

LOWBALL RURAL DEFENSE

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ABSTRACT

Focus on the deleterious effects of the privatization of functions in both the criminal adjudicative system and criminal legal system has increased on both the scholarship and policymaking fronts. Much of this attention lately has been directed toward privatized police forces, privatized prisons, and even privatized prosecutors. As important as the examination of privatization and outsourcing in these arenas is, the role of the privatized public defender—especially in rural America, with about 90% of the country’s landmass and more than 20% of its population—gets lost in the shuffle. This Article centers these public defenders, especially in the rural context, and the specific ethical conundrums that arise when local governments such as counties and cities decide to privatize their public defense services through the use of competitive bidding. By opening with a comparison of two comparable criminal cases with very different results of the accused, the Article spotlights what happens when public defense is privatized. The Article then discusses the specific perverse incentives that rural public defenders face and the burdens they consequently bear when their services are procured by way of competitive bid—not with the intention of arguing that such services should never be bid out, but rather that any jurisdiction using such a system should be fully cognizant of the risks it incurs when choosing to do so. The Article then applies, for the first time, the concept of “noble cause corruption”—which was previously used to explain and to some extent excuse police malfeasance—to a new context to explain the consequences of some of the choices rural public defenders make while working under contract systems, presumably for the good of their clients.

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INTRODUCTION

In the summer of 1973 two attorneys, Frank Armani and Frank Belge, were appointed by a judge in upstate New York—Onondaga County—to represent Robert Garrow,¹ a Syracuse man accused of murdering an

1. *Slayer’s 2 Lawyers Kept Secret of 2 More Killings*, N.Y. TIMES, June 20, 1974, at 1, <https://www.nytimes.com/1974/06/20/archives/slayers-2-lawyers-kept-secret-of-2-more-killings-two-attorneys-for.html>.

eighteen-year-old college student camping in the Adirondacks.² While preparing for trial, Armani and Belge learned that their client, Garrow, killed other teenagers as well.³ Garrow revealed to the attorneys the places in the Adirondacks he hid the bodies of Alicia Hauck and Susan Petz. With this information, Armani and Belge traveled to the location described by Garrow.

Armani and Belge took the unusual step—for defense attorneys, anyhow—of personally investigating the veracity of their client’s claims regarding their client’s guilt.⁴ In an interview with *Radiolab*, Frank Armani described finding Susan Petz’s body in an old mine’s air shaft:

Here we are in our Sunday suits, and here we go trudging through the forest, looking for the cave. We spent a lot of hours looking around [a]nd then . . . We found this air vent. . . . And then Belge held my feet and let me down in there. . . . I could see her sneak. A blue shoe. . . . I said to myself, “The son of a bitch did it.” [Then he yelled,] “Get me out of here. Pull me back up.”⁵

Armani and Belge found Alicia Hauck’s body in the place Garrow described shortly thereafter; neither of them contacted the police with these details even though searches for both young women were still ongoing.⁶ When asked whether he had knowledge of one of the young women’s whereabouts by her father, Armani said that he did not, refusing to divulge the information

2. Brenna Farrell & Matt Kielty, *Radiolab: The Buried Bodies Case*, WNYC STUDIOS (June 3, 2016), https://www.wnycstudios.org/podcasts/radiolab/articles/the_buried_bodies_case [<https://perma.cc/TR4E-N9V7>].

3. Lisa G. Lerman, Frank H. Armani, Thomas D. Morgan & Monroe H. Freedman, *The Buried Bodies Case: Alive and Well After Thirty Years*, 2007 PROF. LAW. 19, 19 (2007).

4. In anticipating broaching the issue of candor before the tribunal, many criminal defense attorneys elect to not be informed by their clients whether their clients have actually committed the crimes with which they have been charged. Put simply, when it comes to the ultimate issue of their client’s guilt, many defense counsel decide that they would rather not know for certain. See MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS’N 1983). The rule states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Id.

5. Farrell & Kielty, *supra* note 2.

6. *Id.*

shared with him by his client in confidence.⁷ Rather, when the opportunity presented itself, Armani attempted to use this information to strike a plea deal with the prosecutor: in exchange for a promise not to pursue the death penalty against Garrow, Armani offered information that could be used to locate the bodies of the missing young women.⁸

The prosecutor in the case was irate.⁹ Later, the larger community around Syracuse was, as well, when it came out during Garrow's trial that Armani and Belge were aware of the locations of the bodies but had not informed anyone.¹⁰ Both attorneys faced the scorn and disdain of their local legal communities, while also facing disciplinary action by their state bar. Belge was indicted for failing to report the location of a body.¹¹ Both lawyers' respective families faced harassment and left town out of fear for their safety.¹² Both attorneys over time, however, became renowned among lawyers and scholars studying professional responsibility in the United States, particularly for their devoted representation of a less than sympathetic—if outright infamous—client, along with their dogged adherence to not disclosing confidential and privileged information. Over the years, their ordeal representing Garrow became an important case in the professional responsibility canon—it came to be known as “The Buried Bodies Case.”¹³

Nearly fifty years later, an attorney in Cache County, Utah, was faced with representing a client in a very similar situation. A five-year-old girl, Lizzy Shelley, went missing.¹⁴ By the fifth day of her absence, residents of Cache County mounted searches for her throughout the Cache Valley in “backyards, fields and ditches”¹⁵ Suspicion began to rise against her uncle, Alexander Whipple. The local prosecutorial agency, the Cache County Attorney's Office, filed charges against Whipple related to Lizzy's disappearance. Less than two hours later, her body was found less than a mile away from her home. Police acted on information secured from Whipple himself by Whipple's attorney, Shannon Demler. As Demler

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Lerman et al., *supra* note 3, at 20.

13. Farrell & Kielty, *supra* note 2.

14. *5-year-old Utah Girl Goes Missing, Sparking Massive Search*, CBS NEWS (May 27, 2019, 2:56 PM), <https://www.cbsnews.com/news/missing-girl-logan-utah-5-year-old-utah-girl-goes-missing-sparking-massive-search/> [<https://perma.cc/M3SU-N62J>].

15. Jackson Wilde, *Resident of the Year: Defense Attorney Shannon Demler Changed Course of Murder Case*, HERALD J. (Dec. 30, 2019), https://www.hjnews.com/news/local/resident-of-the-year-defense-attorney-shannon-demler-changed-course-of-murder-case/article_d0b6595b-bf25-555f-9ccb-3ecf22b8eb3d.html [<https://perma.cc/TN3T-F6H9>].

explained: “I think at some point in time it just needed to stop—the waste of resources and everything needed to stop.”¹⁶

Demler shared this information only two hours after his client was charged and after he was appointed. Demler explained he rapidly concluded that “[Whipple] was never getting out of prison. . . . It was obvious with what happened he was going to spend his life in prison, but I think anybody wants to preserve their life, and I think he wanted to preserve his.”¹⁷ Demler also expressed how he felt when his client revealed where Lizzy’s body was: “At that point in time, there were two people in the world that knew where the body was. Me and him—and that gives you a weird feeling.”¹⁸ In an interview for a newspaper article, Demler justified moving quickly not only as being for the good of his client, but also for the good of “the family and the community.”¹⁹ For his part in convincing his client to divulge the location of Lizzy’s body, Demler was lauded in Utah and in his community. He was even pronounced “Resident of the Year” by his local newspaper.²⁰ Members of the public left positive reviews for him and his law office on different websites, in praise of the service he had rendered to the community by revealing the information he received from his client.

Demler’s handling of his client’s case stands in sharp contrast to the representation afforded to Robert Garrow by Belge and Armani. Rather than keeping his client’s confidences, Demler orchestrated a quick deal within two hours of his client getting charged. Rather than taking the time to seriously consider possible defenses for his client, such as insanity or lack of competence, Demler resolved the case by revealing the location of Lizzy’s body. In doing so, he quickly built a reputation for himself as an outstanding community member and generated great local press.

Demler was appointed to represent Whipple as a public defender. As any student of criminal procedure would know, the Sixth Amendment right to counsel was extended to the states in 1963 under *Gideon v. Wainwright*.²¹ While propounding standards for the effective assistance of counsel under *Strickland v. Washington*²² and its progeny, the Supreme Court has never

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Wilde, *supra* note 15.

21. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

22. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing a two-factor test for a claim of ineffective assistance of counsel to prevail: (1) the defendant must show that counsel’s performance was deficient, and (2) the defendant must show that the deficient performance prejudiced him or her). The Court has previously recognized the existence of a Sixth Amendment right to counsel, and that such counsel, when needed, is a fundamental right in a series of cases such as *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon*, 372 U.S. at 335. With *Strickland*, the

mandated a specific structure for public defender's offices and agencies. While the overriding public understanding of a public defender's office is one that envisions a group of attorneys paid for by the state who are appointed, full-time, to provide services to poor defendants, there are varying ways of delivering public defender services in the United States that have been understudied and undertheorized. This Article examines a particular form of procuring public defender services—the contract as secured through a competitive bid, which is how Demler was hired. Beyond holding the competitive bidding system up to greater scrutiny, this Article also applies a concept from the literature on policing known as “noble cause corruption” and examines how it may undermine rural public defense.

II. OUTSOURCING PUBLIC DEFENDER SERVICES

A. *A Brief History Of Public Defense*

In *Gideon v. Wainwright*, the Supreme Court held that all criminal defendants, including the indigent, are entitled to counsel to represent them in their criminal cases. *Gideon* therefore became the origin of the American public defender, a “vast decentralized criminal justice bureaucracy.”²³ While *Gideon* established the need for public defender's offices to provide criminal defense services to those who cannot afford them, the Court has never established any parameters for delivery of those services, apart from the minimal standard of competence set forth in *Strickland v. Washington*: a defense attorney's representation will be found ineffective when (1) their performance was deficient and (2) when that deficient performance prejudiced the defense so as to deprive a defendant of a fair trial.²⁴ While *Gideon* is often taught as the origin point of public defender services in many criminal procedure texts and classes, “the overwhelming majority of the nation already adhered to the rule that *Gideon* would articulate even before the Court issued its landmark decision.”²⁵

1. *Pre-Gideon Public Defense*

Different cities and regions throughout the country approached the issue of indigent defense with a surprisingly diverse range of solutions, some

Court finally considered the question of how such a standard should be defined, even if the standard it formulated was, arguably, unworkable and set a low bar.

23. Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1268 (2006).

24. *Strickland*, 466 U.S. at 668.

25. Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 939 (2014).

more workable and effective than others. Los Angeles and Chicago had, perhaps, the earliest municipal public defender systems. Clara Shortridge Foltz presented the first proposal for a public defender's office at the Congress of Jurisprudence and Law Reform, which was held during the massive Chicago World's Fair.²⁶ Foltz had already made a name for herself before this first presentation introducing the very idea of public defense—she was the first female deputy district attorney in Los Angeles²⁷ and went through extraordinary steps to become the first woman attorney on the West Coast.²⁸ This speech made up the first published proposal for such services, published in both the *Chicago Legal News* and the *Albany Law Journal*.²⁹ Foltz's proposal, even now, might be considered radical by some: "For every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund."³⁰

In a manner that seems to anticipate many of the unfair jokes made in the present day at public defenders' expense equating their low levels of pay with a lack of knowledge or skill, Foltz's proposed public defender was meant to truly defend everybody—including those who could afford counsel otherwise: "[S]he knew that an advocate who represented only the friendless and destitute would not command the respect or resources necessary to do the job."³¹

However, even apart from this Foltzian model, a different vision of public defense emerged that was ostensibly progressive, but necessarily more limited in scope: the charity model of public defense. As described by Professor Mayeux, under this charity model "privately funded organizations staffed by short-term trainees defended small numbers of 'worthy' clients."³² This charity model and its reliance on volunteer labor was viewed as a place for young lawyers to hone their burgeoning litigation skills before joining law firms or securing more permanent, better-paying employment.³³ This view has taken hold and remains relatively prevalent in many segments of the criminal defense community. While organized indigent defense

26. Babcock, *supra* note 23, at 1270–71.

27. Mortimer D. Schwartz, Susan L. Brandt & Patience Milrod, *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 557–58 (1976).

28. See JILL NORGREN, REBELS AT THE BAR: THE FASCINATING, FORGOTTEN STORIES OF AMERICA'S FIRST WOMEN LAWYERS 104–33 (2013).

29. Clara Foltz, *Public Defenders, Address to the Congress on Jurisprudence and Law Reform during the Chicago World's Fair*, 25 CHI. LEGAL NEWS 427, 431 (1893) [hereinafter Foltz, *Address to the Congress*]; Clara Foltz, *Public Defenders—Rights of Persons Accused of Crime—Abuses Now Existing*, 48 ALB. L.J. 248 (1893) [hereinafter Foltz, *Rights of Persons*]. Both versions have minor differences.

30. Babcock, *supra* note 23, at 1271 (citing Foltz, *Rights of Persons*, *supra* note 29, at 249).

31. *Id.* at 1272.

32. Sara Mayeaux, *What Gideon Did*, 116 COLUM. L. REV. 15, 26 (2016).

33. *Id.* at 33.

services were operating in Los Angeles and Chicago before *Gideon*, such offices ran into greater opposition on the East Coast, as the more established private defense bar jealously guarded their turf.³⁴

2. *The Post-Gideon Landscape*

The formal recognition of the right to counsel in criminal cases at the national level began in the 1940s. While the court ruled in *Betts v. Brady* that the defendant Betts did not have a right to counsel, it also asserted that under certain circumstances, counsel could be necessary to ensure a fair trial and to assure that a criminal defendant was afforded due process.³⁵ The Court availed itself of this exception in the large majority of its right to counsel jurisprudence following *Betts* but preceding *Gideon*: “In its first eight years of applying *Betts*, the Court found ‘special circumstances’ about half of the time. But after 1950, the Court found ‘special circumstances’ in every right-to-counsel case that it decided.”³⁶

Gideon, of course, applied the Sixth Amendment right to counsel to the states through the due process clause of the Fourteenth Amendment, which was part of a long piecemeal process of incorporating the Bill of Rights to the states.³⁷ The Court, thereafter, continued to slowly expand the right to situations outside the state felony prosecution context, holding that the right to counsel applied to those charged with misdemeanors who could be facing incarceration, children in juvenile delinquency proceedings, during the process of criminal investigation, and more.³⁸ Neither *Gideon* nor any of its progeny, however, proscribe how public defender offices should be funded or established, leaving states to fend for themselves with little to no guidance apart from the minimal standards set for effective assistance of counsel by *Strickland v. Washington*. There is a marked gap in funding between law enforcement and indigent defense and, more specifically, between prosecution (a subset of law enforcement alongside the police) and

34. *Id.* at 30.

35. *Betts v. Brady*, 316 U.S. 455, 455–56 (1942).

36. *Mayeaux*, *supra* note 32, at 47–48 (citing WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 170 (1955); *Gideon v. Wainwright*, 372 U.S. 335, 350–51 (1963) (Harlan, J., concurring)).

37. U.S. CONST. amends. VI, XIV.

38. Katherine E. Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 238 (citing *In re Gault*, 387 U.S. 1, 41 (1972) (expanding right to counsel to juveniles in delinquency proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (expanding right to counsel to defendants charged with misdemeanors who face potential jail time); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (expanding right to counsel to custodial investigation); *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (expanding right to counsel to post-indictment lineups); *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (expanding right to counsel to direct appeals)).

indigent defense. A higher percentage of defendants at a state or local level are represented by public defenders than in federal prosecutions, meaning that defendants at the local level are at a marked disadvantage compared to those prosecuted federally.³⁹ Indigent defense is historically unpopular to fund, making diverting more resources to it politically risky.⁴⁰ This reluctance to fund is exacerbated by the fact that “[p]rosecutors often have higher salaries than defenders, lighter caseloads, and more access to investigative and expert assistance.”⁴¹

Many larger cities and counties supply public defender services through a devoted office of full-time public defenders. The Los Angeles County Public Defender’s Office currently employs a little over 1,100 attorneys using such a model.⁴² Offices devoted entirely to public defense—referred to in this Article as public defender systems—differ dramatically in size, from offices of hundreds of attorneys to small agencies of only a handful. No matter the size, however, “all public defender systems are funded directly or indirectly by the government, there are important differences in *the level* of government which supplies that financing,” such as those differences seen between federal and the more constrained local funding of public defense.⁴³

There are, however, two other models that often escape the attention of scholars, policy makers, and the general public: the “assigned counsel model” and the “contract system.” In an assigned counsel model, members of the bar are appointed by a judge to represent criminal defendants on a case-by-case basis. Depending on the size of the jurisdiction and the local bar, all attorneys in the area might be chosen by a judge to represent criminal defendants. Alternatively, judges in jurisdictions using this system may have a list of attorneys willing to take on criminal defense cases from which they will draw.⁴⁴ The assigned counsel model might be broken down into two further subcategories: an ad hoc assign counsel method and the coordinated counsel approach. In the former method, a judge may appoint counsel without any other mechanism to guide such a choice, such as a list

39. *Presumed Guilty: Research the System*, PBS <https://www.pbs.org/kqed/presumedguilty/3.2.0.html> [<https://perma.cc/ZG9F-J5JX>].

40. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019).

41. Eve Brensike Primus, *Defense Counsel and Public Defence*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESS 121, 125 (E. Luna ed., 2017).

42. *Employment Opportunities*, L. OFFS. L.A. CNTY. PUB. DEF., <https://pubdef.lacounty.gov/employment-opportunities> [<https://perma.cc/2FMV-5LL7>].

43. Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 517 (2015).

44. *Id.*

of available attorneys or selection criteria.⁴⁵ The latter may include some kind of oversight of attorneys who are being appointed by judges to provide defense services, such as “minimal qualification standards in order to join the program,” “a greater degree of supervision,” and a system by which “attorneys are usually assigned on a rotational basis according to their respective areas of expertise and the complexity of the cases.”⁴⁶

In a contract system, a jurisdiction (usually a state, county, city, or town) will contract with attorneys to provide public defense services rather than hiring them directly into dedicated public defender systems. While this system is often used for procuring services when there may be a conflict of interest or only for certain types of cases,⁴⁷ some counties and cities use a contract system as their primary means of providing indigent defense services. The number of jurisdictions that have attempted to fulfill their constitutional obligation to provide indigent defense services through a contract system has “increased dramatically” over the past few decades, with jurisdictions that were previously using an assigned counsel model making the switch to using contracts.⁴⁸ Often times such jurisdictions have realized that, even though they are too small or perhaps too under-resourced to support an entire public defender system, the number of criminal cases for which indigent defense services need to be procured necessitates a better or more efficient system than relying on an appointment model. The need for indigent defenders ballooned especially in the wake of the further criminalization of nonviolent offenses with the advent of the “War on Drugs” and the even more vaguely named “War on Crime.”⁴⁹

There are a wide number of contracts that might be solicited through the bidding process described above. These can be generally grouped into six different types: (1) fixed-fee contracts, where “the total compensation the lawyer will receive for work on all cases he or she is assigned during a specified contract period [is specified]. The number of cases assigned to the attorney is not capped”;⁵⁰ (2) fixed-fee based on the type of case, where the contract “establishes the total amount of compensation the lawyer will receive, but it specifies a particular type of case as well”;⁵¹ (3) flat-fee for a

45. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 59 L. & CONTEMP. PROBS. 31, 33 (1995).

46. *Id.*

47. *Id.* at 34.

48. THE SPANGENBERG GRP., U.S. DEP’T OF JUST., CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 (2000) [hereinafter CONTRACTING FOR INDIGENT DEFENSE].

49. Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1811 (2000).

50. CONTRACTING FOR INDIGENT DEFENSE, *supra* note 48, at 4.

51. *Id.*

specific number of cases, where the local government in question “pays a flat fee for all work completed based on a specific number of cases the attorney agrees to accept during the contract period”;⁵² (4) flat-fee per case, which “establishes a fee by case type”;⁵³ (5) hourly fee with caps, where the attorney is paid “an hourly fee established in the contract but includes a cap on the total amount of compensation he or she can receive”;⁵⁴ and (6) hourly fee without caps, which “pays the attorney an hourly fee established in the contract, but also covers the actual expenses of each case.”⁵⁵

This Article focuses on this contract system and a common way that such contracts are awarded—the competitive bid. While reports from organizations such as the National Legal Aid and Defender Association (NLADA) and previous articles have roundly critiqued the contract system, this Article builds on that previous work. Additionally, it is now the first to offer an accounting of what specific ethical duties are placed at risk by using such a system of procurement, as well as the first to connect these difficulties to other challenges of rural public defender practice, especially the risk of noble cause corruption.

B. Spatial Inequities

As explained above, there is no standard method of delivery for public defense, though its existence has been mandated in one form or another throughout the country by *Gideon*.⁵⁶ Given the different ways by which states and their political subdivisions such as counties, cities, and towns may seek to fulfill their obligation to provide indigent defense services, the American public defense system has been likened to a patchwork quilt with moth-ridden holes and threadbare spots: while such a quilt may look like it covers a wide surface, with closer inspection, there are spots that have been eaten through, and others where, perhaps, the stitching is messy and follows no discernable patterns.⁵⁷ Thus, unsurprisingly, coverage by indigent

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. As explained by Sloan, Clarke, and Engelberg:

During a March 2003 symposium to mark *Gideon*'s fortieth anniversary, Abe Krash, one of *Gideon*'s lawyers, noted that in 1963 even the most dedicated reformers did not appreciate how much the Supreme Court's decision neglected to say. *Gideon* did not deal with several crucial issues: what constitutes adequate funding for indigent defense; what effective indigent defense systems should look like; and what standards of quality should be required of a publicly funded lawyer.

