

## ARTICLES

### PRIVATE VENGEANCE AND THE PUBLIC GOOD

*Michael Edmund O'Neill*\*

#### INTRODUCTION

In early 1975, a cleaning woman discovered the lifeless body of seventy-five-year-old Inez Phillips stretched out on a bed with a large butcher knife “protruding from her upper chest.”<sup>1</sup> An unknown assailant had bound and gagged the elderly widow with duct tape, stabbed her repeatedly, and then crushed in the back of her skull with a blunt instrument.<sup>2</sup> The murder reverberated throughout the victim’s small, close-knit Gladewater, Texas community because of its remarkable brutality. Police investigations led officers to focus on Joseph Stanley Faulder, a local vagrant. After his arrest, Faulder confessed to the crime. He was subsequently convicted of killing Mrs. Phillips.<sup>3</sup> Although this conviction was set aside because of the introduction at trial of an improperly obtained confession, Faulder was retried, convicted again by a jury, and sentenced to death. Inez Phillips’s murder and the ensuing conviction of Joseph Faulder might not stand out among similar heinous crimes save for one important fact: an individual hired by the Phillips family, a privately retained prosecutor, tried the case against the defendant and secured the conviction.<sup>4</sup>

Although public prosecutors handled Faulder’s initial prosecution, after Faulder’s capital conviction was overturned on appeal, the murder victim’s son hired private attorneys to investigate and then to re-prosecute the defendant.<sup>5</sup> When the defense counsel objected to

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1 Faulder v. State, 611 S.W.2d 630, 631 (Tex. Crim. App. 1979) (en banc), *cert. denied*, 449 U.S. 874 (1980).

2 *Id.*

3 *Id.*

4 Faulder v. Johnson, 81 F.3d 515, 517 (5th Cir. 1996), *cert denied*, 519 U.S. 995 (1996).

5 *Id.* at 518.

this unique arrangement, arguing the impropriety of permitting the victim's family to control the prosecution, the private prosecutors—one of whom was the former district attorney who had tried the defendant previously—obtained a written appointment from the district attorney's office designating the privately-retained counsel as special volunteer prosecutors.<sup>6</sup> The Texas state and federal courts upheld the conviction,<sup>7</sup> and the United States Supreme Court denied Faulder's petition for certiorari review.<sup>8</sup>

Murder prosecutions—especially where the possibility of capital punishment looms—rank as the most serious within the American criminal justice system.<sup>9</sup> What doubtless comes as a surprise to the experienced criminal justice practitioner, however, is that a *private* prosecutor could litigate Mr. Faulder's criminal trial. Indeed, when the criminal justice system is considered, most people, including members of the bar and the screenwriters for *Law & Order*, think only of the public prosecutor. The public prosecutor—whether directly elected by the people or appointed by the people's representatives—has become the “central actor in the criminal justice system.” In fact, “the American prosecutor enjoys an independence and discretionary privileges unmatched in the world.”<sup>10</sup> Few understand, however, that public prosecutors were not always the dominant figures in the prosecution of criminal trials. Fewer still realize that even today several states authorize the hiring or appointment of *private* attorneys to prosecute criminal cases. Despite the persistence of private prosecutors, little has been written about their history or potential value to the criminal justice system. Generally, what has been written is critical of the practice, arguing that it is the vestige of a bygone era and incompatible with the modern values that define today's criminal justice system. The aim of this Article is to challenge that position.

This Article will examine the history and constitutionality of the private prosecution of criminal cases and assess the potential value of

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6 *Id.*

7 *Id.* at 517 (rejecting defendant's habeas petition and explaining that defendant had been convicted, and lost on direct appeal).

8 *Faulder v. Johnson*, 519 U.S. 995 (1996).

9 See Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1182 (1981) (discussing retributivists' concerns about erroneously sentencing to death an innocent person); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1844–50 (2000) (discussing through statistics the possibility of error in capital punishment).

10 Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 568 (1984) (citation omitted).

privately retained prosecutors to the justice system. It is my contention that private prosecutions can be a useful adjunct to the more familiar public model, potentially freeing up scarce public resources while at the same time vindicating the interests—both of the victim and the public—in the enforcement of the criminal law. It is widely acknowledged that the state possesses limited resources to allocate to the criminal justice system.<sup>11</sup> Those resources, in turn, must be divided among crime prevention activities, police officers, investigative functions (such as crime labs), courts, prisons, rehabilitation programs, probation and parole officers, and myriad other responsibilities that make up the criminal justice system. Enforcement is only one element of the criminal justice portfolio. Individual victims and select communities—whether comprised of home owners or stores within a shopping mall—may have interests that overlap with those of the state, but which may nevertheless be distinct from those of the state and deserve vindication. Similarly, if the state is able to conserve resources otherwise allocated to prosecutions, it might better be positioned to target resources to other under-resourced areas. In the same way in which the actions of private individuals competing in the free market may benefit the society as a whole, if private resources can be tapped to enforce criminal statutes, the public at large may benefit as the result of those individual efforts.

In Part I of this Article, I trace the history of criminal prosecution, demonstrating that public prosecutors did not always play the dominant role in the adjudication of criminal cases. I examine both the English and the American experience with private prosecutors, noting that private prosecutions remain common in present-day England even as they have all but withered away in the United States.<sup>12</sup>

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11 See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 76–77 (2008) (describing resource allocation inherent in the criminal justice system); Thomas P. Sullivan, *Repair or Repeal—Report of the Illinois Governor’s Commission on Capital Punishment*, 49 FED. LAW. 40, 44 (2002) (discussing proposed state criminal reforms, and weighing the costs with respect to the state budget); Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 363, 383, 412 (2001) (explaining the role U.S. Attorneys play in the “inevitable rationing of limited resources”).

12 See Douglas Hay, *Controlling the English Prosecutor*, 21 OSGOODE HALL L.J. 165, 180 (1983) (stating that, by not including police in the private prosecution numbers, “[f]ewer than three percent of defendants are prosecuted by private individuals”); Patrick M. Fahey, Note, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 208 (1992) (contrasting the legitimacy of private prosecution of crime in Great Britain with the disapproval of private prosecution of crime in the United States); Michael T. McCormack, Note, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U. L. REV. 497, 500–01 (2004) (“According to a 1960 study, the Director

In Part II, I examine the contemporary role of private prosecutors in the United States, finding that a number of states permit—whether by common law tradition or express statute—privately retained lawyers to pursue criminal cases. I also consider the function of private justice in federal law, focusing on the establishment of *qui tam* actions and the creation of private attorneys general to enforce specific federal statutes.

In Part III, I analyze the doctrinal basis for the private prosecution of criminal cases, determining whether under current standards of due process and equal protection, such prosecutions remain constitutionally permissible. While sensitive to the real issues privately managed prosecutions may pose to the criminal justice system, I nevertheless conclude that they survive constitutional scrutiny. Similarly, I explore prudential arguments against private criminal law enforcement, focusing on both the ethical considerations swirling around private prosecutors as well as the general utility of private law enforcement schemes.

Finally, in Part IV, I argue that the use of private prosecutors is likely to have a beneficial effect upon the criminal justice system and thus offer the contours of a model statute. Turning to the policy arguments for permitting the private prosecution of criminal cases, I note that private prosecutors may prove useful in trying cases that may otherwise go unnoticed by the system, may help relieve the burdens of overworked public prosecutorial offices, and allow the use of expert prosecutors in particularly complex cases, such as in criminal trademark or patent cases. If nothing else, leveraging private resources to fund criminal investigations and prosecutions will have a beneficial effect upon deterrence strategies. This benefit rests upon the Berccarian insight that it is the certainty, not necessarily the severity, of punishment that deters crime.<sup>13</sup>

The use of private prosecutors, while hardly a complete solution to the myriad problems confronting our criminal justice system, may nevertheless be a viable means of expanding prosecutorial resources and thereby increasing the costs to potential criminals of engaging in untoward behavior. As Adam Smith understood in discussing the “invisible hand” that guided free markets, the pursuit of self-interest,

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of Public Prosecutions handled only eight percent of the prosecutions in Great Britain, while private prosecutors or police accounted for the other ninety-two percent.”).

<sup>13</sup> See Brian E. Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743, 762–63 (1977) (finding empirical support for Cesare Beccaria’s “two-hundred-year-old suggestion that certainty of punishment deters more effectively than its severity”).

rightly understood, can yield benefits for society as a whole as well as for the individual.<sup>14</sup>

### I. A BRIEF HISTORY OF PRIVATE PROSECUTION

Traditionally, the aims of the criminal law have been to deter wrongdoing through the threat of prosecution and subsequent punishment and, when deterrence fails, to recompense the victim and provide just punishment to the offender.<sup>15</sup> Punishment itself has been understood to function as a deterrent to prevent conduct society abhors; but when deterrence fails, a court may impose punishment to incapacitate the offender,<sup>16</sup> to rehabilitate the offender,<sup>17</sup> or to exist as an end in and of itself.<sup>18</sup> Punishment, however, cannot exist without prosecution.

The criminal justice system exists to provide a forum wherein wrongs perpetrated by one individual against another may be remediated and social values may be vindicated. Although societies, both ancient and modern, have selectively enforced criminal laws depending upon the immediate availability of resources and the shifting interests of society,<sup>19</sup> the nature of common law crimes has remained remarkably stable over time. Murder, rape, theft, and other obvious criminal acts have long been recognized as “wrongs” in both common law and civil law jurisdictions.<sup>20</sup>

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14 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 477 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776).

15 See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 401 (1958). See generally 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 1 (15th ed. 1993) (examining the general purpose of criminal law).

16 See Kent Greenawalt, *Punishment*, 74 *J. CRIM. L. & CRIMINOLOGY* 343, 351–53 (1983) (“Imprisonment puts convicted criminals out of general circulation . . .”).

17 See *id.* (“Punishment may help to reform the criminal so that his wish to commit crimes will be lessened . . .”).

18 See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 *BUFF. CRIM. L. REV.* 225, 253 (1997) (explaining that one theory of punishment “sees the imposition of deserved punishment as a valuable end in itself, without regard to whether it avoids future crimes”).

19 See Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 *U. PA. L. REV.* 62, 81–85 (1976) (discussing an application of the Roman jurist Julian’s concept of desuetude); Cynthia B. Herrup, *Law and Morality in Seventeenth-Century England*, 106 *PAST & PRESENT* 102, 104–06 (1985) (describing the use of legal discretion and the actual application of the law in seventeenth-century England); Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 *YALE L.J.* 2531, 2564 (1994) (speaking to the practice of selective enforcement of laws in the People’s Republic of China).

