is performed (by whoever is tasked with performing it) in the first place.¹⁴

The private role in criminal justice administration has become more pronounced in recent years.¹⁵ From crime prevention and detection to adjudication and corrections, private actors perform functions many would assume were exclusively public.¹⁶

¹⁴ The use of the word "function" here carries significance. Another important dichotomy in the outsourcing literature is the privatization of governmental *powers* versus the privatization of governmental *functions*. See generally Lawrence, 61 Ind L J 647 (cited in note 3) (distinguishing between privatization of government functions and privatization of governmental powers, and concluding that the latter is more problematic). The contracting out of tax collection to a private collection agency would be an example of privatization of a governmental function. Granting a private entity the ability to freeze a taxpayer's assets for nonpayment of taxes might be considered an example of the privatization of a governmental power. Also, it is important to note that when outsourcing governmental functions to private actors, governments can retain control while outsourcing the execution. See, for example, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 Utah L Rev 573, 586 ("[A] public agency retains oversight over the prison, even though day-to-day management may be left to the privately contracted company."). Alternatively, a government could cede to a private entity all control and authority over the provision of a function. Related to this concept is the division between those functions which are ministerial in nature and those which require the exercise of discretion by those performing the function. See Part III.B.

¹⁵ See generally Ric Simmons, *Private Criminal Justice*, 42 Wake Forest L Rev 911 (2007).

¹⁶ See Stanger, *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy* 26 (cited in note 2) ("Running a prison or policing the streets seems like an inherently governmental function—an essential part of 'preventing coercion' or 'protecting citizens'—yet both prisons and policing have been privatized."); Benson, *To Serve and Protect* 17 (cited in note 6) ("[M]any components of the public sector's criminal justice system are actually being produced by employees of private firms."). See also Charles H. Logan, *Private Prisons: Cons and Pros* 58–59 (Oxford 1990); Wollan, *The Privatization of Criminal Justice* at 113–23 (cited in note 3). Professor Wollan makes the point that although most would reflexively resist the notion that criminal justice might be conducted by private actors, once the various criminal justice functions are dissected, the private role is more easily acknowledged (or imagined). See *id.* at 113–14. For instance, although pre-trial supervision and detention would appear to be an exclusively public function, the bail bondsman is a stark example of the state ceding to private actors a public criminal justice function. A private bail bondsman provides to the court the total amount of a defendant's bail in exchange for a nonrefundable fee (typically 10 percent of the bail amount) from the defendant and perhaps some form of collateral to ensure the defendant's appearance and the bondsman's recovery of the bail money. The risk of financial loss gives the bondsman an incentive to track down and bring to court bailed defendants who have absconded. For a description of the private bail bondsman's role, see, for example, Stephen A. Saltzburg and Daniel J. Capra, *American Criminal Procedure* 936–40 (Thomson 8th ed 2007). Without this private role, the alternative might be widespread incidence of defendants without financial resources having to remain in jail prior to trial, see *id.* at 937, or even a move to universal pre-trial detention, an option that would be both cost-prohibitive and unwise from a public policy and penological standpoint.

Also, part-time judges—private lawyers hired to hear cases in public courts on a part-time or fee basis—are utilized in many jurisdictions. See, for example, Tenn Code

The expanding private role in criminal justice is most notable and visible in the areas of private prisons and private policing.

A. Outsourcing Corrections—Private Prisons

Private prisons are a prominent example of outsourcing in criminal justice at both the federal and state levels.¹⁷ Despite the decidedly public nature of modern corrections,¹⁸ governments have engaged in the contracting of prison administration services for juvenile offenders since the 1800s.¹⁹ In response to the explosion in prison population prompted by the drug enforcement policies of the 1980s and 1990s, governments began to rely more heavily upon the private sector for the provision of corrections services for adults.²⁰ As a result, a significant number of state and federal prisoners are now in the custody of private entities.²¹

Prison outsourcing can range from the private provision of certain services, such as inmate medical care and feeding, to the full private operation of a correctional facility.²² In all of these roles, private prison contractors might exercise tremendous dis-

§ 7-3-311(g)(2003); State of Nevada Commission on Judicial Discipline, Opinion JE04-03 (Mar 17, 2004), online at <http://judicial.state.nv.us/je040033new.htm> (visited Sept 7, 2010); J. Anthony McLain, *Part-Time Judges, Part-Time Assistant District Attorneys and Imputed Disqualification*, 70 Ala Law 217 (2009). However, the practice has come under fire on the grounds that it presents the perception—if not the reality—of conflict of interest, and undermines the rule of law. See, for example, Sarah Foster, *Ohio Considers Eliminating Part-Time Judges*, Miami Student (Sept 26, 2006), online at <http://www.miamistudent.net/2.8197/ohio-considers-eliminating-part-time-judges-1.1153773> (visited Sept 7, 2010); James L. Cotton, Jr., *The Impossible Balance: A Tennessee Judge Makes the Case for Abolishing State's Part-Time Judgeships*, 37 Tenn Bar J 12, 15 (May 2001).

¹⁷ As Professor Jody Freeman observes, the history of public corrections and its provision of prison labor to the private sector “complicates the common view of incarceration as a traditionally public enterprise.” Freeman, 75 NYU L Rev at 626 (cited in note 6). See also Metzger, 103 Colum L Rev at 1392 (cited in note 1); Freeman, 28 Fla St U L Rev at 162, 185–86 (cited in note 1).

¹⁸ See, for example, Metzger, 103 Colum L Rev at 1499 (cited in note 1) (“Notwithstanding the lengthy historical pedigree of private involvement in incarceration, today punishment and the legitimate use of physical coercion are seen as exclusive state prerogatives.”).

¹⁹ See Logan, *Private Prisons* 9, 15 (cited in note 16). Although the operation of secure correctional facilities has not been privatized widely on the federal level, the federal Bureau of Prisons has outsourced its community-based halfway house operations for the past thirty years. See Benson, *To Serve and Protect* at 21 (cited in note 6); Logan, *Private Prisons* at 16 (cited in note 16).

²⁰ See Logan, *Private Prisons* at 9–10, 20 (cited in note 16). Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L J 437, 439–40 (2005).

²¹ Metzger, 103 Colum L Rev at 1393 (cited in note 1) (“In 2001, 12.3% of all federal prisoners and 5.8% of all state prisoners, approximately 92,000 inmates, were housed in private prison facilities.”).

²² See Freeman, 28 Fla St U L Rev at 185–87 (cited in note 1); see also Minow, *Partners, Not Rivals* at 20 (cited in note 6).

cretion.²³ Also, because private prison contractors act as agents of the state, misconduct by private prison officials may be actionable, in certain circumstances, against the outsourcing government entity under constitutional tort principles.²⁴

The literature on private prisons is rich and wide-ranging.²⁵ Some commentators reject the premise that private prisons are practically viable or bristle at the notion that private actors are entrusted with the sovereign duty to punish.²⁶ Others perceive the heightened potential for corruption and human rights abuses in private prisons.²⁷ However, many trumpet private prisons as a way to deliver higher-quality, safer corrections at a fraction of the cost of public corrections.²⁸ Although there are many issues generated by the debate over whether a private firm should provide public correctional services,²⁹ “[f]ew deny that private pris-

²³ See Freeman, 28 Fla St U L Rev at 188 (cited in note 1).

²⁴ See Verkuil, *Outsourcing Sovereignty* at 38 (cited in note 6).

²⁵ For insightful commentary on the myriad considerations highlighted in the debate surrounding the private provision of corrections services, see Logan, *Private Prisons* at 38–48 (cited in note 16). See also generally Gary W. Bowman et al, eds, *Privatizing Correctional Institutions* (Transaction 1993); Douglas C. McDonald, ed, *Private Prisons and the Public Interest* (Rutgers 1990); Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 Stan L Rev 1197 (2008); Dolovich, 55 Duke L J 437 (cited in note 20); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 Vand L Rev 813 (1987); Richard Culp, *Prison Privatization Turns Twenty-Five: The Evolution of a Mature Private Prison Industry in the United States, July 2009*, online at <http://ssrn.com/abstract=1462792> (visited July 4, 2010).

²⁶ See, for example, John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in McDonald, ed, *Private Prisons and the Public Interest* 155–78 (cited in note 25); Freeman, 75 NYU L Rev at 631 (cited in note 6). See also Freeman, 28 Fla St U L Rev at 187 (cited in note 1) (“Those who object to prison privatization reject it on moral as well as pragmatic grounds.”).

