

Roger Williams University

DOCS@RWU

Law Faculty Scholarship

Law Faculty Scholarship

2006

Police Prosecution in Rhode Island: The Unauthorized Practice of Law

Andrew Horwitz

Roger Williams University School of Law

John R. Grasso

Roger Williams University School of Law

Follow this and additional works at: https://docs.rwu.edu/law_fac_fs



Part of the [Criminal Procedure Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Andrew Horwitz and John R. Grasso, "Police Prosecution in Rhode Island: The Unauthorized Practice of Law," *Rhode Island Bar Journal*, 5 (May/June 2006)

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

***5 POLICE PROSECUTION IN RHODE ISLAND: THE UNAUTHORIZED PRACTICE OF LAW**

Andrew **Horwitz**, Esq, John R. **Grasso** [\[FNa1\]](#)

Copyright © 2006 by Andrew Horwitz, Esq, John R. Grasso

Every day in Rhode Island, police officers are practicing law without a license in both the District Court and the Traffic Tribunal. They do so with the full stamp of approval of the judges before whom they appear, despite the fact that the unauthorized practice of law is a crime in Rhode Island, as it is in every other state in the country. While one can certainly speculate about reasons why this practice has developed, there is nothing in any published decision of the Supreme Court of Rhode Island or in any state statute that appears to permit or justify it. And, although the vast majority of police prosecutors in Rhode Island are dedicated and highly qualified public servants who do their jobs in good faith and to the best of their abilities, the fact remains that it is a highly problematic practice to allow police officers, who are not licensed attorneys, to prosecute criminal and traffic cases. After first explaining the various ways in which police officers routinely engage in the unauthorized practice of law in the District Court and the Traffic Tribunal, the authors explore a few of the many reasons why this unlawful practice is simply bad public policy.

At the outset, it is important to recognize the vital role a public prosecutor plays in protecting the public, the defendant, and the criminal justice system as a whole. While it may seem superficially harmless to entrust a misdemeanor or traffic prosecution to a police officer, that delegation of responsibility completely ignores the prosecutor's vital role. A prosecutor exercises enormous discretion -- discretion that is essentially unreviewed and unreviewable -- in handling criminal or traffic cases. The proper exercise of that discretion is dependent upon a number of factors, not the least of which include legal training and ethical obligations. Indeed, the criminal justice system functions almost entirely on a presumption that the extraordinary power of the government, as wielded through a prosecutor, is being applied fairly and justly. This presumption is founded on the fact that the prosecutor is an attorney who, having been licensed to practice law in the jurisdiction, is fully trained in the law and bound by the code of legal ethics governing attorney conduct. The licensing process also assures a prosecuting attorney has passed a screening with respect to honor and integrity and that he or she has sworn obedience to a code of legal ethics. The fact that a prosecuting attorney is subject to the threat of professional discipline if he or she violates any of the relevant ethical obligations, provides further assurance that a prosecuting attorney will faithfully execute the duties of his or her office in a fair and just fashion. When the person who prosecutes a criminal or traffic case is not a licensed attorney, none of these protections or assurances is in place, and the legal presumption that prosecutorial discretion is being exercised fairly is entirely unfounded.

The following points detail some of the many reasons why, even if one were to assume that a prosecuting police officer were as legally competent as a prosecuting attorney and as obedient to all of a prosecuting attorney's ethical requirements, several troubling issues still remain. In Rhode Island, we elect an Attorney General to carry out the prosecutorial function for the State. As our duly elected public prosecutor, he or she is charged with the responsibility of prioritizing the use of prosecution resources and

determining fairness on an individualized basis. Ultimately, he or she is answerable to the electorate. The public prosecutor's failure to perform these roles, either directly or through his or her staff, constitutes an entirely unjustified delegation to an individual police department that is not directly accountable in any fashion. Moreover, there are problems in terms of the appearance of justice in courts in which police officers serve as prosecutors. When a prosecuting attorney fails to appear to prosecute a criminal case, the message conveyed is the case is not of any particular importance -- certainly not the message our criminal justice system ought to be conveying. By failing to distinguish between the functions of the police department and the functions of a prosecutor's office, the practice suggests the existence of an unsupervised police state. In addition, allowing a layperson to practice law, an act that is illegal in every state in the country, the practice condones illegality at the same time that it purports to be enforcing the law.