20 W. H. Hitchler, *Crimes and Civil Injuries*, 39 *DICK. L. REV.* 23, 23–24 (1934).

While the nature of common law crimes has remained fairly steady over time, the manner in which society handles remediation for criminal behavior has evolved. Western society once generally viewed crime as a harm perpetrated against the individual;<sup>21</sup> hence crimes were prosecuted in much the same way as suits in tort were litigated: individuals squared off in a state-provided forum. Religion, however, especially in those nations dominated by Christianity, also understood crime to be an offense against God.<sup>22</sup> Because the Church represented God on earth, crimes could be seen as offenses against the organization of the Church as well.<sup>23</sup> In an age of the divine right of kings to rule, and—at least in England—of the King’s position as head of the Church—crime came to be viewed as harm perpetrated against the state.<sup>24</sup> To this end, the state would allow public prosecutors to press a case against the defendant not only in the victim’s name, but in the King’s name as well.<sup>25</sup> I suspect the King’s advisors also viewed criminal prosecutions as a means of initiating social control as well as serving as a vehicle to collect revenue. Nevertheless, the civil justice system remained the more appropriate avenue for individuals to seek redress for harms perpetrated against them as individuals.

This theoretical understanding of crime as a harm to the state versus crime as a harm to the victim has crucial practical consequences. If crime is viewed as a harm principally against the victim, then the state has no (or only a minor) role in seeking remediation. For example, just as in a civil suit in tort, the state merely provides a forum wherein the injured party can obtain justice; similarly, in a private criminal law model, the aggrieved victim (or other interested party) initiates prosecution and the state serves only as mediator.

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21 See Dianne Molvig, *Violence and the Judicial System: Stemming the Tide of Violence in Our Courthouses*, WIS. LAW., July 1997, at 10, 59 (emphasizing that a “fundamental concept in human history” is the concept “of crime as a violation against an individual and his or her family and community”).

22 See Jordan J. Ballor, *To Reform or to Abolish? Christian Perspectives on Punishment, Prison, and Restorative Justice*, 6 AVE MARIA L. REV. 481, 502 (2008) (discussing the Christian tradition’s understanding of crime and sin).

23 HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 187 (1983).

24 See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*269 (“[T]he king shall be reputed the only supreme head in earth of the church of England . . .”); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1666 (1994) (paraphrasing Richard Hooker’s thoughts on absolute monarchy and divine appointment).

25 See 4 BLACKSTONE, *supra* note 24, at \*298 (discussing modes of prosecution); see also 3 *id.* at \*254 (inquiring into “the mode of redressing those injuries to which the crown itself is a party”).

Although the aim of this Article is not to provide a comprehensive analysis of the history of private prosecutions in English or American law, it is important to review briefly the history of criminal prosecutions in general in order to understand the transformation of the criminal prosecution system from a privately managed system to one dominated by public officers.

#### A. *The Concept of Private Prosecutions in English Law*

Criminal prosecution in England is commonly divided into two periods: the period before the 1879 Act creating the Office of the Public Prosecutor, and the time period since.<sup>26</sup> Prior to the 1879 Act, private citizens and non-police agencies tended to dominate criminal prosecution. During the time period following that Act, however, public prosecutions began to gain purchase and have since come to fill the dominant, albeit not exclusive, role in prosecuting crimes.

##### 1. *Early England and Privately Managed Criminal Prosecutions*

Before the early-nineteenth century, English law recognized that the victim of a crime was generally responsible for the crime's prosecution.<sup>27</sup> Blackstone discussed the nature of the English "appeal," which is not, as is commonly understood in contemporary American law, a petition to a superior court to remedy an error committed in an inferior court but, instead, an "original suit" instigated by a "private subject against another" to obtain redress for a wrong.<sup>28</sup>

English law erected a rudimentary criminal justice system as a means to mediate between parties and to allow those wronged to obtain recompense.<sup>29</sup> Under the English system, the victim of a crime

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26 See K. W. LIDSTONE ET AL., PROSECUTIONS BY PRIVATE INDIVIDUALS AND NON-POLICE AGENCIES 2-3 (1980). A number of articles traverse this same territory, and doubtless in a more concise and elegant fashion, including Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-73 (1986); Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 WAKE FOREST INTRAMURAL L. REV. 300, 300-11 (1968); Andrew Sidman, Comment, *Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 756-65 (1976); and W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 125-37 (1952).

27 See 3 BLACKSTONE, *supra* note 24, at \*161 ("The party offending is here bound, by the fundamental contract of society, to obey the direction of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved . . .").

28 4 *id.* at \*312.

29 See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 40-47 (2003) (discussing structure of pretrial procedure organized by statute).

would prosecute.<sup>30</sup> Professor John Langbein has explained that “the criminal trial was expected to transpire as a lawyer-free contest of amateurs.”<sup>31</sup> Even in the case of a serious offense, “the prosecution was . . . not [typically] represented by counsel. The victim of the crime commonly served as prosecutor.”<sup>32</sup> The victim was not entirely alone, however, for the Marian Committal Statute of 1555<sup>33</sup> empowered local magistrates to issue search and arrest warrants and to order accused persons to be held prior to trial.<sup>34</sup> The warrant effectively indemnified those conducting the search or effecting the seizure of the person. Similarly, pre-trial detention prevented the accused from fleeing and thereby escaping justice. Parliament thus laid the foundation of a rudimentary criminal justice system in which the victim could search and seize evidence and even arrest the offender without fear of tort liability. Underlying the criminal justice system of the time was the view that, since the principal harm was inflicted on the victim, the victim was in the best position to avenge the wrong:

The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely the degree to which a criminal trial resembles a private litigation.<sup>35</sup>

The sense that justice has been rendered to the victim is not inconsequential—all peoples desire justice. The concept of revenge is as old as mankind. The state, in providing an orderly means by which justice might be meted out, helps to satiate this yearning for justice:

[N]o stronger or more effectual guarantee can be provided for the due observance of the law of the land . . . than is given by the power . . . of testing the legality of any conduct of which [the victim] disapproves . . . by a criminal prosecution. Many such prosecutions . . . have given a legal vent to feelings in every way entitled to respect, and have decided peaceably, and in an authentic manner, many questions of great constitutional importance.<sup>36</sup>

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30 See 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 245 (London, MacMillan 1883) (“The history of appeals or accusations by a private person and trial by battle go together, as trial by battle was an incident of appeals.”).

31 LANGBEIN, *supra* note 29, at 11.

32 *Id.*

33 2 & 3 Phil. & M., c. 10 (1555) (Eng.).

34 LANGBEIN, *supra* note 29, at 40–41.

35 STEPHEN, *supra* note 30, at 245; see also Cardenas, *supra* note 26, at 359.

36 STEPHEN, *supra* note 30, at 496.



As in the civil courts, the privately initiated prosecution could proceed with counsel's assistance, but counsel was compensated by the victim.<sup>37</sup> To discourage the possibility of a frivolous prosecution, the law required the approval of a justice of the peace or an indictment by a grand jury before the private prosecution could commence.<sup>38</sup> The grand jury acted "as a filtering mechanism to dispose of groundless or insubstantial prosecutions, sparing the defendant the peril and indignity of public trial in a transparently weak case."<sup>39</sup>

If the screening function served to weed out inappropriate or otherwise malicious prosecutions, then, so did private prosecutions themselves serve as a check upon centralized authority.<sup>40</sup> Certainly, the Framers of the Bill of Rights recognized the possibility that the government could use criminal prosecution as a tool of oppression;<sup>41</sup> hence, many provisions of the Bill of Rights may be read as a code of criminal procedure, ensuring the defendant basic procedural rights.<sup>42</sup>

The aim of a criminal prosecution lay not only in justice-as-revenge, however, but also in restitution. Blackstone explained that the "private process for the punishment of public crimes had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses."<sup>43</sup> The *weregild* was simply the

37 See J. J. TOBIAS, *CRIME AND POLICE IN ENGLAND 1700–1900*, at 119 (1979) ("Fees would have to be paid to various people to see the prosecution through, and if the prosecutor had called upon the assistance of a parish constable or someone else, he would be required to share the reward.").

38 See LANGBEIN, *supra* note 29, at 45.

39 *Id.* (footnote omitted).

40 See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 361 (1986) (explaining the view that "a private prosecutorial system was necessary to limit the power of the Crown"); Hay, *supra* note 12, at 167 ("One of the crucial safeguards of the citizenry against an executive contemptuous of liberty was the right of private prosecution.").

41 1 ANNALS OF CONG. 424–50, 661–65, 707–17, 757–59, 766 reprinted in THE FOUNDERS' CONSTITUTION (Philip Kurland & Ralph Lerner eds., 2000), available at [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss11.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html). Mr. Goodhue, though not supporting the immediate passage of the Bill of Rights, acknowledges, "it is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.* Arguing, instead for the immediate passage of a Bill of Rights, Mr. Madison explains that "if all power is subject to abuse . . . then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done." *Id.*

42 See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) (identifying specific constitutional provisions as creating a criminal code of sorts).

43 4 BLACKSTONE, *supra* note 24, at \*313. See generally 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 450–51 (2d ed. 1923).

price the offender would have to pay to make the victim whole. This is not unlike a civil suit wherein damages are sought for precisely the same purpose.

Procedural rules evolved to control private prosecutions. Blackstone noted, for example, that crimes prosecuted by appeal were limited to certain types of heinous offenses committed against a specific victim or that victim's property, such as larceny, rape, and murder, and standing was limited only to certain individuals.<sup>44</sup> A man's murder, for example, could only be prosecuted by the spouse or by a male heir "to the four nearest degrees of blood."<sup>45</sup> Not unlike a civil case, then, standing served as a means of limiting the pool of potential complainants who could prosecute a case. Moreover, jeopardy attached to a private prosecution, and the punishments meted out mirrored those of a case initiated by the King's attorneys.<sup>46</sup>

Unlike contemporary America, where punishment more often than not comes in the form of incarceration and making the victim whole seems to be of secondary concern, English society appeared to be far more concerned about recompense to the victim than incapacitating the offender. Even capital cases might be settled through bargaining rather than the actual imposition of the death penalty.<sup>47</sup> In early societies in particular, the value of a human capital was considerable; to remove the offender from society (either by forfeiture of life or imprisonment) made little sense. Although a victim (or a victim's family) might have an urge for revenge that might be satiated only by imposition of the death penalty, there was little else to be gained if the perpetrator was not in a position to provide restitution—whether through money, forfeiture of property, or indentured servitude. A private prosecution thus enabled the victim not only to obtain restitution but also to conclude that he had obtained some measure of justice.

Despite the predominance of privately managed criminal prosecutions, the King, as sovereign, could elect to intervene in a criminal trial:

[W]hen . . . his immediate officers were . . . assured that a man had committed a gross misdemeanor, either personally against the king or his

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44 4 BLACKSTONE, *supra* note 24, at \*314–15.

45 *Id.* at \*315.