²⁷ See, for example, Elaine R. Jones, *Private Prisons Profiting at the Expense of Women of Color*, *The New Crisis*, Mar/Apr 2001, online at http://findarticles.com/p/articles/mi_qa3812/is_200103/ai_n8932486/?tag=content;coll (visited July 4, 2010); Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, NY Times A14 (Mar 27, 1989). A recent high-profile example of corruption related to the private prison industry can be found in the case of Pennsylvania judges sentencing juveniles to private prisons in exchange for kickbacks. See Stephanie Chen, *Pennsylvania Rocked by ‘Jailing Kids for Cash’ Scandal*, Cable News Network (Feb 24, 2009), online at <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/> (visited Mar 17, 2010); Ian Urbina and Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, NY Times A22 (Feb 13, 2009).

²⁸ See, for example, Logan, *Private Prisons* at 76–118 (cited in note 16).

²⁹ Professor Charles Logan provides a useful typology of the central concerns: (1) propriety of having correctional services delivered by private actors; (2) whether privatization of corrections results in lower costs; (3) the impact correctional privatization will have on the quality of imprisonment; (4) the impact correctional privatization will have on quantity of imprisonment; (5) whether private jailers are more flexible and adaptable to change than their bureaucratic counterparts; (6) whether private corrections providers can ensure security of their facilities; (7) whether private corrections providers will expose government to greater or lesser tort liability; (8) whether private corrections provid-

ons are wielding government power, given that the right to physically constrain and coerce others is ordinarily reserved for the state.”³⁰

B. Outsourcing Law Enforcement—Private Policing

Private policing is another prominent example of the private exercise of criminal justice functions.³¹ Public policing took hold in the United States in the mid-nineteenth century.³² However, over the past several decades, the private presence in policing has increased dramatically. As Professor Ric Simmons noted in his recent study of increasing privatization in the criminal justice system, “[t]he degree to which private entities have taken over law enforcement functions in this country is extraordinary.”³³ Paul Verkuil notes that “the number of private police exceeds the number of federal, state, and local ‘public’ police combined.”³⁴

Many private police are retained by private communities and business groups to serve as an adjunct to the publicly paid and maintained police force. The ubiquity of privatized police in American society—in such familiar contexts as stadium security, school and university police, and the ever-popular “mall cops”—

ers are less accountable to the public; (9) the greater or lesser susceptibility of private corrections providers to corruption; and (10) whether privatization of corrections would give rise to a dangerous governmental dependence upon the private sector for a crucial function. See Logan, *Private Prisons* at 38–40 (cited in note 16). The various concerns cited, as Logan points out, offer insight into the breadth of the “many philosophical, empirical, and policy questions” raised by private prisons. *Id.* at 38. See also Metzger, 103 *Colum L Rev* at 1393–94 (cited in note 1).

³⁰ Metzger, 103 *Colum L Rev* at 1397 (cited in note 1).

³¹ For an introduction to the private policing regime, see generally Simmons, 42 *Wake Forest L Rev* 911 (cited in note 15); Joh, 2005 *Utah L Rev* 573 (cited in note 14); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 *J Crim L & Criminol* 49 (2004); David A. Sklansky, *The Private Police*, 46 *UCLA L Rev* 1165 (1999).

³² See Robert D. McCrie, *Three Centuries of Criminal Justice Privatization in the United States*, in Gary W. Bowman et al, eds, *Privatizing the United States Justice System: Police, Adjudication, and Corrections Services from the Private Sector* 16–17 (McFarland 1992). See also Sklansky, 46 *UCLA L Rev* at 1205–11 (cited in note 31).

³³ Simmons, 42 *Wake Forest L Rev* at 919 (cited in note 15)

³⁴ Verkuil, *Outsourcing Sovereignty* at 38 (cited in note 6). Private police outnumber “public” police officers and expenditures on private police service are at least double that for public policing. See Simmons, 42 *Wake Forest L Rev* at 920–22 & nn 34–35 (cited in note 15); Joh, 95 *J Crim & Criminol* at 50 (“Private police long ago outpaced the public police in terms of persons employed and dollars spent.”) (cited in note 31); Sklansky, 46 *UCLA L Rev* at 1165 (cited in note 31) (“The private security industry already employs more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing . . .”); Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 *Hofstra L Rev* 649, 663–64 (1987).

has rendered their existence unremarkable to the average American.³⁵ The rationale underlying the explosion in the private police presence is that public police resources are not sufficient to protect the property and personal interests of those segments of society able to afford additional security.³⁶ As Professor Elizabeth Joh notes, “[m]any of these privately paid police behave like public law enforcement officers: detaining individuals, conducting searches, investigating crimes, and maintaining order.”³⁷ Although those apprehended by private police officers may be turned over to the public authorities for prosecution,³⁸ most private police are not in privity with the state and are not state actors for purposes of constitutional remedies.³⁹ Therefore, conduct that otherwise would give rise to either constitutional remedies—civil or exclusionary—against the government or its actors is actionable only against the private police agency or the private entity or individual employing such agency. What this means in addition to more narrow civil remedies is the possibility that evidence will be collected in a way that offends constitutional norms, but that still can be shared with government prosecutors for use in establishing criminal liability.

In addition, there are instances in which the government—rather than private entities—contracts with private firms to provide services traditionally performed by the public police.⁴⁰ As Professor Joh notes, “[i]n publicly contracted policing, a private police agency replaces a specific service formerly performed by the government, rather than simply offering in the private mar-

³⁵ Two recent studio films present a humorous, if irreverent, picture of the work done by mall “police” officers. See Manohla Dargis, *Mall Crisis? Call Security. Then Again, Maybe Not*, NY Times C1 (Apr 10, 2009) (review of Warner Brothers film *Observe and Report*); Nathan Lee, *A Hapless Security Guard Runs Amok*, NY Times C1 (Jan 16, 2009) (review of Sony Pictures film *Paul Blart: Mall Cop*).

³⁶ See Wollan, *The Privatization of Criminal Justice* (cited in note 3).

³⁷ Joh, 95 J Crim & Criminol at 50 (cited in 31).

³⁸ However, private entities theoretically may sponsor and conduct their own proceedings against the wrongdoer. See Simmons, 42 Wake Forest L Rev at 962 (cited in note 15); see also Ric Simmons, *Private Plea Bargains*, 89 NC L Rev (forthcoming 2011), online at <http://ssrn.com/abstract=1622846> (visited Sept 7, 2010).

³⁹ *Id* at 979–81.

⁴⁰ The evidence shows that the incidence of government outsourcing of police functions is considerable, though not as pervasive as government outsourcing of prison management. See Joh, 2005 Utah L Rev at 586 (“[O]nly some private policing is contracted out by cost-conscious public agencies. Much private policing arises from the private sector to meet private demands.”) (internal citations omitted) (cited in note 14). Government entities rank just behind manufacturing and retail firms in terms of the extent of their outsourcing functions to private security firms. See Benson, *To Serve and Protect* at 18 (cited in note 6).

ket services that also happen to be offered by government.”⁴¹ In this context, private policing actors *are* in privity with the state.

Over the past 35 years, government entities have outsourced various “subservice” police functions, such as crime laboratory analysis, data entry, dispatch, guarding detainees, and transporting prisoners, with increasing frequency.⁴² Additionally, what might be considered “core” police activities also have been outsourced.⁴³ For instance, a number of jurisdictions have contracted with private security firms to patrol certain geographic areas.⁴⁴ Other jurisdictions have engaged private firms to conduct investigations on behalf of the governmental entity.⁴⁵ Furthermore, although the evidence does not show the practice to be widespread, there are instances of governments outsourcing the entire policing function to private firms,⁴⁶ a practice that entails the robust delegation of public police authority to private actors.⁴⁷

II. OUTSOURCING THE CRIMINAL PROSECUTORIAL FUNCTION

Tough economic times are forcing governments to make difficult choices about resource allocation in the criminal justice

⁴¹ Joh, 2005 Utah L Rev at 613 (cited in note 14) (emphasis omitted).

⁴² See id; Philip E. Fixler, Jr., and Robert W. Poole, Jr., *Can Police Services Be Privatized?*, in Bowman et al, eds, *Privatizing the United States Justice System* at 31–32 (cited in note 32).

⁴³ Id at 32.

⁴⁴ See Verkuil, *Outsourcing Sovereignty* at 38 & n 112 (cited in note 6) (noting that “the Defense Department and GSA employ private guards [at] military and other government properties”); Benson, *To Serve and Protect* at 18 (cited in note 6); Fixler and Poole, *Can Police Services Be Privatized?* at 32–33 (cited in note 42).

⁴⁵ Benson *To Serve and Protect* at 18 (cited in note 6); Fixler and Poole, *Can Police Services Be Privatized?* at 33 (cited in note 42).

⁴⁶ See Benson, *To Serve and Protect* at 18, 20–21 (cited in note 6); Fixler and Poole, *Can Police Services Be Privatized?* at 33–35 (cited in note 42).

