
Delegation of the Criminal Prosecution Function to Private Actors

Roger A. Fairfax, Jr.*

Government lawyers have never had a monopoly on criminal prosecution. Long before the establishment of the modern public prosecution norm, private lawyers prosecuted criminal cases on behalf of crime victims or the state. Even today, remnants of the private tradition in criminal prosecution remain in varying contexts where the government delegates prosecution authority to private lawyers. This Article argues that despite the prominent historical role of private lawyers in criminal prosecution prior to the development of the office of the American public prosecutor, it is rarely appropriate to delegate criminal prosecutorial authority and discretion to nongovernmental actors. In addition to advancing ethical, due process, and accountability critiques, this Article argues that notions of sovereignty and important values associated with the public prosecution norm counsel against the private exercise of prosecutorial authority and discretion. Recognizing, however, the normative attractiveness and inevitability of such delegations in certain

* Associate Professor, George Washington University Law School, A.B., Harvard College; M.A., University of London; J.D., Harvard Law School. I would like to thank John Bessler, Angela Jordan Davis, Andrea Dennis, Jeremi Duru, Lisa Fairfax, Phyllis Goldfarb, Kristin Henning, Ketanji Brown Jackson, Fred Lawrence, Cynthia Lee, Joan Meier, Michael Pinard, Steve Saltzburg, and Yolanda Vazquez for reading and commenting upon earlier drafts. The Article also benefitted greatly from conversations with Lenese Herbert, Tamara Lawson, Daved Muttart, Austin Sarat, Steven Schooner, Joshua Schwartz, Ric Simmons, and Frank Wu, as well as feedback during presentations at the Criminal Law Research Collective workshop, the Mid-Atlantic People of Color Legal Scholarship Conference, and the Law and Society Annual Meeting in Montréal, Canada. I truly appreciate the research assistance provided by Emily Crandall Harlan, David Kirsch, Christopher Martin, and Rebecca Rodgers, as well as Susan Lopez of the American Prosecutors Research Institute of the National District Attorneys Association. All errors are mine. This Article is dedicated to the memory of the Honorable Reginald C. Lindsay (1945–2009) of the United States District Court for the District of Massachusetts.

contexts, the Article offers suggestions for mitigating damage to important values that the public prosecution norm advances.

TABLE OF CONTENTS

INTRODUCTION	413
I. DELEGATIONS OF THE PROSECUTION FUNCTION TO PRIVATE ACTORS	415
A. <i>Prosecution Outsourcing</i>	416
B. <i>Part-Time Prosecutors</i>	419
C. <i>Victim-Retained Private Prosecution</i>	421
D. <i>Delegating Prosecution Functions — Common Themes and Distinctions</i>	425
II. THE CASE AGAINST OUTSOURCING THE PROSECUTORIAL FUNCTION TO PRIVATE ACTORS.....	427
A. <i>Exercise of Prosecutorial Discretion as a Non-Delegable Sovereign Act</i>	427
B. <i>The Public Prosecution Norm and Its Benefits</i>	432
C. <i>Ethical Issues — Conflicts of Interest and Corruption</i>	436
D. <i>Performance and Accountability</i>	441
III. MITIGATING CONCERNS WITH DELEGATIONS OF PROSECUTORIAL AUTHORITY	445
A. <i>Moving Beyond Formalism? — Contractor vs. Employee</i> ...	445
B. <i>Delegating Only Ministerial Prosecution Functions</i>	448
C. <i>Guiding the Discretion Exercised by Private Actors</i>	450
D. <i>Enhancing the Transparency of Discretionary Decision-Making by Private Actors</i>	452
CONCLUSION.....	455

INTRODUCTION

Most observers reasonably view criminal prosecution as a function to be performed exclusively by the state. Making charging decisions, plea bargaining, and litigating cases at trial or on appeal would all seem to be functions solely within the exclusive province of full-time government lawyers to whom we commonly refer as “prosecutors.” However, this assumption rests on a public prosecution norm that has not always existed in the United States. Up until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state. Even well into the twentieth century, many prosecutors (even federal prosecutors) had a hybrid existence, maintaining private practices while prosecuting criminal matters for the government.

Indeed, this private tradition in criminal prosecution is alive and well today. Private lawyers perform criminal prosecutorial functions in significant and surprising measure in many jurisdictions in the United States. Some jurisdictions permit victims of crime to retain private attorneys to prosecute criminal matters. Other jurisdictions employ nominally public prosecutors, who prosecute cases part-time and maintain full-fledged private practices — including even criminal defense. Still other jurisdictions go even further, completely outsourcing their criminal prosecution function to private lawyers and law firms. In all these contexts, private or semiprivate actors are given the tremendous discretion and power associated with the public prosecution of criminal offenses.

This Article argues that the private exercise of the tremendous discretion reserved for public prosecutors represents an inappropriate delegation of sovereign prerogative. The Article asserts that delegating the prosecution function to private lawyers presents the potential for conflicts of interest and corruption, the erosion of due process, prosecutorial underperformance, and diminished accountability. Also, examining the important values associated with the modern public prosecution norm, the Article seeks to unravel the knotty issues inherent in the state’s delegation of *discretionary* prosecutorial functions to private actors. Fundamentally, the private exercise of the discretionary prosecutorial function — what Austin Sarat and Conor Clarke term a “fragment of sovereignty”¹ — challenges our settled

¹ Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008).

assumptions regarding the public-private distinction and government authority.² Moreover, it calls into question the role and professional identity of the prosecutor in the modern system of criminal justice and, perhaps, the essential nature of the system itself.

Part I illuminates the various contexts in which government may delegate criminal prosecution to private and semiprivate actors, including prosecution outsourcing, part-time prosecution, and victim-retained private prosecution. Although these practices are not ubiquitous, as Part I observes, they do demonstrate the capacity of the government to entrust criminal prosecution to those outside of the modern public prosecution tradition.

Part II argues that such delegations of prosecution authority to private actors are troubling at best and inappropriate at worst. First, this Part grapples with the compelling and fundamental question of whether private actors legitimately may — and should — exercise the sovereign power of prosecutorial discretion. After offering a taxonomy of prosecutorial discretionary functions, Part II argues that performance of such functions is at the core of governmental power: the idea that the prosecutor's discretion is derived from — and is emblematic of — sovereign authority. Part II contends that the private exercise of this tremendous discretion is an inappropriate delegation of sovereign prerogative. Part II then argues that the important values advanced by the public prosecution norm are ill served by delegations of prosecutorial authority to private actors. In particular, such delegations undermine the professional role and identity of the modern public prosecutor and diminish the perceived legitimacy of the criminal process. Finally, Part II raises a number of ethical, fairness, performance, and accountability concerns with the government practice of contracting with private attorneys to prosecute criminal cases.

Part III proposes ways to mitigate concerns with the delegation of prosecutorial authority to private actors in those contexts where it is inevitable, such as when a jurisdiction simply lacks the resources to fund a public prosecutor. Among the suggestions advanced are the limitation of delegations to certain nondiscretionary prosecutorial tasks, the implementation of guidance mechanisms for private actors

² See Simon Chesterman & Angelina Fisher, *Introduction*, in *PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS* 1, 7 (Simon Chesterman & Angelina Fisher eds., 2009) (“The privatization of public functions thus raises important legal and political issues in the governance of private actors, but also calls into question the nature of what functions should be ‘public.’ ”); Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, *J. CONT. MGMT.*, Summer 2008, at 9, 10.

to whom discretionary prosecutorial functions are entrusted, and the enhancement of the accountability and transparency of decision making by private actors.

I. DELEGATIONS OF THE PROSECUTION FUNCTION TO PRIVATE ACTORS

Just as corporations with in-house legal departments sometimes utilize outside lawyers,³ government has long engaged in the practice of contracting with private lawyers to represent public interests.⁴ Recent well-known examples of this phenomenon include local, state, and federal government use of private lawyers in handgun, lead paint, tobacco, and antitrust litigation,⁵ and the retention of a Wall Street law firm to serve as legal adviser to the Treasury Department on the implementation of the 2008 financial bailout.⁶

However, such governmental reliance on private actors is not limited to the civil context. Despite the common assumption that “prosecution is a totally public function” in the United States,⁷ governments have delegated to private actors the authority to exercise

³ See William V. Luneberg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 399 (1988).

⁴ In fact, the heavy reliance of postbellum cabinet departments upon expensive private lawyers was part of the rationale for the creation of the Department of Justice. See HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 218-29 (1937).

⁵ See, e.g., 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) (noting federal and state government employment of private attorneys in antitrust and tobacco litigation, respectively); see also 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) (discussing state employment of private attorneys in tobacco litigation); Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85, 85 (1987). Governments might outsource legal work due to lack of in-house resources, the need for special expertise not possessed by in-house lawyers, conflicts of interest for in-house lawyers, or simple cost-effectiveness. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 656-57 (1986); Luneberg, *supra* note 3, at 405-07; Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 PUB. CONT. L.J. 443, 444-45 (2004).

⁶ See Press Release, U.S. Dep't of the Treasury, Treasury Hires Legal Adviser Under the Emergency Economic Stabilization Act (Oct. 16, 2008), <http://www.treas.gov/press/releases/hp1217.htm>.

⁷ See, e.g., Laurin A. Wollan, Jr., *The Privatization of Criminal Justice*, in PROCEEDINGS OF THE 29TH ANNUAL SOUTHERN CONFERENCE ON CORRECTIONS 111, 118 (1984) (asserting that privatization of prosecution is only “found in foreign or in rare domestic examples”).

the criminal prosecutorial function.⁸ For example, a significant number of smaller American jurisdictions completely forgo the public lawyer provision of prosecutorial services and contract out criminal prosecution to private attorneys.⁹ Other jurisdictions allow practicing members of the private bar to serve simultaneously as a prosecutor.¹⁰ Furthermore, although the practice is no longer as widespread as it was in the first two centuries of the nation's development, some jurisdictions permit the victim of criminal conduct to retain an attorney to prosecute the matter when the public prosecutor will not.¹¹

A. Prosecution Outsourcing

As one commentator has explained, the traditional model of modern public prosecution features “[f]ull time government servants who are bureaucratically organized and paid according to a fixed salary schedule from appropriated funds [to] prosecute crimes.”¹² In contrast, some jurisdictions regularly contract with a private, nongovernmental employee lawyer to prosecute criminal offenses on behalf of the state. Under this outsourcing model, “[A] government (state, city, etc.) contracting officer employs independent contractor lawyers to represent the government and to prosecute crimes. The lawyer is given great discretion as to strategy and means. His fees are appropriated.”¹³

Some jurisdictions contract out the prosecutorial function to a private lawyer or law firm through the traditional “request for proposal” or bidding process that one would see with other types of

⁸ The term “prosecution function” includes a variety of tasks associated with the prosecution of a criminal case, from the charging decision, to plea bargaining, to the litigation of a case through trial, sentencing, and appeal. *See infra* Part II.A.

⁹ *See infra* Part I.A.; *see also* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 20 (2002).

¹⁰ *See infra* Part I.B.

¹¹ *See infra* Part I.C.

¹² Patrick Halligan, *A Political Economy of Prosecutorial Discretion*, 5 AM. J. CRIM. L. 2, 3-4 (1977); *see also* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 442 (2009) [hereinafter Bibas, *Rewarding Prosecutors*] (“[M]ost prosecutors receive flat, lockstep annual salaries tied to their years of seniority and experience, with civil-service protections.”); Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1317 (2002) (describing “model prosecutor” as “a government employee who engages in truth-seeking and whose actions are constrained by rules that ensure fairness to defendants”).

¹³ Halligan, *supra* note 12, at 4.

government outsourcing.¹⁴ Some jurisdictions vest the executive with authority to enter into a contract for prosecution services with a private firm or attorney.¹⁵ Although some of these lawyers whose services are procured are deemed to be employees of the retaining government entity,¹⁶ many of these lawyers often have no employment relationship with the retaining government entity; in this sense, they are classic independent contractors.

Certain of these prosecution service contracts call for the private lawyer to handle all of the criminal prosecutions in a jurisdiction for a set period of time in exchange for a flat fee.¹⁷ Other contracts call for the private lawyer to prosecute criminal cases on an as-needed basis for an hourly fee.¹⁸ Still other contracts pay the private attorney a set amount for each case handled.¹⁹

Like with most outsourcing, perceived cost savings and efficiency drive prosecutorial outsourcing.²⁰ Many jurisdictions contract out the

¹⁴ See, e.g., City of Sequim, Wash., Request for Proposal for Prosecutorial Services, <http://www.mrsc.org/rfps/s46prosattsvcs.pdf> (last visited Sept. 22, 2009) (“The City of Sequim is soliciting Requests for Proposal to provide prosecutorial services for misdemeanor violations of state law and the municipal code.”); Scott H. Neal, City Manager, Eden Prairie, Minn., *Commentary: City Prosecutor Selection*, Sept. 22, 2006, <http://edenprairieweblogs.org/scottneal/post/733>; City Council of Northfield, Minn., Approve RFP for Prosecuting City Attorney Services (Sept. 14, 2009), <http://www.ci.northfield.mn.us/assets/p/Packet145.pdf> (approving city council agenda item considering request for proposal from law firms for prosecuting services).

¹⁵ See, e.g., Contract for Legal Services, Between City Council of the City of North Bend, Wash. and Kenyon Disend, PLLC Resolution 1174 (Jan. 16, 2008), <http://www.mrsc.org/Contracts/N66legal.pdf> (authorizing city council resolution for mayor “to enter into a contract for legal services” with law firm).

¹⁶ See *infra* Part I.B; see, e.g., Contract Between Yachats, Or. and Michael G. Dowsett, Esq. (Jan. 1, 2002) (on file with author) (specifying that lawyer was “part time employee of the City”).

¹⁷ See, e.g., Contract Between Albany, Or. and Long, Delapoer, Healy & McCann, P.C. (2005) (on file with author) (compensating law firm \$201,700 in 12 monthly installments for, *inter alia*, “[p]rosecution of all matters before the Albany Municipal Court”).