46 *Id.*

47 See Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 LAW & HIST. REV. 1, 4 (2001) (describing a "special kind of appeal that was brought by a convicted criminal who had already been sentenced to hang" whereby the criminal could have his life spared if he or she "successfully appealed several of his accomplices").

government, or against the public peace and good order, they were at liberty . . . to convey that information to the Court of the King's Bench by a suggestion on record, and to carry on the prosecution in his majesty's name.<sup>48</sup>

Even in circumstances in which the Crown was not directly threatened, the King might choose to insert himself in a criminal case. Professor Langbein has documented that “[g]overnment intervention . . . in noteworthy criminal cases unrelated to affairs of state is well evidenced for the 1750s.”<sup>49</sup> Langbein explains that “when the central authorities wanted to strengthen a criminal prosecution, they did it by sending in the lawyers.”<sup>50</sup> Despite the occasional intervention by the Crown, however, the private criminal prosecution remained a cornerstone of English law. J. Chitty, in his influential criminal law commentaries, explained the “right” of prosecution:

[E]very man is of common right entitled to prefer an accusation against a party whom he suspects to be guilty. . . . even an individual who has, for the purpose of detecting a suspicious person, afforded him an opportunity to commit the particular crime, is not thereby precluded from becoming a prosecutor, and instituting proceedings against him . . . .<sup>51</sup>

A preference for private prosecution may be attributed to the slow development of a centralized system of government or a general reluctance to raise taxes to support public prosecutions.<sup>52</sup> A crime involving the conversion of private property, for example, might not be so disruptive of the public order that the King would feel a sense of obligation to prosecute a case against the malefactor. Nevertheless, “the idea of wrong to a person or his kindred is still primary, and that of offense against the common weal secondary, even in the gravest cases.”<sup>53</sup> It goes without saying that when wronged, the individual victim will feel it far more acutely than the state.

In time, professional societies arose to bear “some of the costs associated with the risk of being victimized by a serious crime.”<sup>54</sup> Essentially, members paid a subscription fee and, if victimized, could count on the association to offer a reward and to bear the costs of the inves-

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48 4 BLACKSTONE, *supra* note 24, at \*309–10.

49 LANGBEIN, *supra* note 29, at 121.

50 *Id.*

51 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 1–2 (1816); *cf.* Robinson, *supra* note 26, at 301.

52 *See* Klerman, *supra* note 47, at 45 (detailing the chronology of the private prosecution in England).

53 1 POLLOCK & MAITLAND, *supra* note 43, at 46.

54 LANGBEIN, *supra* note 29, at 133.

tigation and prosecution of the offense.<sup>55</sup> Professor Leon Radzinowicz has explained that such societies were established to secure the interests of merchants who might otherwise be victimized.<sup>56</sup> Communities “weighed” offenses in light of their perceived harm to the social order. As described by Professor Radzinowicz, monetary rewards provided to prosecutors for bringing cases involving house-breaking (modern burglary) in the counties of Middlesex and Hertford netted twenty pounds; livestock theft, seven pounds; grand larceny, five pounds; and petty larceny, three pounds.<sup>57</sup> This is precisely the sort of “harmfulness weighing” that modern legislatures engage in to determine the relative severity of punishment for various criminal offenses.<sup>58</sup>

It is unclear why private prosecutions began to wane; to date, no one has been able to provide a complete account of their fall from prominence. The evolving understanding of crime as an offense against the state doubtless contributed to the decline—this understanding might have been fueled by the state’s decision to seek rents in the form of criminal fines and to quell concerns with private justice. Over time, the Crown came to shoulder a higher percentage of criminal prosecutions. Professor Daniel Klerman, in an empirical analysis of privately initiated prosecutions in thirteenth-century England, offers an alternate explanation as to the apparent decline.<sup>59</sup> Based upon his statistical analysis, Klerman suggests that judicial attitudes towards settlement and pressure to move cases to jury trial, more than anything, accounted for the decline in private prosecutions.<sup>60</sup> He observes that:

[W]hen judges put nonprosecuted appellees to jury trial, the number of appeals [private prosecutions] declined. It is possible, however, that the appeal did not decline in importance because crime victims did not need to initiate an appeal in order to settle. All they had to do was threaten to appeal. If such threats resulted in settlement before appeal was initiated at county court, the king’s suit procedure would not be invoked because

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55 *Id.* at 133. Professor Langbein provides the interesting example of a 1770 Association of “several Gentlemen, Tradesmen, Farmers and others of the County of Nottingham, To Prosecute Horse Stealers.” *Id.* at 132.

56 2 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 116–19 (1948). For a discussion of those societies, see Thomas J. Robinson, Jr., Comment, *Private Prosecution in Criminal Cases*, 4 WAKE FOREST INTRAMURAL L. REV. 300, 302–03 (1968).

57 2 RADZINOWICZ, *supra* note 56, at 125.

58 See generally WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 26 (1992) (discussing development of retributivism).

59 Klerman, *supra* note 47, at 47–48, 53–55.

60 *Id.* at 57–58.

it was only triggered if an appeal was initiated. In addition, such threats to appeal, even if followed by settlement, would not be mentioned in legal records. It is thus possible that although the number of recorded appeals dropped, the number of preappeal settlements rose, so that the overall social impact of appeals and settlements induced by the threat of appeals remained constant.<sup>61</sup>

While the exact reasons for the decline remain shrouded by history, certainly private prosecutions, not unlike civil tort actions, might be expected to encourage settlements prior to trial. Such cases would not have been recorded; hence the *perceived* decline may not have been a *real* decline.

One might further speculate that the emergence of the associations designed to incentivize the prosecution of certain offenses, coupled with the burgeoning understanding that criminal offenses were also breaches against the state (perhaps leavened by the state's realization that it might be able to have a slice of any restitution provided to victims as well as fines directly payable to the state itself)<sup>62</sup> led to the establishment of public prosecutors. General tax revenue came to support public prosecution, thereby obviating the need for any special associations or guilds to bear the cost of prosecution. In 1879, Parliament passed the Prosecution of Offenses Act, which (among other things) established an office of the Director of Public Prosecutions "to institute, undertake, or carry on such criminal proceedings . . . and to give such advice and assistance to chief officers of police, clerks to justices, and other persons . . . concerned in any criminal proceeding."<sup>63</sup> As noted, however, "[t]his act conferred no sweeping official powers on the Director, but merely gave him powers of [a] very technical nature . . . amounting to little more than those of a private prosecutor."<sup>64</sup> Although Parliament fiddled with the office over the years (including abolishing it altogether and then resurrecting it), subsequent legislative enactments clarified that "[n]othing in the Prosecution of Offences Act[] . . . shall preclude any person from instituting or carrying on any criminal proceedings, but the Director of Public Prosecutions may undertake at any stage the conduct of those proceedings if he thinks fit."<sup>65</sup> Thus, while the right of private prosecution remained, its scope was trimmed by the

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61 *Id.*

62 *See id.* at 6 (discussing shift from paying injured kin to paying the "church, king, or community at large").

63 42 & 43 Vict., c. 22, § 2 (1879) (Eng.).

64 Robinson, *supra* note 56, at 306.

65 Prosecution of Offenses Act, 1908, 8 Edw. 7, c. 3, § 2(3) (Eng.).

acknowledgment that the public prosecutor possessed plenary authority to intercede in a private prosecution or to quash it altogether.

## 2. *The Contemporary Function of Private Prosecutors in England*

Although privately initiated prosecutions remain commonplace in England,<sup>66</sup> what constitutes a “private” prosecution is somewhat different from the way in which such prosecutions are understood in the United States. In England, the term “private prosecution” has come to mean a prosecution not formally involving the police.<sup>67</sup> Local governments, governmental agencies, trade and professional associations, and individuals all may bring private prosecutions.<sup>68</sup>

Following the 1985 adoption of the Prosecution of Offences Act,<sup>69</sup> the English crown began to shoulder a greater burden of conducting criminal prosecutions. While the police may assist the private complainant in a private prosecution, oftentimes the Crown may intercede in a matter of significant public interest. If, for example, the crime is one of violence or a breach of the public order, the police will become the official complainant, and the government will handle the case.<sup>70</sup> However, the Prosecution of Offences Act did not end the practice of privately initiated prosecutions. Such prosecutions remain a cornerstone of the English criminal justice system.<sup>71</sup>

Although the individual’s right to commence and maintain a private prosecution was preserved under the Prosecution of Offences Act,<sup>72</sup> the Crown Prosecution Service (CPS) was nonetheless granted considerable authority to take over, end, or otherwise control a private prosecution. The CPS’s own website, however, acknowledges that:

[T]here is nothing wrong in allowing a private prosecution to run its course through to verdict and, in appropriate cases, sentence. The fact that a private prosecution succeeds is not an indication that the case should have been prosecuted by the CPS. Parliament has specifically al-

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66 See generally LIDSTONE, *supra* note 26, at 15 (exploring the significant minority of cases in which the police are not the prosecutors).

67 See RICHARD J. STAFFORD, PRIVATE PROSECUTIONS, *Introduction* (1989) (discussing private prosecutions in contemporary England).

68 See *id.*

69 Prosecution of Offences Act, 1985, c. 23, § 3(2) (Eng.).

70 The Crown Prosecution Service, Public Order Offences Incorporating the Charging Standard, [http://www.cps.gov.uk/legal/p\\_to\\_r/public\\_order\\_offences/](http://www.cps.gov.uk/legal/p_to_r/public_order_offences/) (last visited Feb. 16, 2010).

71 See Abraham S. Goldstein, *History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1286, 1286 (Sanford H. Kadish ed., 1983).

72 Prosecution of Offences Act, 1985, c. 23, § 6(1) (Eng.).

lowed for this possibility by the way section 6 is constructed: there is no requirement for the CPS to take over a private prosecution.<sup>73</sup>

The standards under which the CPS might supplant a private prosecution are identified as situations in which “either the evidential sufficiency stage [a patently frivolous prosecution] or the public interest stage [in other words, society must have some sort of stake in the prosecution] . . . is not met”; or “the prosecution is vexatious” (a malicious prosecution or one in which any rational prosecutor would forgo bringing a case).<sup>74</sup>

The circumstances under which the CPS takes over and continues a private prosecution involve those instances in which there is sufficient evidence to maintain a prosecution and such a case is in the public interest.<sup>75</sup> Arguably, while a prosecution may be in the public interest, institutional, cultural, or fiscal concerns may prevent the case from going forward. The avenue of the personally initiated private prosecution exists to redress institutional failings. In 2007, for example, police failed to prosecute the murder of a young black man from Liverpool, Stephen Lawrence.<sup>76</sup> The family, as well as a number of commentators, argued that the failure to prosecute the case could be attributed to lingering racism. The family therefore initiated a private prosecution to seek justice for their murdered son.<sup>77</sup> Private prosecutions thus remain a vital part of the English criminal justice system.<sup>78</sup>

### *B. Prosecutions in the Colonies and Early America*

Mirroring the English view of considering crime to be a private concern,<sup>79</sup> private criminal prosecutions in the American colonies appear to have been commonplace, but not exclusive. Scholarship tracing the origins of the prosecutorial function in colonial America

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<sup>73</sup> The Crown Prosecution Service, Private Prosecutions, [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/index.html](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html) (last visited Feb. 16, 2010).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Luke Traynor, *Integration Not Working Says City Debate Vote*, LIVERPOOL ECHO, July 12, 2007, at 15, available at <http://www.liverpoolecho.co.uk/liverpool-news/local-news/2007/07/12/integration-not-working-says-city-debate-vote-100252-19444008/>.

<sup>77</sup> See Press Release, The Crown Prosecution Service, CPS Advise on Stephen Lawrence Re-Investigation (May 5, 2004), [http://www.cps.gov.uk/news/press\\_releases/120\\_04](http://www.cps.gov.uk/news/press_releases/120_04) (last visited Feb. 16, 2010).