⁴⁷ See Joh, 2005 Utah L Rev at 614 (cited in note 14) (“The more a publicly contracted police force is organized to replace a public force entirely, the more likely it is that full public legal powers and complementary material resources will be made available to it.”).

However, jurisdictions have tended to shy away from the complete privatization of the police function. In one Michigan example, a jurisdiction contracted with a private firm but deputized the individual private personnel to avoid legal issues. See Fixler and Poole, *Can Police Services Be Privatized?* at 33 (cited in note 42). A jurisdiction in Ohio contracted with a private firm for police services, but retained “full autonomy in hiring, firing, disciplining, and organizing the police force.” Id at 33–34, quoting T. Gage, *Cops, Inc.*, Reason 23–28 (Nov 1982). One jurisdiction in Arizona signed a contract in which it ceded all operational decision making to the private contractor, but retained the ability to overrule the decisions made. See id at 34. In all of these examples, external pressures eventually caused the jurisdictions to abort the contractual agreement, rendering the outsourcing arrangements short-lived. See id at 33–34; Benson, *To Serve and Protect* at 20–21 (cited in note 6).

arena. Many of the resulting budget cuts have been directed toward prosecutors' offices.⁴⁸ Consequently, in many jurisdictions, reductions in personnel have led to diminished criminal enforcement capacity.⁴⁹ In the face of budgetary challenges, it is conceivable that more jurisdictions will consider the sort of privatization and outsourcing solutions some have relied upon in the prison and policing contexts.

What might such prosecution outsourcing look like? Should we outsource prosecutorial authority—and, more specifically, prosecutorial discretion—to private actors? If not, why not? The following two thought experiments, in which state and federal governments outsource the criminal prosecution function to private actors, will serve as a point of departure for the discussion.

A. North Publica, USA—State Outsourcing of Criminal Prosecution

As part of an attempt to reduce budget costs in the wake of declining tax revenues, the legislature of the fictional state of North Publica passes a measure authorizing the outsourcing of a number of government functions. One of these functions is criminal prosecution. The state legislative research service determined that, on average, a state criminal prosecutor draws a salary of \$50,000, and receives health insurance and other employment benefits worth approximately \$25,000. In addition, initial training and continuing education costs, and the incremental costs of office accommodations, secretarial support, and other

⁴⁸ See, for example, Kenneth Hart, *Prosecutor Offices Feel Pain from Budget Cut*, Daily Independent (Dec 27, 2008); Donna Leinwand, *Cuts Have Prosecutors at "Breaking Point," Some Face Unpaid Leave, Less Support*, USA Today 3A (Nov 21, 2008). See also *Letter from Hon. John Conyers, Jr. and Hon. Henry A. Waxman to Hon. Alberto Gonzales* (July 24, 2006), online at <http://oversight.house.gov/images/stories/documents/20060724095809-74936.pdf> (visited Mar 21, 2010) (noting budget and staffing challenges in federal prosecutors' offices).

It should be noted that public defenders' offices have fallen victim to budget cuts as well. See, for example, Adam Liptak, *Poor Defendants and a Drained State Budget Cross Paths in Georgia*, NY Times A13 (July 6, 2010); Josh Richman, *Cash-Strapped Alameda County Public Defender's Office Starts Turning Away Cases*, San Jose Mercury News (Aug 3, 2009). Interestingly, this has caused one state public defender's office to cease reliance upon contracting with private attorneys to handle cases presenting a conflict of interest for the office. See Marcia Coyle, *Cash-Strapped Maryland Public Defender Office Ends Contracts With Private Attorneys*, Nat'l L J (Sept 30, 2008).

⁴⁹ See Henry K. Lee, *D.A. Cuts Efforts on Lesser Crime*, SF Chron B1 (Apr 22, 2009); Conor Berry, *Budget Questions Loom over DA's Office*, Berkshire Eagle (Feb 4, 2009); Jacinda Howard, *Public Safety Takes a Big Hit in King County*, Federal Way Mirror (June 7, 2008), online at http://www.pnwlocalnews.com/south_king/fwm/news/19608489.html (visited Aug 7, 2010).

associated overhead total approximately \$25,000. Therefore, the annual per-prosecutor cost to the North Publica treasury is \$100,000, for a total of \$1,000,000 for all of North Publica's ten prosecutors. The legislative research also found that the average prosecutor disposes of 100 cases per year, for a per-case labor cost of \$1,000.

Various cost-cutting proposals float around, including one plan to reduce the number of prosecutors by 80 percent (down to two prosecutors) and another plan to eliminate the need for all of the North Publica prosecutors. Legislators decide to survey the market for legal services to determine their available options. Ultimately, a request for proposals (RFP) is issued through various bar journals and newsletters in the state. The RFP seeks proposals from private lawyers and law firms for contracts to handle North Publica's criminal prosecutions. Offerors are asked to describe their qualifications for handling criminal prosecutions, including any past experience with criminal work. All bidders also are required to outline the practical aspects of how the criminal prosecutions would be handled as well as the fee structure for the contract.

The winning proposal is submitted by the law firm of Henry & Bell, LLP, a 120-lawyer firm with six offices across the state. Both name partners, John Henry and Edwina Bell, are former North Publica prosecutors and have significant criminal defense experience. The two senior lawyers are both known for being excellent supervisors of the young associates in their firm, all of whom had been top performers in law school. The proposal specifies that the law firm's attorneys would prosecute all criminal cases on behalf of North Publica in exchange for an annual flat fee.

The proposal also contained a blueprint for how cases would proceed with Henry & Bell serving as prosecutor. When the North Publica police make an arrest, a lawyer from Henry & Bell would be summoned to the courthouse to handle the initial appearance and bail hearing. The Henry & Bell lawyer would then assess the case and determine whether the prosecution should proceed. If the Henry & Bell lawyer decided to charge the defendant, Henry & Bell would handle the preliminary hearing, plea bargaining and guilty plea (if any), motion to suppress and other pre-trial motions, and Henry & Bell would try the case. Assuming guilty plea or conviction, Henry & Bell would decide on the sentence recommendation and argue in favor of a particular sentence. If there were a need to defend the conviction on appeal or on collateral review, Henry & Bell would do the briefing

and argument, including deciding which positions to take and what concessions to make. In cases where the involvement of a prosecutor was required prior to arrest and apprehension, Henry & Bell would handle all aspects of the investigation, including obtaining search warrants, arrest warrants, and wiretaps and planning undercover sting operations.

Henry & Bell would provide all secretarial support, word processing, printing, photocopying, office supplies, expert witness, and laboratory fees training of associates in criminal prosecution topics; and all other overhead expenses. In addition, Henry & Bell would be solely responsible for the salaries and benefits of the lawyers who performed the criminal prosecution work on behalf of North Publica. As a result of the contractual arrangement, North Publica would save \$500,000 annually in labor costs associated with criminal prosecution.

B. US Department of Justice—Federal Outsourcing of Criminal Prosecution

The Attorney General of the United States seeks to reduce her workforce and the costs of criminal prosecution. After the Congressional Research Service determines that there could be significant cost savings associated with the outsourcing of the prosecutorial function, she is able to persuade Congress to authorize the contracting out of white-collar fraud prosecutions to private law firms.⁵⁰

The Attorney General engages the 800-lawyer firm of Shearman, Gray & Myers to handle the Justice Department's white-collar criminal fraud prosecutions. The contract calls for the firm to handle criminal prosecution in white-collar cases at a greatly reduced hourly rate. Shearman, Gray & Myers would provide all secretarial support, word processing, printing, photocopying, office supplies, expert witness and laboratory fees, training of associates in criminal prosecution topics, and all other overhead expenses. In addition, the firm would be solely respon-

⁵⁰ Although prosecution is thought by most to be an inherently executive function, see Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541, 658–59 (1994). But see Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1 (1994), the Department of Justice and the office of the Attorney General itself are creatures of statute and may be regulated by Congress as such. See, for example, Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L J 561, 566–82.

sible for the salaries and benefits of the lawyers who performed the criminal prosecution work on behalf of the United States.

When the Federal Bureau of Investigation or some other federal law enforcement or regulatory entity began to investigate allegations of white-collar wrongdoing, a consultation between the agency and Shearman, Gray & Myers would take place. The attorneys and the agents would discuss investigative strategies and would sketch out an investigative plan. Shearman, Gray & Myers attorneys would work with the agency throughout the investigation, obtaining any search warrants, arrest warrants, or wiretaps they deemed necessary, and directing witness interviews and other gathering of evidence. As part of the legislation authorizing the outsourcing of the prosecutorial function, the Federal Rules of Criminal Procedure would be amended to make clear that these private law firm attorneys were to be treated as government prosecutors for purposes of gaining access to the grand jury and grand jury materials.