¹⁸ See, e.g., Agreement for Legal Services, City of Davis, Cal. and McDonough, Holland & Allen, P.C. (2006), http://cityofdavis.org/meetings/councilpackets/20060110/05D_City_Attorney_Contract.pdf (compensating law firm \$180 per hour for, *inter alia*, “[p]rosecution of municipal code violations”).

¹⁹ See, e.g., Agreement for Prosecuting Attorney Services, City of Sequim, Wash. (2003), <http://www.mrsc.org/contracts/s46ProsAttSvc.pdf> (designating certain types of criminal appeals for billing “at a flat rate of \$300 per individual case”).

²⁰ See, e.g., Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111, 113 (2005) (“The popular view is that the debate on privatization is about cost and efficiency.”); cf. Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 128, 128-47 (Jody Freeman & Martha

prosecution function because the alternative — employing a public prosecutor — either is cost prohibitive or represents an unjustifiable allocation of limited resources. Particularly in smaller, rural jurisdictions where it is most prevalent, the outsourcing of the prosecution function is not a choice among alternatives; it is the recognition of the reality that a public prosecutor is a cost-prohibited luxury.

Furthermore, even in jurisdictions where prosecution outsourcing is not an absolute necessity, the potential benefits of prosecution outsourcing make it an attractive option. It still may be seen as an attractive cost-cutting measure, made all the more palatable by criminal justice outsourcing in prisons and policing, as well as broader government privatization. In addition, efficiency in prosecution is not only relevant to costs; such efficiency also might enhance service delivery, both by helping to reduce crime and, in some jurisdictions, by reducing the amount of time a detained defendant would need to remain in pretrial detention.²¹

Given the perceived potential benefits of prosecution outsourcing, it would not be surprising to see the practice expand. Nearly every jurisdiction around the nation is facing severe budget cuts caused by revenue shortfalls in the down economy. Prosecutors' budgets are not immune to these cuts. Indeed, not only are many prosecutors being forced to do more with less,²² many jurisdictions have had to cut

Minow eds., 2009) (critiquing “comparative efficiency” deliberative framework in context of private prisons).

²¹ For example, a South African report advocating greater outsourcing of the prosecution function to private attorneys cited the fact that reduction in the case backlog through outsourcing ultimately would benefit defendants facing the burdens of pre-trial detention. See Martin Schönteich, *Conclusion*, in PRIVATE MUSCULE: OUTSOURCING THE PROVISION OF CRIMINAL JUSTICE SERVICES 93, 95-96 (Martin Schönteich et al. eds., 2004), available at <http://www.iss.co.za/pubs/Monographs/No93/Chap7.pdf>.

²² See, e.g., Kenneth Hart, *Prosecutor Offices Feel Pain from Budget Cut*, DAILY INDEP., Dec. 27, 2008 (describing cuts to prosecutor office budgets); Donna Leinwand, *Budget Cuts Hamper Abilities of Prosecutors Across U.S.*, USA TODAY, Nov. 21, 2008 (noting that budget cuts force prosecutors to plead out serious offenses as minor crimes in order to avoid trial, and to rely upon less experienced prosecutors to handle even complex prosecutions); Chad Selweski, *Prosecutor Raises Ruckus*, MACOMB DAILY, Oct. 14, 2009 (describing tense budget battle adversely affecting prosecutor's office staffing). Even federal prosecutors have confronted personnel shortages and budget scarcity issues for some time now. See, e.g., Letter from Rep. John Conyers, Jr. & Rep. Henry A. Waxman to Alberto Gonzales, U.S. Att'y Gen. (July 24, 2006), available at <http://oversight.house.gov/images/stories/documents/20060724095809-74936.pdf> (noting severe staff and supply shortages and unfilled prosecutor vacancies in United States Attorney's Offices across nation).

prosecutorial positions and narrow enforcement priorities.²³ Given this crisis in the funding of the public prosecutorial function, larger governmental entities increasingly may contemplate turning toward prosecution outsourcing, just as smaller jurisdictions with limited law enforcement budgets have done for some time.

B. *Part-Time Prosecutors*

Today, nearly one out of every four state prosecutors is a so-called “part-time” prosecutor — a publicly-paid government lawyer permitted to maintain a full-fledged private law practice. In other words, these lawyers are employed as prosecutors but permitted to “moonlight” or engage in private practice.²⁴ Under the jurisdiction’s laws, regardless of whether these private lawyers assume the job of public prosecutor through direct election, political appointment, or civil service hiring and, therefore, are bona fide government officials, they are permitted to maintain a private practice.

For example, some publicly elected prosecutors²⁵ are permitted, by statute, to maintain a private practice despite their service as chief

²³ See, e.g., Conor Berry, *Budget Questions Loom over DA’s Office*, BERKSHIRE EAGLE, Feb. 4, 2009 (noting that district attorney positions may need to be cut in face of budget reductions); Jacinda Howard, *Public Safety Takes a Big Hit in King County*, FED. WAY MIRROR, June 7, 2008 (stating that budget cut forces downsizing of approximately 30 assistant district attorneys, or one-sixth of prosecutorial staff); Henry K. Lee, *Many Contra Costa Crooks Won’t Be Prosecuted*, S.F. CHRON., Apr. 22, 2009, at B1 (reporting that district attorney was forced to decline all misdemeanor and small-quantity drug prosecutions among other types of cases).

To be sure, such budget constraints may also provide an opportunity for political reconsideration of prosecutorial priorities and overcriminalization. Cf. Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009) (exploring overcriminalization and prosecutorial discretion); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005) (discussing pretextual prosecutions).

²⁴ Estimates of the number of part-time prosecutors hover between one-quarter and one-third of all state prosecutors. See BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005, at 2 (2006) (stating that “almost three-quarters of all offices reported having a full-time chief prosecutor”); Newman Flanagan, *Message from the Executive Director*, 33 PROSECUTOR 6, 6 (1999) (stating that part-time prosecutors are 26 percent of nation’s prosecutors).

²⁵ See, e.g., ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 10-11 (2007) [hereinafter DAVIS, ARBITRARY JUSTICE] (stating that popular elections of prosecutors began in 1820s and that almost every state held public elections for district attorneys by 1912); JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 37-38 (1980) (documenting advent of locally elected prosecutors, beginning in Cuyahoga County, Ohio in 1821).

public prosecutor.²⁶ In addition, in a handful of jurisdictions, government officials such as the mayor, town council, or the county executive appoint the prosecutor.²⁷ In some of these jurisdictions, the lawyer, who is appointed to prosecute criminal offenses, may maintain a private practice. Whether elected or appointed, these chief prosecutors typically hire assistant prosecutors if there is sufficient budgetary authority to staff such positions. The ability of a jurisdiction's assistant prosecutors to maintain a private practice is a question typically determined by statute or regulation.

These part-time prosecutors have been described by Newman Flanagan, former president of the American Prosecutors Research Institute, as "quiet heroes [who] work long hours at low pay with meager budgets in largely rural jurisdictions around the nation to protect their communities and seek justice."²⁸ Moreover, part-time prosecutors, even in rural areas, handle all manner of criminal

²⁶ See, e.g., Dave Forster & Tim McGlone, *Prosecutor in Vick Case Represented Quarterback's Father*, VIRGINIAN-PILOT, Oct. 5, 2007 (reporting on part-time prosecutor who maintains private practice); Jean Reid Norman, *Gary Booker, Full-Time Defense Attorney, Part-Time Boulder City Prosecutor*, LAS VEGAS SUN, Aug. 5, 2009 (profiling part-time prosecutor); *Officials Tied to Vick Investigation Win Re-Election*, ASSOCIATED PRESS, Nov. 7, 2007 (reporting on part-time prosecutor in Virginia); Prosecuting Attorneys' Council of Georgia: Find Your Prosecutor, <http://www.pacga.org/find/> (last visited Oct. 22, 2009) (noting that in two-thirds of Georgia counties, prosecutors designated to handle misdemeanor criminal cases may also engage in private practice of law); James F. Stevenson, *Shelby County Prosecutor's Office: Progress Report*, Jan. 2006, <http://www.co.shelby.oh.us/Prosecutor/progressreport.asp> (last visited Nov. 24, 2009) (noting that, under Ohio law, prosecutors in counties of certain size "may elect to . . . engage in the private practice of law").

²⁷ See, e.g., DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 10-11 (noting that only Connecticut, Delaware, District of Columbia, New Jersey, and Rhode Island have appointed, rather than elected, prosecutors).

²⁸ Flanagan, *supra* note 24, at 6. This Article's definition of "part-time prosecutor" does not include those prosecutors who, for family or other personal reasons, choose to work a part-time schedule. For instance, in Montgomery County, Maryland, the State's Attorneys Office employs a number of prosecutors who work a modified or "flex-time" partial work schedule of fewer than 40 hours per week. Interview with John McCarthy, State's Attorney for Montgomery County, Md., in Rockville, Md. (June 26, 2008); see also, e.g., Ann Givens, *DA's New Flex Time Unit*, NEWSDAY, Dec. 11, 2006 (reporting on flex-time schedule for prosecutors in Nassau County, New York). Nor does the term "part-time prosecutor" intend to capture necessarily those prosecutors who, because of lower caseload demands in a given office, work less than a full-time schedule. In any event, "part-time" versus "full-time" characterizations tend to be based on an outdated notion that 40 hours is a full-time work week for prosecutors (and lawyers generally for that matter). See Flanagan, *supra* note 24, at 6 (recounting that "when a so-called part-time prosecutor is asked how many hours she works in a typical week, she laughs and replies '[a]ll the time'").

offenses, from relatively minor misdemeanors to the most serious crimes.²⁹ As with prosecutorial outsourcing, the prohibitive cost of public prosecution often compels smaller and rural jurisdictions to resort to part-time prosecutors.³⁰

C. *Victim-Retained Private Prosecution*

The heritage of the American public prosecutor is not coextensive with that of the American criminal justice system. Indeed, public prosecution is a relatively recent phenomenon in American history. Although prosecutorial power in the early colonies initially often was concentrated in a representative of the Crown, the English tradition of private prosecution dominated the early American experience before the Revolution.³¹

²⁹ Flanagan, *supra* note 24, at 6 (“No longer are part-time prosecutors handling primarily minor-league crimes. Because of the explosion of technology, communication and transportation facilities, major crimes have spread beyond the metropolitan areas. Drugs and drug-related crimes, medical fraud and even gangs have found their way into smaller communities, which certainly are not immune to such other problems as domestic violence. The difference between big-city prosecutors’ offices and part-time prosecutors’ offices today is largely a matter of volume rather than types of crimes handled.”).

³⁰ See, e.g., Jan Hoffman, *Otsego Prosecutor Tries to Avoid Trial Conflicts*, N.Y. TIMES, Aug. 27, 1996, at B1 (quoting chairman of county legislators as saying “I just don’t think a full-time lawyer who costs \$100,000 is the answer to the crime problems in our county”); see also COMM. ON THE OFFICE OF ATT’Y GEN., NAT’L ASS’N OF ATT’YS GEN., SURVEY OF LOCAL PROSECUTORS 43 (1972) [hereinafter SURVEY OF LOCAL PROSECUTORS] (“As expected, whether a prosecutor serves full-time or part-time is directly related to the population of his district.”); Jenny Michael, *When Counties Can’t Find Prosecutors*, BISMARCK TRIB., June 2, 2007, at 1A (discussing small jurisdictions in North Dakota with no or very few resident lawyers and problem that this poses for filling part-time prosecutors jobs).

Indeed, the only way many of these jurisdictions could afford a full-time public prosecutor would be to share the cost with neighboring jurisdictions, thereby undermining the notion that prosecutors should be intimately familiar with communities in which they enforce the law. See, e.g., JACOBY, *supra* note 25, at 35 (“Many states have resisted a change to full-time prosecutors because such a change would lead either to large increases in the cost of criminal justice, or to a switch to nontraditional methods of defining jurisdictional boundaries.”); Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 106 (1976) (connecting sparsely-populated geographic regions and propensity to employ part-time prosecutors, and suggesting geographic consolidation to allow for exclusively full-time prosecutors).

³¹ See DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 9 (“Criminal prosecutions in colonial America mirrored the early English experience. Before the American Revolution, the crime victim maintained sole responsibility for apprehending and prosecuting the criminal suspect.”); William B. Gwyn, *The Indeterminacy of the*

Under the system of private prosecution prominent in the United States from the colonial era well into the nineteenth century,³² private lawyers regularly pressed private victims' cases before the grand jury and at trial.³³ Aggrieved victims who could afford to engage counsel

Separation of Powers and the Federal Courts, 57 GEO. WASH. L. REV. 474, 500 (1989); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290-93 (1989); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571 (1984); see also Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1071-72 (1990).

By the end of the 1800s, private prosecution had the sanction of many state courts. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 49 (1995) ("By the end of the nineteenth century, the high tribunals of Alabama, Florida, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, Texas, Utah, Vermont, and Virginia had upheld the legality of privately funded prosecutors."). *But see id.* at 48-50, 56 (noting that Massachusetts, Wisconsin, Michigan, Nebraska, Missouri, and Georgia state supreme courts have disapproved of this practice).

³² Although virtually all commentators share the view that private prosecution was the dominant mode in the colonial era, Joan Jacoby, in her influential book on the development of the American prosecutor, challenges the conventional wisdom. See JACOBY, *supra* note 25, at xvi-xvii ("The English system was one of private prosecution, a system that was never adopted by the early American colonists."). *But see* Ramsey, *supra* note 12, at 1325 ("The idea that public prosecution had become firmly established as the American system by 1789 does not bear scrutiny.").