Virginia E. Sloan, Cait Clarke & Daniel Engelberg, *Gideon's Unfulfilled Mandate: Time for a New Consensus*, 31 HUM. RTS. 3, 3 (2004).

57. Geoffrey Burkhardt & David Lam, *Toes Poke Through and Knees Shiver: Mapping Public*

defense services throughout the nation is spotty when one looks at the issue of indigent defense funding, and responsibility for said funding. A relatively recent study “found that only 23 states completely fund their indigent-defense systems at the state level,” while in nineteen of them counties provide the funding for at least part of public defense budgets.⁵⁸

This “quilt” becomes even patchier and more haphazard in smaller and rural jurisdictions.⁵⁹ Sparse populations and smaller communities face challenges due to the spatial inequalities. “Spatial inequality is closely associated with uneven development—that is, place-to-place variations in degree and type of development.”⁶⁰ Areas of the United States that are sparsely populated often suffer from small budgets and poor tax bases.⁶¹ This spatial inequality, and the very common lack of resources that it engenders in rural and exurban spaces, often results in public defender services being delivered in methods that risk unique conflicts of interests, among other ethical issues.

These issues are exacerbated by the chronic underfunding of states’ political subdivisions,⁶² as well as the nature of local government in the United States. The “relative absence of development and a consequent lack of private wealth” often leave rural local governments particularly cash poor and struggling.⁶³ The trend in devolution—the transfer of authority and attendant responsibilities from state to local governments—has made providing not just indigent defense services, but any and all services, more difficult in jurisdictions already struggling to make ends meet.⁶⁴ These challenges are impacted even further by uneven development reflected in differing economic opportunities depending on location.⁶⁵ A lack of development leads to a lack of wealth, limiting the ability of local government to generate much needed tax revenues.⁶⁶ This situation is

Defense in America, 31 CRIM. JUST. 44 (2017).

58. Primus, *supra* note 41, at 125 (citing THE SPANGENBERG PROJECT, STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 5 (2010)).

59. Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 242–46 (2010).

60. *Id.* at 227.

61. “Rural places are often defined by their ‘relatively sparse populations and relative isolation from urban areas,’ sometimes referred to as the ‘ecological component’ of rurality.” Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 485 (2014) (quoting Frank L. Farmer, *The Definition of “Rural”* in ENCYCLOPEDIA OF RURAL AMERICA: THE LAND AND THE PEOPLE 833 (Gary A. Goreham ed., 2d ed. 2008)).

62. Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 183 (2017).

63. Pruitt & Colgan, *supra* note 59, at 227.

64. Romero, *supra* note 62, at 184–85 (citing Patricia M. Wald, *Looking Forward to the Next Millennium: Social Preview to Legal Change*, 70 TEMP. L. REV. 1085, 1098 (1997)).

65. Pruitt & Colgan, *supra* note 59, at 226–27.

66. *Id.* at 228.

common in many nonmetropolitan and rural local governments that often have poorer constituencies.⁶⁷ Local governments such as cities and towns do not have the same capacity as federal or state governments to engage in the sort of massive redistribution of wealth⁶⁸ that would be necessary to achieve proper funding of a host of programs and needs, including public defense.

Much has been made of the “decline” of rural America of late, especially in popular media.⁶⁹ A number of different theories have abounded to explain the genesis of this decline.⁷⁰ Professor Rick Su has noted that, given much of the discussion around rural decline, there has been a surprising dearth of attention paid to the role of local government itself.⁷¹ Rural governments come in a variety of different configurations and structures, with certain forms being more dominant in different regions of the country.⁷² Others have noted, however, that population growth is what really fuels the apparent decline in rural America. Once rural locales find success in their efforts at economic development and growth, they are subsequently reclassified from rural or nonmetropolitan to urban or metropolitan.⁷³ Between 1960 and 2017, “reclassification of U.S. counties has been a significant engine of metropolitan growth and nonmetropolitan decline,” with nearly a quarter of nonmetropolitan counties being reclassified as metropolitan.⁷⁴ Given the fact that localities that manage to grow, both in population and economy, are eventually reclassified as metropolitan—

67. *Id.*

68. Linda Lobao & David S. Kraybill, *The Emerging Roles of County Governments in Metropolitan and Nonmetropolitan Areas: Findings from a National Survey*, 19 *ECON. DEV. Q.* 245, 247 (2005).

69. See, e.g., Eduardo Porter, Opinion, *The Hard Truths of Trying to ‘Save’ the Rural Economy*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html> (last visited Sept. 25, 2021); David Swenson, Opinion, *Dwindling Population and Disappearing Jobs is the Fate that Awaits Much of Rural America*, MARKETWATCH (May 24, 2019, 11:10 AM), <https://www.marketwatch.com/story/much-of-rural-america-is-fated-to-just-keep-dwindling-2019-05-07>; Paul Krugman, Opinion, *Getting Real About Rural America*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/opinion/rural-america-economic-decline.html>.

70. These theories are numerous and diverse, ranging from the decline of family farms and farm populations (Bruce L. Gardner, *Farm Population Decline and the Income of Rural Families*, 56 *AM. J. AG. ECON.* 600 (1974)) to the encroachment of urban land on rural areas and the environmental impacts that follow (John Fraser Hart, *Urban Encroachment on Rural Areas*, 66 *GEOGRAPHICAL REV.* 1 (1976)). There are also many other reasons for continued population loss. See, e.g., Kenneth Johnson & Daniel Lichter, *Rural Depopulation in a Rapidly Urbanizing America*, UNIV. N.H. CARSEY SCH. PUB. POL’Y (Feb. 6, 2019), <https://carsey.unh.edu/publication/rural-depopulation> [<https://perma.cc/54A7-YQND>].

71. See Rick Su, *Democracy in Rural America*, 98 *N.C. L. REV.* 837, 851 (2020).

72. *Id.* at 853–57.

73. See Kenneth M. Johnson & Daniel T. Lichter, *Metropolitan Reclassification and the Urbanization of Rural America*, 57 *DEMOGRAPHY* 1929, 1929–50 (2020).

74. *Id.* at 1929.

essentially urban—localities that underperform are, by definition, classified as nonmetropolitan or rural.⁷⁵

Much of the greater, more urban-normative⁷⁶ response to questions about and efforts to improve life in rural America is dismissive of rurality and the people who live in it. Nick Gillespie infamously asked in an op-ed for *Reason*, “If Rural Americans Are Being ‘Left Behind,’ Why Don’t They Just Move?”⁷⁷ Kevin Williamson has advised people that “[s]ome towns are better off dead.”⁷⁸ In his op-ed for the *National Review*, he flippantly suggests that “[m]y own experience in Appalachia and the South Bronx suggests that the best thing that people trapped in poverty in these undercapitalized and dysfunctional communities could do is—*move*. Get the hell out of Dodge, or Eastern Kentucky, or the Bronx.”⁷⁹ These op-eds fail to consider that people who wanted to leave would have already done so if they had the ability.

Many are inclined to assume that the reason many rural dwellers refuse to leave for cities, where jobs may be more plentiful and government benefits and services are easier to deliver, is due to profound place attachments. It is important to acknowledge that, among those who decide to stay in rural places, place attachment might not play as strong a role as once believed. In a study from rural eastern Kentucky, researchers found a host of reasons apart from solely place attachment explaining why those who wished they could move from a rural location felt they could not.⁸⁰ While some expressed a strong and positive place attachment, feeling “rooted in place,” others felt more “tied to place” and stuck. The latter group felt immobility forced upon them, rather than chosen at all, due to factors like “caring for elderly parents, job loss, family dissolution, and housing insecurity,” among other factors.⁸¹

75. *Id.*

76. Professor Lisa Pruitt noted that the notions of rural and urban are often understood as opposites and that the “rural is often popularly depicted as the ‘other,’” in contrast to the urban. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN L. REV. 159, 168 (2006). In using the term “urban-normative” throughout this Article, I mean to highlight the fact that “if a scene, situation, or person is not expressly designated as rural, it is implicitly urban, which is the default, the norm.” *Id.*

77. Nick Gillespie, *If Rural Americans Are Being ‘Left Behind,’ Why Don’t They Just Move?*, REASON (Jan. 9, 2018, 4:45 PM), <https://reason.com/2018/01/09/if-rural-americans-are-being-left-behind/> [<https://perma.cc/S5CW-D4YD>].

78. Kevin D. Williamson, *If Your Town Is Failing, Just Go*, NAT’L REVIEW (Oct. 15, 2015, 8:00 AM), <https://www.nationalreview.com/2015/10/mobility-globalization-poverty-solution/> [<https://perma.cc/FW6V-PF8T>].

79. *Id.*

80. Holly R. Barcus & Stanley D. Brunn, *Towards a Typology of Mobility and Place Attachment in Rural America*, 15 J. APPALACHIAN STUDS. 26, 43 (2009).

81. *Id.* at 38, 43–45.

Rather than suggesting in oversimplistic fashion, as perhaps others might, that rural dwellers move to larger cities to leave small towns, villages, and counties to “die,” this Article argues that it is essential to understand the contours in rural life. Some of these contours include the variability of structures of local government or the myriad reasons apart from mere place attachment that might induce a person to live in someplace rural. This understanding is imperative to consider before attempting to prescribe measures to solve problems like indigent service delivery, among many others. The hope is that there is a rejection in the “one size fits all” thinking so prevalent in urban-normativity: effective solutions to rural woes will only come from meeting rural locations *where they are at*.

C. Outsourcing and RFPs

This Article focuses on public defenders who are hired through a competitive bidding system. Larger cities have enough criminal cases and criminal defendants to justify dedicated public defenders’ offices and services. In smaller jurisdictions, however, it may not make economic sense to hire multiple, let alone one, full-time defense attorney to serve as public defender. This Article acknowledges those pressures and difficulties. Rather than mandating that competitive bidding should never be used to fill public defender positions, this Article highlights the potential difficulties of using outsourcing and competitive bidding, particularly the ethical conundrums and perverse incentives that can arise and derail public defenders from their imperative goals of providing zealous defense to the indigent.