In addition, these private attorneys would be fully authorized to sign and file information and complaints to initiate criminal proceedings in cases not requiring grand jury indictment. All charging decisions would be entrusted to Shearman, Gray & Myers attorneys, subject only to grand jury or judicial findings of probable cause in appropriate cases.

From the Department's perspective, the lawyers at the law firm could do the work at a fraction of the cost of public, full-time prosecutors. From the law firm's perspective, although the work would not be as lucrative as the full-fee matters it handled for private clients, the criminal prosecution work would always be present, providing a solid source of billable hours for the firm's lawyers, particularly in a down economy. Furthermore, the criminal prosecutions would provide an excellent opportunity for junior lawyers at the law firm to "cut their teeth" in courtroom litigation.

These two hypothetical scenarios may seem far-fetched to those of us who value and endorse the public prosecution norm. The thought of private lawyers being contracted to perform the seemingly exclusive state function of prosecuting violations of the criminal law is somewhat jarring. However, as is discussed below, these two thought experiments are actually grounded in the present reality within many smaller jurisdictions around the United States.

C. Outsourcing the Prosecutorial Function to Private Actors

Governments outsource a significant amount of legal work.⁵¹ Instead of using the often sizable stables of in-house lawyers—of the city solicitor’s office, state Attorney General’s office, or Department of Justice—governments sometimes decide to contract their legal work out to the private sector, a classic example of outsourcing. Governments on the local, state, and federal levels have contracted with private lawyers to handle all manner of government lawsuits—relating to matters from antitrust and tobacco to lead paint and handguns⁵²—often on a contingency fee basis.⁵³ Private lawyers also are sometimes retained to assist government lawyers with civil enforcement activities.⁵⁴ This “outsourcing” description also holds for those instances where government entities contract out *criminal prosecution* to the private sector.

Surprisingly, a significant amount of prosecution outsourcing already is being undertaken by smaller jurisdictions

⁵¹ See Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 Georgetown J Legal Ethics 85, 85 (1987) (“While the federal government employs a very large in-house staff of over 17,000 attorneys to handle its legal problems, it nevertheless spends over twenty-five million dollars a year to hire outside counsel to represent its interests.”) (internal citations omitted). But see William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L Rev 399, 399 (1988) (“Contracting for legal services by the Federal Government has been, and continues to be, the exception rather than the rule.”).

⁵² See, for example, Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 UC Davis L Rev 1, 17, 35 (2000); John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: *Myth and Reality about the Synthesis of Private Counsel and Public Client*, 51 DePaul L Rev 241, 241, 243 (2001); Rotunda, 1 Georgetown J Legal Ethics at 85 (cited in note 51); Jenna Greene, *Cadwalader Slashed Rates for Treasury Work*, Natl L J 27 (Oct 12, 2009) (reporting on law firm’s reduction of its attorneys’ hourly rates for work on behalf of U.S. Treasury Department’s Troubled Assets Relief Program).

⁵³ See, for example, *County of Santa Clara v Superior Court of Santa Clara County*, 235 P3d 21 (Cal 2010) (approving contingency fees for private firms hired to assist government attorneys in some public nuisance cases, but noting that due process would likely bar the use of contingency fees for criminal prosecutions); *Priceline.com, Inc v City of Anaheim*, 180 Cal App 4th 1130, 103 Cal Rptr 3d 521 (2010) (approving contingency fees for private firms hired to assist government attorneys in tax assessment litigation). Jurisdictions sometimes engage outside counsel on a pro bono basis. See, for example, Mark Scarcella, *Outside Counsel Worked Landmark Gun Case Pro Bono*, Blog of Legal Times (May 20, 2010), online at <http://legaltimes.typepad.com/blt/2010/05/dc-says-outside-counsel-worked-handgun-case-pro-bono.html> (visited Sept 11, 2010).

⁵⁴ Telephone Interview with Betsy Miller, Esq. (private law firm attorney with practice representing governmental entities in civil matters) (Apr 27, 2010). Miller stressed that, in her experience, state attorneys general who retain the assistance of private lawyers are bound by statute and custom to maintain control over the strategy and direction of the matters. See *id.*

across the nation.⁵⁵ These governments, with limited budgets for criminal justice administration, often turn to the private bar for prosecution services. Rather than spend scarce resources on a traditional public prosecutor, some governments will pay private lawyers or law firms to prosecute criminal matters within the jurisdiction.

Prosecution outsourcing arrangements take a number of different forms. Some governments contract with private law firms to handle criminal prosecutions on an hourly fee basis, much like the arrangement depicted above in the federal outsourcing thought experiment.⁵⁶ For example, the city of Davis, California recently entered into an agreement with a California law firm that paid the firm \$180 per hour for a variety of legal services, including the “[p]rosecution of municipal code violations.”⁵⁷

Other prosecution outsourcing arrangements simply pay a private lawyer or law firm a fee for each criminal prosecution they handle. An example of this type of compensation scheme can be found in the city of Sequim, Washington, which pays a private attorney to handle criminal appeals “at a flat rate of \$300 per individual case.”⁵⁸

Still other outsourcing arrangements, like that imagined in the “North Publica” thought experiment above,⁵⁹ have a private lawyer or law firm prosecute all of the criminal cases in a jurisdiction for a flat annual fee. The town of Albany, Oregon has paid a private law firm an annual flat fee of over \$200,000 for prosecution and other legal services.⁶⁰

⁵⁵ There are other examples of private influence on, or control over, criminal prosecution, such as victim-retained private prosecution and part-time prosecution. See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 UC Davis L Rev 411, 419–24 (2009). Furthermore, it is tempting to draw analogies between *qui tam* actions and prosecution outsourcing. But see *id.* at 425 n 44 (pointing out fundamental distinctions between prosecution outsourcing and *qui tam* actions); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark L Rev 511, 595 (1994) (“Even if the Supreme Court refuses to declare the use of private prosecutors unconstitutional in *all cases*, an interested prosecutor’s participation at trial must invalidate any conviction obtained for any serious offense.”). Although there are a number of common attributes among the various species of the private role in criminal prosecution, see Fairfax, 43 UC Davis L Rev at 425–27 (cited in note 53), the focus of this Article is limited to prosecution outsourcing.

⁵⁶ See Part II.B.

⁵⁷ *Agreement for Legal Services, City of Davis, California and McDonough, Holland & Allen, PC* (2006), online at http://cityofdavis.org/meetings/councilpackets/20060110/05D_City_Attorney_Contract.pdf (visited Mar 17, 2010).

⁵⁸ *Agreement for Prosecuting Attorney Services, City of Sequim, Washington* (2003), online at <http://www.mrsc.org/contracts/s46ProsAttSvcs.pdf> (visited Mar 17, 2010).

⁵⁹ See Part II.A.

⁶⁰ See *Contract between Albany, Oregon and Long, Delapoer, Healy & McCann, PC*

Often an elected mayor or county executive or appointed city administrator will engage the criminal prosecution services of a private law firm pursuant to a negotiated agreement or following a request for proposal process.⁶¹ Although the reputation and professional ability of the private firm obviously factor prominently into the selection, the desire to reduce costs and enhance efficiency through the contract is a significant consideration.⁶²

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.

Although much of current prosecution outsourcing is limited to smaller jurisdictions and less serious criminal offenses, larger jurisdictions very well may take note of the perceived benefits. Government budgets are being reduced across the board, includ-

(2005) (on file with U Chi Legal F).

⁶¹ See, for example, *City of North Bend, Washington and Kenyon Disend, PLLC, Resolution 1174* (Jan 16, 2007) online at <http://www.mrsc.org/contracts/N66legal.pdf> (visited Sept 11, 2010); *City of Sequim, Washington, Request for Proposal for Prosecutorial Services*, online at <http://www.mrsc.org/rfps/s46prosattysvcs.pdf> (visited Sept 11, 2010) (proposal for a contract that would acquire the services of a private attorney to prosecute alleged criminals on behalf of the city); *City Council of Northfield, Minnesota, Approve RFP for Prosecuting City Attorney Services*, online at <http://www.ci.northfield.mn.us/assets/p/Packet145.pdf> (visited Sept 11, 2010) (same).

⁶² See Telephone Interview with Scott Neal, City Manager of Eden Prairie, MN (Mar 2, 2010) (noting cost savings as the primary motivation for prosecution outsourcing in his jurisdiction); Rupa Shenoy, *Prosecutors Caught between Cost-Cutting and Profiteering*, Minnesota Public Radio (Mar 26, 2010).