³³ See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 449 (2001) [hereinafter Davis, *The American Prosecutor*] (stating that American victims of crime bore responsibility to apprehend and prosecute in colonial era); Ireland, *supra* note 31, at 57 (offering evidence that private prosecutions continued throughout twentieth century); Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 332-33 (2009) (stating that in early nineteenth century New York, public attorney would represent prosecution where victim did not employ private attorney); Krent, *supra* note 31, at 281, 290-92 (explaining existence of private prosecution both before and after ratification of Constitution); Ramsey, *supra* note 12, at 1326 (stating that representation of victims by private attorneys was common in early nineteenth century New York). There is some evidence that complainants took allegations directly to the grand jury — without the assistance of a public prosecutor — both before and after the ratification of the Constitution and the passage of the Judiciary Act. See Krent, *supra* note 31, at 292-93. Grand juries during this era, thus, had the power to initiate criminal prosecution without the assistance of a public prosecutor. Though the grand jury is often described as a check on prosecutorial power, see Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 703, 707-08 (2008); Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1268-69 (2006), the subsequent rise of the public prosecutor and its power of *nolle prosequi* can be thought of as important checks on the grand jury. See ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 186-87 (1930). Indeed, Roscoe Pound cited the development of the

would retain a lawyer to initiate criminal proceedings against an accused.³⁴ Those complainants without access to counsel would have to manage the criminal case without a lawyer. Complainants in the system of private prosecution could, and often did, settle their criminal cases out of court.³⁵

Although the idea of the privately-retained prosecutor is largely a historical one,³⁶ remnants of the private prosecution model remain.³⁷ In fact, a small number of jurisdictions still permit private individuals — victims — to press criminal proceedings.³⁸ These private

public prosecutor and its obviation of the grand jury's charging role as a rationale for the abolition of the grand jury. *See id.* at 109.

³⁴ Professor Robert Ireland recounts anecdotal nineteenth century examples of prominent attorneys taking fees from crime victims to prosecute high-profile cases. One interesting example cited by Professor Ireland involved two prominent early nineteenth century Kentucky lawyers — John Rowan and Ben Hardin. During the course of representing a criminal defendant, Rowan attacked Hardin for serving as a private prosecutor, and challenged the basic concept of private prosecution as violative of “due process and the presumption of innocence.” Ireland, *supra* note 31, at 46-48 (citing *The Trial of Judge Wilkinson, Dr. Wilkinson, and John Murdaugh for the Murder of John Rothwell and Alexander H. Meeks, Kentucky, 1839*, in *AMERICAN STATE TRIALS* 132, 282-304 (John D. Lawson ed., 1914)).

³⁵ *See* Ramsey, *supra* note 12, at 1316-17. This ability of private prosecutors to dismiss clients' criminal cases in exchange for monetary consideration led to perceived corruption. *See* ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 64 (1989).

³⁶ *See* DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 9-10 (discussing history of private prosecution); William J. Novak, *Public-Private Governance: A Historical Introduction*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 20, at 23, 31.

³⁷ *See* Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 *WASH. U. L. Q.* 85, 103-07 (1992).

³⁸ *See, e.g.*, *Sedore v. Epstein*, No. 2672/06, slip op. at 3 (N.Y. App. Div. Sept. 30, 2008) (collecting cases); Ireland, *supra* note 31, at 57 (1995) (providing evidence that jurisdictions in Oklahoma, Mississippi, Missouri and Kentucky allow privately funded prosecutions); Meier, *supra* note 37, at 103-07 (asserting that majority of states continue to permit private prosecutions). For a historical analysis of private prosecution in the United States, see generally Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 *WAKE FOREST INTRAMURAL L. REV.* 300 (1968) (describing English roots of private prosecution and arguing for limitations on private prosecution); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 *AM. U. L. REV.* 754 (1976) (tracing history of private prosecution in American history and arguing that it is “outdated, unnecessary, unethical, and perhaps unconstitutional”).

Of course, a victim or victim's family may always retain private counsel to help gather and organize evidence in order to present it to the public prosecutor for consideration. *See, e.g.*, Richard Leiby, *Schooled in Scandal; For Attorney Billy Martin, the Chandra Levy Case Has a Familiar Ring*, *WASH. POST*, July 16, 2001, at C1 (profiling prominent attorney hired by family of murder victim).

Another phenomenon beyond the scope of this Article is where victims or other

prosecution arrangements, however, have come under serious criticism on constitutional due process grounds.³⁹ In addition, some commentators have made the argument that private prosecutors are susceptible to competing financial incentives that complicate the picture.⁴⁰ Furthermore, because of a privately retained prosecutor's duty to her client, some question the propriety of having her in the position of trust with regard to the disclosure of exculpatory evidence or interaction with the grand jury.⁴¹

Nevertheless, some contemporary commentators have proposed the expanded "privatization" of the prosecution function in which individual victims of crime would be permitted to retain private counsel to bring a criminal prosecution against an alleged offender.⁴² With some in the victim rights movement advocating for a greater private role in the initiation and conduct of criminal proceedings,⁴³ there remains an open question as to what the future holds for victim-retained private prosecution.

interested parties directly fund or subsidize public prosecution efforts. See generally Aviva Abramovsky, *An Unholy Alliance: Perceptions of Influence in Insurance Fraud Prosecutions and the Need for Real Safeguards*, 98 J. CRIM. L. & CRIMINOLOGY 363, 381-88 (2008) (highlighting conflict of interest and due process concerns with insurance industry funding of prosecutions and investigations); Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 674-76, 679-87 (1997) (underscoring equality and conflict of interest concerns with private financing of public prosecution).

³⁹ See Meier, *supra* note 37, at 107-08; see, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (ruling that prosecutors in criminal contempt cases must be disinterested and citing due process concerns); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994) (highlighting due process arguments against private prosecutions); Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279 (2001) (same).

⁴⁰ See, e.g., Bessler, *supra* note 39, at 581-83.

⁴¹ See, e.g., *id.* at 599-601.

⁴² See BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* 287-89 (1998) (proposing privatization of prosecution function); Tim Valentine, *Private Prosecution*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR* 226, 226-28 (Gary W. Bowman et al. eds., 1992) (advocating private prosecution).

⁴³ As Professor Carolyn Ramsey points out, however, there are some in the victim rights movement who would prefer the enhancement of victims' rights within the public model of prosecution rather than a reversion to a system of private prosecution. See Ramsey, *supra* note 12, at 1310 n.3 (citing Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125-31 (1984)); cf. Meier, *supra* note 37, at 103-07 (discussing right of disinterested prosecution in criminal contempt context).

D. *Delegating Prosecution Functions — Common Themes and Distinctions*

To be sure, these species of governmental delegation of prosecutorial authority — outsourcing of criminal prosecution, part-time prosecution, and private victim-retained prosecution — merit comparison and contrast, as they have as much to distinguish them as they have in common. For example, one can draw important distinctions between victim-retained private prosecution and outsourcing of the prosecution function by the government.⁴⁴ After all, private prosecutors are not in privity with the state. Indeed, private citizens retain and pay these prosecutors.⁴⁵ Prosecution outsourcing, on the other hand, involves the retention of a private actor by the government and payment for prosecutorial services from public

⁴⁴ The ability of a *qui tam* plaintiff to file a civil suit seeking redress for a wrong visited upon the government is not considered the outsourcing of prosecutorial authority. See Bessler, *supra* note 39, at 595. Some statutes authorize private plaintiffs to act as “private attorneys general” in areas that, although not technically criminal, are regulatory in nature with sanctions on par with those imposed in criminal cases. Perhaps the most prominent example is the False Claims Act and its authorization of private *qui tam* relators. See, e.g., Richard J. Pierce, Jr., *Outsourcing is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1220 (2008) (reviewing PAUL R. VERKUL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007)) (discussing conferring of *qui tam* authority upon private actors under False Claims Act); see also Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 958-61 (2002); William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 768-772 (2001); Dayna Bowen Matthew, *The Moral Hazard Problem with Privatizing Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 286-92 (2007). However, the *qui tam* context does not fall within the central focus of this Article — the state’s delegation of criminal prosecution to private actors. First, *qui tam* actions cannot be brought under criminal statutes. See Bessler, *supra* note 39, at 594 n.362, 595. *But see* Dangel, *supra* note 31, at 1083 n.89 (treating *qui tam* actions as criminal for various procedural purposes). Also, although the state may encourage private initiative in the prosecution of cases under the False Claims Act, it is not in any real sense procuring the services of these private litigants. Furthermore, the government retains broad power to commandeer or dismiss the litigation brought by *qui tam* relators. See Kovacic, *supra*, at 770-71; Matthew, *supra*, at 285-92. Perhaps the analogy to the private attorney general is stronger in the victim-retained private prosecutor context. See *supra* Part I.C.

⁴⁵ See Robinson, *supra* note 38, at 325 (“Replacement of the official prosecutor should be allowed only where the official prosecutor is incapacitated, disqualified or unqualified. But his replacement should be a qualified substitute paid by the state, prosecuting for the people, not a privately-paid special counsel hired by the parties with a vested interest in the outcome of the trial.”); Sidman, *supra* note 38, at 755 n.9 (distinguishing between special prosecutor, which is appointed and paid by state, and private prosecutor, which is retained and paid by interested, private party).

funds.⁴⁶ In this sense, prosecution outsourcing presents the cleanest examples of the delegation and private exercise of public prosecutorial authority. Additionally, victim-retained private prosecutors generally are authorized only to assist the public prosecutor or, in rare circumstances, to step in and perform the prosecutorial role when the government declines to do so in a given case.⁴⁷ In contrast, prosecutorial outsourcing involves the delegation to private actors of either prosecutorial authority in cases the government has chosen to pursue or the blanket authority to exercise discretion as to whether the government will prosecute in the first instance.

Nevertheless, there are good reasons to analyze together these varied species of governmental delegation of the prosecution function. Many of the reservations regarding prosecution outsourcing will apply with equal force to victim-retained private prosecution. Government motives for outsourcing, such as cost savings, efficiency, need for particular expertise, and even conflict avoidance, also may be present in the context where the government permits the participation of victim-retained private counsel in a criminal case.⁴⁸ Therefore, an increase in use of victim-retained private prosecution easily could accompany the expansion of the type of prosecution outsourcing described above.

Furthermore, the distinction between a government prosecutor permitted to moonlight and to maintain a private practice and a private lawyer permitted to wield prosecutorial authority can be

⁴⁶ See Sidman, *supra* note 38, at 755 n.9.

⁴⁷ See *id.* at 755, 789. Nevertheless, victim-retained private prosecution might be seen as the government's delegation of the criminal prosecution function to private actors in certain circumstances. Indeed, those jurisdictions that allow victims to retain lawyers to prosecute cases when the state declines prosecution might be seen as ceding their prosecutorial authority to a private actor even though the government had no interest in having the criminal case brought. Where the state's vesting in private citizens the power to engage private counsel to initiate and pursue criminal charges is accompanied by the state's abdication of its duty to bring a criminal case itself, such vesting properly might be seen as outsourcing. See, e.g., Sedore v. Epstein, No. 2672/06, slip op. at 3 (N.Y. App. Div. Sept. 30, 2008) (considering delegation of prosecutorial authority by state); Scott H. Greenfield, *Outsourcing Prosecutors Is a Step Too Far*, SIMPLE JUSTICE, Oct. 7, 2008, <http://blog.simplejustice.us/2008/10/07/outsourcing-prosecutors-is-a-step-too-far.aspx> (characterizing state's declination to prosecute and granting of permission to complainant's private counsel to prosecute case as "outsourcing").

⁴⁸ See Novak, *supra* note 36, at 31 ("Allowing, indeed encouraging, private persons to prosecute violations of public law sprang from some of the same motivations seen in the economic arena. Private prosecution allowed for the wide distribution of the policing function — stretching capacity, spreading costs, and lessening the need for an expansive, professional bureaucracy.").

difficult to discern.⁴⁹ Unlike the fully private actor under an explicit outsourcing arrangement, the part-time prosecutor is only semiprivate. Nevertheless, many objections to the delegation of prosecutorial authority apply equally to the moonlighting, “part-time” prosecutor.⁵⁰

Of course, it should be acknowledged that none of these species of delegation are ubiquitous in modern criminal justice. Prosecution outsourcing and part-time prosecution are confined largely to sparsely populated rural or suburban jurisdictions and sometimes are limited to less serious criminal offenses.⁵¹ Further, only a handful of states still permit crime victims to retain a private prosecutor.⁵² Nonetheless, the fact that many governments already delegate criminal prosecution authority to private actors (and many more could choose to follow suit) makes worthwhile a close consideration of the implications of such delegations for those values that the modern criminal justice system seeks to advance.

II. THE CASE AGAINST OUTSOURCING THE PROSECUTORIAL FUNCTION TO PRIVATE ACTORS

This Part argues that the government’s delegation of criminal prosecution authority to private actors is unwise or improper in most circumstances. Such delegations clash with notions of sovereignty and important values animating the public prosecution norm. They also present the potential for conflicts of interest, corruption, underperformance, and a failure of accountability.

A. *Exercise of Prosecutorial Discretion as a Non-Delegable Sovereign Act*

Prosecutors exercise tremendous discretion in all phases of the criminal process, making both low- and high-visibility decisions throughout. This subpart sheds light on the contours of that decision-making authority and its impact on the interests of institutions and individual criminal defendants. Ultimately, this subpart argues that the prosecutorial exercise of discretion is a form of sovereign power not subject to delegation to private actors.

⁴⁹ See discussion *infra* Part III.A.

⁵⁰ See discussion *infra* Part II.C.

⁵¹ See discussion *supra* Part I.A–B (recognizing that outsourcing and part-time prosecutors are particularly common in less populated areas where full-time prosecution may be cost prohibitive).

⁵² See discussion *supra* Part I.C.

Prosecutors, first and foremost, *make decisions* — and these decisions are of tremendous importance.⁵³ The decisions made by a prosecutor in setting enforcement priorities have far-reaching impact on commerce, politics, and the everyday lives of those who must order their conduct and behavior accordingly.⁵⁴ Prosecutorial decisions regarding whether and what to investigate and what tactics and tools to use in the course of an investigation can have grave consequences for those who fall under the government's scrutiny.⁵⁵ The ability to decide whether and what to charge gives the prosecutor perhaps the most power of any single actor in the criminal justice process.⁵⁶ Furthermore, plea bargaining, referrals for mediation, and conditional and unconditional dismissals all require the prosecutor to make significant decisions.⁵⁷

Moreover, although the vast majority of criminal cases are disposed of by guilty plea,⁵⁸ for those cases that proceed to trial, the prosecutor

⁵³ JACOBY, *supra* note 25, at 29; see also Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 317 (1978) [hereinafter Beck, *Administrative Law*]; *Prosecutorial Discretion*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 209, 209-12 (2008).