This Article is also the second in a series examining both the personal and institutional motivations potentially driving public defender behavior and performance under a competitive bidding system and will be using similar definitions to that found in its 2017 companion, *Profit-Driven Prosecution and the Competitive Bidding Process (Profit-Driven Prosecution)*.⁸² That piece “focuse[d] exclusively on those cities, counties, and other political governmental subdivisions below the state level that rely on ‘contracting out’ . . . services by way of a competitive bidding process.”⁸³ Also, as in that piece, this current Article does not focus on complete privatization. Given the nature of public defense and its funding through some level of government, be it federal, through the state, or through one of its political subdivisions, public defense can never be completely privatized, as that would require exclusive private sector control over the allocation of

82. See Romero, *supra* note 62.

83. See *id.* at 185.

resources.⁸⁴ Under these circumstances, the greatest level of privatization that can be achieved is partial, by which “government retains the responsibility” to provide the service in questions—here public defense—but contacts with private actors to fulfill whatever roles or perform whatever services are needed.⁸⁵

1. *Privatization in the Criminal Defense Context*

Privatization, and much of the faith that is placed in it by local governments, flows from the devolution of federal and state power to local governments. The idea is that “power is shifted to local institutions or private parties so that people make their voice known more effectively or take responsibility for their own actions.”⁸⁶ Ideally, this shift of power results in a more local base better able to serve the best interests of those that stand to benefit. This assumption, while not necessarily categorically incorrect, reveals both a bias toward local control, as well as what has been called a “pastoral impulse,” favoring hyperlocal control of resources rather than what is seen as a less efficient or less trustworthy large bureaucracy.⁸⁷

While contracts for public defense are not of recent invention,⁸⁸ contracting for indigent defense services really began to escalate with the trend in devolution of responsibility to local government that became fashionable in the early 1980s: “A 1982 national survey was the first to take note of the growth of contracts as a primary means of defense delivery.”⁸⁹ Currently, flat fee contracts where an attorney “handles an unlimited number of cases for a single flat fee under contract to a county administrator” or a court are “[t]he most prevalent manner for delivering indigent defense services in the United States.”⁹⁰

84. BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* 15 (1998).

85. Romero, *supra* note 62, at 186.

86. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005).

87. *Id.* (citing RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 13–45 (1973)).

88. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-3.1, cmt. at 47 (AM. BAR ASS'N 1990).

89. *Id.* at 44.

90. *Abolishing Flat Fee Contracts for Public Defense Services—ABA Principle 8*, SIXTH AMENDMENT CENTER, <https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/> [https://perma.cc/JG9R-YXGV].

2. *Competitive Bidding and Government Procurement Mechanics*

Governments may use competitive bidding to procure a number of very different services or goods, from road maintenance and infrastructure projects to legal services.⁹¹ The use of competitive bidding is meant to make hiring processes more equitable by focusing on an easily measured metric, rather than other attributes; this metric is usually cost, with the intention of keeping costs to local government low while attracting competent candidates.⁹² “[B]oth state and local governments will ‘often require proof of cost savings prior to permitting’ services or goods to be procured through the . . . bidding process, as well as through other privatization methods.”⁹³ Local governments utilizing competitive bidding to procure services have broad discretion in setting their own processes.⁹⁴ Of all the procurement processes that could possibly be utilized by local government, competitive bidding is, perhaps, the most formal⁹⁵—other agreements and contracts that are low value and relatively low risk may even be based on unwritten, handshake-style agreements.⁹⁶

No matter what is being procured or purchased, bidding periods are usually initiated with the publication of a legal notice soliciting bids, typically in a newspaper. Bidding periods have more recently been initiated by publication on the local government’s website that intends procurement or purchase.⁹⁷ These requests for proposals, (RFPs), are more than a simple job vacancy announcement, however. Rather, they invite interested, qualified parties to submit details regarding why they should be chosen to provide the service in question. RFPs will generally include or require: “1) a statement of what services are needed, 2) a schedule for the project or the term of years for which the service is being solicited, 3) qualifications needed and evaluation criteria [which is how applicants can gauge whether

91. Romero, *supra* note 62, at 185.

92. *Id.* at 187.

93. *Id.* (quoting Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2237 (2013)).

94. *Id.*

95. *Contracting and Competitive Bidding*, MUN. RSCH. & SERVS. CTR., <https://mrsc.org/getdoc/99fac994-e481-44dd-8639-c557b887893c/Contracting-and-Competitive-Bidding> [<https://perma.cc/9ACP-UFQU>].

96. While handshake agreements are, understandably, frowned upon, they are still enough of a concern that prohibitions against them are occasionally found in local government procurement manuals. *See, e.g.*, BUNCOMBE CNTY., N.C., *PROCUREMENT MANUAL* (2018), [https://www.buncombecounty.org/common/Commissioners/20181120/Procurement%20Manual%2011-20-18\(final\).pdf](https://www.buncombecounty.org/common/Commissioners/20181120/Procurement%20Manual%2011-20-18(final).pdf) [<https://perma.cc/R8R4-KPJD>].

97. BLACK’S LAW DICTIONARY (11th ed. 2019) (defining request for proposal as “[a]n invitation to prospective suppliers or contractors to submit proposals or bids to provide goods or services”).

they are minimally qualified or not], and 4) a request for a budget. . . .”⁹⁸ Generally, in government purchasing and procurement, contracts are awarded to the “lowest qualified bidder,” though other factors might also be considered.⁹⁹

D. “Rurality” [Hazily] Defined And The Rural Lens

“Rural,” as well as the related concept of “rurality” is notoriously difficult to define. It is important to remember from the outset, however, that “[r]ural communities, rather than being monolithically white and conservative are, rather, exceptionally diverse in character, culture, and social fabric.”¹⁰⁰ Lisa Pruitt noted the irony of courts pronouncing the term “rural” as “not difficult to understand” when it is anything but.¹⁰¹ Different organizations and groups might define “rural” differently depending on the circumstances. For example, “rural” is sometimes defined by way of population, but other times, it is linked to predominant land use.¹⁰² Agencies that are usually authoritative sources for the definitions of other demographic and geographic terms, such as the Census Bureau, have yet to establish even for themselves easy to use or consistent definitions of “rural.” The Census Bureau explained the following:

Deciding where to draw the line between urban and rural can be a complex task. Densely developed “downtowns” and sparsely populated areas are relatively easy to identify. Where does an urban area end as settlement patterns change from the city center to suburbs and beyond? The ambiguity of the urban area’s edge is diminished with the application of standard measures.

98. Romero, *supra* note 62, at 188 (citing *A Guide to Writing a Request for Proposal*, WAREHOUSING EDUC. & RSCH. COUNCIL, <http://www.werc.org/assets/1/assetmanager/rfpwritingguide.pdf> (last visited Oct. 5, 2021)).

99. See *LPTA Contract Evaluations & Lowest Price Technically Acceptable Vs Best Value Bid Protest*, WATSON & ASSOCS., <https://blog.theodoretowatson.com/lowest-price-technically-acceptable-versus-best-value-bid-protest/> [<https://perma.cc/7EUL-WEAJ>] (advertising attorney services that assist in bringing best value bid protests against the grant of a government contract).

Such evaluation factors could vary widely, of course, depending on the good or service that is being procured. For example, evaluation criteria can differ dramatically when evaluating bids for public defender services versus trash pickup and disposal services. There are, however, some common factors that are prevalent in evaluation criteria, regardless of the service being procured: cost or price evaluation, past performance evaluation with the understanding that past performance is the best predictor of future performance, and technical evaluation. See FAR 15.305 (2021).

100. Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM L. & CRIMINOLOGY 803, 806 (2020).

101. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 177 (2006) (quoting *Kenaitze Indiant Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988)).

102. See *id.* at 178.

The Census Bureau uses a definition based on population density and other measures of dense development and other measures of dense development when identifying urban territory. The definition seeks to draw the boundary around an urban area's "footprint" to include its developed territory. To accomplish this, the Census Bureau's definition of urban is largely based on residential population density and a few other land-use characteristics to identify densely developed territory.¹⁰³

Put more simply, the Census Bureau adheres primarily to an entirely urban-normative definition of "rural," defining it in terms of what urban is not. This definition strips rural country of the things that make it unique and threatens to flatten it into a nondescript monolith.¹⁰⁴ The Census Bureau's definition also very quickly declassifies places from being rural by using a relatively low population threshold. Starting in 1950, the Census Bureau began using population cutoffs in an effort to neatly define urban versus rural: urbanized areas had populations of 50,000 or more.¹⁰⁵ Over time, the definition changed, with areas of 2,500 or more qualifying as "urban clusters" while those with over 50,000 people were dubbed "urbanized areas."¹⁰⁶ Density, land use, and distance are also considered, with rural being defined as "all population, housing, and territory not included within an urbanized area or urban cluster."¹⁰⁷

For purposes of this Article, and in an effort to remain consistent with the first article in this series, *Profit-Driven Prosecution*, a more flexible definition derived from Professor Pruitt's previous work will be used, which does not differentiate between models using the rural/urban or

103. Michael Ratcliffe, Charlynn Burd, Kelly Holder & Alison Fields, *Defining Rural at the U.S. Census Bureau: American Community Survey and Geography Brief*, U.S. CENSUS BUREAU (Dec. 2016) [hereinafter *Census Report*], https://www2.census.gov/geo/pdfs/reference/ua/Defining_Rural.pdf [<https://perma.cc/H67G-TVYY>].

104. When studying the rurality and the rural in the United States, it is important to be mindful of the following:

The people of rural America are a heterogeneous group with great diversity in cultures, occupations, wealth, lifestyles, and physical geography. For example, rural New England is quite different from the more sparsely populated rural areas of the Southwest, where large open areas further separate people. Rural areas also contain significant numbers of minority populations that are often physically isolated and have unique social service needs. Such groups range from predominantly poor Appalachian Whites, isolated Native Americans, poor southern Blacks, and linguistically isolated Hispanics in the Southwest. Many rural areas of North America also contain culturally isolated communities settled by a single immigrant group.

J. Dennis Murray & Peter A. Keller, *Psychology and Rural America: Current Status and Future Directions*, 46 AM. PSYCH. 220, 222 (1991).

105. *Census Report*, *supra* note 103, at 3.

106. *Id.*

107. *Id.*

metropolitan/nonmetropolitan dichotomy: “I use the term here to refer to an inchoate concept of rurality, the general idea of sparsely populated areas, including small towns, and associated cultural aspects.”¹⁰⁸ In choosing to focus on the impact of competitive bidding on indigent defense in rural areas, this Article not only continues the rural focus found in *Profit-Driven Prosecution*, but also builds on the work of Professor Hannah Haksgaard in unapologetically focusing on the rural, legitimating and normalizing viewing these issues through a rural lens.