<sup>78</sup> By at least one count, roughly “37 percent of non-motoring offences” were privately prosecuted. See STAFFORD, *supra* note 67, *Introduction*.

<sup>79</sup> See Richard Gaskins, *Changes in the Criminal Law in Eighteenth-Century Connecticut*, 25 AM. J. LEGAL HIST. 309, 313 (1981) (“[C]rimes against public morality were systematically downgraded . . . while crimes against property were gradually up-graded.”).

demonstrates that colonial legislatures, borrowing from the Dutch, often established offices for public prosecutors.<sup>80</sup> Until the late-nineteenth century, however, private prosecutions dominated the legal landscape.<sup>81</sup>

In her comprehensive history of the American prosecutor, to which anyone writing in the field owes a significant debt, Professor Joan Jacoby traces the roots of the American prosecutor to England, explaining that the colonists largely replicated the legal systems with which they were most familiar.<sup>82</sup> For example, the Massachusetts Bay Colony, one of the largest settlements in the American colonies, strove to emulate the English example by adopting the English justice of the peace model.<sup>83</sup> According to George Haskins, “[replicating English systems in America] was what they were used to . . . it comported well with the leaders’ ideas about the functions of government and law.”<sup>84</sup>

Although the colonists transplanted English law to America, they adapted it to meet the needs of a geographically sprawling patchwork of “colonies . . . spread along the Eastern seaboard . . . for almost two thousand miles with only distant connections to the central government in England and with virtually no ties to one another.”<sup>85</sup> And while the bulk of early colonial settlers may have had English roots,

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80 Connecticut has been cited as “the first colony to appoint public prosecutors.” See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 17 (1980). In 1704, the Queen’s attorney in Connecticut, the colonial equivalent of the district attorney, was empowered to “prosecute and implead in the lawe all criminall offenders, and to doe all other things necessary or convenient as an attorney to suppress vice and imorallitie.” 3 CHARLES J. HOADLY, *THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT: FROM AUGUST, 1689, TO MAY, 1706*, at 468 (1868); see also Jack M. Kress, *Progress and Prosecution*, 423 *ANNALS AM. ACAD. POL. & SOC. SCI.* 99, 103 (1976) (“In May of 1704, the Connecticut Assembly passed the law which is generally recognized as creating the first permanent office of public prosecutor on a colony-wide basis . . .”). Interestingly, the job of the attorney general in New Hampshire, first appointed in 1683, was to present criminal indictments before the grand jury. See ELWIN L. PAGE, *JUDICIAL BEGINNINGS IN NEW HAMPSHIRE 1640–1700*, at 60 (1959).

81 See Steinberg, *supra* note 10, at 571–72; see also Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson and the Framers’ Intent, 99 *YALE L.J.* 1069, 1071–72 (1990) (describing original understanding of the role of prosecutors).

82 See generally JACOBY, *supra* note 80.

83 See Joan E. Jacoby, *The American Prosecutor in Historical Context*, PROSECUTOR, Mar./Apr. 2005, at 34, 38, available at <http://www.mcaa-mn.org/docs/2005/AmericanProsecutorHistoricalContext52705.pdf> (noting “the Massachusetts Bay Colony modeled its court system after the rural British justice of the peace courts”).

84 GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 177 (1960).

85 JACOBY, *supra* note 80, at 11. See also JOHN BLUM ET AL., *THE NATIONAL EXPERIENCE* 59 (1963).



immigrants from other cultures brought with them their own ideas with respect to government's role in enforcing criminal law.<sup>86</sup> Professor John Blum, in discussing the settlers' diverse ancestry and who that ancestry affected their legal forms, has noted:

[N]one of their institutions [were] quite like its English counterpart; the heritage of English ideas that went with the institutions was so rich and varied that Americans were able to select and develop those that best suited their situation and forget others that meanwhile were growing prominent in the mother country.<sup>87</sup>

Similarly, Professor Jacoby has explained that in the colonies of New York and New Jersey, which enjoyed a preponderance of colonists from Holland, "the British common law methods of prosecution were altered early because of the influence of Dutch law and the duties of a Dutch judicial officer, the *schout*."<sup>88</sup> Among the duties exercised by the *schout* was that of "[the] present[ment of] criminal charges against alleged criminals."<sup>89</sup> As described by Professor Jacoby, the *schout* acted as a sort of one-man criminal justice system: collecting evidence, presenting it before a court, contacting witnesses, and notifying the accused of the charges leveled against him.<sup>90</sup>

The confluence of the colonists' varied legal traditions and the growing need to maintain order in a burgeoning society thus drove modifications to the English system and enabled the colonists to craft a prosecutorial system that best served their local interests. The statutory creation of a public prosecutor in certain colonies was one such innovation. Professor Jack Kress has observed that the public prosecutor appears to be

[A] distinctive and uniquely American contribution . . . . Whereas Americans typically describe their legal system as based upon the English common law . . . the public prosecutor is a figure virtually unknown to the English system, which is primarily one of private prosecution to this day.<sup>91</sup>

Nevertheless, Connecticut's Constitution appears to be the only such charter to refer to a local prosecutor,<sup>92</sup> which may be attributed to that one-time colony's establishment of a system of public prosecutors by 1704.<sup>93</sup> Professor Jacoby's work identifies few mentions of public prosecutors in the time period immediately after the federal Con-

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86 See Jacoby, *supra* note 83, at 38.

87 BLUM ET AL., *supra* note 85, at 59.

88 JACOBY, *supra* note 80, at 13 (citing Van Alstyne, *supra* note 26, at 125).

89 *Id.* at 14.

90 *See id.* (listing the duties of the justices of the peace).

91 Jack M. Kress, *supra* note 80, at 100.

92 See JACOBY, *supra* note 80, at 22; see also Sidman, *supra* note 26, at 763 (exploring the history of private prosecutions).

93 *Id.* at 10.

stitution's ratification,<sup>94</sup> noting that "[o]nly five of these first thirteen constitutions . . . mention the office of the Attorney General."<sup>95</sup> However, those charters, as was common for the day, relegated that office to one primarily of legal advisor, not prosecutor. According to Professor Jacoby, and buttressed by a review of the relevant documents, of the state constitutions adopted at that time, only Connecticut and New York appear to refer to the office of the public prosecutor.<sup>96</sup>

Without a practice of establishing an office for the prosecution of crimes, it is no surprise then that the colonists and early Americans imported from England the practice of private prosecutions of criminal offenses.<sup>97</sup> The absence of police forces and public prosecutors necessitated such a practice:

[The crime victim] served as policeman and prosecutor who, if he chose to apprehend an offender and initiate a prosecution, did so directly and at his own expense. He did not have to rely on other government agencies. On the contrary, he could not rely on them even if he had wanted to because they either did not exist or did not perform the function he sought.<sup>98</sup>

The enterprising colonists, left to their own devices, established legal forums to resolve disputes and provide a peaceable means of seeking restitution. And, it appears, that without statutorily established public prosecutors, privately-retained prosecutors managed the majority of criminal enforcement actions.<sup>99</sup>

For crimes against property, the victims, it appears, tended to bring private prosecutions to seek redress.<sup>100</sup> Such an arrangement makes perfect sense<sup>101</sup>—especially if the threat of criminal punishment forced settlement or if the defendant had little ability to satisfy

94 See *id.* at 273.

95 *Id.* at 22. The constitutions of Georgia, Maryland, Massachusetts, New Jersey, and Virginia include the office of attorney general in the judicial article. *Id.* The attorney general in New Hampshire, first appointed in 1683, was to present criminal indictments before the grand jury. See PAGE, *supra* note 80, at 60.

96 N.Y. CONST. of 1777, art. XXVII; JACOBY, *supra* note 80, at 22; Jacoby, *supra* note 83, at 34. Secondary references to public prosecutors, as Professor Jacoby notes, are equally rare. For example, an 1816 manual for bar members describing New York government covers twenty-one officers without mentioning public prosecutors. See generally JOHN TAPPEN, THE COUNTY AND TOWN OFFICER (1816).

97 See Jacoby, *supra* note 83, at 37–38.

98 William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649 (1976) (footnote omitted).

99 See Steinberg, *supra* note 10, at 571–72 (discussing the dominance of private prosecutions in the colonies).

100 See Jacoby, *supra* note 83, at 37.

101 See Gaskins, *supra* note 79, at 313–15 (explaining why property crimes were handled in civil proceedings).

a civil judgment. Indeed, contemporary scholarship suggests that the number of tort cases dwarfed those of criminal cases in colonial America.<sup>102</sup> If a civil suit proved impractical, the victim of a crime would need some sort of ability to seek recompense to repair the harm done. Under such an arrangement, the state would have little need to involve itself, except to provide its citizens with a forum to settle disputes in a court of law rather than by force of arms.<sup>103</sup>

Thus, ministerial functionaries, such as justices of the peace or aldermen, used informal procedures to deal with privately initiated prosecutions.<sup>104</sup> Private litigants retained control over their cases and could choose to settle even in circumstances in which a grand jury might have returned an indictment.<sup>105</sup> If there is a dearth of references to private prosecutions in colonial America, it probably is a product of the inadequate record keeping of the times, as well as the fact that a case settled after the threat of prosecution might never have been recorded and would be lost to modern researchers.

And for the most part, early attorneys general and district attorneys functioned more as legal advisors than actual prosecutors.<sup>106</sup> For example, attorneys general provided legal advice to other government functionaries and rendered legal opinions interpreting statutes, state contracts, or judicial opinions.<sup>107</sup> District prosecutors, instead of performing the functions we commonly think of today, performed the administrative tasks of a quasi-judicial official or served the courts,

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102 See generally Goldstein, *supra* note 71, at 1286. In fact, the number of so-called public crimes remained fairly small during this time—perhaps because evolving societies concerned with survival had other, more pressing issues on which to focus. For a discussion along these lines, see William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450 (1967).

103 See, e.g., *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784), reprinted in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674–1784, at 57–59 (Richard B. Morris ed., 1935) (describing how in 1783, a victim used private prosecution for trespass to vindicate an anti-Tory state policy “in derogation of the sixth article of the treaty of peace”).

104 See, e.g., JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 341, 347–50, 366–67, 379–82 (1944) (describing relatively informal procedures used in private prosecutions); see also Steinberg, *supra* note 10, at 572–73 (highlighting the importance of alderman and justices of the peace to the criminal justice system and describing the types of offenses they handled).

105 See, e.g., Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720–1740*, 25 AM. J. LEGAL HIST. 141, 161 (1981) (suggesting that many prosecutions were dismissed when a party failed to appear); Steinberg, *supra* note 10, at 574 (arguing that, in Pennsylvania, private control over the settlement of cases persisted into nineteenth century).

106 See Dangel, *supra* note 81, at 1073 (“First, colonial attorneys general and district attorneys performed non-prosecutorial tasks . . .”).