⁵⁴ See Fairfax, *supra* note 33, at 732-33. Attorney General (later Associate Justice) Robert Jackson famously remarked that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.” Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940).

⁵⁵ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1536 (1981).

⁵⁶ See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 299-300 (1983); Fairfax, *supra* note 33, at 734-35. Furthermore, expansive criminal codes with redundant and overlapping provisions and the prevalence of mandatory minimum sentences have enhanced the power of the prosecutor and the importance of the charging decision. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 742 (1996); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 21-23 (1998) (“The first and most important function exercised by a prosecutor is the charging decision.” (citations and internal quotation marks omitted)).

⁵⁷ See, e.g., POUND, *supra* note 33, at 41 (stating that “[t]he public prosecutor has wide and substantially uncontrolled power of ignoring offenses or offenders, of dismissing proceedings . . . and of agreeing to accept a plea”); Lucilius A. Emery, *The Nolle Prosequi in Criminal Cases*, 6 MAINE L. REV. 199 (1913) (discussing prosecutorial discretion in context of *nolle prosequi*); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) (discussing prosecutorial discretion in context of sentencing advocacy). See generally Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (discussing criminal mediation).

⁵⁸ See, e.g., Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (“Plea bargaining now dominates the day-to-day operation of the American criminal justice system; about ninety-five percent of convictions are

continues to exercise substantial discretion. In the course of trying a case, a prosecutor must decide the general strategy and theory of the case. Often, the prosecutor must make difficult decisions regarding unanticipated developments during the course of the evidence presentation.⁵⁹ The sentencing phase requires the prosecutor to establish the government's position on the appropriate punishment to vindicate the public's interest in retribution, deterrence, and rehabilitation.⁶⁰ When a guilty judgment is challenged on appeal or on collateral review, the prosecutor must decide whether and how best to protect the verdict — decisions about which arguments to make and emphasize, and, perhaps, when to concede points of law that will impact the government's position in other cases.⁶¹ Importantly, all of the examples of prosecutorial decision making involve discretion that is, for the most part, unreviewable.⁶²

One species of prosecutorial decision making — the discretion to bring the power of the government to bear upon an individual or to forbear even when cause exists to proceed — represents power

obtained by way of a guilty plea.”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) (discussing ubiquity of guilty pleas); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30 n.1 (2002) (noting that criminal justice statistics demonstrate that proportion of criminal convictions attributable to guilty pleas in state and federal systems have risen to upwards of 94%).

⁵⁹ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 841 n.15.

⁶⁰ See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 304-06 (2009).

⁶¹ Perhaps nowhere is this notion more concrete than in the capital murder context when a claim of actual innocence is made. See Green & Zacharias, *supra* note 59, at 841 n.17. See generally Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389 (2002) (advancing model ethical obligations for prosecutors in context of innocence-based post-conviction claims); Bruce A. Green & Ellen Yaroshfsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 505-06 (2009) (discussing broad discretion of prosecutors in post-conviction stage where claim of factual innocence is asserted and arguing that adversarial advocacy at this stage is inappropriate); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005) (advocating less discretion for prosecutors in post-conviction stage).

⁶² See Fairfax, *supra* note 33, at 734-36. As Professors Stephen Saltzburg and Daniel Capra have noted, “There are several theoretical checks on the prosecutor’s decision not to prosecute.” STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 878 (2007). Among these, in some jurisdictions, are the grand jury’s ability to act independently of the prosecutor, the ability of the state attorney general or the governor to appoint a special prosecutor to replace the original prosecutor in a given case, and the possibility of private prosecution. See *id.*

unequaled by that vested in virtually any other civilian official, save for presidential or gubernatorial pardon power.⁶³ When exercising this discretion, prosecutors have a remarkable impact on the lives and liberty of those in society who fall within the law's mandates.⁶⁴ Indeed, because the enforcement of the criminal law is entrusted fully to the office, prosecutors can effectively nullify a law in a jurisdiction.⁶⁵

A strong nexus exists between the prosecution function and the very idea of sovereignty.⁶⁶ Indeed, the prosecutor's exercise of discretion is an exercise of sovereign power. As the Supreme Court famously observed in *Berger v. United States*:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a

⁶³ See, e.g., JACOBY, *supra* note 25, at xxii (“The first and most important area of the prosecutor’s discretionary power is the decision to charge. . . .”); POUND, *supra* note 33, at 41 (discussing prosecutors’ “wide and substantially uncontrolled power of ignoring offenses or offenders”). See generally Todd D. Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003) (discussing executive pardon power). For an interesting treatment of the President’s historical and constitutional role in prosecutions, see generally Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (asserting that Constitution, as originally understood, gave President responsibility of prosecuting all offenses against United States).

⁶⁴ See Davis, *The American Prosecutor*, *supra* note 33, at 408; Arthur Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 14 (1972) (“Modern criminal justice is a highly selective process in which severe punishment is meted out to a few, while many other individuals who appear similarly situated escape with little or no punishment.”).

⁶⁵ See Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347, 347, 348 (1930) (describing results of survey of 3,000 prosecutors across United States, many of whom “boldly admit[ted] that they nullify both laws and ordinances whenever and wherever it seems desirable”). See generally Richard E. Myers II, *Responding to Time-Based Failure of Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327 (2008) (discussing, *inter alia*, laws not enforced by prosecutors). Other criminal justice actors with this sort of “nullification” power are either drawn from, or are otherwise accountable to, the citizenry. See Fairfax, *supra* note 33, at 732-43, 738, 741-44.

⁶⁶ See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME* 33 (2007) (noting nexus between law enforcement, prosecutorial authority, and sovereign power); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 14 (2007) (“[S]overeignty is the exercise of power by the state.”).

criminal prosecution is not that it shall win a case, but that justice shall be done.⁶⁷

As discussed above, in discharging the duty to represent sovereign interests, prosecutors, functionally, are decision makers. Prosecutors' largely unreviewable discretion, Joan Jacoby observes, "pervades every aspect of their work."⁶⁸ How does this broad prosecutorial discretion relate to sovereign authority? Austin Sarat's recent work on this question illuminates some very important considerations.⁶⁹ Sarat and his coauthor have theorized the connection between sovereign power and the prosecutor's ability to decide not to prosecute despite a reasonable evidentiary basis on which to proceed.⁷⁰ Sarat views circumstances where prosecutors *could* legitimately prosecute an individual but decline to do so as examples of "lawful lawlessness," which he defines as "actions that are legally authorized but not legally regulated" and "instances in which law acknowledges its own limits and confers a kind of sovereign prerogative on a legal official."⁷¹ In Sarat's view, a prosecutor's ability to decide to excuse individuals from the prohibitions of criminal law represents a "fragment of sovereignty."⁷²

As Sarat suggests, the prosecutor's ability to forbear or exempt potential defendants from the valid reach of the law can be seen as the exercise of sovereignty. This conception dovetails with the Supreme Court's view of the function and role of prosecutorial discretion:

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

⁶⁷ *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* *People v. Kelley*, 142 Cal. Rptr. 457, 461-62 (Ct. App. 1977).

⁶⁸ JACOBY, *supra* note 25, at xx ("The prosecution function is most effectively analyzed by viewing it as a highly discretionary decision-making system operating in a complex set of constraints."); Green & Zacharias, *supra* note 59, at 840.

⁶⁹ *See generally* Sarat & Clarke, *supra* note 1 (considering relationship of prosecutorial discretion to sovereignty).

⁷⁰ *See id.* at 390.

⁷¹ *Id.*; *see also* Rosett, *supra* note 64, at 15 ("Discretion usually is seen as normlessness . . .").

⁷² Sarat & Clarke, *supra* note 1, at 390.

their sense of public responsibility for the attainment of justice.⁷³

By recasting the exercise of prosecutorial discretion as the exercise of sovereign power, Sarat and others present criminal prosecution as an inherently public function, with profound impact on life and liberty, unsuitable for delegation to private hands. As such, they provide a compelling rationale for withholding such discretion from private actors.⁷⁴

B. *The Public Prosecution Norm and Its Benefits*

As discussed above, from the Founding until the early twentieth century, the state and even victims themselves regularly retained private attorneys to prosecute criminal offenses.⁷⁵ However, as the private prosecutor tradition faced heightened scrutiny in England in the late nineteenth century,⁷⁶ American jurisdictions began to move toward the publicly funded prosecutor model.⁷⁷ Despite the differing accounts of the reasons for its early development,⁷⁸ public

⁷³ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

⁷⁴ See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1396 (2003) (“[T]he powers exercised by private entities as a result of privatization often represent forms of government authority, and that a core dynamic of privatization is the way that it can delegate government power to private hands.”); see also VERKUIL, *supra* note 66, at 3 (“‘Outsourcing sovereignty’ occurs when the idea of privatization is carried too far.”).

⁷⁵ See *supra* Part I.C; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 19-20 (1994) (explaining private citizens’ “power to decide whether and in what manner to prosecute for violations of federal law” in early American history).

⁷⁶ See, e.g., DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 9 (discussing reformers’ criticisms of private prosecution in nineteenth century England). The English Parliament, in 1879, passed legislation to establish public prosecutorial authority in a “Director of Public Prosecution,” which, in combination with the development of public policing, eroded the private prosecution norm in England. See *id.*

⁷⁷ See, e.g., Ireland, *supra* note 31, at 43 (citing American movement toward public prosecutors throughout nineteenth century); Ramsey, *supra* note 12, at 1327 (linking American movement toward public prosecution to changes in England). Even though there was a move toward public prosecution, private prosecution continued to thrive. One reason for this is that many early public prosecutors were inexperienced and outmatched by members of the defense bar. See Ireland, *supra* note 31, at 45, 55-56.

⁷⁸ There is a good deal of scholarly uncertainty regarding the origins of the American public prosecutor. See Kress, *supra* note 30, at 100 (“Although we possess enormously detailed records of many trivial aspects of our justice system, the derivation of the office of public prosecutor surprisingly remains an historical mystery.”).

Various theories have been advanced to explain why public prosecution developed

prosecution, by the late nineteenth century, was an established and powerful element of the American criminal justice system.⁷⁹

Today, the “public” prosecutor maintains tremendous symbolic importance in the modern American constitutional democracy.⁸⁰ Indeed, the public prosecution norm — the notion that criminal prosecution authority properly rests exclusively with the state — is a source of legitimacy for the criminal justice system. The fact that prosecutions are brought not in the name of an individual but in the name of the state both requires and produces public confidence in the criminal process. In the same vein, that the actor wielding criminal prosecutorial authority is a public lawyer is of tremendous significance.

Furthermore, the development of criminal prosecution from a largely private function into an inherently public function has forged the professional identity of American prosecutors. Many, if not all, prosecutors take the positions out of a sense of duty to their

in the United States. *See, e.g.*, DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 10 (noting public prosecutorial system evolved to address growing inadequacies of private prosecution in Industrial Age); JACOBY, *supra* note 25, at 3-7 (exploring influences on development of American public prosecution); Davis, *The American Prosecutor*, *supra* note 33, at 450 (asserting geographic dispersal during the Industrial Age); Ramsey, *supra* note 12, at 1310-11 n.3, 1322-24 (exploring various theories for rise of public prosecution).

In a 1952 article exploring the origins of the American public prosecutor, Professor W. Scott Van Alstyne noted that England did not have any significant public prosecutorial function until the late nineteenth century. *See* W. Scott Van Alstyne, Jr., *The District Attorney — A Historical Puzzle*, 1952 WIS. L. REV. 125, 125. Thus, Van Alstyne queries from where the early nineteenth century American public prosecutor derives. *See id.* Van Alstyne presents evidence that continental civil law prosecutorial mechanisms influenced procedural practice in various American colonies, leading to the adoption of the public prosecutorial model in the United States. *See id.* at 137-38.

Professor Ramsey makes a compelling contrarian case regarding the historical development of the public prosecutor, questioning some of the typical normative assumptions made by those in the prosecutorial privatization camp regarding reasons for the shift to public prosecution. *See* Ramsey, *supra* note 12, at 1323-24. Using primary sources from nineteenth century New York, Professor Ramsey concludes that historical evidence supports the view that the public prosecution norm was embraced not out of concern for fairness to defendants but out of the desire for greater crime control and order maintenance. *See id.* at 1310-11, 1316-23.

⁷⁹ *See* DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 10-12.

⁸⁰ *Cf.* Joseph E. Field, *Making Prisons Private: An Improper Delegation of Government Power*, 15 HOFSTRA L. REV. 649, 673-74 (1987) (discussing symbolic importance of state operating prisons); Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 20, at 310, 330. (“There is something in our democratic system that puts symbolic as well as practical value on public service.”). To be sure, some may dismiss the symbolic importance of having public actors perform public duties.

community.⁸¹ Thus, public prosecution has become synonymous with the public service ideal.⁸² This professional ethos is one of the most effective reminders to prosecutors that their singular focus should be to aspire to seek justice, and not to “win” at all costs.⁸³ Therefore, professional identity norms developed over the course of the past two

⁸¹ See, e.g., DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 16 (stating that most prosecutors choose their careers with goal of serving community). Of course, private lawyers may share this sense of duty and, conversely, some prosecutors might seek the position for less altruistic reasons.

⁸² See, e.g., *id.* (“Most prosecutors join the profession with the goal of doing justice and serving their communities, and most work hard to perform their responsibilities fairly, without bias or favoritism.”). Many prosecutors have forgone much more lucrative private practice opportunities in order to take their public service positions. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 828-30 (2000). Indeed, recent legislative efforts to defray some of the burden of law student debt on prosecutors and public defenders recognize the sacrifices these prosecutors made for such a public service ideal. See, e.g., Marcia Coyle, *Loan Forgiveness Program Becomes Law*, NAT’L L.J., Aug. 15, 2008 (describing legislation which authorizes forgiveness of up to \$60,000 of student debt in exchange for minimum time commitment).