Daily Practice in the District Court and the Traffic Tribunal

On any given morning in the Rhode Island District Court, dozens and sometimes hundreds of criminal defendants are arraigned on criminal charges. In each of those cases, the defendant is arraigned on a criminal complaint that has been drafted by a police officer, not by a licensed attorney. [\[FN1\]](#) Prior to the arraignment, particularly in misdemeanor cases, there is typically some conversation or negotiation that takes place between the prosecuting police officer and the defendant's lawyer or, much more frequently, the unrepresented defendant. At the arraignment, the government is represented by a police officer, not a licensed attorney, and in the case of misdemeanor offenses, the case is frequently resolved with some sort of a plea. The Court will generally ask the police prosecutor for a sentencing recommendation or, if the case is not resolved, for ***6** a recommendation with respect to bail. Those recommendations are made without any input from a licensed attorney. If a misdemeanor case is not resolved, it is scheduled for a pre-trial conference date. On that date, depending upon the city or town prosecuting the case, it is quite likely that the government will once again be represented in the negotiation phase and before the Court by a police prosecutor who is not licensed to practice law. In some settings, that representation occurs under some form of supervision by a licensed attorney, but frequently that is not the case. In many cities and towns, a licensed attorney will review the case if, and only if, the case is scheduled for trial. Under current practice in District Court, police prosecutors who are not duly licensed to practice law are not permitted to represent the government at trial.

The situation is similar at the Rhode Island Traffic Tribunal, with the notable exception of what occurs at the trial stage. As in District Court, the case is initiated with a summons drafted by a police officer who is not licensed to practice law. The government is represented by a police officer at the arraignment stage, not only for purposes of appearing before the court, but also for purposes of negotiating dispositions with unrepresented defendants and with defense counsel. If the case is passed for trial, with the exception of chemical test refusal cases, which are prosecuted at trial by the Department of the Attorney General, the government will be represented by the individual police officer who wrote the summons. That officer will generally be permitted not only to testify, but also to cross-examine defense witnesses, make arguments to the court, and make sentencing recommendations if a charge is sustained. If, as frequently occurs, the defendant is not represented by counsel, the trial proceeds and concludes without a licensed attorney ever having looked at the case.

What Constitutes the Unauthorized Practice of Law

As the Supreme Court of Rhode Island noted in 1935 "[that] the practice of law is a special field reserved to lawyers duly licensed by the court, no one denies." [\[FN2\]](#) Although "the definition of the practice of law and the determination concerning who may practice law is exclusively within the province" of the Supreme Court,

legislature clearly has the power to “declare acts of unauthorized practice of law illegal and punishable by fine or imprisonment, or both.” [\[FN4\]](#) In General Laws Title 11, Chapter 27, the legislature has done just that. [Rhode Island General Laws § 11-27-5](#) provides that “No person, except a duly admitted member of the bar of this state, whose authority as a member to practice law is in full force and effect, shall practice law in this state.” [\[FN5\]](#) For purposes of enforcing that statute, [General Laws § 11-27-2](#) provides a statutory definition of the practice of law; that definition includes “the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the court,” [\[FN6\]](#) “acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case,” [\[FN7\]](#) and acting as a “representative of another person before any court.” [\[FN8\]](#) [Rhode Island General Laws § 11-27-14](#) provides the penalty provision for any violation of the statute prohibiting the unauthorized practice of law, permitting a sentence of up to one year in prison for a first offense and making a second offense a felony. [\[FN9\]](#)