107 See *id.*

which often were responsible for their appointment.<sup>108</sup> While select jurisdictions empowered public prosecutors to quash privately initiated suits,<sup>109</sup> few permitted them to initiate criminal cases.<sup>110</sup>

Following the Constitution's ratification in 1789, state constitutions slowly began to acknowledge offices of public prosecution, but without ending the practice of private prosecution where it had previously existed.<sup>111</sup> Interestingly, district attorneys, who actively managed prosecutions, tended to be elected while attorneys general, who served exclusively as legal advisors to the government, often remained appointed officials.<sup>112</sup> Why this dichotomy persisted is unclear.<sup>113</sup> One might argue, however, that their difference in function dictated that attorneys general ought to be appointed by those whom they advised, while public prosecutors, who might be counted on to represent the interests of a particular victim as well as the state, were best elected directly by the people. Similarly, concerns about the centralization of prosecutorial authority may have fueled popularly elected prosecutors who operate with a significant degree of independence from other governmental departments. A desire to ensure that public prosecutors could be held directly accountable by the people would thus conform to the idea of a carefully checked and balanced government, even if a prosecutor created to represent the in-

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108 The public prosecutor often acted as a judicial clerk and set the stage for the private prosecutor and defendant to present their case before the court. See JACOBY, *supra* note 80, at 23 (stating that in the nineteenth century district attorneys were minor court figures and served primarily judicial, not executive, roles); see also Steinberg, *supra* note 10, at 577 (describing a public prosecutor's duties as including organizing the court's calendar).

109 See *People v. Wabash, St. Louis & Pac. Ry. Co.*, 12 Ill. App. 263, 265 (Ill. App. Ct. 1882) (per curiam) ("He may commence public prosecutions, in his official capacity by information and he may discontinue them when, in his judgment, the ends of justice are satisfied.").

110 Cf. Goldstein, *supra* note 71, at 1286 ("[L]ike its English ancestor, [America] places extraordinary emphasis on local autonomy and charging discretion.").

111 See, e.g., MISS. CONST. of 1832, art. IV, § 25 ("There shall be an attorney general . . ."). Mississippi in 1817 and Louisiana in 1812 separated the prosecuting attorney from the attorney general, who served as advisor to the executive. See LA. CONST. of 1812, art. IV, § 7 ("There shall be an attorney general for the state, and as many other prosecuting attorneys for the state as may be hereafter found necessary."); MISS. CONST. of 1817, art. V, § 14 ("There shall be an attorney general for the State, and as many district attorneys as the general assembly may deem necessary . . .").

112 States distinguished the prosecutor from the attorney general, who was a legal advisor to the executive, and the sheriff, who embodied the executive function of law enforcement. See JACOBY, *supra* note 80, at 22–25 (comparing the roles of attorneys general and sheriffs).

113 See generally *Cantrell v. Commonwealth*, 329 S.E.2d 22, 25 (Va. 1985) (providing the Supreme Court of Virginia's discussion of the historical development of the private prosecutor).

terests of justice as opposed to the popular will might better be insulated from politics in the same way in which judges are. But, if the underlying point of electing public prosecutors was to ensure their ties to the community, then they were probably not thought of either as being at odds with privately managed prosecutions or even as being a necessity, given the availability of such privately managed prosecutions. As Professor Jacoby acknowledges, the public prosecutor was “for the first half-century at least . . . clearly a minor actor in the court’s structure.”<sup>114</sup>

*Commonwealth v. Williams*<sup>115</sup> is among the earliest cases to criticize the practice of private prosecution. In *Williams*, the defendants were charged with burglarizing a bank in Charlestown, Massachusetts. At trial, the court granted the District Attorney’s motion to have a private attorney aid in prosecuting the case. The defendants were convicted. On appeal, the defendants argued that the conviction should be overturned because the private attorney was permitted to aid in the prosecution.<sup>116</sup> The Court nevertheless upheld the conviction, explaining that with the permission of the court, private counsel may aid a public prosecutor in a case.<sup>117</sup> The Court noted that while public prosecutors would be expected to shoulder the primary duty in arguing a criminal case to a jury, exceptions may occur in particular cases with the court’s permission. The Court thus concluded that it lay within the judge’s discretion to grant the district attorney’s request for assistance and, in turn, implicitly upheld the principle that privately-managed prosecutions were legitimate.<sup>118</sup>

One is left curious as to why states moved to adopt public prosecution schemes. An argument can be made for the ability of the state to collect fines assessed against convicted criminals when the prosecutor is a government agent. Indeed, early English history suggests that the monarch was more interested in obtaining a “cut” from the criminal proceeds—predictable rent-seeking behavior—than in ensuring the victim was adequately recompensed.<sup>119</sup> Moreover, even in circum-

114 JACOBY, *supra* note 80, at 23.

115 56 Mass. (2 Cush.) 582 (1849) (finding the indictments for the offense sufficient and overruling the defense’s motion).

116 *Id.* at 584 (stating that the court had permitted a private attorney to aid in the prosecution and that he had opened the case to the jury and examined several witnesses).

117 *Id.* at 585.

118 *See id.* (“While we deem it our duty to say, that such additional counsel is not, under ordinary circumstances, to be permitted, yet, when sanctioned by the court . . . it will not furnish any sufficient ground for setting aside a verdict.”).

119 *See* Linda B. Deutschmann & Aaron Young, *Crime and Delinquency*, in SOCIAL PROBLEMS 69, 70 (Norman A. Dolch et al. eds., 2d ed. 2007) (“In early England, crimes were violations

stances in which no fine is sought, the incarceration of the offender both provides “justice” to the victim as well as a benefit to society by removing from the community—at least in some circumstances—a threat to the social order. But, since neither incarceration nor the death penalty were common punishments in colonial America (death sentences were sometimes imposed, but seldom carried out), the reasons private prosecutions were rejected in favor of their public counterparts remain unclear.

Professor Allen Steinberg provides an interesting explanation for the decline of private prosecutions in early Pennsylvania.<sup>120</sup> Professor Steinberg analyzed Pennsylvania criminal justice data to provide a window into the history of criminal prosecution in that state. He concluded that, contrary to some assertions, “the fee system [by which private prosecutions were maintained] did not prevent anyone from participating in this criminal justice relationship.”<sup>121</sup> In fact, Steinberg unearthed evidence that “[g]rand jurors, judges, and journalists frequently commented on the ease with which the poorest Philadelphians, and those otherwise excluded from public life, made use of this system.”<sup>122</sup> Steinberg asserts that the system of private prosecution declined “not because it ceased to be effective for the citizens using it, but because it was an ineffective means of law enforcement in the matter of breaches of the public order.”<sup>123</sup> Philadelphia’s increasing concern with maintaining public order, especially in circumstances in which no victim might be found, led to the creation of a public police force. The public police force, in turn, “initiat[ed] more criminal prosecutions than ever before” and did so “without a private complainant.”<sup>124</sup>

The blossoming of public prosecutions coupled with “increased dissatisfaction with the effectiveness of aldermen and grand jurors to restrain excessive private prosecution”<sup>125</sup> led Pennsylvania, at least, to undertake efforts to limit the scope of private prosecutions. According to Professor Steinberg, this was done, in no small part, by eliminating the office of aldermen, a low-level ministerial position largely

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of the ‘King’s Peace.’ Fines were paid to the king, who made a profit from providing justice.” (citation omitted)).

120 See Steinberg, *supra* note 10; cf. Christopher Tomlins, *In This Issue*, 19 LAW & HIST. REV. xv (2001) (noting that “most crimes in premodern societies were prosecuted privately”).

121 Steinberg, *supra* note 10, at 574.

122 *Id.*

123 *Id.* at 579.

124 *Id.*

125 *Id.* at 581.

responsible for adjudicating privately initiated prosecutions.<sup>126</sup> The rise of the public police force, which brought a corresponding increase in the number of criminal prosecutions, and the restructuring of the judicial system with an increasing reliance upon judges and an independent judiciary, effectively squeezed out private prosecutions in Pennsylvania.<sup>127</sup>

*C. The Rapid Decline of Private Criminal Law Enforcement in the United States*

By the turn of the twentieth century, the use of private prosecutors appears largely to have faded from the scene. In his Article, *The Office of Prosecutor in Connecticut*, Judge Walter M. Pickett summed up the status of criminal prosecution in the following words:

In all criminal cases in Connecticut, 'the state' is the prosecutor. The offenses are against [sic] 'the state.' The victim of the offense is not a 'party' to the prosecution nor does he occupy any relation to it other than that of a 'witness,' an interested witness mayhap but none the less only a witness.

It is not necessary that the injured party make complaint, nor is he required to give bond to prosecute; he is in no sense a 'relator.' He cannot in any way control the prosecution and whether reluctant or no, he can be compelled like any other witness to appear and testify.

As expressed in the case of *Malley v. Lane*[,] . . . '[t]he peace is that state and sense of safety which is necessary to the comfort and happiness of every citizen, and which government is instituted to secure.'<sup>128</sup>

*Malley*, decided in 1921 when a new "wave of democratization" was sweeping the country,<sup>129</sup> illustrates the trend towards subordinating the interests of the victim to those of society. The individual's loss in such a scheme is not explicitly stated as such; rather, the cost of the offense to society is the dominant consideration. Rather than accepting Adam Smith's insight in which society as a whole benefits when individuals pursue their own rightly understood interests,<sup>130</sup> it can be

<sup>126</sup> *Id.* at 582.

<sup>127</sup> Professor Steinberg notes that "[a]ny attempt to generalize about the history of American criminal prosecution is fraught with danger." *Id.* at 583. Nevertheless, he makes a strong case for doing precisely that: namely, using the Pennsylvania experience as a means of understanding the broader decline of private prosecutions in the nineteenth and early-twentieth centuries.

<sup>128</sup> Walter M. Pickett, *The Office of Prosecutor in Connecticut*, 17 AM. INST. CRIM. L. & CRIMINOLOGY 348, 356-57 (1926) (quoting *Malley v. Lane*, 115 A. 674, 676 (Conn. 1921)); cf. JACOBY, *supra* note 80, at 11.

<sup>129</sup> See generally Renske Doorenspleet, *Reassessing the Three Waves of Democratization*, 52 WORLD POL. 384 (2000) (identifying a period of democratization between 1826 and 1926).

<sup>130</sup> See generally SMITH, *supra* note 14, at 477.

argued that democratic ideals necessitated the demise of the private prosecutor. Professor Jacoby offered a similar insight: “Private prosecution [became] inconsistent with the American concept of democratic process and[, thus,] had a short life span in the American colonies.”<sup>131</sup>

The states’ decision to eschew privately managed prosecutions in favor of public ones might not have been purely an evolution in democratic thinking and democratic institutions. Douglas Campbell argues that private prosecutions (at least in England) constituted a system “by the rich and for the rich” destined to fail in a democracy.<sup>132</sup> “Bought” justice could never equate to public justice. Professor Jacoby has echoed this concern, positing that: “[t]he rejection of the general notion of a privileged class within society also resulted in the rejection of ideas and forms that tended to protect that privilege. In colonial America, public prosecution was an available and progressive remedy for a population dedicated to a more democratic society.”<sup>133</sup> Certainly, this is not simply an indictment leveled at colonial America or early England. Recent news reports condemn the cost of private prosecutions but note that they are necessary to buttress an “ineffective[.]” criminal justice system.<sup>134</sup> And yet, while there is no doubt an advantage to be gained by having the state initiate and maintain a prosecution, what benefit is accrued to the victim (other than a general feeling that someone is doing something)? The fine, after all, goes to the state. Mandatory victim restitution is only a fairly recent innovation.<sup>135</sup> If the goal is general deterrence, does it matter who conducts the prosecution? While it is often argued that a public prosecutor will be more fair than her private counterpart because of her obligation to “justice,” not merely to a self-interested client, is that necessarily so?