Just as Professor Haksgaard’s recent piece did not, this Article does not mean to suggest that some of the challenges described herein are not faced by urban indigent defenders. However, “rural areas face certain unique disadvantages that should be studied separately.”¹⁰⁹ There may even be concepts that researchers and academics from a more urban-normative perspective might learn from studying rural jurisdictions in their own right—not all of the flow of beneficial information and knowledge need be in one direction, from urban centers out to rural areas. And as much as Professor Haksgaard remarked with regard to her research into appointed counsel compensation rates in rural America, the same holds true for this Article: there is little to no scholarship focusing on the problems of competitive bidding and indigent defense in the specifically rural setting.¹¹⁰ Greater distance decreases access to justice.¹¹¹ As detailed elsewhere in this Article, there are large public defender services, such as those in the Bronx or the District of Columbia, that are based on indigent defense contracts. These offices, however, do not encounter the same pressures that rural contract indigent defenders do because of the size of their offices and the scale of their operations. These conundrums alone should justify the closer study of rural challenges not only in indigent defense, but in access to justice as a whole.

108. Lisa R. Pruitt, *Latinas/os, Locality, and the Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 136 n.2 (2009).

109. Hannah Haksgaard, *Court-Appointment Compensation and Rural Access to Justice*, 14 U. ST. THOMAS J. L. & PUB. POL’Y 88, 90 (2020).

110. *Id.* at 90–91.

111. Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 12 HARV. L. & POL’Y REV. 15, 121 (2018).

E. Indigent Defense Duties and Standards

1. ABA Defense Function Standards

The American Bar Association (ABA) has promulgated rules regarding the delivery of defense services, including its Standards for the Defense Function and Standards for Providing Defense Services. These types of standards have been more readily adopted by public defense systems with both complete or partial funding by the state, versus those that are funded at a local level, like a county.¹¹² Unlike the Standards for Prosecution Services, which practically ignore the hiring of prosecutors on contracts awarded through bids, the Defense Services standards contain an entire part addressing contract defense services. Standard 5-3.1 provides that “[c]ontracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. **The contracting authority should not award a contract primarily on the basis of cost.**”¹¹³ Cost, in other words, can still be a factor to consider under these standards. RFPs soliciting indigent defense services generally do not seem to prioritize cost savings as strongly as RFPs for prosecution services but also do not ignore the consideration outright.

While the last article in this series looked at the effects of outsourcing on criminal adjudication, particularly in rural criminal legal systems, by focusing on prosecutors and their duties, the duties that this Article considers when examining contract public defense are, understandably, very different. Defense counsel, unlike prosecutors, have distinct, identifiable clients and do not represent a hazy, amorphous concept like “the State” or “the People.” As the ABA Defense Standards explain:

The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.¹¹⁴

And while the standard set for effective assistance of counsel under

112. Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards* iv (2003), <https://www.ojp.gov/pdffiles1/nij/grants/205023.pdf> [<https://perma.cc/L92J-5W9G>].

113. CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES 5-3.1 (AM. BAR ASS’N 1992) (emphasis added).

114. CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES 4-1.2 (AM. BAR ASS’N 2017).

Strickland is, according to many judges and scholars, paltry and exceptionally low, it is, perhaps, a firmer and more easily administrable standard than any that purport to limit how a prosecutor performs or behaves in their job.

2. *The ABA's Ten Principles of a Public Defense Delivery System*

In February of 2002, the ABA House of Delegates approved the *ABA Ten Principles of a Public Defense Delivery System*, which was drafted by the Standing Committee on Legal Aid and Indigent Defendants.¹¹⁵ The Principles were meant to serve as a condensed set of guidelines for those with the power and authority to manage existing or create new indigent defense delivery systems and mechanisms.¹¹⁶ As with most of the guidelines promulgated by the ABA, including those for the prosecution function and the Model Rules of Professional Conduct, the real substance of the rules lies in the accompanying commentary.

Principle 1 emphasizes the independence that the defense function should enjoy: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”¹¹⁷ While the standard itself never specifies what the defense function should be independent of, the comment explains that, as far as contract systems, “a nonpartisan board should oversee defender[s]” that are hired through contract and that selection of a defender should be made on merit.¹¹⁸

Principle 8 explains that there should be “parity between defense counsel and the prosecution with respect to resources and defense counsel [should be] included as an equal partner in the justice system.”¹¹⁹ The commentary for Principle 8 especially emphasizes the role of the contract defender: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.”¹²⁰

115. ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (AM. BAR ASS'N 2002), <https://www.nacdl.org/getattachment/49867dc1-1655-4337-9dfc-ce095ce544e8/aba-ten-principles.pdf> [<https://perma.cc/4EA9-UKVG>].

116. *Id.*

117. *Id.* at 1.

118. *Id.* at 2.

119. *Id.* at 3.

120. *Id.*

III. PERVERSE INCENTIVES AND LOWBALL DEFENSE

Smaller jurisdictions, often ones that may be defined as rural, exurban, or suburban, often rely on competitive bidding and contracting for procurement of a range of different legal services—from attorneys providing advice on the civil side of matters to indigent defense. “[N]onmetropolitan county governments and small municipalities generally struggle to provide all sorts of services and functions because of the inability to achieve economies of scale, and because they typically depend on local sales or property taxes, which are less robust than in urban locales.”¹²¹ While there have been an increasing number of scholars studying rurality and the law, the rural lawyer shortage, and rural indigent defense, few of those scholars examine this contracting and competitive bidding model of procuring indigent defense or the problems that might arise from either a professional responsibility or a public choice perspective. While many similar issues arise from competitive bidding for public defense contracts as in bidding for prosecutorial ones, one of the unique problems that arises in using competitive bidding for retaining indigent defense, particularly in a rural or small jurisdiction context, is the potential for what may be thought of as a form of noble cause corruption, as evident in the Lizzy Shelley case earlier described.¹²²

While those who dwell in urban settings may still harbor outmoded ideas regarding rurality, such as subscribing to rural dwellers the sort of simplicity of existence one might see in a television show like *The Beverly Hillbillies*, or the exceptional lawlessness of rural people in *Ozark* or *Justified*, rural American communities have broad legal needs that are expanding.¹²³ This includes a need for criminal defense services as the reach of the criminal legal system and its attendant outgrowths continue unabated in many places throughout the rural United States.

A. Samples of Indigent Defense RFPs

Without examining examples of the RFP language employed by local governments to both solicit and procure public defense services, it is difficult to understand why competitive bidding presents the problems it does. The following section provides different examples of recent RFPs used throughout the country. Inclusion of these RFPs does not necessarily

121. Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 501 (2014).

122. See *supra* Part I.

123. Pruitt & Showman, *supra* note 121, at 115.

indicate those who respond to and are hired in these respective examples are committing any unethical acts or providing anything less than constitutionally-mandated effective assistance.

1. Mukilteo, Washington

Mukilteo is a city in Snohomish County, Washington, not too far north of Seattle. As of the 2020 Census, its estimated population is 21,351.¹²⁴ In 2017, the City of Mukilteo, Washington released an RFP for public defender services.¹²⁵ Proposals were due on November 9, 2017 for a term to start on January 1, 2018 and end December 31, 2020, and renewable for an additional two years.¹²⁶ While the RFP describes the scope of services to be provided by the individual or law firm who wins the contract and makes reference to public defense services, there is, surprisingly, no section addressing what the appropriate qualifications of a bidder should be.¹²⁷

The section describing selection criteria appears to incorporate some of the standards found in the *Ten Principles of a Public Defense Delivery System*. The RFP draws on some of the guidelines from those standards, explaining that, “[t]he objects [sic] of these guidelines [for selection] is to alert the attorney to the course of action that may be necessary, advisable, or appropriate and thereby assist the attorney in deciding the particular actions that must be taken in a case to **ensure that the client receives the best representation possible**.”¹²⁸ According to the RFP, the city and the City Council are the ones who evaluate the RFPs that are received from private attorneys and law firms. While the RFP attempts to center quality representation as the primary selection criteria, the RFP also clarifies that in evaluating received proposals the city considers value.¹²⁹ The RFP explains that value means “the best qualified attorney(s) at a price typical for the provision of defense services in Snohomish County, Washington.”¹³⁰ While this definition of value does not explicitly say that the least expensive

124. *City and Town Population Totals: 2010-2020, Washington*, U.S. CENSUS BUREAU [hereinafter *U.S. Census Bureau Population Totals*], <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-cities-and-towns-total.html> [https://perma.cc/666X-AWB9].

125. Mukilteo Request for Proposal for Public Defender Services, CITY OF MUKILTEO (2017), <https://mukilteowa.gov/wp-content/uploads/MUKILTEO-RFP-FOR-PUBLIC-DEFENDER-SERVICES.pdf> [https://perma.cc/5MJE-8X69].

126. *Id.*

127. *See id.*

128. *Id.* (drawing on TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 113).

129. *Id.*

130. *Id.*

attorney will win the contract, it pits attorneys against each other in trying to establish a baseline for what an appropriate value would be.

2. *Maple Valley, Washington*

Maple Valley, Washington is a city in King County, with an estimated 2020 population of 27,544.¹³¹ It might best be considered an exurb¹³² of Seattle, and there are an increasing number of commuters who are coming to live in the city. The city of Maple Valley, Washington released an RFP seeking public defenders to provide indigent defense services in 2019.¹³³ The deadline for proposals to the city of Maple Valley was on December 9, 2019.¹³⁴ The city specified that it was going to contract with either solo practitioner law firms or associations of firms for public defender services.¹³⁵ The winners of the contract would appear on behalf of indigent defendants in Maple Valley Municipal Court.¹³⁶ The initial term was to begin on January 1, 2020 and would last three years, ending on December 31, 2022.¹³⁷ The RFP provides for a potential option to extend the contract on the mutual agreement of the parties, with no specific date mentioned.¹³⁸

The city provides very minimal selection criteria. It mentions it is seeking someone who can provide indigent defense services based on the guidelines that have been previously established by the Washington State Bar.¹³⁹ Interestingly, the list of preferred qualifications state very bluntly that the city will consider the reputation of specific individuals, without detailing the type of reputation for which they happen to be looking.¹⁴⁰ For example, this statement could mean a reputation for providing zealous indigent defense, or just a general good reputation in the local community.¹⁴¹ Attorneys submitting bids are informed that the winner of the contract will be compensated on an annual flat fee basis. The RFP

131. *U.S. Census Bureau Population Totals*, *supra* note 124.

132. While there are no settled definitions of exurbia, an article from CityLab put it simply as “deconcentrated towns flung far beyond the urban core and just outside the suburban spread . . .” Nate Berg, *Exurbs, the Fastest Growing Areas in the US*, CITYLAB (July 19, 2012, 10:25 AM), <https://www.bloomberg.com/news/articles/2012-07-19/exurbs-the-fastest-growing-areas-in-the-u-s> [<https://perma.cc/7VYG-U6R8>].