*7 The Supreme Court of Rhode Island maintains a separate and distinct authority to enforce the prohibition of the unauthorized practice of law and, for purposes of enforcement, the Court has set out its own definition of the practice of law. Although it has stated that the practice of law “is difficult to define,” [\[FN10\]](#) the Court has adopted the following language from the Supreme Court of South Carolina: “It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, ... and, in general, all advice to clients, and all action taken for them in matters connected with the law.” [\[FN11\]](#) Additionally, in 1983, the Supreme Court of Rhode Island published guidelines for the use of legal assistants that help elucidate its perspective on what does and does not constitute the practice of law. [\[FN12\]](#) As a general matter, these guidelines prohibit the delegation to a non-attorney of “[s]ervices requiring the exercise of independent professional legal judgment.” [\[FN13\]](#)

Clearly, drafting a charging instrument and submitting that charging instrument to a court each constitute a violation of [General Laws § 11-27-5](#). The drafting process involves “the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the court,” an act that is squarely within the statutory definition of the practice of law contained in [General Laws § 11-27-2\(1\)](#). Once the charging instrument is submitted to the court, the person doing so has commenced the case, an act that [General Laws § 11-27-2\(3\)](#) explicitly defines as the practice of law. Similarly, the Supreme Court’s definition of the practice of law includes “the preparation of pleadings, and other papers incident to actions and special proceedings ... before judges and courts.” [\[FN14\]](#) Presumably, for that reason, in its guidelines for the use of legal assistants the Supreme Court requires all legal documents be “reviewed by a lawyer before being submitted to a client or another party.” [\[FN15\]](#)

The charging instrument used in the arraignment of a criminal or traffic case, much like the complaint in a civil action, is a pivotal document that can determine the entire nature of the following proceedings. As one noted criminal law professor has observed, “our system is one in which guilty pleas routinely follow a charge and, therefore, the decision to charge is, in many cases, tantamount to conviction.” [\[FN16\]](#) Consequently, and particularly because of the many intricate legal questions within the charging decision, it *9 makes perfect sense to require the charging instrument be drafted, or at least approved, by a person who is licensed to practice law. At a bare minimum, the decision to charge, and what offense or offenses to charge, involves a detailed knowledge of the elements of the available offenses and any potential defenses to those offenses. Moreover, because an offense should not be charged unless there is sufficient evidence to support a finding of probable cause and sufficient admissible evidence to support a conviction, [\[FN17\]](#) the charging decision, reflected in the drafting and submission of a

charging instrument, plainly requires "the exercise of independent professional legal judgment" that the Supreme Court says is solely a lawyer's job. [\[FN18\]](#)

As clear as it is that the drafting and submission of the charging instrument constitutes the unauthorized practice of law, the law, representing the government's interests in a plea negotiation, is that much clearer. [General Laws § 11-27-2\(3\)](#) explicitly provides that "acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case" constitutes the practice of law. This is, of course, as it should be. As the Supreme Court of South Carolina opined recently, "The non-attorney's negotiation of guilty pleas with defendants and defense counsel clearly crosses the line into the unauthorized practice of law. Plea negotiations require the training, skill and accountability of an attorney." [\[FN19\]](#)

When the plea negotiation takes place with the unrepresented defendant, as is most often the case in the District Court arraignment courtroom and almost exclusively the case in the Traffic Tribunal, another aspect of the practice of law comes into play: the provision of legal advice. While it may be theoretically possible to engage in a plea negotiation without offering legal advice, it is virtually impossible to imagine. Any effort on the part of the police prosecutor to discuss the evidence in the case, the likelihood of conviction, and possible sentencing consequences of a conviction after trial or the wisdom of entering a plea, must fairly be characterized as the giving of legal advice. [\[FN20\]](#) Because [General Laws § 11-27-2\(2\)](#) defines the provision of "any advice or counsel pertaining to a law question or a court action or judicial proceeding" as the practice of law, a police officer engaged in the negotiation of a criminal or traffic charge will invariably be practicing law.