Presumably, the state’s decision to monopolize criminal prosecutions is in part incentivized by the fact that fines levied against the convict will go to the state. Ultimately, whatever the causes—the democratic impulse, economic factors, or the mounting complexity of the law—privately initiated prosecutions played less and less of a role as the nation’s system of criminal prosecution evolved.

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131 JACOBY, *supra* note 80, at 10.

132 2 DOUGLAS CAMPBELL, *THE PURITAN IN HOLLAND, ENGLAND, AND AMERICA* 444 (1892).

133 JACOBY, *supra* note 80, at 17.

134 *See Protection—What Protection?*, SCOTSMAN (Edinburgh), April 21, 2007, at 25.

135 *See FINES AND RESTITUTION IN FEDERAL COURTS* 7 (Maxwell R. Silverstein ed., 2003) (“[M]andatory restitution as part of a federal criminal sentence is a relatively recent idea.”).



Yet, it is crucial to bear in mind the criminal law's justification of general deterrence. That said, even with the advantages of public prosecution, it arguably does not matter who conducts the prosecution. Nor is it clear that a public prosecutor will act more fairly than a private counterpart seeking personal justice for his client. While the public prosecutor may have an obligation to seek impartial justice for the state, he or she is not always immune from local or national political pressures in how to conduct the office. It is not necessarily so that a public prosecutor will be more fair than her private counterpart because of her obligation to "justice," rather than a victim seeking personal justice, or "vengeance." And conversely, while there are admittedly advantages to be gained from the state initiating and carrying out prosecutions, little benefit typically, other than a sense that something is being done, accrues to the victim in a public prosecution system.

## II. CONTEMPORARY PRIVATE PROSECUTION IN THE UNITED STATES

Although several states continue to allow private prosecutions,<sup>136</sup> most jurisdictions have either disallowed privately managed prosecutions completely, or severely limited the role a private prosecutor may play.<sup>137</sup> The Texas case discussed at the beginning of this Article may represent something of an anomaly. Iowa and North Dakota, for example, have laws prohibiting a private attorney from accepting a fee for prosecuting a criminal case.<sup>138</sup> Illinois, Kentucky, Massachusetts, Michigan, and Nebraska have laws that prevent a former prosecutor from acting as private counsel in a subsequent civil case that relies on the same factual scenario as he or she had previously prosecuted as a

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<sup>136</sup> See 17 AM. JUR. 2D *Contempt* § 152 (2004) (pointing out that courts will require the appointment of a disinterested attorney even though interested parties may be appointed to assist); see also Christopher Vaeth, Annotation, *Disqualification or Recusal of Prosecuting Attorney Because of Relationship with Alleged Victim or Victim's Family*, 12 A.L.R. 5TH 909, 924 (1993) (describing an Ohio case where a court concluded that the disqualification of a special prosecutor employed by the victim was not required).

<sup>137</sup> David E. Rigney, Annotation, *Participation of Private Counsel for Beneficiary of Court Order Allegedly Violated by Defendant, in Prosecution of Federal Criminal Contempt Proceeding*, 96 A.L.R. FED. 519, 520 (1990) (observing that "private counsel may participate with government or disinterested court-appointed counsel . . . so long as the private attorney does not effectively control the proceeding").

<sup>138</sup> See, e.g., *State v. Williams*, 217 N.W.2d 573, 575 (Iowa 1974) (discussing statute prohibiting private attorney from accepting fees for private prosecution of a criminal case); *State v. Kent*, 62 N.W. 631, 635 (N.D. 1895) (holding that statute forbidding lawyer from accepting fees for private prosecution of a criminal case did not apply to privately retained special counsel).

criminal matter.<sup>139</sup> Likewise, in Colorado, the Supreme Court has held that private prosecutions are themselves prejudicial, at least when those prosecutions are factually related to subsequent civil proceedings.<sup>140</sup>

Nevertheless, even while diminished in scope, private prosecutions continue to play a role in the criminal justice system. Private prosecutions often occur as the result of a court seeking enforcement of a judicial order, when private counsel possesses specialized knowledge about a case, or when a public prosecutor's office is conflicted out of a case. I will briefly discuss common instances of private prosecution in the sections that follow.

#### A. *The Private Prosecution of Criminal Contempt Citations*

The majority of the modern-day cases involving privately managed prosecutions deal with the issue of whether a private attorney may lawfully prosecute a contempt citation after an adverse party's alleged violation of a court order. Extant cases posit three different methods by which a private attorney may prosecute criminal contempt. First, the court may, *sua sponte*, appoint a private prosecutor; second, the plaintiff may retain private counsel with the court's consent; or finally, the public prosecutor may seek the assistance of private counsel

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139 See *People v. Kidd*, 81 N.E.2d 892, 895 (Ill. 1948) ("The state's attorney shall . . . not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend."); *Commonwealth v. Tabor*, 384 N.E.2d 190, 195–96 (Mass. 1978) ("[N]o prosecuting officer shall . . . be concerned as counsel or attorney for either party in a civil action depending upon the same facts involved in such prosecution or business." (quoting MASS. GEN. LAWS ch. 12, § 30 (1978))); *People v. Hillhouse*, 45 N.W. 484, 486 (Mich. 1890) ("The statute is positive and peremptory that the attorney shall not be permitted to prosecute, or aid in prosecuting, any person for an alleged criminal offense, where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts, against such person, directly or indirectly."); *Fitzgerald v. State*, 110 N.W. 676, 677 (Neb. 1907) ("No prosecuting attorney shall . . . be concerned as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend."). Relying on a statute prohibiting public prosecutors from receiving compensation from crime victims, the Massachusetts Supreme Judicial Court initially struck down private prosecution in 1855 in the case of *Commonwealth v. Gibbs*. See 70 Mass. (4 Gray) 146, 148 (1855) ("[T]he appointment was irregular in point of law."). That court has since held that "a private citizen has no judicially cognizable interest in the prosecution of another." *Taylor v. Newton Div. of Dist. Court Dept.*, 622 N.E.2d 261, 262 (Mass. 1993).

140 See *People v. Jiminez*, 528 P.2d 913, 915–16 (Colo. 1974) (en banc) (prohibiting prosecutor from representing party in divorce proceeding arising from same facts that gave rise to the criminal case).

to undertake the action. Each of these situations will be discussed in turn.

### 1. Trial Court Appointment

In circumstances in which the complainant alleges that the adverse party has violated a court order, the trial court may respond by selecting a prosecutor to undertake enforcement of the contempt action. In *Rogowicz v. O'Connell*, for example, the plaintiff alleged that the defendant violated the court's protective order.<sup>141</sup> The court had issued the order after the plaintiff filed a domestic violence petition,<sup>142</sup> but the county prosecutor thought the matter was "civil in nature" and declined to prosecute.<sup>143</sup> The trial court exercised its authority to appoint private counsel sua sponte and selected the director of New Hampshire's Legal Assistance Domestic Violence Project to prosecute.<sup>144</sup> The respondent challenged the court's decision to appoint a private prosecutor.<sup>145</sup> Although the New Hampshire Supreme Court agreed that the trial court enjoyed the power to appoint private counsel to enforce its order, it held that the court erred in the appointment of the Project's attorney because counsel would personally benefit from the court order.<sup>146</sup>

Federal district courts have also had occasion to appoint private prosecutors to enforce contempt citations. The district court in *United States v. Vlahos*, for example, appointed a private prosecutor in a criminal contempt proceeding.<sup>147</sup> There, the contempt proceeding arose from the alleged violation of a court order issued in a civil case brought by the Federal Trade Commission (FTC) against the respondent.<sup>148</sup> Initially, the court refused to allow the FTC itself to prosecute the alleged contempt.<sup>149</sup> Other government prosecutors were sought out, but the court similarly disqualified those government at-

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141 786 A.2d 841, 842 (N.H. 2001).

142 *Id.*

143 *Id.*

144 *See id.* ("The record is not clear on how [the director of New Hampshire's Legal Assistance Domestic Violence Project] assumed the role of prosecutor, but a pleading she filed alleges that the family division requested her appearance.").

145 *Id.*

146 *Id.* at 843, 845.

147 No. 93 CR 360, 1993 U.S. Dist. LEXIS 11781, at \*1 (N.D. Ill. Aug. 24, 1993) ("[T]his court deemed its request that the appropriate prosecutorial authority handle this matter to have been 'constructively denied,' and therefore appointed a private attorney to handle this matter.").

148 *Id.*

149 *Id.*

torneys because of their connection to the FTC.<sup>150</sup> As a result, the court found that its request for appropriate prosecutorial authority was “constructively denied” and instead appointed a private attorney to prosecute.<sup>151</sup> The court relied on its inherent authority to ensure enforcement of its orders.<sup>152</sup>

## 2. *Plaintiff Initiated Appointment of Private Counsel*

While courts may choose to appoint a private prosecutor *sua sponte*, a somewhat more common scenario is for the plaintiff involved in the underlying civil litigation to request appointment of private counsel to prosecute the contempt action.

Where the contempt action arises from an underlying civil case, plaintiffs will often seek to use the private attorney who litigated the civil cause. For instance, in *Wilson v. Wilson*, the respondent in the underlying civil case tried to use the same attorney from a divorce proceeding to prosecute two contempt actions arising from the civil trial.<sup>153</sup> Although the trial court approved, the Court of Appeals of Tennessee overruled this appointment, apparently because of the concern that counsel had a stake in the underlying cause.<sup>154</sup> In *Woodside v. Woodside*, however, the plaintiff prosecuted a criminal contempt charge of failing to pay court-ordered child support by using her attorney from the divorce proceedings.<sup>155</sup> Unlike the outcome in *Wilson*, however, in this case, the Court of Appeals in Tennessee affirmed the appointment.<sup>156</sup>

Similarly, in *Green v. Green*, the plaintiff used her personal attorney from the underlying civil action to prosecute her former husband for contempt after he violated a civil protection order issued by the court.<sup>157</sup> The District of Columbia Court of Appeals affirmed the ap-

150 *Id.*

151 *Id.*

152 *See id.* at \*2-3 (“[T]he U.S. Attorney’s Office argues that the court’s power to appoint a private attorney is an inherent power of self-protection that should be used only as a last resort. This court agrees wholeheartedly . . .”).

153 No. 01A01-9704-CV-00152, 1998 Tenn. App. LEXIS 199, at \*1-2 (Tenn. Ct. App. Mar. 20, 1998) (describing plaintiff’s motions to disqualify private counsel because of involvement in divorce proceeding).

154 *See id.* at \*2-3 (explaining that this type of appointment is contrary to judicial and attorney ethical standards).