⁸³ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); see also Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 35-36 (2006) (discussing higher ethical burden on prosecutors to preserve justice); Ramsey, *supra* note 12, at 1312 n.8 (providing support for prosecutors’ special duties to ensure fairness and reliability of criminal process); Sidman, *supra* note 38, at 774. In addition, public prosecutors are expected to consider systemic implications of their decisions to prosecute, including impacts upon court and correctional resources. Cf. Joshua I. Schwartz, *Two Perspectives on the Solicitor General’s Independence*, 21 LOY. L.A. L. REV. 1119, 1127, 1129 (1987) (noting Supreme Court case acknowledging special role Solicitor General plays in sometimes forbearing to bring meritorious appeals of adverse lower court decisions out of respect for Supreme Court’s need to regulate its docket (citing *United States v. Mendoza*, 464 U.S. 154 (1984))).

As part of the prosecution role, public prosecutors also perform a robust *investigative* role — including the directing of law enforcement resources, obtaining warrants for searches and wiretaps, and making deals with informants. In this way, the prosecutor wields state power in a way that a private lawyer retained to prosecute a case does not. Although a private prosecutor may invoke the jurisdiction of a court and seek to satisfy the prerequisites for state punishment of the accused, the public prosecutor has dominion over significant public investigative resources, which adds to the power, responsibility, and prestige of the office. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) (“[The prosecutor] has the power to employ the full machinery of the state in scrutinizing any given individual.”).

hundred years have established a model of public prosecution that is incompatible with the privatization of the prosecution function.⁸⁴

Regardless of its foggy origins in the United States,⁸⁵ the prosecution of crime is now firmly entrenched as a public function. Although an ardent privatization advocate might view the lineage of the office of the modern public prosecutor as irrelevant at best, the public nature of the prosecutorial role has been absorbed by and is intertwined with the professional identity of prosecutors.⁸⁶ Delegation of the prosecution function to private actors subverts that special professional identity now associated with the public prosecutor, along with the public confidence that the public prosecution norm engenders.⁸⁷

While the mere fact that these public prosecution norms have developed may not be reason enough to reject privatized prosecution, the public prosecution norm has become closely associated with the legitimate exercise of government power, public confidence in the criminal justice system, and the proper pursuit of justice. These

⁸⁴ Professor Jody Freeman has credited Professor Gerald Frug for inspiring her use of the word “publicization.” See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 n.1 (2003). I, in turn, borrow the term from Professor Freeman.

⁸⁵ See *supra* note 78. In 1985, the United Kingdom established the Crown Prosecution Service, which marked the beginning of a move toward greater “publicization” of the criminal prosecution there. See JULIA FIONDA, *PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY* 16-22 (1995). For more of the development of the Crown Prosecution Service and its implications for the private role in criminal prosecution in the U.K., see Alec Samuels, *Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals*, 1986 CRIM. L. REV. 33, 33-44, and John Timmons, *The Crown Prosecution Service in Practice*, 1986 CRIM. L. REV. 28, 28-32.

⁸⁶ See Jackson, *supra* note 54, at 18; Krent, *supra* note 31, at 311 (“Reinstitution of a broad scheme of privately-initiated prosecutions (or quasi-criminal *qui tam* actions) would therefore cast a wide net and could well result in less even-handed enforcement of the law, permitting private motives to dominate instead of what one hopes is dispassionate professional judgment.”); see also Berenson, *supra* note 82, at 815-17 (analyzing various normative conceptions of prosecutorial role).

⁸⁷ See, e.g., Ramsey, *supra* note 12, at 1311-12 (“When, in 1935, the Supreme Court distinguished ordinary law practice from the sovereign interest in insuring that justice shall be done in criminal cases, it articulated a standard that is now threatened by careerism, error, and proposals to re-privatize some aspects of criminal prosecution.” (citations omitted)); see also *Hurd v. People*, 25 Mich. 405, 416 (1872) (discussing importance of prosecutorial role in upholding justice as opposed to conviction); *Hosford v. State*, 525 So. 2d 789, 792 (Miss. 1988) (same); *Foute v. State*, 4 Tenn. 98, 99 (1816) (same); Ireland, *supra* note 31, at 58 (citing Sidman, *supra* note 38, at 773-94; John A.J. Ward, *Private Prosecution — The Entrenched Anomaly*, 50 N.C. L. REV. 1171-79 (1972)).

important values can be eroded when the criminal prosecution function and prosecutorial discretion are delegated to private hands.

C. *Ethical Issues — Conflicts of Interest and Corruption*

When the government outsources the prosecution function or permits victim-retained lawyers to prosecute, the government delegates prosecutorial authority to private attorneys. These lawyers typically maintain private practices in addition to handling criminal prosecutions. In this sense, they are all part-time prosecutors. The notion that an attorney could serve simultaneously as both a prosecutor and a private practitioner has long been the subject of criticism from law reform commissions,⁸⁸ the organized bar,⁸⁹ and

⁸⁸ See, e.g., JACOBY, *supra* note 25, at 35 (describing criticism by early criminal law reform commissions of part-time prosecution). The now-defunct Advisory Commission on Intergovernmental Relations once recommended that part-time prosecutors be abolished. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 50 (1971) ("The Commission recommends that States require prosecuting attorneys to be full-time officials . . ."); see also SURVEY OF LOCAL PROSECUTORS, *supra* note 30, at 42 ("Advisory Commission on Intergovernmental Relations, and the President's Commission on Law Enforcement and Administration of Justice are among the other groups which have formally recommended that prosecutors be full-time.").

President Lyndon B. Johnson's Commission on Law Enforcement and Administration of Justice undertook a comprehensive study of the American criminal justice system and developed a number of recommendations for its improvement. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). One of the Commission's recommendations directed at the prosecutorial function was for a reform of salary structure and geographic distribution "so that district attorneys and assistants devote full time to their office without outside practice." *Id.* at 148.

⁸⁹ The American Bar Association, in 1968, promulgated its *Standards for Criminal Justice*, a seventeen volume work that Chief Justice Warren Burger described as "probably the most monumental undertaking in the field of criminal justice ever attempted by the legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974).

The "Prosecution Function" chapter of the ABA standards evidences a strong preference for the full-time prosecutor. Standard 3-2.1, "Prosecution Authority to be Vested in a Public Official," emphasizes that "[t]he prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION standard 3-2.1, at 19 (3d ed. 1993) [hereinafter ABA, PROSECUTION FUNCTION]. Standard 3-2.3, "Assuring High Standards of Professional Skill," provides that "[w]herever feasible, the offices of chief prosecutor and staff should be full-time occupations." *Id.* standard 3-2.3(b), at 24, 26-27.

prosecutor advocacy groups.⁹⁰ The moral hazard concerns presented when prosecutors also maintain private practices have fueled support for the full-time public prosecution norm.⁹¹ As such, critiques of part-time prosecutors largely have focused on ethical issues of conflicts of interest and potential corruption.⁹² These concerns are understandable.

⁹⁰ The National District Attorneys Association promulgated the National Prosecution Standards in 1977. The Standards, now in their second edition, advocate forcefully against part-time prosecution. Standard 1.4 provides:

1.4 Full-Time/Part-Time

The office of prosecutor should be a full-time profession. The prosecutor should neither maintain nor profit from a private legal practice. In those jurisdictions unable to justify the employment of a full-time prosecutor, the prosecutor may serve part-time until the state determines that the merger of jurisdictions or growth of caseload necessitates a full-time prosecutor.

The prosecutor should devote primary effort to his office and should have no outside financial interests which could conflict with that duty.

NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS standard 1.4, at 9 (2d ed. 1991) [hereinafter NATIONAL PROSECUTION STANDARDS]. *See also* Michael, *supra* note 30, at 1A (noting proposals to institute state prosecution districts in order to consolidate sparsely populated jurisdictions for purposes of appointing prosecutor).

Likewise, in 1971, the National Association of Attorneys General adopted its "Recommendations on the Prosecution Function." One of the recommendations sought to ensure geographic assignments and salaries were sufficient to "assure full-time prosecutors" and "to allow prohibition of private practice." COMM. ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATT'YS GEN., RECOMMENDATIONS ON THE PROSECUTION FUNCTION: RECOMMENDATION #6 (1971).

The full recommendation reads: "Prosecutors in the majority of states serve only a single county and serve only part-time. A district system should be adopted to assure full-time prosecutors. Pay should be adequate to attract and retain qualified persons and to allow prohibition of private practice." *Id.*

⁹¹ Metzger, *supra* note 74, at 1372 (describing "moral hazard problem" as "the danger that private actors will exploit their position in government programs to advance their own financial or partisan interests at the expense of program participants and the public"); *cf.* Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007) (discussing moral hazard problem in context of *qui tam* litigation).

⁹² *See, e.g.*, BD. OF DIRS., N.Y. STATE DEFENDERS ASS'N, RESOLUTION SUPPORTING FULLTIME DEFENDER OFFICES (July 27, 2000) (noting for comparison purposes that public policy favors full-time prosecutors to "eliminat[e] the potential for conflicts of interest, provid[e] a foundation for prosecutorial career service, and statutorily elevat[e] the prosecutorial function"). Scholarly treatment of the issue of the outsourcing of the prosecutorial function is largely confined to the *ethical dilemmas* posed by a criminal prosecutor who maintains a private law practice. *See, e.g.*, Susan W. Brenner & James G. Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993) (expressing ethical concerns part-time prosecutors raise); Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey*

It does not take much imagination to envision the potential for corruption and conflicts of interest when a lawyer who controls the tremendous power of criminal investigation and prosecution also represents private clients.⁹³ For example, the danger of a part-time prosecutor using information obtained in the course of an official criminal investigation to benefit a private client is a concern. A part-time prosecutor might be tempted to decline a justified prosecution of the prosecutor's private client, to initiate an unjustified prosecution against a private client's adversary, or to use the threat of criminal investigation or prosecution to coerce an opponent into submission or concession.⁹⁴ All of these issues are exacerbated in sparsely populated communities with a relatively small number of lawyers.⁹⁵

Sanctions and prophylactic rules have developed in response to the very real danger of conflict that arises when private actors perform public prosecutorial duties.⁹⁶ For instance, many jurisdictions prohibit

and Some Proposals, 81 KY. L.J. 1 (1992) (same). There was also a good deal of commentary on conflicts of interest and part-time prosecution in the wake of criticism regarding Whitewater Independent Counsel Kenneth Starr's maintenance of a private law practice during part of his tenure. See, e.g., David Halperin, *Ethics Breakthrough or Ethics Breakdown? Kenneth Starr's Dual Roles as Private Practitioner and Public Prosecutor*, 15 GEO. J. LEGAL ETHICS 231 (2002); John Padilla & Alex Wagner, *The "Outing" of Valerie Plame: Conflicts of Interest in Political Investigations After the Independent Counsel Act's Demise*, 17 GEO. J. LEGAL ETHICS 977 (2003); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 275-76 (2000).

⁹³ See, e.g., Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have the Duty to Disclose?*, 43 AM. CRIM. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1492309> (exploring problems created by conflicts of interest related to defense counsel's relationship with prosecutor's office).

⁹⁴ See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 568 (2005). Of course, concerns about such conflicts can extend to the law partners of part-time prosecutors. See, e.g., Op. Ala. Att'y Gen. No. 94 (Mar. 12, 2004), available at <http://www.ago.alabama.gov/pdfopinions/2004-094.pdf> (cautioning against assignment of court-appointed criminal cases to law partners of part-time prosecutors in jurisdiction in which prosecutor is employed).

⁹⁵ See Hoffman, *supra* note 30, at B1 (noting difficulties present in small community where part-time district attorney also maintains private practice). Allegations of at least the appearance of impropriety were made when it was revealed that the part-time prosecutor in Surry County, Virginia, investigating dogfighting charges against NFL superstar quarterback Michael Vick had represented, at one time, Vick's father in the prosecutor's private civil law practice. See Forster & McGlone, *supra* note 26, at B2; see also Scott Williams, *Lawyer's Two Roles Questioned: Attorney Represents Man He Has Also Prosecuted*, MILWAUKEE J. SENTINEL, Jan. 11, 2009, at B1.

⁹⁶ Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 59 (1992) (observing that conflict of interest rules "reflect a belief that the public interest is not well served

outright the private practice of law by prosecutors.⁹⁷ For most of those jurisdictions that allow part-time prosecutors, a substantial body of case law and state ethical standards sets the minimum requirements for avoiding conflicts of interest.⁹⁸ In addition, courts have overturned criminal convictions when conflicts of interest have impacted the due process rights of criminal defendants.⁹⁹ However, even state bars, through their licensing authority, and courts, with their power to overturn convictions through their supervisory authority or on due process grounds, cannot ensure that real or perceived conflicts do not arise.¹⁰⁰

A related concern is that part-time prosecutors may be more susceptible to corruption than full-time, public prosecutors.¹⁰¹ A part-time prosecutor working under contract with a jurisdiction might feel compelled to maintain a high conviction rate to ensure the renewal of the contract.¹⁰² Moreover, the part-time prosecutor might be in a position to use her prosecution role to influence matters in her private

when government officials have close economic ties to some outside, private interests”).

⁹⁷ See, e.g., MD. CODE ANN., CRIM. PROC. § 15-401 (LexisNexis 2009) (prohibiting private practice of law by State’s Attorneys); Op. Wash. Att’y Gen. No. 10 (July 20, 1982) (analyzing prohibition on private practice of law by prosecuting attorneys and noting that prosecutors in counties of certain sizes are prohibited from engaging in private practice). *But see* Terry Kinney, *Ohio Prosecutor Takes Job with Private Firm*, ASSOCIATED PRESS, Jan. 6, 2009, available at 1/6/09 APALERTOH 21:37:11 (Westlaw).

⁹⁸ See National Center for Prosecution Ethics, Topical Index of Ethics Advisory Opinions, http://www.ethicsforprosecutors.com/ethics_advisory_opinions.html (last visited Feb. 16, 2009).