When a police officer appears in open court as the government's representative, whether for the purpose of resolving a case or simply for the purpose of arraigning a defendant on a new charge, that police officer is engaged in the practice of law. The statutory definition of the practice of law includes acting as a "representative of another person before any court" [\[FN21\]](#) and "acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case." [\[FN22\]](#) Each of these things happens at every single arraignment in the District Court and at the Traffic Tribunal. The Supreme Court's definition of the practice of law encompasses "the management of ... actions and proceedings on behalf of clients before judges and courts." [\[FN23\]](#) Making plea offers, presenting facts, and making recommendations with respect to sentencing and to bail, are all part and parcel of the police prosecutor's daily activities in the District Court. At those times, the Court calls upon the police prosecutor to make legal arguments. Each of these activities falls squarely within any reasonable definition of "management" of the case before the court.

Rule 6(a) of the Traffic Tribunal Rules of Procedure, which governs the arraignment stage, provides the "police department which charged the summons shall be represented by a prosecution officer." Because these rules are subject to the approval of the Supreme Court of Rhode Island, one might wonder whether the Court has somehow authorized police officers, who are not licensed to practice law, to engage in these various activities. In fact, such a conclusion seems very ***29** much at odds with the court's recent case law. The Traffic Tribunal rules offer no definition whatsoever of the term "prosecution officer," so it is not at all clear the term refers to a police officer who is not licensed to practice law. Similarly, the rules offer no description of the specific tasks that may or may not be undertaken by a "prosecution officer." Nothing in the requirement that the charging police department be "represented" by a "prosecution officer" inherently means that a police officer, who is not licensed to practice law, is suddenly permitted to engage in charging decisions, plea negotiations, and the exercise of prosecutorial discretion. Nor, does the requirement that a "prosecution officer" represent the charging department inherently mean that such a person must exclusively represent the department. Indeed, nothing in the rules suggests that charging decisions, plea negotiations, and the exercise of prosecutorial discretion cannot, and should not, be reserved for attorneys duly licensed to practice law.

When the Supreme Court first upheld the Constitutional validity of the precursor to General Laws Title 11, Chapter 27, it explicitly confirmed the Legislature's power to criminalize acts that the Legislature defines as the unauthorized practice of law. In **Creditors' Service Corp. v. Cummings**, [\[FN24\]](#) the Court recognized the Legislature "has the inherent power to prohibit and punish any act as a crime, provided that in exercising such power it does not violate any provision of the Federal or State Constitution If the statute is within the power of the Legislature to enact, it is the duty of the court to sustain it, irrespective of its own opinion of the wisdom, reasonableness, or necessity for the statute." [\[FN25\]](#) Thus, while the Legislature clearly "has no power to pass a law granting the right to any one to practice law," the Court noted the Legislature does have the power to "enact a statute designed to protect the public against imposition, incompetency, and dishonesty." [\[FN26\]](#)

Much more recently, in 2002, the Court reasserted its strong support for the Legislature's independent right to protect the public against the unauthorized practice of law. In **In re Rule Amendments to Rules 5.4(a) and 7.2(c) of the Rules of Professional Conduct**, [\[FN27\]](#) the Court considered and rejected a proposed rule change that would have conflicted with portions of the Legislature's unauthorized practice statute. Although [General Laws § 8-6-2\(a\)](#) explicitly provides that rules adopted by the Supreme Court "shall supersede any statutory regulation in conflict therewith," the Court expressed, in no uncertain terms, its reluctance to create such a conflict with the unauthorized practice statute: "As a matter of comity, we believe this Court should avoid enacting rules that would conflict with the Legislature's policy determinations in this area." [\[FN28\]](#) Although not a single party testified against the proposed rule changes, which had been put forward by the Ethics Advisory Panel and supported by the Rhode Island Bar Association, the Court ultimately rejected the proposal because adopting it would have put the Court rules "at variance with the public policy of the General Assembly and condone [d] conduct [that has been] declared to be criminal by the General Assembly." [\[FN29\]](#) In light of this vigorous protection of the Legislature's efforts to prevent the unauthorized practice of law, it seems hard to imagine that by approving just one sentence in Traffic Tribunal Rule 6(a) -- and a highly ambiguous sentence containing undefined terms at that -- the Court intended to completely undermine [General Laws § 11-27-5](#).