133. Maple Valley Request for Proposals for Public Defender Services, CITY OF MAPLE VALLEY, WASHINGTON (2019) (on file with author).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

specifies that, “[n]o additional fees, costs, charges, telephone fees, paralegal fees, delivery fees, or any other reimbursables expenses will be allowed.”¹⁴² This stipulation means that those submitting bids had to estimate all of their potential expenses before submission and that the winner of the bid would not be able to seek reimbursement beyond the flat fee that they detailed in their proposal. Because the procuring of public defender services in Maple Valley is being furnished through a competitive bidding system, attorneys who wish to become the public defender will likely have to undercut each other in their estimations of how much they will charge for an entire year of their services.

3. *Shoshone County, Idaho*

Shoshone County is located in the state of Idaho at the northern end of the state, in its upper panhandle. Its estimated population as of 2020 is 12,911 people.¹⁴³ Its largest city is Kellogg, with an estimated 2020 population of around 2,130, while the county seat is in Wallace, with a population of 778.¹⁴⁴ The Idaho Panhandle occupies a unique place in intermountain western history and culture; it is isolated from the rest of the state of Idaho given both its distance and topography.

Shoshone County was recently accepting proposals from both attorneys and law firms to provide indigent defense services on a contractual basis.¹⁴⁵ It is perhaps unsurprising that Shoshone County would not be able to fund a public defender system of its own, given its small population and likely poor tax base. As often seen in RFPs from smaller jurisdictions, the language of the RFP is less standardized than what you might see in larger cities and counties. The Shoshone County RFP does not specify a deadline date, nor does it specify much in the way of required qualifications.¹⁴⁶ The RFP requires that attorneys who seek to be awarded the contract be members in good standing with the Idaho State Bar with no other required qualifications; experience in criminal defense was preferred but not required.¹⁴⁷

The county’s RFP is particularly interesting in comparison to some others: it offers three types of matters on which indigent defenders could

142. *Id.*

143. *U.S. Census Bureau Population Totals, supra* note 124.

144. *Id.*

145. *See* Shoshone County Public Defender Request for Proposal, COUNTY OF SHOSHONE (2019), <https://shoshonecounty.id.gov/wp-content/uploads/2019/02/Public-Defender-RFP-Final-Draft-February-2019.pdf> [<https://perma.cc/BGD3-AFA6>].

146. *See id.*

147. *Id.*

choose to bid.¹⁴⁸ In the RFP, there is a felony representation contract, a misdemeanor contract, and a juvenile court defender contract. Under the felony contract an attorney would “represent all persons charged with one or more felony offenses together with related misdemeanor offenses. [The] contract will also provide conflicts representation.”¹⁴⁹ Attorneys who opt for the misdemeanor contract would “represent all persons charged with misdemeanor offenses only. [The contract also covers] conflicts representation.”¹⁵⁰ Finally, the juvenile defense contract provides that the winner of the contract “represent all juveniles charged with juvenile offenses, individuals subject to child protective act proceedings, mental health commitment proceedings, and all other proceedings for which an indigent person is entitled to appointed counsel other than” as provided in the felony or misdemeanor contract.¹⁵¹

Also of interest in this particular RFP is that two fee proposals were permitted.¹⁵² The first was to bid for a contract with Shoshone County where compensation could be up to \$75,000 a year based on caseload.¹⁵³ An attorney could also elect, rather than to work on contract, to become an employee of the county, with a full benefits package including retirement health reimbursement plans and health insurance. If an attorney decided to proceed as a contractor, they would necessarily need to place a bid using a flat fee compensation estimate, which would include estimating all costs even apart from an attorney’s labor for inclusion in the contract price.¹⁵⁴ The county’s RFP also offers multiple options regarding contract length. These include contracts coinciding with the county’s fiscal year from October through September and has short six-month contracts from April to September of 2019. There are, however, no provisions for mutual renewal of a contract upon commendable performance. The Board of County Commissioners is responsible per the RFP to choose attorneys to win contracts.¹⁵⁵

4. *Winder, Georgia*

Winder, Georgia is the County seat of Barrow County to the East of Atlanta. Winder is considered part of the Atlanta Metro area but has a rather

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.*

155. *Id.*

small population of about 18,273 as of 2020.¹⁵⁶ Winder very recently advertised for a new public defender by issuing a request for qualifications rather than a request for proposal, even though the web page on which this request may be found is entitled “RFP Posts.”¹⁵⁷ The qualifications required in Winder are minimal, as they have been in some of the other examples given in this Article. Winder requires applicants to have a juris doctor degree, to be licensed in the state of Georgia to practice law, and to have been practicing for six months. The term of the public defender contract lasts only a year but includes the caveat that it is subject “to renewal at the will of the City Council of Winder.”¹⁵⁸ In this sense, the City Council of Winder asserts itself as the boss of its public defenders.

Court is held once a week in the city of Winder every Friday at 8:00 a.m.¹⁵⁹ That court can be limited to only one day a week is a testament to how small Winder must be. In its request for qualifications, the city clarifies its position on compensation: “the city will compensate the selected public defender \$60 per hour for time spent in court and \$45 per hour for out of court time.”¹⁶⁰ While this presents a more transparent explanation of potential remuneration for services rendered than other RFPs discussed thus far in this Article, the billable rate is exceptionally low.

5. *White Pine County, Nevada*

White Pine County, Nevada is located along the eastern boundary of Nevada. The population of the County is estimated to be 9,466 as of 2020.¹⁶¹ Much of the land in White Pine County is undeveloped because it is the home of Great Basin National Park and a number of federally designated wilderness areas as well as other protected federal lands. The county seat of White Pine County is Ely, with an estimated 2020 population of 4,014.¹⁶² Ely was once a stop on the Pony Express.¹⁶³

Nevada is among the states like Utah and Pennsylvania that uniquely require cities and counties to devise methods for securing indigent defense

156. *U.S. Census Bureau Population Totals*, *supra* note 124.

157. *See RFP Posts*, CITY OF WINDER, <https://www.cityofwinder.com/Home/Components/RFP/RFP/54/> [<https://perma.cc/7A4E-QSDW>].

158. Winder Request for Proposals for Indigent Defense, CITY OF WINDER (2019), <https://www.cityofwinder.com/home/showpublisheddocument/5354/637425985285500000> [<https://perma.cc/A4X6-9ZEX>].

159. *Id.*

160. *Id.*

161. *U.S. Census Bureau Population Totals*, *supra* note 124.

162. *Id.*

163. *See SARAH JANE BLITHE, ANNA WIEDERHOLD WOLFE & BREANNA MOHR, SEX AND STIGMA: STORIES OF EVERYDAY LIFE IN NEVADA’S LEGAL BROTHELS* 58 (2019).

services for criminal defendants. While many states have seen devolution of constitutional responsibilities to local governments as a panacea of sorts, in Nevada, this has led to wild variances in the quality of representation available to indigent defendants depending on where they live and where they are charged.¹⁶⁴ As detailed by the Sixth Amendment Center, “[t]he state of Nevada has no method of ensuring that its local governments meet the state’s constitutional obligations.”¹⁶⁵ Rather than being given any guidance with regard to standards for public defense and how to procure such services, cities and counties are left to their own devices.¹⁶⁶ While larger inner cities and counties may be able to take advantage of economies of scale to establish larger public defense offices, those in rural Nevada that are exurban, rural, or smaller face a much heavier burden in cobbling together effective public defense without resources and without standards.¹⁶⁷

This lack of direction from the state or any other centralized agency is more than apparent in the RFP from White Pine County. The County recently released an RFP with a deadline of February 22, 2019. The RFP seeks individual attorneys or law firms to provide public defender services in 2020 and 2021. The public defender hired through the competitive bidding process was expected to handle the following kinds of cases:

1. Any criminal case arising in Ely Justice Court and the Seventh Judicial State District Court;
2. Ely State Prison and Honor Camp¹⁶⁸ cases;
3. 432B¹⁶⁹ cases with the Division of Child and Family Services;

164. See generally SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN RURAL NEVADA: EVALUATION OF INDIGENT DEFENSE SERVICES (2018), https://sixthamendment.org/6AC/6AC_NV_report_2018.pdf [<https://perma.cc/C4G9-H8A5>].

165. *Id.* at 47.

166. *Id.*

167. See *id.*

168. The term “honor camp” may be used interchangeably in Nevada with “conservation camp.” There are nine conservation camps that operate in the state of Nevada. See *Conservation Camps*, NEV. DIV. OF FORESTRY, <http://forestry.nv.gov/ndf-conservation-camps/> [<https://perma.cc/MR2S-TN32>].

The conservation camp in Ely “has two full time teachers who help the inmate population earn a G.E.D. or high school diploma” while the forestry department “helps to train the inmates in a variety of skills, including: fire fighting, mechanics, fence rebuilding, concrete work, and building remodeling.” *Ely Conservation Camp (ECC)*, NEV. DEP’T OF CORR., https://doc.nv.gov/Facilities/ECC_Facility [<https://perma.cc/R9EU-W632>]. Conservation camp detainees are offered anger management classes, financial literacy classes, and other courses on reintegrating with the general population after their sentences have been served. *Id.*

169. “432B cases” are those related to child abuse and neglect. See NEV. REV. STAT. §§ 432B.010 to 432B-178 (2020).

4. Appeals from Ely Justice Court to the Seventh Judicial District Court;
5. Appeals from the Seventh Judicial District Court to the Nevada Supreme Court;
6. Drug Court;
7. Pre-Conviction and/or Post-Conviction Habeas Corpus cases;
8. Death Penalty cases;
9. Motion in Limine;
10. Civil Commitment; Competency Hearings.¹⁷⁰

The very breadth of cases to be covered by this public defender is rather intimidating. The only qualifications that are detailed by the RFP include that the attorneys should be White Pine County resident attorneys and should have malpractice insurance.¹⁷¹ For those handling death penalty matters, they must be death penalty qualified. The RFP asks that proposals “detail the scope of work and types of cases to be handled, total contract price, types of cases and situations in which additional fees may be requested.”¹⁷² Based on these very minimal guidelines, it appears clear that cost savings, efficiency, and value are likely the most important criteria by which White Pine County would determine the winner of the indigent defense contract.¹⁷³

6. *Cache County, Utah*

Cache County, Utah is located along the northern border of Utah with Idaho between two other largely rural counties, Box Elder County and Rich County. The most recently estimated population of Cache County is 130,004.¹⁷⁴ Its county seat, Logan, is not necessarily a small town, yet much of the County surrounding Logan has rural attributes, with many residents considering themselves to be rural.