⁹⁹ See, e.g., *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967) (affirming grant of habeas corpus relief on due process grounds relating to conflict of interest of part-time prosecutor). Professor Ramsey observes that those favoring the public prosecution norm do so, in part, out of concern for fairness to defendants. See Ramsey, *supra* note 12, at 1393.

¹⁰⁰ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 975-78 (2009) [hereinafter Bibas, *Prosecutorial Regulation*] (describing significant role of courts and bar associations in disciplining prosecutors); Rotunda, *supra* note 5, at 119, 123. To be sure, there is no guarantee that such safeguards will render *public* prosecutors conflict-free. Indeed, even private lawyers representing different private clients might be susceptible to similar ethical pitfalls. However, the potential for damage to public confidence in the criminal process arguably is much greater when private actors are wielding prosecutorial authority.

¹⁰¹ Cf. Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 20, at 1, 4 (noting potential for fraud and abuse in government contracting); VERKUIL, *supra* note 66, at 5 (discussing corrupting potential of outsourcing regimes).

¹⁰² Cf. Field, *supra* note 80, at 662-64 (discussing performance pressures of private contractors in prison context).

practice.¹⁰³ For example, a part-time prosecutor might hint at launching a criminal investigation against a civil litigation opponent in order to encourage settlement in the civil suit.¹⁰⁴

To be sure, one can fairly argue that part-time prosecutors are no more likely to engage in misconduct of this sort than their full-time counterparts. Of course, performance pressures also affect full-time, public prosecutors — particularly those who periodically must be reappointed by the executive or must answer to the citizenry through the ballot.¹⁰⁵ Furthermore, with regard to corrupt acts such as granting

¹⁰³ See, e.g., Ramsey, *supra* note 12, at 1350-51 nn.248-49 (expressing concerns over potential conflicts of interest for part-time prosecutors).

¹⁰⁴ An episode in the early 1950s, when United States Attorneys still were permitted to maintain a private practice, illustrates the grounds for such a concern. Tobias E. Diamond, the United States Attorney for Iowa, resigned his position in November 1952 amidst Justice Department and congressional investigations into alleged improprieties related to his private practice. See *House Probers Told Justice Dept. Denounced U.S. Attorney with \$67,000 Private Practice*, WASH. POST, Dec. 18, 1952, at 9. After unsuccessfully settling a claim that his client had against a Florida company, Diamond obtained a grand jury indictment against the company and two of the company's officers. See Murrey Marder, *Justice Aide Quits During Investigation — Iowa U.S. Attorney Probed for Alleged Outside Practices; Second in Month*, WASH. POST, Nov. 8, 1952, at 1. A 1952 Justice Department inquiry revealed that most United States Attorneys and Assistant United States Attorneys maintained private practices with an average annual income of \$5,000 to \$6,000, and \$2,500 to \$3,000, respectively. See *Only Ireland Fails to Reply to Quiz on Private Practice*, WASH. POST, Jan. 18, 1953, at M1.

A special subcommittee of the U.S. House of Representatives held a series of hearings on the Diamond incident and other issues related to outside activities by federal prosecutors. See *Hearings Before the Special Subcomm. to Investigate the Dep't of Justice, of the H. Comm. on the Judiciary*, 82d Cong., 2d Sess. (1952); *House Probers Score Ethics of U.S. Lawyers*, WASH. POST, Dec. 5, 1952, at 12. In the wake of these probes, the Justice Department prohibited outside law practice by its attorneys. See Luther A. Huston, *M'Granery Limits Aides' Activities — 15,000 in Justice Department May Not Do Outside Work Interfering with Duties*, N.Y. TIMES, Dec. 19, 1952, at 25. This prohibition, with limited exceptions, is reflected in the current regulations governing federal prosecutors. See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-4.000 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usamtitle1/4mdoj.htm. Although this sort of concern did lead to the abolishment of "moonlighting" by federal prosecutors, little has changed at the state and local levels, with many jurisdictions simply relying on the possibility that such misconduct will come to light and be dealt with accordingly after the fact.

¹⁰⁵ See Misner, *supra* note 56, at 718; Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1410118>. But see DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 166-69 (arguing that prosecutors are largely unaccountable to democratic checks). To be sure, many assistant and some chief prosecutors have civil service or even union protection. However, even within a civil service framework, there can be significant

leniency to a putative defendant in exchange for some sort of monetary consideration, part-time prosecutors arguably would face no more temptation than would full-time government prosecutors.¹⁰⁶ Private actors, of course, have no monopoly on vice; there are undoubtedly at least some public prosecutors who “are motivated by self-interest and not purely by love of justice.”¹⁰⁷ Indeed, there is no evidence that most private and part-time prosecutors working today are not honest and fair in the discharge of their duties.

That said, however, it is the *perceived* danger of abuse by a private attorney wielding prosecutorial power (even when she does not abuse it) that the public prosecution norm seeks to avoid. When private lawyers — particularly those with clients who may have interests adverse to those of a criminal defendant, or to the systemic needs of criminal justice administration — assert prosecutorial authority, this has tremendous potential to undermine public confidence in the very legitimacy of the state’s provision of criminal justice.

D. *Performance and Accountability*

Another danger of delegating prosecution authority to private or part-time prosecutors is the possibility that they will not devote the requisite time and attention to their public duties.¹⁰⁸ A part-time, outsourced, or victim-retained prosecutor faces not only conflicting loyalties regulated by ethical rules, but competing demands on her time and attention.¹⁰⁹ The private practice of law is as demanding as any professional vocation. The development, servicing, and maintenance of clients; the managing of an office, junior lawyers, and

incentives to achieve results. See, e.g., CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 74 (1990) (“Job security, prestige, and power are among the incentives of prosecutors. Many have political ambitions. They are rewarded along these lines according to their conviction rate.”). Some scholars have pointed toward other, more direct ways to incentivize certain behavior on the part of public prosecutors. See generally Bibas, *Rewarding Prosecutors*, *supra* note 12 (suggesting performance-based compensation and rewards); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851 (1995) (proposing financial rewards for charging and conviction performance and financial penalties for misconduct).

¹⁰⁶ In fact, it reasonably could be argued that because part-time prosecutors are able to earn significant additional income through private practice, they are less susceptible to bribery and other similar corruption.

¹⁰⁷ LOGAN, *supra* note 105, at 74.

¹⁰⁸ See ABA, PROSECUTION FUNCTION, *supra* note 89, standard 3-2.3(b), at 24, 26-27; NATIONAL PROSECUTION STANDARDS, *supra* note 90, standard 1.4, at 9, 10-11.

¹⁰⁹ Cf. Nolan, *supra* note 57, at 139-41 (discussing toll that supplemental employment can take on executives’ ability to perform public duties).

support staff; and other duties make it difficult to strike a proper work-life balance, much less allow for the focus required of a prosecutor.¹¹⁰

In addition, the financial pressures of the part-time prosecutor's full-time job (law practice or otherwise) will be brought to bear. The desire to turn his attention to more lucrative private client work might prompt a part-time prosecutor to give short shrift to the criminal cases.¹¹¹ Given the economic realities of part-time prosecutorial pay, there exist "incentives for part-time prosecutors . . . to avoid time-consuming proceedings."¹¹² As a result, there is the chance that the prosecution of crime by private practitioners could be marked by suboptimal performance, allocation of time, and attention.¹¹³

¹¹⁰ See, e.g., James J. Sandman, Letter, *Is Work-Life Balance Possible in Law?*, WASH. LAW., Apr. 2007 (pondering work-life balance issues in legal profession). In addition, there is evidence that the "part-time" characterization is a bit of a misnomer, with part-time prosecutors working full-time hours with full-time caseloads. See, e.g., Flanagan, *supra* note 24, at 6 (noting busy dockets of part-time prosecutors); Jan Hoffman, *Rural Justice: Neighborliness Is a Headache; Otsego Prosecutor Tries to Avoid Trial Conflicts*, N.Y. TIMES, Aug. 27, 1996 (same); Letter from N.Y. State Dist. Att'ys Assoc. to Hon. Sheldon Silver, Speaker of the N.Y. State Assembly (Feb. 9, 2000), available at <http://www.nysdaa.org/detail.cfm?page=129> ("The notion of a part-time District Attorney not only is outdated, it is also a myth; there are no true part-time District Attorneys, only District Attorneys paid a part-time salary."). Professor Ramsey in her scholarly examination of the public prosecutor in late-nineteenth century New York points out the intense media criticism of prosecutors being focused on private legal work. See Ramsey, *supra* note 12, at 1335 n.149, 1336 nn. 153-54, 1344, 1350-51 nn. 248-49.

¹¹¹ See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 43 (2003) ("The pressure to plea bargain was . . . part and parcel of part-time prosecuting: No matter how many criminal cases a district attorney handled, he could make more money if he handled them with dispatch."); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 n.17 (2004) ("[M]any part-time prosecutors . . . have financial incentives to speed their dockets so that they can get back to their paying clients.").

¹¹² James Eisenstein, *Research on Rural Criminal Justice: A Summary*, in CRIMINAL JUSTICE IN RURAL AMERICA 105, 125 (Shanler D. Cronk et al. eds., 1982). Similar arguments have been made regarding the incentives of appointed criminal defense counsel versus those of full-time public defenders. See, e.g., *id.* (noting "incentives for part-time prosecutors and underpaid assigned defense counsel to avoid time-consuming proceedings"); Editorial, *Hard Times and the Right to Counsel*, N.Y. TIMES, Nov. 21, 2008 (discussing near-crisis levels of underfunding in public defender offices); Board of Directors, New York State Defenders Association, Resolution Supporting Fulltime Defender Offices (July 27, 2000), available at http://www.nysda.org/00_FulltimePDOfficesAdopted.pdf (citing laws requiring prosecutors to be full-time as support for resolution asking legislature for more funding of full-time public defenders).

¹¹³ Perhaps the fear that private practice demands will detract from the lawyer's

Furthermore, accountability — another classic objection to the privatization of government functions in general¹¹⁴ — is a particular concern regarding the outsourcing of criminal prosecution.¹¹⁵ Private attorneys might have less accountability than public prosecutors. After all, public prosecutors ostensibly are answerable — either directly or indirectly — to the citizenry in whose name they prosecute.

Chief prosecutors in the United States typically are either directly elected¹¹⁶ or appointed by an elected official.¹¹⁷ Even civil servant assistant prosecutors, therefore, are hired and supervised by an elected official or someone appointed by an elected official. It would seem to follow that elected prosecutors — or those who serve at the pleasure of someone who is elected — would be answerable to the voters and accountable for the prosecutorial decisions that they make.¹¹⁸

capacity to effectively perform the prosecutorial role can be addressed through contract or regulation. Theoretically, strict guidelines setting the minimum amount of time and effort that must be expended on prosecutorial work may ensure that the private contractor strikes the appropriate balance between her duties to public and private clients.

The aforementioned 1952 U.S. Department of Justice inquiry into private practice activities of federal prosecutors, which led to the prohibition of “moonlighting,” revealed that virtually all of the federal prosecutors who maintained private practices spent a minimum 40 hours per week on their prosecutorial work. *See Only Irelan Fails to Reply To Quiz on Private Practice*, *supra* note 104, at M1.

¹¹⁴ *See, e.g.*, Dannin, *supra* note 20, at 113 (suggesting that “arguments for or against privatization are actually about accountability”); Jody Freeman, *Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 636 (2000) (expressing concern about accountability of private actors in prison context); Freeman & Minow, *supra* note 101, at 5; Lawrence, *supra* note 5, at 669-70.

¹¹⁵ *See, e.g.*, Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys, 4B Op. Off. Legal Counsel 434, 439 (1980) (“How can a lawyer represent the United States in court if he or she is not accountable to the United States?”). Accountability has long been a primary concern of those wary of the potentially expansive nature of the discretionary power to prosecute. *See* Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 720 (2005) (quoting then-Attorney General Janet Reno as stating that “[o]ur Founders believed that the enormity of the prosecutorial power — and all the decisions about who, what, and whether to prosecute — should be vested in one who is responsible to the people.”); *see also* Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (“Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect.”).

¹¹⁶ *See, e.g.*, DAVIS, ARBITRARY JUSTICE, *supra* note 25, at 10-11 (stating that all but four states and District of Columbia have elected district attorneys).

¹¹⁷ *See id.*

¹¹⁸ Some commentators have argued that even public prosecutors have very little, if any, accountability for the decisions they make. *See, e.g.*, DAVIS, ARBITRARY JUSTICE,

Furthermore, because much of prosecutorial decision making is done outside of public view, the lack of accountability associated with prosecution outsourcing is all the more worrisome. Although the decision making processes of public prosecutors are notoriously opaque,¹¹⁹ the decision making of private attorneys may be even less transparent, given that they may be exempt from free information laws and work in spaces far removed from other public actors.

To be sure, outsourcing arrangements, which must face the scrutiny of the appropriations process, may create greater incentive and opportunity for elected officials who ratify the contracts to demand transparency and responsiveness from the private attorneys.¹²⁰ Also, because the contracts for criminal prosecution services are of a limited duration, it may be easier for a jurisdiction to “fire” (or decline to renew the contract of) a contracted prosecutor than it would be to terminate an underperforming full-time elected or civil servant prosecutor.

However, because these private attorneys may simply turn to more lucrative private client work, traditional checks ensuring accountability are not as potent. As the private prosecutor either is self-employed or employed by a nonpublic entity, his overall livelihood may not be jeopardized by substandard performance in the

supra note 25, at 163-66 (arguing that prosecutors are unaccountable); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997) (critiquing nature and effectiveness of electoral accountability for prosecutors). The ballot, directly or indirectly, seemingly ensures the accountability of public prosecutors. *See, e.g., Morrison*, 487 U.S. at 728-29 (Scalia, J., dissenting); Lawrence, *supra* note 5, at 669; Ramsey, *supra* note 12, at 1319-20. However, Professor Angela Davis makes the argument that, although such political accountability exists in theory, in reality there is very little attention paid by the electorate to prosecutorial actions and policies. *See Davis, The American Prosecutor, supra* note 33, at 439-43. Professor Ron Wright argues that although “we typically hold prosecutors accountable for their discretionary choices by asking the lead prosecutor to stand for election from time to time,” such elections are largely ineffective in ensuring accountability because of the imperfect nature of information (if any) made available to voters regarding the prosecutorial priorities of the incumbent. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581, 583 (2009).