Whatever limited protection Rule ***30** 6(a) may arguably provide to a prosecuting police officer at the arraignment stage at the Traffic Tribunal, there is certainly no parallel rule concerning the arraignment stage in the District Court. And even at the Traffic Tribunal, the rule is limited by its terms to the arraignment stage. When a police officer prosecutes a Traffic Tribunal case at trial, which is generally the case unless the defendant is charged with refusing a chemical test, the unauthorized practice of law is too transparent to require significant exploration. Beyond the practice issues previously described and inherent in representing the government in open court, no plausible definition of the practice of law could exclude cross-examining witnesses and making legal arguments to the court.

Why Police Prosecution Should Be Prohibited [\[FN30\]](#)

A prosecutor in the American legal system is vested with an enormous amount of discretion in the handling of a criminal case. In the vast majority of situations, that discretion is exercised at early stages in a prosecution in ways that cannot and will not ever be reviewed, either by the judiciary or by anyone else. Most obviously, the basic decision to charge a person with a crime and the secondary decision of what charge or charges to file are almost entirely beyond any form of review. Any of a multitude of pre-trial decisions, including bail requests, discovery, and plea negotiations, are similarly outside the scope of any effective review. The United States Supreme Court has noted that most prosecutorial decisions do not lend themselves readily to judicial review and, except for some very narrow exceptions, should remain beyond the scope of judicial

review for broader policy reasons. [\[FN31\]](#) Consequently, the criminal justice system functions largely on a tremendous leap of faith that those who wield the government's prosecutorial power will wield it in a fair and just fashion. In large part, this leap of faith is justified by the prosecutor's legal training, by the prosecutor's oath of obedience to a binding code of legal ethics, and by the fact that the prosecutor, at least on the state level, is an elected official who is expected to be responsive to the electorate.

In 1996, the United States Supreme Court made explicit the general rule that courts had consistently followed for years when issues had arisen concerning the prosecution of a criminal case: that prosecutors' decisions are supported by a ***31** "presumption of regularity" such that "in the absence of any clear evidence to the contrary, courts [should] presume that they have properly discharged their official duties." [\[FN32\]](#) In that case, which involved a claim of selective prosecution, the Court stressed the need for broad judicial deference to prosecutorial judgments. Because it wished to avoid judicial interference with the proper exercise of prosecutorial discretion, the Court held that a defendant must present clear evidence of a violation "[i]n order to dispel the presumption that a prosecutor has not violated equal protection." [\[FN33\]](#) Simple logic suggests that a presumption of regularity cannot apply when there is no assurance the prosecutor has ever expressed the willingness and ability to abide by ethical rules, or that the prosecutor has any legal training or competence whatsoever.

Because our entire legal system is designed around the presumption of regularity, it is critically important that only those licensed to practice law are permitted to exercise the vast powers of the prosecutor. While it may well be that many police officers perform the prosecutorial function both ethically and effectively, this misses the point that there must be clear and consistent guidelines in place to protect the public, the defendant, and the very integrity of the system. The Supreme Court of Rhode Island has made this point on more than one occasion: "To safeguard the practice of law, which touches so intimately the administration of justice, and to promote the welfare of the people, whose ministers we are, this Court has ordained certain standards of character and education as a prerequisite to admission to the bar. These standards are high, as indeed they ought to be, and there is constant pressure to elevate them still higher, all to the end that the people may be assured the best possible service in the dispatch of their legal business." [\[FN34\]](#) The Court adheres to these standards because, it has noted, "Great and irreparable injury can come to the people, and the proper administration of justice can be prevented, by the unwarranted intrusion of unauthorized and unskilled persons into the practice of law." [\[FN35\]](#)