The practice in Cache County, as in many other rural and exurban counties in Utah, has been to procure indigent defense services through

170. *White Pine County Request for Proposal*, WHITE PINE CNTY. (2019), <https://www.whitepinecounty.net/DocumentCenter/View/4079/RFP-for-Public-Defender-Services-Jan-2019?bidId=> [<https://perma.cc/VPK3-TCYU>].

171. *See id.*

172. *Id.*

173. *See id.*

174. *U.S. Census Bureau Population Totals*, *supra* note 124.

contracts and competitive bidding.¹⁷⁵ Utah is also one of the states mentioned previously in this Article that has devolved its responsibility to provide and fund indigent defense services to local governments like cities, counties, and towns.¹⁷⁶ In Cache County, the conflicts of interest that can arise by using a competitive bidding system for indigent defense are more readily apparent, perhaps, than in any of the previous examples. In Cache County, the elected County Attorney is responsible not only for prosecuting criminal cases in state court, but also for representing the county in civil matters and providing advice to the county in its procurement and purchasing procedures and decisions,¹⁷⁷ including those relevant to the choice of who wins a public defense contract.¹⁷⁸ While Utah recently established an indigent defense commission, it has been longstanding practice in Cache County for prosecutors to provide feedback to county commissioners on defense counsel performance. In this sense, defense attorneys in Cache County hired by way of competitive bidding face unusual degrees of prosecutorial interference, not only in the way they secure their contracts, but also in deciding whether those contracts are renewed. This, of course, along with working on a flat fee basis, creates a number of incentives to dispose of cases in summary fashion and to stay on the good side of prosecutors, county commissioners, and any of the members of the public who might complain to either of those two groups.

Utah also happens to be unique in that its recently formed indigent defense commission has been focusing on issues affecting its exurban and rural counties, though making slow progress.¹⁷⁹ This focus is necessary given the historic underfunding public defenders throughout the state. Depending on the individual county, the amount spent per capita an indigent defense may seem barely adequate to unconstitutionally scanty. By estimates from 2019, Juab County—also in Utah—spent \$40.48 on indigent defense per County resident. Cache County in contrast spent about one-tenth of that, at \$4.18 per resident.¹⁸⁰ Yet Cache County was not the worst when looking at per capita spending. Box Elder County only spent \$3.90 per resident, while Morgan County only spent an unbelievable \$1.31 per

175. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES 46, 50–54 (2015) [hereinafter SIXTH AMENDMENT CENTER UTAH REPORT], https://sixthamendment.org/6ac/6AC_utahreport.pdf [<https://perma.cc/W5TQ-SFAM>].

176. *Id.* at 66.

177. *Attorney's Office*, CACHE CNTY., <https://www.cachecounty.org/attorney/> [<https://perma.cc/5U6C-B5P3>].

178. *Id.*

179. *See About the Utah Indigent Defense Commission*, UTAH INDIGENT DEF. COMM'N, <https://idc.utah.gov/about> [<https://perma.cc/LA4L-YLTQ>].

180. UTAH INDIGENT DEF. COMM'N, 2018 ANNUAL REPORT (2018) <https://idc.utah.gov/wp-content/uploads/2019/02/2018-Annual-Report-IDC.pdf> [<https://perma.cc/MFU2-YJCS>].

resident.¹⁸¹ With such paltry spending and with flat fee contracts, the Sixth Amendment Center has explained the following:

[T]he attorney is hurt financially the more he does for his clients. Put another way, the government's compensation structure creates a conflict between the lawyer's financial interests and the case-related interests of each of his court-appointed clients. As a result of that conflict, the lawyer may triage the time and injury he puts into his cases.¹⁸²

B. Self-Dealing

The Sixth Amendment Center's Utah report on access to indigent defense counsel provides two quotations that very vividly illustrate the economic pressures and realities that defense counsel burning under competitively bid contracts face every day:

"If you do a trial, you're hurt because you have to prepare. So I do a lot of motions practice."¹⁸³

"Things happen quickly. . . . I can't say I'm able to meet with every client in the jail. But they can always call me for free."¹⁸⁴

While this Article does not presume malfeasance or unethical conduct on the part of any public defender who secured their position by engaging in competitive bidding and winning a contract for themselves, it does argue that financial interests, economic opportunities, the need to have a stable living, and other personal concerns can potentially warp defense priorities just as you might see in law enforcement.¹⁸⁵ As described in the first Article in this series, "The goal of private enterprise—to make a profit—is antithetical to the fundamental goals of public programs—to deliver services equitably, honestly, and cost efficiently."¹⁸⁶

The same dangers, or at least similar ones, are likely to arise when indigent defense services are procured on a competitive bidding basis, as with the prosecution function.¹⁸⁷ The difference in the insidious economic, personal, and institutional incentives placed on public defenders when using

181. *See id.*

182. SIXTH AMENDMENT CENTER UTAH REPORT, *supra* note 175, at 66 n.179.

183. *Id.* at 66 n.180.

184. *Id.* at 66.

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

186. Romero, *supra* note 62, at 197 (quoting Al Bilik, *Privatization: Selling America to the Lowest Bidder*, 1 LAB. RSCH. REV. 1, 2 (1990)).

187. Romero, *supra* note 62, at 198–201.

such a system is that public defenders and their relationships with their clients form one of the most basic constitutional rights that is guaranteed under the Sixth Amendment. The defense attorney-client relationship is the only one that is discussed or contemplated in the text of the Constitution. Given the fundamental nature of this right, if there should be any disparity in funding between prosecution and defense, it should categorically be weighted in favor of the defense. Again, while this Article is meant to better elucidate the challenges as well as the disadvantages of hiring public defenders through the competitive bidding process, it should also be acknowledged that many other perverse incentives are introduced to the job through other procurement means, such as appointment or even election.

This Article is also premised on the normative assumption that defense counsel are ethically obligated to be zealous advocates for their clients, as mandated under standard 4-1.2 of the ABA's criminal justice standards for the defense function.¹⁸⁸ Having to engage in competitive bidding to secure defense contracts can potentially flout this standard in a number of ways. Rather than the focus being zealous representation of clients, defense counsel may feel additional pressure to satisfy the standards not set by the ABA or other prevailing defender organizations, but those by the body awarding the contract. What if a County Council, a mayor, or a County Executive has been elected on the basis of a "tough on crime" agenda? Providing zealous representation to a client who has been accused of an infamous crime or who may already be unpopular in a community may be especially difficult in a rural setting using competitive bidding where one's job may be on the line.

It may also be especially difficult to cobble together a living as a rural practitioner. As has been documented in her work, Hannah Haksgaard explains that defense counsel and others who are appointed by courts to represent clients in rural communities are paid exceptionally low hourly rates.¹⁸⁹ It would be foolhardy to think that rural criminal defense attorneys are not motivated by their own personal situations and economic needs. Competitive bidding and encouraging attorneys to outcompete one another by undercutting to provide the most lowball offer may lead to the winner of the contract providing the most lowball defense. Those working on a flat fee basis will do as little as possible on each case, knowing that they will not be paid any more for additional effort. Those who are hired on the basis of a flat yearly fee will also try to do as little as possible, such that they can supplement their incomes with more lucrative private defense work or even

188. CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES 4-1.2 (AM. BAR ASS'N 2017).

189. See Haksgaard, *supra* note 109, at 113–115.

other civil litigation and transactional work. Rural defense counsel may even amass several public defender contracts within a region of their state. This practice becomes much more workable and financially lucrative the less time the attorney devotes to each public defense contract. By partially privatizing the public defense function, the main focus can become revenue generation for the attorney providing services and cost savings for the local government paying for them. Attorneys who are able to work with greater independence can act as more devoted and zealous advocates for their clients. On the other hand, counsel who are dependent on prosecutors, the whims of local government, and members of the public may have a “much harder time fighting back against both excessive caseloads and other violations of their clients’ rights.”¹⁹⁰

C. Challenges in Professional Formation

Rural local governments employing competitive bidding as a strategy for fulfilling their obligations to provide indigent defense also undermine the sort of public defense culture in professional formation necessary and helpful for defense counsel in zealously representing their clients. Ideally, a public defense culture will be client-centered and will “encourage defense attorneys to vindicate their clients’ rights and [] foster an environment in which threats to independence are not tolerated.”¹⁹¹ Competitive bidding and encouraging defense counsel to undercut one another in an effort to secure contracts prevents the formation of practice norms among these lawyers and hinders them from making professional connections with one another. If anything, such a procurement process encourages underhandedness, dishonesty, and distrust between competing criminal defense counsel. The divide and conquer culture that is inculcated by use of competitive bidding works against the interests of indigent clients. “[C]hanging culture is a long and often difficult process,” and it is certainly not assisted by structures such as competitive bidding.¹⁹² While public defenders are, generally, anti-authoritarian,¹⁹³ they will certainly be more inclined to cooperate with the state when it serves as both their opposition and their boss when dealing with indigent defense services that are provided under contract.

190. Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES, 147, 169–72 (2020).

191. *Id.* at 196.

192. Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 200 (2008).

193. Pamela Metzger & Andrew G. Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1077 (2015).

In their Article *Defending Data*, Pamela Metzger and Andrew Guthrie Ferguson explained that the creation of a public defense culture with “shared goals and a shared terminology are important” and that for the good of those accused of crimes, a data driven culture accepting of “data-collection, error reporting, and an evidence-based feedback loop for outcome-improving reforms” is a goal that all defense systems should strive for.¹⁹⁴ Competitive bidding not only disincentivizes manifesting this culture into reality, but also prioritizes reaching the exact opposite of these goals.

D. Noble Cause Corruption

While a number of scholars have explored some of the ramifications of privatizing the public defense function, this Article is the first to argue that doing so may be a driver of noble cause corruption in public defense offices, especially those in rural America. The concept of “noble cause corruption” has been used to describe a certain type of police behavior whereby officers “violat[e] legal procedures for the sake of obtaining an outcome they see as just.”¹⁹⁵ This theory delineating one of the drivers of police misconduct and violence has, understandably, received fresh pushback and critique given the greater recent public attention given to police violence in the wake of the police killings of George Floyd and Breonna Taylor among, tragically, many others in 2020.¹⁹⁶ Some of this pushback is because the theory of noble cause corruption, to some extent, excuses police misconduct in that much of the literature “characterizes police explanations for such illegal behavior as reflecting a genuine ethical dilemma, rather than as a rationalization or form of moral disengagement.”¹⁹⁷

194. *Id.* at 1110.

195. Rachel Wahl, *Justice, Context, and Violence: Law Enforcement Officers on Why They Torture*, 48 LAW & SOC’Y REV. 807, 814 (2014).