As with outsourcing more generally, see Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization and Public Values*, 15 Cornell J L & Pub Pol 111, 113 (2005), there are various motivations for governmental outsourcing of legal services, including efficiency, cost savings, and, in certain matters, the need for the expertise possessed by a particular member of the private bar. See, for example, Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub Cont L J 443, 443 (2004) ("There is no compelling reason why government lawyers should be exempt from consideration in [the] outsourcing process. The same arguments that support outsourcing of other services support outsourcing of government legal services."). See also *id.* at 444–48 (citing efficiency, expertise, and quality of service as rationales for government outsourcing of legal services); Lawrence, 61 Ind L.J. at 656–57 (cited in note 3) ("Persons with certain kinds of expertise may be too expensive for government to employ or may prefer less structured work environments than government can offer. Private delegation may be a practical method of obtaining that sort of otherwise unavailable expertise.").

ing in vital areas such as criminal prosecution.⁶³ Such budget cuts no doubt hamper the ability of jurisdictions to provide optimal levels of law enforcement.⁶⁴ Given difficult economic conditions and increasing criminal justice demands, larger jurisdictions may consider the sort of outsourcing imagined in the thought experiments above.

III. CONCERNS WITH PROSECUTION OUTSOURCING

A. Accountability and Transparency

Prosecution outsourcing raises concerns about accountability and transparency. Most chief prosecutors in the United States are elected, with the remainder directly appointed by elected officials, sometimes with the confirmation of legislative bodies.⁶⁵ Perhaps the primary rationale for the tremendous discretion enjoyed by prosecutors is their accountability to the communities in whose name they enforce the criminal laws.⁶⁶ Prosecutors wield enormous power in deciding whether and what to prosecute. Their decisions have long-lasting consequences not only for putative criminal defendants and victims of criminal conduct, but also for law enforcement strategy, correctional resource allocation, and social policy more generally.

When private actors are contracted to perform the prosecution function, they exercise this power without the democratic check that theoretically applies to public prosecutors.⁶⁷

⁶³ See, for example, Hart, *Prosecutor Offices Feel Pain from Budget Cut* (cited in note 48) (describing recent cutbacks in funding for government prosecutorial functions); Berry, *Budget Questions Loom over DA's Office*, *Berkshire Eagle* (cited in note 49) (noting that district attorney positions may need to be cut in the face of budget reductions); Howard, *Public Safety Takes a Big Hit in King County*, *Federal Way Mirror* (cited in note 49) (budget cut forces downsizing of approximately 30 assistant district attorneys, or one-sixth of prosecutorial staff).

⁶⁴ See, for example, Lee, *D.A. Cuts Efforts on Lesser Crimes*, *SF Chron B1* (cited in note 49) (district attorney forced to decline all misdemeanor and small-quantity drug prosecutions among other types of cases); Leinwand, *Cuts Have Prosecutors "at Breaking Point," Some Face Unpaid Leave, Less Support*, *USA Today 3A* (cited in note 48) (discussing the nationwide scope of recent budget cutbacks).

⁶⁵ See Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 10–11 (Oxford 2007) (“Mississippi was the first state to hold public elections for district attorneys. By 1912, almost every state had followed this trend. Today, only the District of Columbia and four states—Delaware, New Jersey, Rhode Island and Connecticut—maintain a system of appointed prosecutors.”)

⁶⁶ See Roger A. Fairfax, Jr., *Prosecutorial Nullification?* (unpublished manuscript, 2010) (on file with author).

⁶⁷ It must be recognized, however, that there is a good deal of scholarly skepticism regarding the prosecutorial accountability that the democratic process provides. See Davis, *Arbitrary Justice* at 163–66 (cited in note 63) (outlining arguments that have been

Furthermore, because private contractors perform most non-courtroom tasks in private offices away from public spaces and actors and are not subject to government information disclosure laws, there is even less transparency than we enjoy with regard to public prosecutors.⁶⁸

Of course, the fact that prosecution outsourcing contracts are negotiated and monitored by elected or otherwise politically accountable officials may provide some degree of accountability.⁶⁹ Additionally, because public expenditures theoretically are subject to public scrutiny, there may be demands upon private contractors to increase access to internal office procedures and decision making.⁷⁰ Nevertheless, prosecution outsourcing diminishes the sort of accountability and transparency demanded of, and theoretically provided by, public prosecutors.

B. Underperformance

Related to the accountability concerns raised by prosecution outsourcing is the worry that it may be difficult to ensure adequate performance of outsourced prosecutors. There are tremendous demands on the time of lawyers in private practice. A private firm may have litigation, transactional, or administrative

put forth that the democratic process of electing district attorneys does not have a sufficient abuse deterrence effect); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 Ohio St J Crim L 581, 583 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 Va L Rev 939, 963 (1997).

⁶⁸ See Fairfax, 43 UC Davis L Rev at 444 (cited in note 53) (“[T]he decision making processes of public prosecutors are notoriously opaque.”), citing Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L Rev 393, 448 (2001); Marc L. Miller and Ronald F. Wright, *The Black Box*, 94 Iowa L Rev 125, 129 (2008) (internal citations omitted) (“[T]he absence of controlling statutes or case law makes it possible for prosecutors to do their daily work without explaining their choices to the public.”).

⁶⁹ For example, the performance of Henry & Bell lawyers under the outsourcing arrangement depicted in the above thought experiment presumably would be reviewed by the governor and the legislature at the time of contract renewal.

Indeed, the city manager in one jurisdiction that outsources its misdemeanor prosecutions to private law firms touts the ability of the city to withdraw from the contract with ninety days notice if the city is unsatisfied with the contractor’s performance. See Telephone Interview with Scott Neal (cited in note 62).

⁷⁰ For instance, in our Henry & Bell thought experiment, North Publica might require frequent reporting by the contracting firm on its decisionmaking processes related to the criminal case dispositions.

One former “private prosecutor” recalls that her private law firm, which handled criminal cases for one Minnesota jurisdiction, was subject to formal annual reviews and more frequent informal performance reviews by the city manager and police department command staff. See Telephone Interview with Jennifer Inz, Esq. (currently a public prosecutor in Hennepin County, Minnesota, who previously prosecuted criminal offenses for a Minnesota jurisdiction for 17 years under an outsourcing contract as a private law firm attorney) (Apr 27, 2010).

matters taking place in far-flung venues and geographic regions. Private law firms must generate sufficient revenues to pay not only lawyer salaries and overhead, but the costs associated with maintaining support staff. Although the government obviously must meet payroll and pay overhead expenses, the practice decisions of individual government lawyers are not burdened with such financial considerations.

Such pressures might affect a private lawyer's prosecutorial performance in a number of ways. 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. For example, Henry & Bell in the above thought experiment might place criminal prosecution matters on the back burner in order to accommodate work on behalf of a private client, particularly if the private client work is more lucrative. This could mean improper delays in the prosecution or processing of criminal cases, leading to court system backlogs, unfair treatment of pretrial detainees, and even speedy trial issues.

Just as troubling is the possibility that Henry & Bell might begin to plead out cases for lesser sanctions than would normally be deemed appropriate, in order to clear the decks for more private client work. Of course, a firm presumably would not engage in a prosecution outsourcing arrangement if the firm believed that the arrangement might hinder its ability to service private clients. However, new clients and fresh matters arise all the time, and circumstances can change dramatically after the outsourcing agreement has been executed.

C. Ethical Concerns

There are also ethical concerns that can arise when a private lawyer is entrusted with criminal prosecution authority. There has long been strong support among reformers for the full-time public prosecution norm because of the tremendous potential for conflicts of interest when prosecutors also represent private clients. It is not difficult to recognize the conflict that would be created were Henry & Bell or Shearman, Gray, & Myers to represent criminal defendants in a jurisdiction in which those firms contracted to prosecute criminal cases.⁷¹ Although such direct

⁷¹ In addition to the problems such a dual role would pose for the prosecution function, the Henry & Bell attorneys would be vulnerable to ineffective assistance of counsel claim for breach of duty of loyalty. See *Strickland v Washington*, 466 US 668 (1984) (presuming prejudice when defense counsel represents conflicting interests).

conflicts can be avoided by requiring contractor firms to recuse themselves from all criminal defense matters in the jurisdiction,⁷² the danger of conflicts of interest do not end there. A firm could show favoritism in a criminal case to one of its private *civil* clients, or might use the discretionary power of criminal investigation and prosecution as a weapon against a civil litigation adversary.

In addition, some reasonably may be concerned that private lawyers will be more susceptible to corrupting influences than will public prosecutors. There is the aforementioned concern that a private lawyer may use her criminal prosecution authority to cow an adversary into submission in an unrelated civil matter. In addition, the performance pressures associated with maintaining a potentially lucrative criminal prosecution contract with a jurisdiction could create incentives to win conviction at all costs,⁷³ even through misconduct. Although it must be conceded that there may be incentives for *public* prosecutors to ignore their duty to ensure “that justice shall be done,”⁷⁴ the perception—if not the reality—of the increased danger of corruption and conflicts of interest associated with prosecution outsourcing is cause for particular concern.