Because the prohibition of the unauthorized practice of law has been justified largely in terms of protecting the putative client and society at large from the unscrupulous or incompetent practitioner, the fact that an individual police prosecutor may be acting in an ethical and competent ***32** fashion is largely beside the point. The general prohibition should hold for the greater good of society. It is hard to imagine a context in which more harm might be done to an individual or to society as a whole than to entrust the enormous power of the criminal justice system to one who is engaging in the unauthorized practice of law; consequently, it is hard to imagine a context in which the general prohibition should be more rigorously enforced.

One fundamental characteristic of the American system of justice is that both the public and the accused are entitled to the fair and prudent exercise of prosecutorial discretion. As the commentary to the American Bar Association's Prosecution Function Standards notes "The character, quality and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers." [\[FN36\]](#) The fair and prudent exercise of prosecutorial discretion turns, in large part, on obedience to an attorney's code of legal ethics. If the person acting as prosecutor is making discretionary decisions without the guidance and restrictions provided by an attorney's ethical rules, both the public and the accused are deprived of the fair exercise of discretion that an attorney would provide and that the law commands.

On a very basic level, both the public and the accused rely heavily on the fact that, as the United States Supreme Court has noted, "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." [\[FN37\]](#) In a wide variety of settings, beginning with the decision to charge and including pre-trial discovery, plea negotiations, and trial, the public and the accused are forced to rely quite heavily on the ethical obligations on a prosecutor to seek "justice," not just a desired end result. [\[FN38\]](#) Exculpatory evidence in the hands of a prosecutor will generally find its way to a criminal defendant if, and only if, the prosecutor obeys his or her ethical and constitutional duties in the face of any number of competing interests. A plea negotiation is founded upon the fact that the defense can rely on factual representations made by a prosecutor who is faithful to his or her constitutionally and ethically prescribed role in the face of any number of competing interests. In each of these areas, and in countless others throughout the criminal process, ***33** both the public and a defendant must rely on the good faith of the prosecutor to protect his or her rights. Any notion that a judge is capable of monitoring the prosecutor's conduct in order to ensure that no ethical or constitutional violations occur is both inconsistent with the conclusion reached by the United States Supreme Court [\[FN39\]](#) and simply incorrect.

Because the charging decision is the "part of the prosecutor's discretion which carries with it the greatest potential for misuse," [\[FN40\]](#) the reliance on a police prosecutor at that stage of a prosecution is particularly inappropriate. As a general matter, a prosecutor's natural inclination, exacerbated when left unchecked by any obligation to an ethical code or any prospect of sanction for doing so, is to overcharge. The police prosecutor will generally feel more protected by overcharging, as the cost of any error will be borne by the criminal defendant. However, it is clear that a police prosecutor is much more likely to be subject to certain kinds of institutional biases than a prosecuting attorney. In any number of cases, the arresting officer may be in some jeopardy concerning allegations of police brutality, false arrest, or various other violations of an individual's rights. One way of providing greater protection for the arresting officer is for a fellow officer -- the police prosecutor -- to ensure criminal charges are filed, because a case that never makes it through the charging stage puts the officer in a much worse posture in terms of civil or criminal litigation. If a prosecuting officer recognizes that some evidence was gathered in an illegal fashion, there is an enormous disincentive for the officer to acknowledge the illegality, particularly if doing so means refusing to file charges. Not only would the prosecuting officer risk engendering tremendous resentment from an officer upon whom he or she is likely to have to rely in the future, but the prosecuting officer also risks setting up a colleague for the possibility of internal review or potential litigation. This sort of behavior violates what has frequently been described as one of the central maxims of police culture: protect your fellow officers at all costs. [\[FN41\]](#) The far easier path for the police prosecutor is to charge the individual and then use the prosecutorial power to resolve the case quickly.