Recently published books on end and means policing addressing noble cause corruption still accept that primary rationale of policing as something that is arguable or laudable. A 2019 example states that “Policing is a highly pragmatic occupation. It is designed to achieve the important social ends of peacekeeping and public safety” JOHN KLEINIG, *END AND MEANS IN POLICING*, at i (2019).

196. Toby Miles-Johnson, Suzanna Fay & Susann Wiedlitzka, *Policing Minority Communities: How Perception of Engagement and Level of “Awareness” Influence Officer Attitudes toward Practice*, 10 SOC. SCI. 1, 7 (2021); Harmeet Kaur, *Videos Often Contradict What Police Say in Reports. Here’s Why Some Officers Continue to Lie*, CNN (June 6, 2020, 8:55 AM), <https://www.cnn.com/2020/06/06/us/police-reports-lying-videos-misconduct-trnd/index.html> [<https://perma.cc/7F38-Y5TA>]; Jordan Culver, *Devin Brosnan Likely Won’t Break ‘Blue Wall of Silence’ to Testify Against Garrett Rolfe. Here’s Why Police Stick Together.*, USA TODAY (June 18, 2020, 7:11 PM), <https://www.usatoday.com/story/news/nation/2020/06/18/rayshard-brooks-officer-devin-brosnan-testify-against-garrett-rolfe/3211966001> [<https://perma.cc/CBD4-LTY6>].

197. Wahl, *supra* note 195, at 814. See also John Kleinig, *Rethinking Noble Cause Corruption*, 4 INT’L J. POLICE SCI. & MGMT. 287 (2002).

1. Noble Cause Corruption in Law Enforcement

“Noble cause corruption,” while existing as a concept since at least the 1930s, gained traction in policing literature starting in the 1970s.¹⁹⁸ Early versions of this theory posited that rather “than being socialised into a moral corruption, police officers entered the force already endowed with the capacity to ignore procedural guidelines to achieve what was perceived to be a ‘good end.’”¹⁹⁹ Now, there is greater disagreement as to whether “individual predisposition” is the most important factor in the rise of noble cause corruption or whether it is a police department’s organizational culture.²⁰⁰

Under either paradigm, however, what makes noble cause corruption a unique form of corruption is that, in theory when applied to policing, it springs from a different impulse than abusing authority for personal gain—rather, noble cause corruption “is the abuse of authority on behalf of the public good.”²⁰¹ Troublingly, because the impetus for noble cause corruption is argued to arise from something apart from person gain, such an explanation has been used to characterize “police explanations for such illegal behavior as reflecting a genuine ethical dilemma,”²⁰² rather than the after-the-fact rationalization it really may be. In this sense, noble cause corruption has been used to trivialize police misconduct by painting it as borne of good intentions. As Rachel Wahl explained,

One textbook intended for police officers in training describes noble cause corruption as what happens when police seek to “get bad guys off the street and protect the innocent.” According to the [textbook] authors, such corruption can result when police “care too much about their work” and are motivated by the belief that “the outcome will be good[.]”²⁰³

Police are not, however, the only agents in law enforcement who are prone to noble cause corruption or rationalizations. Prosecutors, too, very likely engage in a similar “naïve form of ethical reasoning.”²⁰⁴ In studies

198. Jonathon A. Cooper, *Noble Cause Corruption as a Consequence of Role Conflict in the Police Organization*, 22 POLICING & SOC’Y 169, 170 (2012).

199. *Id.*

200. *Id.*

201. Major Marlin D. Paschal, *Getting Beyond “Good Enough” in Contingency Contracting by Using Public Procurement Law as a Force to Fight Corruption*, 213 MIL. L. REV. 65, 83 (2012).

202. Wahl, *supra* note 195, at 814.

203. *Id.* (quoting MICHAEL A. CALDERO & JOHN P. CRANK, *POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE* 3 (3d ed. 2010)).

204. Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243,

examining career motivations of prosecutors, several driving factors—apart from directly personal factors—have been identified, including forming and expressing a professional identity, gaining trial and other litigation skills for future positions, having a work-life balance that might not be found in private practice, and performing a valuable public service.²⁰⁵ To some prosecutors, that valuable public service is “promoting crime control and community safety” as an ideal held in higher esteem than merely enforcing the law for the law’s sake.²⁰⁶ In their Article on the motivations of state prosecutors, Professors Ronald Wright and Kay Levine interviewed prosecutors who saw themselves serving the community in a variety of fashions. Some identified specifically with helping crime victims,²⁰⁷ while others made the laudable connection that defendants are members of communities as well and that, to some extent, “prosecutors must look out for the defendant’s interests too.”²⁰⁸

2. Noble Cause Corruption Among Rural Public Defenders

While competitive bidding in the defense context often focuses, very clearly, on a prospective contractor outbidding their competitors by offering the lowest monetary bid to a local government, deemphasizing the price of services and focusing on other aspects like experience and community engagement potentially introduces informal considerations into the competitive bidding process. For example, what is the prospective defense attorney’s reputation around town? Are they friends with members of a county counsel? These informal considerations may be heightened, especially in the rural context where close relationships and historical dealings between people are often more important than they may be in larger and, therefore, more anonymous jurisdictions.

The rural setting is particularly rife with the sort of personal interrelatedness that more easily gives way to the sort of noble cause corruption this Article describes. There is a certain “[I]ack of anonymity and an accompanying diminution of privacy” that are the “consequences of the high density of acquaintanceship that tends to mark rural places.”²⁰⁹ These

1273 (2011) (citing Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL. 63, 64 (2007)).

205. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1680–1702 (2018).

206. *Id.* at 1689.

207. *Id.*

208. *Id.* at 1690.

209. Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 489.

community ties—and the concern that rural public defenders hired by contract may have for maintaining them—could lead to its own unique form of corruption.

What does this Article mean when using the word “corruption?” Even apart from the term “noble cause corruption,” it is instructive and useful to consider descriptions of the word “corruption.” The word itself has come to be infamously difficult to define. “Some social scientists and other writers have proposed to define corruption by describing the types of actions that may be characterized as corrupt.”²¹⁰ When speaking of the broader concept of corruption and how it might apply to the motivations of defense attorneys hired on by way of competitive bid, it is useful to start with “the classic definition of corruption. Corruption in its classic sense describes something that has become impure or perverted.”²¹¹ In speaking of corruption that may plague rural public defenders, this Article examines a concept more subtle than other forms of “corruption” that may come immediately to mind when one hears that word, such as bribery or nepotism.

Noble cause corruption is generally rooted in “the notion that the end justifies the means.”²¹² In rural settings, especially, it can become very difficult to see, let alone understand, why noble cause corruption should be both shunned and rooted out, especially as applies to public defense. What might that noble cause corruption look like in the rural public defender setting? Look at the case of Lizzy Shelley, described in the Introduction above. Criminal defense at its heart should be an individualistic pursuit in a sense: defense counseling involves a multitude of ethical and fiduciary duties to a client that should remain undivided and unassailable. Mr. Demler, in providing his services, seemed to forget about those duties owed, and instead focused on the communitarian good and what was good for Lizzie Shelley’s family, rather than his own client. Rather than taking the time that he should have to investigate possible affirmative defenses, understand his client’s background better, or obtain greater clarity as to his client’s mental or emotional health, Mr. Demler resolved the case in a fashion most efficient under the circumstances of working a flat yearly fee contract, but was also able to attract positive attention to himself to benefit his more lucrative private practice.²¹³

210. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 799 (1985).

211. Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 464 (2015). See also Richard Mulgan, *Aristotle on Legality and Corruption*, in CORRUPTION: EXPANDING THE FOCUS 25 (Manuhua Barcham et al. eds., 2012).

212. Donald J. Sorochnan, *Wrongful Convictions: Preventing Miscarriages of Justice Some Case Studies*, 41 TEX. TECH L. REV. 93, 98 (2008).

213. See ABC4 Utah, *Attorney for Alex Whipple Speaks*, FACEBOOK (May 29, 2019),

Noble cause corruption, however, is a very special kind of corruption. It is not, at least not consciously, rooted in a desire to benefit oneself so much as the manifestation of teleological justifications for actions taken. Defense counsel who fall sway to noble cause corruption may have the desire to represent their clients in a competent and zealous fashion, but they may also do less than they should, reasoning that there may be no point or that doing so may be harmful to their clients.

In the Lizzy Shelley example, one may very well argue that, given the cultural and political landscape of Cache County, Utah (which is generally conservative and prosecution friendly) Mr. Demler may not have been able to secure a better result for his client than that which he got using the techniques and deals that he did. When local attention by way of the town newspaper focused on the defense system being used in Cache County and the functionality of competitive bidding, another one of the contract public defenders, David Perry, explained that he found the compensation “adequate,” stating that “I feel the county has been fair to me. Obviously we could increase the public defender budget though; that would probably ensure that all defendants are represented properly—but currently I think we are.”²¹⁴

CONCLUSION

Those who study and advocate for reform of the criminal legal system often joke amongst themselves at workshops and panel presentations that many of the injustices in the system could be solved if there were “a giant pile of money,” inexhaustible and available for all reformist efforts. Unfortunately, many criminal legal systems, especially those located in the rural United States, are drastically under resourced and must find ways to make do. While many local governments, including rural ones, have had a large amount of state responsibility delegated to them that they have been able to efficiently fulfill using competitive bidding, public defense categorically should not be one of these delegated responsibilities. While one may argue that no legal services at all should be put up for competitive bid, the public defender function is different—it is the only attorney role that is contemplated in the Constitution, and without access to counsel, it is

<https://www.facebook.com/abc4utah/videos/368841527083860>.

214. Amy Macavinta, *County to Add Another Public Defender Due to Legislation and State Scrutiny*, HERALD J. (Dec. 5, 2015), https://www.hjnews.com/allaccess/county-to-add-another-public-defender-due-to-legislation-and-state-scrutiny/article_1ae70b55-ed28-5609-88fd-bb7d62a1d408.html [https://perma.cc/4RRL-43CD].

nearly impossible for most criminal defendants to avail themselves of their other rights.

To this end, this Article illuminates the problems of public defense that are unique in the rural setting and in particular with competitive bidding. Using competitive bidding to procure indigent defense services introduces a host of potential conflicts of interests, divided loyalties, and dilutes or even eliminates the public defender culture so beneficial to professional formation when providing indigent defense services. By understanding this sort of behavior as a form of corruption—noble cause corruption—this Article gives this constellation of behaviors a name and elevates them to the serious status of unethical conduct that it has merited all along. In fully recognizing these various problems inherent to using competitive bidding to secure public defender services, it is this Article's intent to assist those who choose what procurement system and what public defense system their local government adopts in making the best and most fully informed decision for their community.