¹¹⁹ *See Davis, The American Prosecutor, supra* note 33, at 448; *see also id.* at 443 n.258 (citing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 207-08 (1969)); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

¹²⁰ *See, e.g., Neal, supra* note 14 (describing careful weighing of options by government official overseeing jurisdiction’s contracting with private prosecutor); *cf. Logan, supra* note 105, at 57-63 (discussing accountability of prison contractors through elected officials who hire them).

prosecutorial role. Although a public prosecutor obviously can enter the private sector after being fired for misconduct or poor performance, the barriers to such a transition will be significantly greater than any that might exist for a private prosecutor shifting to an exclusively private client base.

Although adherence to the public prosecution norm by no means guarantees superior performance, accountability, and transparency in prosecution, it does provide the framework for these important goals to be achieved. The delegation of prosecutorial authority to private actors undermines that framework and increases the likelihood that such aims will go unrealized.

III. MITIGATING CONCERNS WITH DELEGATIONS OF PROSECUTORIAL AUTHORITY

It bears repeating that budgetary constraints may force some jurisdictions to rely on the private sector for the provision of prosecutorial services — whether they would like to or not. Furthermore, it may be difficult to dissuade ardent victim rights supporters regarding the merits of victim-retained private prosecution. Even if one is resigned to the fact that there will be some delegation of prosecutorial authority to private actors in certain contexts, the practice still presents the many problems discussed above. To the extent that such practices will continue, query whether it may be possible to tailor these delegations in a way that mitigates the costs they impose. This Part considers and analyzes some possible solutions.

A. *Moving Beyond Formalism? — Contractor vs. Employee*

One tempting, but misguided, response to concerns over the delegation of prosecutorial authority to private actors might be simply to bestow upon all private delegates the nominal title of “government employee.” Presumably, these private actors could be given the title of government employee in an attempt to obviate the concerns with private actors exercising prosecutorial authority, but could be exempted from the myriad rules and regulations restricting outside activities and requiring minimum levels of duty to the government typically imposed on government lawyers.¹²¹

¹²¹ See, e.g., 28 U.S.C. § 515(b) (2006) (“Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law.”); see also Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys, 4B Op. Off. Legal Counsel 434, 441-48 (1980); *id.* at

History certainly supports such an approach. Virtually all government prosecutors “moonlighted” in the nineteenth century. Professor George Fisher pointed out that most nineteenth century prosecutors “worked part-time, drew, at best, part-time salaries, and therefore held more than one job.”¹²² For example, on the federal level, the Attorney General of the United States and the United States Attorneys (then called “District Attorneys”) were expected to serve part-time and were compensated accordingly.¹²³ In fact, even after the office of “public prosecutor” was firmly established, federal prosecutors were permitted to maintain a private practice. Furthermore, after federal prosecutor positions became full-time in the mid-twentieth century, many state prosecutor positions remained part-time. Indeed, in less densely populated areas of the nation, little has changed from the moonlighting prosecution norm prevalent at the nation’s beginning.¹²⁴ Consequently, many public prosecutors today are permitted to maintain private practices when not on duty.

The question of how, in a principled way, to distinguish these moonlighting public prosecutors from part-time independent contractor prosecutors¹²⁵ is related to the extent to which titles should

441 (Appendix, Memorandum Opinion for the Deputy Associate Attorney General) (“Officers and employees in the Executive Branch are covered by the conflict of interest laws; independent contractors are not.”).

¹²² FISHER, *supra* note 111, at 42.

¹²³ See James M. Beck, *The World’s Largest Law Office*, 10 A.B.A. J. 340, 341 (1924); 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, 567 n.21, 583-85 nn.76, 78; see also Krent, *supra* note 31, at 285 n.46.

¹²⁴ See Kress, *supra* note 30, at 105 (noting, in 1976, “[v]ery few states statutorily prohibit the private practice of law . . . ; indeed, only in the larger metropolitan areas do we find full-time prosecutors”); Duane R. Nedrud, *The Career Prosecutor*, 15 J. CRIM. L. & CRIMINOLOGY 343, 344 (1960) (noting, in 1960, that “only a few states have statutes prohibiting the prosecutor from conducting a private practice”); see also JACOBY, *supra* note 25, at xix (contrasting emphasis often placed on over-burdened urban prosecutors with reality that 76% of all prosecutors represent jurisdictions with less than 10,000 inhabitants); John Kaye, *Part-Time Prosecuting Can Be a Formidable Job*, N.Y. TIMES, Aug. 31, 1996, at 20 (noting that “more than 30 percent of our prosecutors are part time, largely because budgets in sparsely populated counties are not big enough to sustain a full time prosecutor. In some states the majority of local prosecutors are part time”). Prosecutorial moonlighting may see a resurgence in the face of shrinking governmental budgets resulting from widespread economic woes. See, e.g., *Budget Cuts Lead Ohio Prosecutor to Take a Job with Private Firm*, ASSOCIATED PRESS, Jan. 6, 2009 (noting one high profile prosecutor’s move to part-time private practice after he took salary cut in wake of budget cuts and stating that estimated 88% of jurisdictions in Ohio, mostly small and medium sized, have prosecutors with private practices).

¹²⁵ The line between moonlighting and being a private contractor is arguably a

carry weight in determining whether the exercise of prosecutorial authority by that individual is appropriate. Concededly, one could fairly argue that simply designating them official employees and making them all take an oath might alleviate the concern about private actors wielding sovereign prosecutorial authority. However, only if that oath were combined with publicly accountable control of the oath-taker's discretion would it begin to address many of the aforementioned problems with the delegation of prosecution functions.

Indeed, there is a long heritage of deputization in this nation — a temporary officialization of a private citizen's status in order to enable the performance of a public function.¹²⁶ Many jurisdictions bestow the title "City Attorney" or "County Prosecutor" upon private practice attorneys to whom they delegate criminal prosecution work. However, merely bestowing an official title and administering an empty oath upon these contractors arguably would not assuage the very real concerns with the private exercise of prosecutorial authority. Stripping away the formalism that such a gambit may represent, it remains apparent that prosecutorial authority is still being delegated to private actors. For those who share the aforementioned concerns, such as the private exercise of sovereign authority, the nominal deputization approach is unsatisfactory.

distinction without a difference. These "moonlighting" elected, appointed, and civil servant prosecutors properly can be viewed as part-time prosecutors. Indeed, the ratio of the number of hours devoted to prosecution to those devoted to private practice could be equivalent in the context of the moonlighting public prosecutor and the private, "part-time" prosecutor. It is fair to argue that the characterization should not rest on the employment status of the lawyer, or the presence or absence of employee benefits. These elected and appointed part-time prosecutors often enjoy the same type of employment relationship with the jurisdiction that a part-time prosecutor hired under civil service rules would have. They receive a salary (albeit smaller than that of a similarly situated full-time prosecutor) and, in many cases, receive employment benefits, such as life and health insurance. On the other hand, the central definition of public prosecution has rested, at least in part, on the notion that the "public" prosecutor would be a "public" employee in the traditional sense of the term. *See, e.g.,* Halligan, *supra* note 12, at 3-4 (discussing two "alternative models" to full-time public prosecution norm). Regardless, even if one excludes from the definition of "part-time prosecutor" those moonlighting prosecutors in jurisdictions with permissive private practice rules, there remain many jurisdictions which contractually retain — without an employment relationship — private lawyers to prosecute criminal offenses. *See supra* Part I.A.

¹²⁶ *See, e.g.,* Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2206 (2000) (defining deputization in both county sheriff and prosecutor contexts).

B. *Delegating Only Ministerial Prosecution Functions*

Although many prosecutorial tasks — including, most prominently, the charging decision — are discretionary, there are others which might be deemed more “ministerial.”¹²⁷ For instance, making the fundamental decision to take a certain position on a motion in limine might be described as discretionary, whereas the drafting — and even the arguing — of the motion itself might be deemed ministerial in some situations. Likewise, a prosecutor’s decision to seek a specific sentence following a conviction would be discretionary, whereas the drafting of the sentencing memorandum reflecting that sentencing recommendation would be largely ministerial.

These ministerial tasks may be appropriate for delegation to private actors.¹²⁸ For example, a jurisdiction seeking to outsource the work of an office with three full-time prosecutors might alternatively consider retaining one full-time prosecutor, whose job it would be to make the charging decisions and other crucial discretionary calls in all of the various cases that the office prosecutes. The jurisdiction could then contract with private attorneys to handle the drafting of briefs, motions, and other filings, and even the courtroom trials and arguments, as long as these private attorneys simply implement the discretionary blueprint set out by the government attorney.¹²⁹ Although the perceived cost savings of a reduction from three full-time prosecutors to one are not as great as those associated with a complete outsourcing of public prosecution, the jurisdiction would still be able to enjoy significant savings, and pay fealty to important considerations, such as sovereignty and accountability as discussed above.¹³⁰

¹²⁷ Cf. Constitutional Limits on “Contracting Out” Department of Justice Functions Under Office of Management & Budget Circular A-76, 14 Op. Off. Legal Counsel 94, 99 (1990) (highlighting distinction between ministerial and discretionary tasks).

¹²⁸ Cf. *id.* (opining that “purely ministerial” functions are type that may be contracted out to nongovernmental employees); Sidman, *supra* note 38, at 791 (theorizing that potential for prejudice to defendant is minimal where private prosecutors are confined to performing in-court functions). See generally Luneberg, *supra* note 3, at 432-49 (describing 1986 “pilot program for the retention of attorneys engaged in private practice in an effort to collect the non-tax indebtedness owed to the United States”).

¹²⁹ See, e.g., Ramsey, *supra* note 12, at 1329 (noting that, even as public prosecution model had overtaken private prosecution in late nineteenth century, public prosecutors in some jurisdictions were permitted to retain private counsel to assist them in trying cases).

¹³⁰ See Metzger, *supra* note 74, at 1395.

Such a model is not without precedent. Indeed, many public prosecutorial offices have a “horizontal” case management structure, whereby a case collects the fingerprints of many prosecutors, none of whom has complete responsibility for any one matter from beginning to end.¹³¹ One prosecutor might handle the initial assessment or “papering” of the case, another prosecutor may conduct the preliminary hearing or present the matter to the grand jury, while yet another may argue the pretrial motions. The trial and appeal may also be handled by two additional and distinct prosecutors.¹³²

Furthermore, Professor Rachel Barkow has argued that administrative law norms of institutional design, which separate the investigative and adjudicative functions, should be applied to the prosecutorial function.¹³³ By decoupling the investigators from those who exercise core prosecutorial discretion, Professor Barkow asserts that we might constrain the potential prosecutorial excess and abuse.¹³⁴ This basic idea of isolating and separating strains of the prosecution function is one which is useful in defining the contours of an appropriate delegation of prosecutorial authority to private actors.

Of course, limiting the delegation of prosecutorial authority to ministerial functions is not a one-size-fits-all solution. Where the delegation is necessitated not by cost-savings, but by conflict of interest, it is precisely the discretionary function that the jurisdiction is seeking to delegate to a private actor. Furthermore, in cash-strapped or smaller “one prosecutor” jurisdictions, there may not be sufficient resources to divide up the discretionary and ministerial roles; indeed, such a division might even increase the overall expense of criminal prosecution. Also, the temptation to delegate more extensively than is contemplated under such a proposal might prove to be too great for an overworked public prosecutor. However, for some jurisdictions seeking to outsource prosecution services in order to cut costs,

¹³¹ See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 1 (1971) (noting that, in large prosecutor’s offices, “the individual lawyer is more like an assembly line worker, doing only specific tasks in relation to the product, *i.e.*, the completed prosecution, than like the old fashioned shoemaker who made the whole shoe”); Susanne Walther, *The Position and Structure of the Prosecutor’s Office in the United States*, 8 EUR. J. CRIME CRIM. L. & CRIM. JUST. 283, 287-88 (2000).

¹³² Abrams, *supra* note 131, at 2. Furthermore, in the victim-retained prosecution context, this approach may mean that the private lawyer may be hired by the victim to assist or “second chair” a public prosecutor, but could not take over discretionary control of the prosecution.

¹³³ See Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869-70 (2009).

¹³⁴ See *id.*

perhaps the separation of discretionary functions from ministerial functions would be a viable approach.

C. Guiding the Discretion Exercised by Private Actors

Another approach to mitigating the damage done by the delegation of prosecutorial authority to private actors is to cabin or guide the discretion that private actors are authorized to exercise.¹³⁵ The exercise of discretion is inherent in the prosecution function and is absolutely necessary to the proper functioning of the criminal justice system.¹³⁶ However, such discretion can be abused or perverted in the absence of checks and guidance.¹³⁷ Although the danger of such abuse may be tolerable in a system of public prosecution, it becomes untenable when private actors are exercising prosecutorial discretion.

Guidelines are one possible way to constrain private actors' discretion in a prosecutorial outsourcing regime. Although not widely used, prosecutorial guidelines have captured the interest of the criminal law community for nearly four decades.¹³⁸ Indeed, the

¹³⁵ Of course, with many decisions to prosecute, there already exists some external check on the prosecutor's discretion. In most serious criminal matters, either a judicial officer will test the sufficiency of the allegations in a preliminary hearing, or the grand jury will make a finding of probable cause. Certainly, this would provide some oversight of the victim-retained private prosecutor's charging decision, even if the public prosecutor had no influence over the matter. However, as is discussed above, much of current prosecutorial outsourcing and part-time prosecution takes place in the context of misdemeanor offenses, which often are not subject to these external checks. See *supra* Part I.A; see also Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 411-12 (2006) (pointing out that Fifth Amendment only requires grand jury indictment for "capital or otherwise infamous crime[s]"). Extending the requirement of preliminary hearing, grand jury indictment, or some other early-stage review to *all* criminal charges brought by a contracted prosecutor would help to check the private exercise of discretion, though at a tremendous detriment to the efficient processing of less serious criminal cases.