D. Potential Constitutional Constraints

The sort of prosecution outsourcing illustrated in the above thought experiment arguably is in tension with certain constitutional norms. Although governments enjoy broad authority to outsource public functions,⁷⁵ and courts have been fairly liberal in approving delegations of government power to private actors,⁷⁶ privatization scholars often point to various constitutional

⁷² But see Telephone Interview with Jennifer Inz, Esq. (cited in note 70) (noting that private prosecutors in Eden Prairie, MN are permitted to represent criminal defendants).

⁷³ A National Public Radio affiliate story on prosecution outsourcing recounted that a winning bidder for a prosecution outsourcing contract stated in its proposal that it would increase the city’s revenues by seeking court-imposed “prosecution costs” from defendants. Prosecution costs, which are directed to the jurisdiction’s coffers, are imposed in cases in which the prosecutor agrees to a conditional dismissal of a defendant’s case in exchange for the defendant’s compliance with certain requirements and the payment of the fee. See Shenoy, *Prosecutors Caught between Cost-Cutting and Profiteering* (cited in note 62).

⁷⁴ *Berger v United States*, 295 US 78, 88 (1935). See also Fairfax, UC Davis L Rev at 440–41 (cited in note 53).

⁷⁵ See Freeman, 75 NYU L Rev at 581 (cited in note 6) (“The federal government thus retains considerable flexibility to make substantial delegations of its responsibilities, and even of functions closely associated with core sovereign powers, to private parties.”).

⁷⁶ See, for example, Metzger, 103 Colum L Rev at 1375, 1440 (cited in note 1). See

restrictions on such delegations—including due process, equal protection, separation of powers, and nondelegation principles.⁷⁷

In addition to the problems *inherent* in the private exercise of sovereign power,⁷⁸ allowing private lawyers to wield prosecutorial authority raises fairness concerns.⁷⁹ One concern is that private attorneys will not be able to check improper incentives influencing their exercise of discretion. Among these are the financial and professional incentives to perform well (that is, seek and obtain convictions) in order to enhance professional reputation for the purpose of maintaining and developing other areas of practice.

As was discussed above, conflicts of interest on the part of the private attorney discharging prosecutorial duties may raise due process concerns serious enough to warrant reversal of a defendant's conviction.⁸⁰ For example, a contracted prosecutor's desire to benefit a client with interests at stake in a given prosecution could result in prejudice to a criminal defendant.

Additionally, corruption in the prosecutorial decision-making process, resulting in bias, favor, or prejudice would give rise to fairness concerns which could implicate both the Due Process and Equal Protection Clauses.⁸¹ Another fairness concern derives from the notion that when two private adversaries litigate, neither should wield the power of the state.⁸² This relates

also Lawrence, 61 Ind L J at 660 (cited in note 3).

⁷⁷ See, for example, Freeman, 75 NYU L Rev at 632 (cited in note 6); Metzger, 103 Colum L Rev at 1437–38 (cited in note 1) (“This same due process concern exists in the federal context, but here separation of powers constitutes an additional potential barrier to delegation of power to private actors.”). See also Verkuil, *Outsourcing Sovereignty* at 15 (cited in note 6) (“[W]hen the Congress subdelegates to the president or the agencies or the president further delegates to private parties, the Constitution still umpires the relationships.”). But see Stanger, *One Nation under Contract* 26 (cited in note 2) (“The Constitution is largely mute on what the founders thought about the proper balance between private and public interests.”). See also Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L Rev 911 (1988) (discussing federal and state nondelegation doctrines).

⁷⁸ See Part III.E below.

⁷⁹ See, for example, Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am J Legal Hist 43, 58 (1995) (“Conversely, a writer in the *North Carolina Law Review* in 1972 called for an end to private prosecution, contending that it violated due process, the canons of ethics, and the modern role of the prosecutor.”).

⁸⁰ See Part III.C above. Compare Pierce, 76 Geo Wash L Rev at 1221 (cited in note 1).

⁸¹ See Lawrence, 61 Ind L J at 661–62 & n 59 (cited in note 3); *Ganger v Peyton*, 379 F2d 709 (4th Cir 1967).

⁸² See, for example, Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash U L Q 85, 108 (1992) (“Private prosecution is seen as unfair to defendants in two respects. First, it is argued that the criminal prosecutor has the ‘full machinery of the state’ at his or her command, and

not only to equity considerations vis-à-vis the accused,⁸³ but also to society's conception of whether and when it is appropriate for private parties to wield state power.

Another set of constitutional values potentially implicated by the contracting out of the prosecution function to private attorneys may be found, at least in the federal context, in separation of powers and nondelegation doctrines. For example, some commentators point to the Appointments Clause of the United States Constitution,⁸⁴ which provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁸⁵

The Appointments Clause is designed, in part, "to preserve political accountability relative to important government assignments."⁸⁶ Paul Verkuil describes the Appointments Clause as a "democracy-forcing requirement" established in part "to check the exercise of private power on government."⁸⁷

When the executive contracts out the prosecution of crime to a private party, he or she is, in a very real sense, *delegating* that function outside of the constitutional structure. Of course, the constitutional mandate that the executive "take Care that the Laws be faithfully executed" does not require that the president himself or herself actually prosecute criminal offenses against the state;⁸⁸ the President may delegate this responsibility vertically to principal and inferior officers.⁸⁹ However, when the exec-

that use of such powers for private advantage is inherently unfair to defendants.").

⁸³ But see *id.* at 109–10 (highlighting arguments that even public prosecution does not ensure fairness for criminal defendants).

⁸⁴ See Freeman, 75 NYU L Rev at 585–86 (cited in note 6). See also Field, 15 Hofstra L Rev at 656 & n 52 (cited in note 34).

⁸⁵ US Const Art II, § 2, cl 2.

⁸⁶ *Edmond v United States*, 520 US 651, 663 (1997).

⁸⁷ Verkuil, *Outsourcing Sovereignty* 106 (cited in note 6). But see Pierce, 76 Geo Wash L Rev at 1220 (cited in note 1).

⁸⁸ US Const Art II, § 3, cl 4.

⁸⁹ See Verkuil, *Outsourcing Sovereignty*, at 102–03 (cited in note 6). See also

utive delegates an executive function beyond the constitutional boundaries of the executive branch,⁹⁰ constitutional constraints on such delegations may be implicated.⁹¹

For example, the Department of Justice Office of Legal Counsel (OLC) has long maintained the view that “purely ministerial and internal functions . . . which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority may be performed by persons who are not federal officers or employees.”⁹² However, OLC has been equally consistent in the view that “the authority to direct litigation on behalf of the United States may not be vested in persons who are not officers of the United States appointed in the proper manner under [the Appointments Clause].”⁹³ Analyzing the Supreme Court’s prominent treatment

Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76, 14 Op Off Legal Counsel 94, 96, 1990 WL 488475 at *2 (1990).

⁹⁰ Scholars have debated whether prosecution is an inherently executive function. See, for example, Davis, 86 Iowa L Rev at 453–55 (cited in note 66) (“The prosecutorial function falls within the executive branch of the government. . . . The framers viewed a strong, unitary executive as advancing accountability because a fragmented executive branch could more easily escape review.”); Calabresi and Prakash, 104 Yale L J at 658–51 (cited in note 50). But see Lessig and Sunstein, 94 Colum L Rev at 1 (cited in note 50); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 Geo Wash L Rev 474, 485, 494, 500 (1989). See also Office of Legal Counsel, *Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76* at 96 (cited in note 89) (collecting cases).

⁹¹ Although authorities are in accord that such delegations do implicate constitutional values, there are varying views as to *which* constitutional values are implicated. See, for example, Verkuil, *Outsourcing Sovereignty* at 103 (cited in note 6) (“If the president assigns duties to private contractors that are normally performed by either principal or ‘inferior’ officers of the United States, the vertical dimension of separation of powers is triggered.”); Office of Legal Counsel, *The Constitutional Separation of Powers between the President and Congress*, 20 Op Off Legal Counsel 124, 1996 WL 876050 at *14 (May 7, 1996), online at <http://www.justice.gov/olc/delly.htm> (visited Sept 11, 2010) (“The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors.”); id at *14 n 60 (“The delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and the general separation of powers principle.”); id at *14 (“[T]he simple assignment [to private individuals] of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem.”). See also id at *14 n 62.

⁹² Office of Legal Counsel, *Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76* at 94, 99 (cited in note 89).