155 No. 01-A-01-9503-PB-00121, 1995 Tenn. App. LEXIS 694, at \*1-2 (Tenn. Ct. App. Oct. 25, 1995) (describing ex-husband’s notice of appeal regarding his ex-wife’s retention of private counsel for the contempt prosecution).

156 *Id.* at \*14.

157 642 A.2d 1275, 1276 (D.C. 1994) (“[T]he wife’s attorneys acted as the prosecuting attorneys during the intrafamily contempt proceedings . . .”).

pointment, explaining that the appointment would expedite the intrafamily proceeding, which was a goal of the family justice system.<sup>158</sup>

*Polo Fashions, Inc. v. Stock Buyers International, Inc.* is another example of a situation in which the plaintiff sought to use the attorneys from the civil action to prosecute a criminal contempt action.<sup>159</sup> In the underlying action, the plaintiff had filed a suit alleging that the defendant was infringing on registered trademarks,<sup>160</sup> and the trial court issued a preliminary injunction order—it was this order that the plaintiffs claimed had been violated.<sup>161</sup> The plaintiffs, therefore, requested that their own attorney in the civil action be appointed to prosecute the contempt charges.<sup>162</sup> The trial court allowed this appointment, along with lawyers from two other private law firms, who would also act as co-counsel for the plaintiffs.<sup>163</sup> During the trial, notably, only the privately hired attorneys were present—no one from the U.S. Attorney’s Office appeared.<sup>164</sup> The Court of Appeals subsequently reversed the appointment, finding that it was a conflict of interest to have counsel for an interested party (that is, interested in the underlying civil action) exercise full control of the proceedings.<sup>165</sup> It is important to note here, however, that the court did not quibble with the fact that private attorneys had been appointed, but merely took issue with the government attorneys’ failure to supervise the case. Presumably, had the U.S. Attorney’s Office been more in control of the prosecution, it would have survived scrutiny.

*In re Sasson Jeans, Inc.* demonstrates a more problematic situation in which a plaintiff, who was designated as the trustee of the defendant debtor company’s assets, sought to prosecute the contempt action himself.<sup>166</sup> The Department of Justice appointed the plaintiff to serve as a “fiduciary vested with [the] public trust.”<sup>167</sup> As the bankruptcy trustee, the plaintiff was supervised by the Attorney General. He initiated the contempt proceedings after the defendant failed to

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158 *Id.* at 1276, 1279–80.

159 760 F.2d 698, 699 (6th Cir. 1985) (“Polo also requested that its attorneys be appointed to prosecute the criminal contempt charges.”).

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* at 704.

166 104 B.R. 600, 602 (S.D.N.Y. 1989) (finding that the trustee’s prosecution of the alleged contempt charges violated the holding in a U.S. Supreme Court case).

167 *Id.* at 604 (quoting *In re Sasson Jeans, Inc.*, 83 B.R. 206, 217 n.5 (Bankr. S.D.N.Y. 1988)).

turn over the assets.<sup>168</sup> The bankruptcy court had allowed the trustee to bring the action because of his role as a government representative; but without any sort of detailed analysis, the district court reversed the conviction because of the potential for a conflict of interest.<sup>169</sup> The court did not elaborate on this concern, however.

Finally, in *In re Peak*, for example, the plaintiff brought a contempt action after the defendant violated a permanent injunction to refrain from illegal drug use.<sup>170</sup> During a status hearing, the district court expressed its concern that no prosecutor had been designated to enforce violation of the injunction.<sup>171</sup> The court therefore encouraged the plaintiff to seek counsel from the U.S. Attorney's Office or to obtain help from a local legal clinic.<sup>172</sup> Several months later, attorneys from a private firm entered an appearance for the plaintiff,<sup>173</sup> which the trial court approved.<sup>174</sup> On review, however, the D.C. Court of Appeals overruled the appointment because the private counsel could personally benefit from the proceeding.<sup>175</sup>

In general, it is hard to understand why, intrinsically, it would be problematic for counsel to benefit from the prosecution. While it is true that ethical canons generally prohibit lawyers from taking criminal cases on the basis of a contingency fee,<sup>176</sup> defense counsel are routinely paid for their efforts. Provided that the fee paid to private counsel is not based upon whether or not the prosecution is successful and other ethical requirements are followed, there should be no other impediment to private counsel managing the prosecution. I suspect the court's primary concern was that a private prosecution initiated by counsel who stands to benefit in the underlying civil proceeding "taints" the prosecution.

### 3. *Private Counsel as an Adjunct to the Public Prosecutor*

Another common situation in which private prosecutions may arise occur in cases in which the private attorney simply collaborates with the government in bringing the prosecution. In *United States v.*

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168 See *id.* at 602 (“[The bankruptcy judge] found Guez to have willfully violated his orders . . . directing that assets of the debtor company be turned over to the trustee.”).

169 *Id.* at 609.

170 See *In re Francine Peak*, 759 A.2d 612, 613 (D.C. 2000).

171 *Id.* at 615.

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.* at 620.

176 MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2002).

*Smith*, for example, a privately appointed attorney acted as co-counsel to the government's attorney.<sup>177</sup> The defendant was charged with criminal contempt for failing to appear in court for a civil proceeding brought by the Securities and Exchange Commission (SEC).<sup>178</sup> The district court first appointed the private firm to represent the SEC in civil actions and to prosecute the criminal contempt citation. However, by this time, the Supreme Court had decided *Young v. United States ex rel Vuitton et Fils S.A.*,<sup>179</sup> so the firm filed a motion to vacate the appointment.<sup>180</sup> The district court obliged and appointed lawyers from the firm as "Special Assistant[s] to the United States Attorney."<sup>181</sup> Despite their designation as "Special Assistants," the firm lawyers did the bulk of the work during trial, including the examination of the witnesses and presentation of evidence.<sup>182</sup> Due to the lack of involvement by the government's office, however, the court of appeals reversed the conviction.<sup>183</sup>

#### B. Examining Private Prosecutions Maintained Under State Law

Alabama, Georgia, Indiana, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin each allow private counsel to participate in a criminal prosecution in some way.<sup>184</sup> Although a comprehensive examination of each of those

177 No. 87-1274, 1991 WL 113192, at \*1 (9th Cir. June 24, 1991).

178 *Id.*

179 481 U.S. 787, 802 (1987) (disapproving of the appointment of private counsel for an interested party to prosecute criminal contempt).

180 *Smith*, 1991 WL 113192, at \*1.

181 *Id.*

182 *Id.* at \*2.

183 *Id.* at \*5.

184 *See, e.g.*, N.J. R. Ct. 7:4-4(b) (1995) (current version located at N.J. R. Ct. 7:8-7(b)); *Hopkins v. State*, 429 So. 2d 1146, 1154 (Ala. Crim. App. 1983) ("[A] special prosecutor's employment by the victim to represent him in a civil action arising out of the same transaction as the criminal proceeding does not deprive the defendant of a fair trial" and "the fact that the attorney was employed by those interested in the prosecution is wholly immaterial." (quoting *Brooks v. State*, 228 So. 2d 24, 28 (Ala. Crim. App. 1969))); *Allen v. State*, 257 S.E.2d 5, 7 (Ga. Ct. App. 1979) (holding that it is not improper for a special prosecutor to also represent the victim in a civil suit arising from the same underlying circumstances); *Shuttleworth v. State*, 469 N.E.2d 1210, 1217-18 (Ind. Ct. App. 1984) (providing that a prosecutor's prior representation of the defendant's wife in a couple's divorce proceeding did not disqualify him in a criminal action for non-support); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) (holding that no constitutional or statutory provisions prevent private prosecutors from assisting in criminal prosecutions); *Commonwealth v. Musto*, 35 A.2d 307, 310 (Pa. 1944) (holding that the trial court has discretion to permit private prosecution); *Wilson v. Wilson*, 984 S.W.2d 898, 899-902 (Tenn. 1998) (holding that there is no automatic disqualification for private counsel representing party in divorce proceeding and violation of criminal contempt action against oppos-

individual state rules is beyond the scope of this Article, I will consider several other circumstances in which states, subject to various limitations, permit privately-managed prosecutions.

### 1. *The New Jersey Court Rule*

Prior to a 2007 amendment to the New Jersey Rules of Court, Rule 7:4-4(b) permitted any attorney to appear on behalf of any complaining witness and prosecute the action if the Attorney General or local prosecutor did not appear in court on behalf of the state.<sup>185</sup> Thus, in *State v. Bazin*, the union representative for a postal worker brought actions for harassment and simple assault against a U.S. Postal Service inspector.<sup>186</sup> After the plaintiff filed the complaint with the Hamilton Township Municipal Court, the U.S. Attorney's Office, representing the defendant, filed a motion to have the matter removed to federal court.<sup>187</sup> The Hamilton Township prosecutor, the Mercer County Prosecutor, and the New Jersey Attorney General's office subsequently all refused to prosecute the matter.<sup>188</sup> In response to those refusals, the plaintiff's union retained the services of a private firm to prosecute the action on behalf of the State of New Jersey.<sup>189</sup> The court allowed the appointment.

In *State v. Kinder*, the court allowed the private prosecution of a simple assault case after the Municipal Prosecutor declined to bring the action.<sup>190</sup> His refusal was not premised on any notion that the prosecution was not in the public interest; rather, his refusal was based on the belief that the prosecutor's authority was limited to courts within the jurisdiction of the City of New Brunswick, while the matter at bar was in federal court.<sup>191</sup>

New Jersey courts have also authorized private prosecutions in which the private attorney possessed special expertise. In *State v. Har-*

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ing party); *State v. Ward*, 17 A. 483, 485 (Vt. 1889) (holding that the trial court has discretion to permit private prosecution); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 25-26 (Va. 1985) (describing history of private prosecutions); *State v. King*, 396 S.E.2d 402, 411 (W. Va. 1990) (allowing a private attorney to prosecute a criminal case while serving as the guardian ad litem of the alleged victim); *Bird v. State*, 45 N.W. 1126, 1126-27 (Wis. 1890) (permitting a private prosecutor's appointment as long as he had renounced previous employment by the alleged victim's father).

185 N.J. R. CT. 7:4-4(b) (1995) (current version at N.J. R. CT. 7:8-7(b)).

186 912 F. Supp. 106, 108-09 (D.N.J. 1995).

187 *Id.*

188 *Id.*

189 *Id.*

190 701 F. Supp. 486, 487, 492 (D.N.J. 1988).

191 *Id.* at 487-88.



*ris*, for instance, the court allowed a private attorney to prosecute a criminal trespass case.<sup>192</sup> The private attorney, who had represented a number of apartment complexes in eviction proceedings, including the complex where the alleged trespass occurred, offered to prosecute the action. The Municipal Prosecutor consented because the private attorney was familiar with the facts of the case, had expertise in handling the legal problems of apartment complexes, and had experience representing the apartment complex at issue in the past.<sup>193</sup> The Pemberton Township Municipal Court, however, declined to approve the appointment of private counsel.<sup>194</sup> Nevertheless, the Superior Court of New Jersey reversed the municipal court and allowed the appointment.<sup>195</sup>

The New Jersey Rule was subsequently modified to limit the circumstances in which private prosecutors might be appointed. The revised rule limited such prosecutions to cases involving so-called “cross-complaints” and “only if the court has first reviewed the private prosecutor’s motion to so appear” and was satisfied that “a potential for conflict exists for the municipal prosecutor due to the nature of the charges set forth in the cross-complaints.”<sup>196</sup> Importantly, New Jersey did not eliminate private prosecutors; instead, the state merely limited the circumstances under which they could operate.