¹³⁶ See, e.g., Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (pointing out that discretion in criminal justice is necessary).

¹³⁷ DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 184-86; Breitel, *supra* note 136, at 435 ("Good men will use discretion wisely. . . . Bad men will make a mess of discretion . . ."); see also Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 461 (2009) (warning of dangers of system that affords prosecutors broad discretion and suggesting ethical guidelines).

¹³⁸ See, e.g., Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 291, 296 (1980) (noting prior suggestions for formal rules or guidelines to control prosecutorial discretion); Kress, *supra* note 30, at 115-16 (arguing that internal guidelines can help to "promot[e] equity and fairness in the future exercise of prosecutorial discretion"); Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53-55

American Bar Association has promulgated model prosecutorial guidelines, and the United States Department of Justice issues charging guidelines to be followed by federal prosecutors at Main Justice and in the United States Attorney's offices in the field.¹³⁹

Certainly, the presence of guidelines, developed through official government channels and subject to democratic checks and accountability,¹⁴⁰ might soften the blow of having private actors perform discretionary prosecutorial functions.¹⁴¹ Specifically,

(1981) (discussing increased interest in prosecutorial guidelines during 1970s). See generally Abrams, *supra* note 131 (discussing prosecutorial guidelines); Wayne Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695 (advocating controls on broad prosecutorial power); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000) (advocating federal prosecutorial guidelines).

The Crown Prosecution Service, established 25 years ago in the United Kingdom, issues an elaborate set of prosecutorial guidelines designed to guide the discretion of crown prosecutors in the field. See DIR. OF PUBLIC PROSECUTIONS, THE CODE FOR CROWN PROSECUTORS (5th ed. 2004), available at <http://www.cps.gov.uk/publications/docs/code2004english.pdf>.

¹³⁹ See DEP'T OF JUSTICE, *supra* note 104, at § 9-27.000; ABA, PROSECUTION FUNCTION, *supra* note 89, standard 3-3.9; see also ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 10.3 (1975); Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 FED. SENT'G REP. 310, 311 (May/June 1994).

In addition, many U.S. Attorneys' Offices have drafted guidelines for the declination of criminal charges. See Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 CASE W. RES. L. REV. 705, 749 (1995). However, as Professor Ellen Podgor observes, "The accused has no judicial recourse when prosecutors fail to abide by these guidelines, as courts routinely find these guidelines strictly internal and unenforceable at law." Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 169 (2004).

¹⁴⁰ Jurisdictions, of course, would have to make a number of fundamental decisions about how the guidelines would be developed. Decisions would include whether to use an *ex ante* or *ad hoc*, common law approach to setting guidelines, see Abrams, *supra* note 132, at 10; whether to include guidelines on peripheral issues such as pre-trial detention and witness management issues, or to focus the guidelines solely on the fundamental charging decision, see *id.* at 10; and whether to have the guidelines define the permissible factors a contracted prosecutor may consider in making the charging decision, or simply to provide a flow chart-like guide to what charges are appropriate when certain factors are present, see *id.* at 11. Jurisdictions also would need to determine whether to make the guidelines public. Although published guidelines would enhance transparency, see *infra* Part III.D., they could lead to burdensome satellite litigation or an erosion in deterrence value of the criminal law. See Beck, *Administrative Law*, *supra* note 53, at 345.

¹⁴¹ Indeed, in determining which delegated public functions are "inherently governmental" the federal outsourcing regulations consider whether there are

guidelines might help to enhance public confidence in the fairness of the prosecution function. Also, they can help to ensure greater consistency in how prosecutors treat similarly situated defendants, perhaps a more acute concern when private actors are making charging decisions.¹⁴²

However, guidelines cannot completely obviate the need for discretion. As Professor Carolyn Ramsey notes, “[D]iscretion can never be completely formulaic. Holes will exist even in the tightest net of legal and ethical rules — holes that must be filled by the attorney’s own judgment.”¹⁴³ Every case will present new questions that even the most carefully constructed guidelines do not anticipate. Even with guidelines for the exercise of prosecutorial discretion by private contractors, the likelihood — if not the certainty — that private actors will exercise significant independent judgment and discretion remains.¹⁴⁴ Though imperfect, prosecutorial guidelines represent at least an attempt to regulate the private exercise of discretion in some of these contexts.

D. Enhancing the Transparency of Discretionary Decision-Making by Private Actors

Other possibilities for mitigating the perceived harm of having private actors wield prosecutorial authority relate to transparency in

guidelines and mechanisms for review of the exercise of discretion. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (REVISED) at A-2 (2003) (providing that 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”); cf. Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 188 (2000) [hereinafter Freeman, *The Contracting State*] (noting tremendous discretion exercised by private prison officials and guards).

¹⁴² See Abrams, *supra* note 131, at 10-11 (expressing doubt as to whether factors that prosecutors consider can be standardized, but suggesting that general prioritization of factors may be feasible); see also Miller & Wright, *supra* note 119, at 129 (“We believe that the internal office policies and practices of thoughtful chief prosecutors can produce the predictable and consistent choices respectful of statutory and doctrinal constraints, that lawyers expect from traditional legal regulation. Indeed, we believe that internal regulation can deliver even more than advocates of external regulation could hope to achieve.”).

¹⁴³ Ramsey, *supra* note 12, at 1318 n.36; see also Lee, *supra* note 57, at 165-66. See generally Green & Zacharias, *supra* note 59 (reconciling broad prosecutorial discretion with existence of standards).

¹⁴⁴ See Green & Zacharias, *supra* note 59, at 898.

the decision-making process. If private actors are permitted to exercise prosecutorial discretion and are not limited to mere ministerial tasks, at least such decisions can be better exposed to public scrutiny. Proposed reforms to the public prosecution function have aspired to increase transparency in prosecutorial decision making for some time,¹⁴⁵ and the transparency rationale applies with perhaps greater force to the prosecution outsourcing context.

One mechanism for greater transparency in the exercise of discretion by private actors might be a public reporting requirement, whereby contracted prosecutors are required to prepare a report on all the cases that they have considered, including matters that they have declined to prosecute, as well as dispositions and outcomes in matters that they have prosecuted.¹⁴⁶ Community review boards provide another potential mechanism for enhancing the transparency of private exercises of prosecutorial discretion. Such review boards could be made up of members of the bar, laypersons, or some combination of the two. Such boards could review a cross section of matters handled by the private prosecutor to determine adherence to prosecutorial guidelines or the compatibility of prosecution, declination, and plea bargaining decisions with community values and preferences. The findings of such boards could then be made public via written report or public hearing, and would serve as a vehicle for assessment of the private actor's performance of the public function by the citizenry and government officials.¹⁴⁷ In this way, such review

¹⁴⁵ See Ramsey, *supra* note 12, at 1393.

¹⁴⁶ As Professor Ramsey points out, Roscoe Pound argued that frequent reports from prosecutors on declined matters would serve as a check. Ramsey, *supra* note 12, at 1392 n.440 (citing CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 206-08 (Roscoe Pound & Felix Frankfurter eds., 1922)); cf. Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 20, at 241, 254 (proposing that government contractors "publicly disclose documents relating to the performance of their contracts"); Miller & Wright, *supra* note 119, at 129-30 (utilizing rare data from prosecution offices in several major cities to examine prosecutorial decision making typically not exposed to public scrutiny); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1255 (2009) (arguing that requirement that public officials "give reasoned explanations for their decisions" would enhance deliberative accountability).

¹⁴⁷ Cf. Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 20, at 336, 353-55 (proposing enhanced participation of public in contract supervision). Although, of course, the government body or official responsible for contracting with the private actor theoretically could take responsibility for monitoring each decision made by the contractor, such a system would likely be inefficient, cost prohibitive, and would

boards, as Professor Angela Davis has proposed in the context of public prosecutors,¹⁴⁸ would certainly help to enhance the transparency of prosecutorial decision making by private actors.

Potential mechanisms for enhancing accountability — a central purpose of transparency — in the private exercise of prosecutorial discretion might include greater access to tort relief or administrative remedies for defendants with colorable claims of prosecutorial abuse.¹⁴⁹ Jurisdictions also might provide and require special training

defeat the purpose of privatization or outsourcing in the first instance. See Jonas Prager, *Contracting-Out: Theory and Policy*, 25 N.Y.U. J. INT'L L. & POL. 73, 76 (1992).

¹⁴⁸ DAVIS, *ARBITRARY JUSTICE*, *supra* note 25, at 184-86; Davis, *The American Prosecutor*, *supra* note 33, at 462-64. Professor Stephanos Bibas has noted that the performance of prosecutorial functions might best be evaluated in a systematic way drawing on feedback of key criminal justice system stakeholders (judges, defendants, victims, etc.) who “see prosecutors in action” in a large number of cases. Bibas, *Rewarding Prosecutors*, *supra* note 12, at 444-45; see also Bibas, *Prosecutorial Regulation*, *supra* note 100, at 964, 979-83. While such an evaluative scheme would not necessarily capture ‘behind the scenes’ exercises of discretion, it would help to illuminate the results of those decisions so that inferences might be drawn about the quality and propriety of the decisions themselves.

¹⁴⁹ Cf. MINOW, *supra* note 9, at 151-52 (noting civil liability imposed on private prison operators); Richard Frankel, *Regulating Privatized Government Through Section 1983*, 76 U. CHI. L. REV. (forthcoming 2009), available at <http://www.ssrn.com/abstract=1369363> (advocating application of respondeat superior tort liability on private constitutional tort defendants regardless of immunity of public defendants); Mendelson, *supra* note 146, at 246-48, 250-51, 257 (considering constitutional tort liability of contractors); Metzger, *supra* note 74, at 1376, 1500 (facilitating prisoner lawsuits against private prisons); Pierce, *supra* note 44, at 1228 (discussing enhanced civil and criminal liability as way to constrain private contractors) (citing VERKUIL, *supra* note 66, at 50).

However, public prosecutors enjoy significant immunity from liability for actions taken as part of their official duties. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (holding that prosecutors were not completely immune from 42 U.S.C. § 1983 damages claims for fabrication of evidence and making false statements at press conference); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding prosecutor not amenable to 42 U.S.C. § 1983 claim for deprivation of defendant’s constitutional rights); Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *TOURO L. REV.* 1643, 1643-44 (1999) (noting that prosecutors enjoy absolute immunity for prosecutorial acts); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 *BYU L. REV.* 53 (same); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 *B.U. L. REV.* 1, 3 (2009) (same); see also *Pottawattamie County v. McGhee*, No. 08-1065 (U.S. argued Nov. 4, 2009) (considering whether prosecutorial immunity covers actions taken during trial preparation).

Moreover, it is unclear, for instance, whether the presence of prosecutorial guidelines would create a cause of action for aggrieved defendants charged in violation of such guidelines. See *Abrams*, *supra* note 131, at 35; Beck, *Administrative Law*, *supra* note 53, at 345; Podgor, *supra* note 139, at 169.

for private contractors providing prosecutorial services.¹⁵⁰ Contractual language in the engagement stage can help achieve some of these goals,¹⁵¹ while legislation or regulation can achieve others.¹⁵²

Even so, it is unclear whether any of these ideas, including separating discretionary functions from ministerial functions, prosecutorial guidelines, and mechanisms for review, can fully and satisfactorily address the central difficulties with the delegation of prosecution authority to private actors. Certainly, none is a panacea; some would apply more neatly to one context than another. Perhaps only a combination of the potential solutions would have any impact. However, they represent a first step in crafting a response to this challenge to our settled notions of sound regulatory design — the private exercise of criminal prosecution authority.

CONCLUSION

The inquiry at the heart of this Article — whether it is improper to delegate sovereign power to private actors — is not merely academic. Although not ubiquitous, in many jurisdictions across the nation, private actors regularly exercise prosecutorial authority and discretion in criminal cases.

Perhaps there is nothing *inherently* wrong with private participation in even crucial, discretionary criminal justice functions. Indeed, one need look no further than the jury box or grand jury room to see evidence of our criminal justice system's reliance upon the discretion of private actors who are performing public duties. In fact, the American system of criminal justice likely would collapse in the absence of the private criminal defense attorneys with whom the state contracts to supplement or replace public defender representation of indigent criminal defendants. Furthermore, the narrative of the

¹⁵⁰ Cf. Dickinson, *supra* note 147, at 340-41 (proposing training requirements for private contractors); Lawrence, *supra* note 5, at 694 (suggesting that private police officers receive training sufficient to justify delegation of police powers).

¹⁵¹ See, e.g., Freeman, *The Contracting State*, *supra* note 141, at 212 (“Government agencies need to view contractual instruments as full-blown accountability mechanisms designed to monitor quality, provide access to decisionmaking, and ensure procedural fairness, not just as accounting tools for monitoring the award of huge sums of money or occasional instances of discretion designed to provide relief from rigid regulatory requirements.”); cf. Mendelson, *supra* note 146, at 243-46 (discussing contract-related mechanisms for enhancing private contractor accountability); Stan Soloway & Alan Chvotkin, *Federal Contracting in Context*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 20, at 192, 226-27 (same).

¹⁵² See Metzger, *supra* note 74, at 1376.

blurred (and sometimes nonexistent) line between public prosecutor and private attorney in the history of the American criminal justice system may serve to bolster confidence in the propriety of vesting private actors with public duties.

However, if we can delegate the core prosecution function — including the power to decide whether the sovereign's laws will be enforced — to private hands, what can we *not* delegate? The delegation of prosecutorial discretion to private actors presents fundamental questions about how we view the sovereign authority to prosecute and punish, whether there is such a thing as an inherently or exclusively governmental function, and how we value the important functional and symbolic role of the modern public prosecutor. With increasing privatization in the criminal justice system, we must be vigilant to ensure that our modern commitment to public prosecution is not eschewed for whatever short-term goals such delegations are perceived to advance.