⁹³ As the Office of Legal Counsel has stated:

There has always been in this Office a basic question whether it is appropriate for the Attorney General (or the President) to contract out the litigation responsibility of the United States. . . . [O]n the constitutional level, we have long asserted that the making of litigation judgments (variously described as prosecutorial discretion or litigation management) is a function at the core of the President’s Article II duty to take care that the laws be faithfully executed, and

of the Appointments Clause in *Buckley v Valeo*,⁹⁴ the Office of Legal Counsel concluded that the restriction of litigation to “officers” applies in the criminal context.⁹⁵ Therefore, it can be argued, unless the private lawyer to whom prosecutorial authority is delegated is an “officer,” such a delegation would contravene the Constitution.⁹⁶

E. Government Contracting Law Norms

In addition, a body of statutory and regulatory law has developed around government “contracting out” of public functions. What, if anything, does the positive law of government outsourcing have to say about the contracting out of the prosecution function? Although these laws scarcely address the outsourcing of the prosecution function, the statutes and regulations governing the bulk of government contracting reflect certain norms related to the outsourcing of core government functions. Prosecution outsourcing is in serious tension with such norms.⁹⁷

The Federal Activities Inventory Reform Act of 1998 (“FAIR”) distinguishes between “inherently governmental functions” and other functions, the latter residual category being subject to competition with the private sector for potential outsource-

must, therefore, be performed by those who serve under, and are responsible ultimately to, the President.

Office of Legal Counsel, *Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys*, 4B Op Off Legal Counsel 434, 1980 WL 20939 (Feb 22, 1980). See also Office of Legal Counsel, *Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76* (cited in note 89).

⁹⁴ 424 US 1 (1976) (per curiam).

⁹⁵ Office of Legal Counsel, *Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76* at 94, 99 (cited in note 89).

⁹⁶ See *Lunenburg*, 63 Notre Dame L Rev at 401–02 (cited in note 51) (“Moreover, governmental policy-making itself is a function that must ultimately be vested, if not in Congress, then in the President or an ‘Officer of the United States’ appointed in the manner prescribed by Article II of the Constitution. To the extent that the activities of a private attorney retained by the government can be considered to involve policy making, the need for sufficient control by ‘officers’ of the United States is . . . present.”).

⁹⁷ The author is mindful that serious analytical limitations constrain the full application of the statutory and regulatory outsourcing regime to prosecution outsourcing. One issue is that some of the laws apply only when government is seeking to replace existing public employees with private contractors. To the extent that any prosecution outsourcing would simply seek to supplement the existing public prosecutorial corps with private contractors (rather than replace them), some laws would not apply. Another such limitation is that much of the law is largely aspirational. Finally, as this Article acknowledges, see note 118 below, the federal outsourcing regulatory regime does not apply to state and local outsourcing. However, the policy norms underlying the outsourcing laws (regulating the public private distinction) can be instructive to state governments not necessarily subject to similar legal constraints.

ing.⁹⁸ The statute defines an “inherently governmental” function as “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”⁹⁹ The statute specifically enumerates certain functions that are “inherently governmental,” including “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government”¹⁰⁰ FAIR goes on to explain that “[a]n inherently governmental function involves, among other things, the interpretation and execution of laws of the United States so as . . . to determine, protect, and advance United States economic, political, territorial, property, or other interests by civil or criminal judicial proceedings . . . ; [or] . . . to significantly affect the life, liberty, or property of private persons”¹⁰¹

FAIR, although not explicitly ruling out the outsourcing of inherently governmental functions,¹⁰² could reasonably be read to assume that the practice is not authorized. In any event, the definition of “inherently governmental functions” excluded from FAIR’s competitive sourcing plan would certainly seem to include a potential contracting out of criminal prosecution. The statute’s references to “exercise of discretion,” the determination of federal interests by “criminal judicial proceedings,” and “significantly affect[ing] the life, liberty, or property of private persons” all would militate in favor of the conclusion that prosecution would be considered an “inherently governmental function.”

The language of the Federal Acquisition Regulations (“FAR”), which apply to federal executive agency procurement, supports even more concretely the view that criminal prosecution is an “inherently governmental function” under federal outsourcing law. The FAR is clear in its policy stance against contracting out certain core government functions: “Contracts shall not be used for the performance of inherently governmental func-

⁹⁸ See Federal Activities Inventory Reform Act of 1998, Pub L No 105-270, 112 Stat 2382, codified at 31 USC § 501 note [hereinafter “FAIR Act”]; Stanger, *One Nation under Contract* 15 (cited in note 2); Mathew Blum, *The Federal Framework for Competing Commercial Work*, in Freeman and Minow, eds, *Government by Contract* at 66 (cited in note 6).

⁹⁹ FAIR Act, 31 USC § 501 note § 5(2)(A).

¹⁰⁰ FAIR Act, 31 USC § 501 note § 5(2)(B).

¹⁰¹ FAIR Act, 31 USC § 501 note § 5(2)(B).

¹⁰² See, for example, Blum, *The Federal Framework* at 66 (cited in note 94); John Cibinic and Ralph C. Nash, *Contracting Out Procurement Functions: The “Inherently Governmental Function” Exception*, 14 No 9 Nash & Cibinic Rep 45 (2000).

tions.”¹⁰³ The regulations contain a non-exhaustive “list of examples of functions considered to be inherently governmental functions or which shall be treated as such.” At the top of this list, which includes “[t]he command of military forces,”¹⁰⁴ “[t]he conduct of foreign relations,”¹⁰⁵ and the “performance of adjudicatory functions,”¹⁰⁶ are “(1) [t]he direct conduct of criminal investigations”¹⁰⁷ and “(2) [t]he control of prosecutions.”¹⁰⁸

The FAR also contains provisions specific to service contracts. A service contract is defined as a “contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.”¹⁰⁹ Therefore, a private lawyer contracted to conduct a criminal prosecution might be considered to have a service contract under the FAR. Here, the FAR states that “[a]gencies shall not award a contract for the performance of an inherently governmental function,”¹¹⁰ and makes reference to the earlier list for guidance on what is an inherently governmental function.¹¹¹ Thus, the FAR demonstrates outsourcing law’s categorical inclusion of the prosecution function as one of those inherently governmental functions that should not be contracted out to the private sector.

Another key interpretive tool, OMB Circular No. A-76, is published by the Office of Budget and Management as policy guidance for competitive sourcing requirements.¹¹² This publication contains a number of relevant and informative provisions. After stating the clear policy that agencies shall “[p]erform inherently governmental activities with government personnel,”¹¹³

¹⁰³ 48 CFR § 7.503(a).

¹⁰⁴ 48 CFR § 7.503(c)(3).

¹⁰⁵ 48 CFR § 7.503(c)(4).

¹⁰⁶ 48 CFR § 7.503(c)(2). The regulation, however, specifically excludes those adjudicatory functions “relating to arbitration or other methods of alternative dispute resolution.” 48 CFR § 7.503(c)(2).

¹⁰⁷ 48 CFR § 7.503(c)(1).

¹⁰⁸ 48 CFR § 7.503(c)(2).

¹⁰⁹ 48 CFR § 37.101.

¹¹⁰ 48 CFR § 37.102(c).

¹¹¹ 48 CFR § 37.102(c).

¹¹² The recent versions of Circular No. A-76 have changed substantially. The administration of President George W. Bush renamed “outsourcing” as “competitive sourcing” and added it to the President’s management agenda. See generally Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 Pub Cont L J 263 (2004).

¹¹³ Office of Management and Budget, Circular No. A-76 (revised) 1 (May 29, 2003), online at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf (visited Sept 11, 2010). An earlier version of the Circular elaborated more fully on this policy:

Circular A-76 goes on to define “inherently governmental activities”:

An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves: . . .

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by . . . civil or criminal judicial proceedings . . .;
- (3) Significantly affecting the life, liberty, or property of private persons¹¹⁴

b. *Retain Governmental Functions In-House.* Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

Office of Management and Budget, Circular No. A-76 (revised) *1-2 (Aug 4, 1983) (on file with U Chi Legal F).

¹¹⁴ Office of Management and Budget, Circular No. A-76 (revised) A-2 (May 29, 2003). The 1983 revision of the Circular, which was generally aggressive in its promotion of outsourcing, see Stanger, *One Nation Under Contract* 15 (cited in note 2), nevertheless was explicit in the notion that criminal prosecution is an “inherently governmental function”:

e. An *inherently Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees [T]hese functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. . . . Inherently Governmental functions usually fall into two categories:

- (1) The *act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions”

Here again we see the “exercise of sovereign governmental authority,” affecting governmental interests in criminal proceedings, and “significantly affecting the life, liberty, or property of private persons”—all key attributes of the criminal prosecution function—enumerated as touchstones of inherently governmental functions. In addition, the “exercise of substantial discretion” is cited as a hallmark of an inherently governmental function. However, Circular No. A-76 cautions that “[w]hile inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental.”¹¹⁵ The exercise of discretion “shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision-making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.”¹¹⁶ Even with this caveat, the tremendous, unchecked discretion traditionally enjoyed by prosecutors almost certainly would qualify criminal prosecution as an inherently governmental function.