Yet another form of bias arises when the victim of the alleged crime is a police officer or the police department. When an officer arrests someone for assaulting him or her or resisting arrest, a fellow police officer asked to prosecute the case is not likely to view it in the same fashion as an attorney without any personal connection to the case. While a prosecuting attorney must recuse himself or herself from a case in which he or she has a conflict of interest, a police prosecutor is not ***34** bound by any similar rule.

Of course, it is also possible that these same sorts of biases can cut in the opposite direction, leaving society poorly protected when a case is either not charged at all or is seriously undercharged. Whether caused by the urge to protect a fellow police officer, an effort to avoid litigation that might expose unseemly or unlawful police practices, or an effort to preserve a city's crime statistics by underreporting serious criminal activity, the absence of any ethical parameters around these vital prosecutorial decisions leaves the public in jeopardy.

In the final analysis, even if one were to assume that a prosecuting police officer were as legally competent as a prosecuting attorney and as obedient to all of a prosecuting

attorney's ethical requirements, the practice of police prosecution is simply bad public policy. Allowing a case to be prosecuted by a person who is neither licensed to practice law nor bound by any specific code of ethical behavior certainly serves to undermine the appearance of fairness in the operation of our system of justice. The situation is that much worse when the unlicensed prosecutor is a member of the arresting police department. Forcing a person who has been arrested by a particular police department to rely on a member of that same department to exercise prosecutorial discretion, evaluate the legality of the police actions in the case, evaluate the legal strength of the prosecution's case, evaluate the worth of the case in terms of its deterrent value, provide the accused with exculpatory evidence, and, in the Traffic Tribunal, even try the case, would certainly cause most defendants to question the fundamental integrity of the proceedings.

It might be tempting for some to justify the practice on economic grounds, suggesting that what transpires in the District Court and the Traffic Tribunal is not that important. Those who would take such an approach grossly underestimate two significant factors. First, they underestimate the significance of a criminal prosecution. Even if the underlying offense is perceived as relatively trivial, a criminal conviction can, in certain circumstances, cost a person a job, an apartment in public housing, a professional license, a driver's license, the right to remain in the United States and, of course, freedom from incarceration. Second, they underestimate the significance of the public's perception of our justice system. The District Court and the Traffic Tribunal, in which the practice of police prosecution is prevalent, are the primary point of contact, if not the only point of contact, most citizens ever have with the system. For just this reason, Arthur T. Vanderbilt, the late Chief Justice of the Supreme Court of New Jersey, repeatedly expressed the viewpoint that the lower courts are the "most important" courts in the state. [\[FN42\]](#)

While any instance in which the public is left unprotected against the unauthorized practice of law is certainly cause for concern, it is that much worse when the unlicensed practitioner purports to actually represent the public through his or her unlawful activity. Condoning illegal activity conducted in the name of the state is hard to justify under any circumstances, but even more so when the state is engaged in the process of attempting to enforce and engender respect for the law. In the most obvious sense, the prosecution of a criminal case in a fashion that involves unlawful action by the state engenders tremendous disrespect for the law. The words of the great Supreme Court Justice Louis D. Brandeis ring just as true today as when he wrote them in 1928:

Decency, security, and liberty alike demand that government officials *35 shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. [\[FN43\]](#)

[\[FN4\]](#). Andrew Horwitz is a Professor of Law and the Director of Clinical Programs at Roger Williams University School of Law. John R. Grasso is a former police officer with the Cranston Police Department and a third year law student at Roger Williams University School of Law.

[\[FN1\]](#). *There are some situations in which the police officer who drafts the complaint or who appears in court as a police prosecutor is also an attorney duly licensed to practice law in Rhode Island. This article is intended to address the more typical situation in which that is not the case.*

[FN2]. [*Rhode Island Bar Ass'n v. Automobile Serv. Ass'n*, 179 A. 139, 140 \(R.I. 1935\).](#)

[FN3]. [*Unauthorized Practice of Law Comm. v. Dep't of Workers' Comp.*, 543 A.2d 662, 664 \(R.I. 1988\).](#)

[FN4]. *Id.* at 141.