Criminal prosecution, it cannot be seriously disputed, qualifies as an inherently governmental function within the meaning of the statutory and regulatory law governing federal outsourcing to the private sector. As such, one reasonably can conclude that discretionary prosecutorial activities would not be eligible for outsourcing by the federal government should the Department of Justice seek to contract out criminal prosecution to the private sector as is posed in the thought experiment above.¹¹⁷ Although this statutory scheme is not necessarily applicable to most existing prosecutorial outsourcing,¹¹⁸ it does illuminate important policy norms relevant to the delegation of

Office of Management and Budget, Circular No. A-76 (revised) *2 (Aug 4, 1983).

¹¹⁵ Office of Management and Budget, Circular No. A-76 (revised) A-2 (May 29, 2003).

¹¹⁶ *Id.*

¹¹⁷ See Part II.B. above.

¹¹⁸ Although most prosecution outsourcing currently takes place on the *state* level, state outsourcing law, as outsourcing and privatization scholar Ellen Dannin observes, is notoriously underdeveloped relative to federal law. See Dannin, 60 *Md L Rev* at 251 (cited in note 3) (noting only “a handful of states that had [enacted comprehensive legislation on privatization and subcontracting] . . . and a patchwork of miscellaneous legislation in states that had not”); Dannin, 15 *Cornell J L & Pub Pol* at 142 (cited in note 50) (noting that “most states lack any regularized oversight of contracting”). For an examination of state approaches to privatization, see Alfred C. Aman, Jr., *Privatization and Democracy*, in Freeman and Minow, eds, *Government by Contract* 261–88 (cited in note 6).

prosecutorial authority to private actors, including a strong skepticism of the delegation of discretionary functions. Even if such norms are given short shrift in other areas of government outsourcing,¹¹⁹ perhaps they should be observed in the area of criminal prosecution.

F. Sovereignty and the Public Prosecution Norm

That prosecutorial discretion is broad and potent is widely acknowledged. Prosecutors have largely unfettered discretion as to whether and what to charge, and such decisions have profound consequences for defendants, victims, and the community.¹²⁰ Particularly given the plea bargain–driven modern system of criminal justice,¹²¹ prosecutors are the single most influential organ of criminal justice administration.

However, the prosecutor's discretionary power has profound meaning apart from its administrative role and impact. By declining to prosecute a winnable case, either in an individual case or across the board under a particular criminal statute, prosecutors decide whether a law will be enforced.¹²² In one context, the prosecutor's decision to decline prosecution in a specific case in the interest of justice places in the prosecutor's hands the sovereign prerogative of forbearance against a particular defendant.¹²³ In another context, a prosecutor who decides that a certain law will not be enforced because it does not comport with her policy

¹¹⁹ See generally Verkuil, *Outsourcing Sovereignty* (cited in note 6); Schooner and Greenspahn, *J Cont Mgmt* 209 (Summer 2008) (cited in note 6).

¹²⁰ See, for example, Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 *Cornell L Rev* 703, 732–33 (2008); *Young v Vuitton et Fils SA*, 481 US 787, 814 (1987) (“Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”).

¹²¹ See, for example, Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 *Ga L Rev* 407, 409 (2008); Ronald Wright and Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan L Rev* 29, 30 n 1 (2002) (“In the federal system, the proportion of convictions obtained through pleas of guilty or nolo contendere has reached 95% and has been climbing steadily for over 30 years.”).

¹²² See Fairfax, *Prosecutorial Nullification?* (cited in note 66).

¹²³ See Austin Sarat and Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 *Law & Soc Inquiry* 387, 390 (2008) (“Yet the decisions prosecutors make involve, in our view, something more than a straightforward exercise of discretion. Where others see discretion, we see a fragment of sovereignty.”).

preferences can singlehandedly determine whether a law, though passed by the legislature, will be a dead letter.¹²⁴

Whether or not there are good reasons for prosecutors to have this tremendous authority to exercise the sovereign prerogative, ceding this authority to private actors is problematic to say the least. The system of private prosecution dominant in the United States in the nineteenth century eventually gave way to the public prosecution norm we enjoy today.¹²⁵ Although there are a number of reasons the public prosecutor achieved prominence in modern criminal justice,¹²⁶ one significant reason is that public prosecution bolsters public confidence in the fairness and impartiality of criminal justice.

As the Supreme Court has reminded us, the government's interest in a criminal case "is not that it shall win a case, but that justice shall be done."¹²⁷ Even if, for instance, the Henry & Bell lawyers prosecuting criminal cases were vigilant to ensure their fidelity to this ideal, there is very little assurance that they are operating as honest brokers. Private lawyers working criminal cases under an outsourcing contract are not as likely to share the professional identity of public prosecutors, which incorporates the values discussed above.¹²⁸ When sworn government employees rather than private lawyers litigate a criminal case,

¹²⁴ See Fairfax, *Prosecutorial Nullification?* (cited in note 66). See generally Richard E. Myers II, *Responding to the Time-Based Failure of Criminal Law through a Criminal Sunset Amendment*, 49 BC L Rev 1327 (2008).

¹²⁵ For more on the history of private prosecution, see Davis, *Arbitrary Justice* 9 (cited in note 63); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 Am Crim L Rev 1309, 1326 (2002); Meier, 70 Wash U L Q at 103–07 (cited in note 78); Ireland, 39 Am J Legal Hist at 49 (cited in note 79).

The system of private prosecution—where victims had the responsibility and authority to hire private counsel to prosecute criminal cases against the wrongdoer—is not analogous to prosecution outsourcing, in which the state retains responsibility for criminal prosecution but contracts the work out to private lawyers. Nevertheless, both private prosecution and prosecution outsourcing certainly are in tension with the public prosecution norm. See Fairfax, 43 UC Davis L Rev at 426 (cited in note 53).

¹²⁶ *Id.* at 432–33 & n 78.

¹²⁷ *Berger v US*, 295 US 78, 88 (1935).

¹²⁸ See Fairfax, 43 UC Davis L Rev at 435 ("[T]he public nature of the prosecutorial role has been absorbed by and is intertwined with the professional identity of prosecutors."). The American Bar Association's Criminal Justice Section bestows the "Norm Maleng Minister of Justice Award" annually to a prosecutor who represents the ideals associated with the public prosecution norm. The criteria for the award require that it be given to "a prosecutor who exemplifies the principles that: (1) the prosecutor's obligation is to protect the innocent as well as to convict the guilty; (2) the prosecutor must guard the rights of the accused as well as enforce the rights of the public; and (3) the prosecutor's commitment to the legal and ethical standards must be unwavering." See ABA Criminal Justice Section, Norm Maleng Minister of Justice Award, online at <http://www.abanet.org/crimjust/ministerofjusticeaward.doc> (visited Sept 11, 2010).

we may have greater confidence that the Supreme Court's admonition to "do justice" is heeded and that the government's solemn obligation is met.

CONCLUSION

It is difficult enough to manage and constrain the discretionary authority of *public* prosecutors. The most promising mechanisms for doing so are democratic accountability and prosecutorial professionalization, both of which are either diminished or lacking in the prosecution outsourcing context. Prosecutors do much more than bring to court criminal matters; they are charged with the solemn duty to "do justice"—a task involving judgment and the wise exercise of discretion, and one not easily instrumentalized for purposes of an outsourcing contractual arrangement.

As the author has argued elsewhere, there are ways we might attempt to mitigate the various concerns with the private exercise of criminal prosecution authority.¹²⁹ Among these are limiting private actors to "ministerial" functions, guiding the discretion private actors exercise, and implementing mechanisms to enhance the transparency of prosecutorial decisions made by private contractors.¹³⁰ Furthermore, incentives might be embedded in these outsourcing agreements to encourage private actors to act in the public interest. However, even with these remedial efforts, there remains the fundamental concern that it is inappropriate to outsource to private actors a function so closely identified with the sovereign prerogative of the state.

Nevertheless, other forms of criminal justice outsourcing, such as private prisons and some species of private policing, have developed and even expanded despite similar concerns. Given the fiscal crisis facing jurisdictions around the nation, the perceived cost savings associated with prosecution outsourcing may overshadow the serious drawbacks of eroding the public prosecution norm. Thus, regardless of the fundamental challenge it poses to our understanding of the public/private distinction, query whether prosecution outsourcing is the inevitable next step in the troubling march toward greater privatization of criminal justice.

¹²⁹ Fairfax, 43 UC Davis L Rev at 435.

¹³⁰ See id at 448–55.