[FN5]. [RI Gen. Laws § 11-27-5.](#)

[FN6]. [RI Gen. Laws § 11-27-2\(1\).](#)

[FN7]. [RI Gen. Laws § 11-27-2\(3\).](#)

[FN8]. [RI Gen. Laws § 11-27-2\(1\).](#)

[FN9]. [RI Gen. Laws § 11-27-14.](#)

[FN10]. [*Automobile Serv. Ass'n*, 179 A. at 140.](#)

[FN11]. *Id.* at 144 (quoting [*In re Duncan*, 65 S.E. 210, 211 \(S.C. 1909\).](#)

[FN12]. *See* [*Provisional Order No. 18*, 454 A.2d 1222 \(R.I. 1983\).](#)

[FN13]. *Id.* at 1223.

[FN14]. [*Automobile Serv. Ass'n*, 179 A. at 145.](#)

[FN15]. *Provisional* [*Order No. 18*, 454 A.2d at 1222.](#)

[FN16]. John B. Mitchell, [*The Ethics of the Criminal Defense Attorney -- New Answers to Old Questions*, 32 STAN. L. REV. 293, 308 \(1980\).](#)

[FN17]. *See* AMERICAN BAR ASSOC., A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.9(A) (3d Ed. 1993) [Hereinafter A.B.A. PROSECUTION STANDARDS]; R.I. RULES OF PROF'L CONDUCT R. 3.8(A).

[FN18]. *Provisional* [*Order No. 18*, 454 A.2d at 1223.](#)

[FN19]. [*In re Lexington County Transfer Ct.*, 512 S.E.2d 791, 793 \(S.C. 1999\).](#)

[FN20]. *See* Russell Engler, [*Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 93-101 \(1997\).](#)

[FN21]. [RI Gen. Laws § 11-27-2\(1\).](#)

[FN22]. [RI Gen. Laws § 11-27-2\(3\).](#)

[FN23]. [*Automobile Serv. Ass'n*, 179 A. at 144](#) (quoting [*In re Duncan*, 65 S.E. at 211\).](#)

[FN24]. [190 A. 2 \(R.I. 1937\).](#)

[FN25]. *Id.* at 8.

[FN26]. *Id.*

[FN27]. 815 A.2d 47 (R.I. 2002).

[FN28]. *Id.* at 49.

[FN29]. *Id.* at 48, 50.

[FN30]. The arguments presented in this section, along with many others, are developed in much greater detail in Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305 (1998).

[FN31]. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

[FN32]. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

[FN33]. *Id.* at 467.

[FN34]. *Automobile Serv. Ass'n*, 179 A. at 146-47.

[FN35]. *Id.* at 143.

[FN36]. A.B.A. PROSECUTION STANDARDS, Standard 3-1.2 cmt.

[FN37]. *Berger v. United States*, 295 U.S. 78, 88 (1935).

[FN38]. A.B.A. PROSECUTION STANDARDS, Standard 3-1.2.

[FN39]. See *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987) (reversing a conviction obtained by a prosecutor with a conflict of interest, noting the wide array of prosecutorial decisions that are "critical to the conduct of a prosecution" yet are "made outside the supervision of the court").

[FN40]. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 537 (1970).

[FN41]. See, e.g., Lawrence Sherman, *Learning Police Ethics*, CRIM JUST. ETHICS, Winter/Spring 1982, at 10, 15.

[FN42]. See, e.g., Arthur T. Vanderbilt, *The Municipal Court -- The Most Important Court in New Jersey: Its Remarkable Progress and its Unsolved Problems*, 10 RUTGERS L. REV. 647, 650 (1956).

[FN43]. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

END OF DOCUMENT