Even under the former rule which lacked the restrictions the 2007 amendments brought, New Jersey courts had established certain limitations on private prosecutions. If a clear conflict of interest exists, for example, courts would not allow the private attorney to prosecute. In *State v. Imperiale*, the plaintiff tried, without counsel, to prosecute a simple assault case against his supervisor.<sup>197</sup> The Municipal Prosecutor of the Borough of Eatontown decided not to prosecute.<sup>198</sup> The court, however, found too great a conflict of interest in having the victim himself act as prosecutor.<sup>199</sup> It is unclear whether the court would have permitted the victim to retain private counsel to undertake the prosecution.

The New Jersey courts have also disallowed private attorney prosecutions if there is a lengthy litigious relationship between the parties in the action and a resultant conflict of interest, as was the case in

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192 620 A.2d 1083, 1088 (N.J. Super. Ct. Law Div. 1992).

193 *Id.* at 1085.

194 *Id.*

195 *Id.* at 1088.

196 N.J. R. Ct. 7:8-7(b).

197 773 F. Supp. 747, 749 (D.N.J. 1991).

198 *Id.* at 749.

199 *Id.* at 756.

*State v. Storm*. In this instance, the plaintiff had requested that the private attorney representing her in a civil action also serve as prosecutor in a criminal stalking and harassment case. The defendant in the latter was also the opposing party in the civil case, which was being tried simultaneously.<sup>200</sup> According to the court, both actions merely represented part of the on-going battle between the parties in their "lengthy litigious history."<sup>201</sup> For these reasons the court found that there was too much of a conflict of interest for the private attorney to prosecute.<sup>202</sup> In all likelihood, the court was more concerned about the tortured legal history between the parties and the possibility that the trial would devolve into an opportunity to pursue a personal vendetta rather than about countenancing a private prosecution per se.

## 2. *The New York Experience*

Although New York has long permitted privately managed prosecutions, efforts have been made to restrict their use. Professor Peter Davis has articulated a vigorous defense of the state's common law private prosecution tradition.<sup>203</sup> He argues that such prosecutions serve to vindicate the crime victim's interests and to support the state's efforts in combating crime.<sup>204</sup> In *People v. Benoit*, litigants sought to use section 50 of the New York City Criminal Court Act to authorize a private attorney to prosecute an action after the District Attorney's office declined.<sup>205</sup> The statute, which authorized a private citizen to undertake a criminal prosecution after the local district attorney's office has declined to pursue the case,<sup>206</sup> was held unconstitutional by the Criminal Court of the City of New York because the private attorney was given too much discretionary authority.<sup>207</sup> Rather than forbid the use of private prosecutors altogether, it merely required supervision by the prosecutor's office.

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200 *State v. Storm*, 661 A.2d 790, 792 (N.J. 1995).

201 *Id.* at 796.

202 *Id.*

203 See generally Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329 (1989) (discussing private prosecution as a supplementary model to the public prosecutor's monopoly on criminal prosecutions).

204 See *id.* at 331-41.

205 575 N.Y.S.2d 750, 751 (N.Y. Crim. Ct. 1991).

206 See N.Y. CITY CRIM. CT. ACT § 50 (1989).

207 *Benoit*, 575 N.Y.S.2d at 758.

The court in *People v. Garfield* examined sections 700 and 701 of New York County Law,<sup>208</sup> the latter of which authorizes certain private prosecutions in some instances.<sup>209</sup> In this case, the victim wished to prosecute the accused with the charge of leaving the scene of an accident,<sup>210</sup> and first turned to the local district attorney, who declined to prosecute. The victim then sought to undertake the prosecution himself, without counsel.<sup>211</sup> However, like *State v. Imperiale*,<sup>212</sup> the court found a conflict of interest in allowing the victim, without the assistance of counsel, to pursue what amounted to a “personal” prosecution.<sup>213</sup> Once again, it is unclear whether the court would have allowed the prosecution to go forward with counsel’s assistance.

### 3. Current Statutes Allowing Private Prosecutors to Assist Public Officials

The need to leverage private resources as a means of enforcing the criminal law did not dissipate completely with the modern state’s monopolization of prosecutorial authority. Indeed, several states authorize private lawyers to serve as deputy prosecutors for a specified period of time. The court in *Fort Emory Cove Boat Owners Ass’n v. Cowett*, for example, discusses California “Government Code section 24101,” which allows the district attorney to appoint private attorneys as deputy district attorneys to enforce a state anchorage ordinance.<sup>214</sup> In this case, the district attorney appointed a private firm that previously served as counsel in a civil case challenging the constitutionality of the ordinance.<sup>215</sup> The defendant sought an injunction to prevent the expenditure of public funds to cover the expenses of hiring the private attorneys.<sup>216</sup> The court allowed the district attorney to make such an appointment in order to discharge his enforcement duties.<sup>217</sup>

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208 N.Y. COUNTY LAW §§ 700–701 (2004).

209 See *People v. Garfield*, 574 N.Y.S.2d 501, 502 (N.Y. Just. Ct. 1991) (disqualifying accident victim from prosecuting criminal complaint against driver who hit him).

210 *Id.*

211 *Id.*

212 See *supra* note 197.

213 *Garfield*, 574 N.Y.S.2d at 503.

214 *Fort Emory Cove Boatowners Ass’n v. Cowett*, 270 Cal. Rptr. 527, 531 (Cal. Ct. App. 1990).

215 *Id.* at 529.

216 *Id.*

217 *Id.* at 531.

Similarly, *Seth v. State* examines Delaware's "Lend-A-Prosecutor" program.<sup>218</sup> The State Attorney General established this program in cooperation with a private law firm.<sup>219</sup> The law allows a firm to lend its attorneys to the state justice department for a specified time period, during which they are deputized as "Special Deputy Attorneys General" to prosecute criminal cases under the Delaware Attorney General's supervision.<sup>220</sup> Although they are deputy prosecutors and devote their full time to the Delaware Justice Department, they continue to be paid by the private firm.<sup>221</sup> The reviewing court in *Seth* upheld the program, finding its creation to be within the Attorney General's powers.<sup>222</sup> This arrangement, of course, looks more like a "prosecutorial internship" than it does like a formal private prosecution in which the crime victim retains private counsel; nevertheless, the program illustrates a situation in which a privately paid attorney may engage in criminal prosecution.

#### 4. Common Law Tradition of Private Prosecutions Maintained

Absent a formal statute or rule, a number of states permit private prosecutions as a matter of common law. Virginia, for example, has traditionally allowed private prosecutions.<sup>223</sup> Virginia's courts, however, have restricted their use. In *Cantrell v. Commonwealth*,<sup>224</sup> a murder trial, the victim's parents hired a private attorney to assist the public prosecutor.<sup>225</sup> In point of fact, the private attorney managed the prosecution and secured the defendant's conviction. On appeal, the defendant argued that, because the private attorney had actually controlled the prosecution, his Virginia due process rights had been violated.<sup>226</sup> Agreeing with the defendant that the private attorney had indeed managed the prosecution (and not merely assisted), the court overturned the conviction on the grounds that the attorney was also representing the victim's family in a related civil case and, hence, was

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218 592 A.2d 436, 438 (Del. 1991) (upholding a program allowing attorneys from a private law firm to work temporarily for the Delaware Department of Justice prosecuting criminal cases).

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *See Cantrell v. Commonwealth*, 329 S.E.2d 22, 25-26 (Va. 1985) (describing history, rooted in English common law, of allowing private prosecutions).

224 *Id.* at 23.

225 *Id.* at 24-25.

226 *Id.* at 25.

serving two clients with different interests.<sup>227</sup> Thus, there existed a possible conflict between his duties to each.<sup>228</sup> As a result, the court held that this inherent conflict violated the defendant's due process rights under the Virginia Constitution.<sup>229</sup> Although the court reversed the conviction, it should be pointed out that it upheld the use of private prosecutors generally,<sup>230</sup> noting both that the practice was subject to the trial court's discretion and control,<sup>231</sup> and the question of whether to abolish or regulate the common law practice of private prosecution was left to the legislature.<sup>232</sup>

New Hampshire follows a similar common law tradition, but its courts have adopted additional limitations. In *State v. Martineau*, the New Hampshire Supreme Court upheld the common law practice of appointing private prosecutors, but limited it to cases where the sentence did not involve a possibility of imprisonment.<sup>233</sup> After the police decided not to file criminal charges against the defendant, a private citizen filed her own private criminal complaint against the defendant.<sup>234</sup> The court noted that the New Hampshire legislature has never prohibited private citizens from initiating criminal proceedings, and therefore the practice is permissible so long as it is not "repugnant to the rights and liberties contained in the constitution."<sup>235</sup> Because of the potential for violation of the defendant's rights and danger to the "sound administration of justice," the court held that private prosecution is not permissible for criminal offenses that carry a sentence of imprisonment.<sup>236</sup>

##### 5. *Private Counsel and "Special Circumstance" Prosecutions*

Often, private prosecutions are sought when the private counsel may have familiarity with the case or possesses special expertise or knowledge. Perhaps the most notorious example of a state-hired private prosecutor was the prosecution of legendary former boxing hea-

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<sup>227</sup> *Id.* at 26.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 26–27.

<sup>230</sup> *See id.* at 26 (observing that, although the appearance of a private attorney was improper in the circumstances of this case, the holding does not disturb the common-law rule generally permitting private attorneys to assist in prosecutions).

<sup>231</sup> *Id.* at 25.

<sup>232</sup> *Id.*

<sup>233</sup> 808 A.2d 51, 53–54 (N.H. 2002) (finding no authority under common law for private prosecutions of criminal offenses punishable by imprisonment).

<sup>234</sup> *Id.* at 52.

<sup>235</sup> *Id.* at 53 (internal quotations omitted).

<sup>236</sup> *Id.* at 54.

vyweight champion Mike Tyson. In Tyson's 1992 rape prosecution, the Indianapolis District Attorney's Office opted to hire a private attorney to lead the prosecution.<sup>237</sup> The attorney was selected not by the victim, but, rather, the government prosecutor who would have otherwise initiated the case.<sup>238</sup>

*State v. Culbreath*<sup>239</sup> and *State v. Eldridge*<sup>240</sup> are further examples in which private counsel was retained because of the attorneys' knowledge of the particular issue. In *Culbreath*, the Citizens for Community Values, Inc. (CCV) requested that a particular private attorney work with two county assistant district attorneys who were involved with the prosecution of obscenity cases.<sup>241</sup> The attorney then served as part of a criminal investigation team that included in its number several government officials.<sup>242</sup> Thereafter, the attorney was appointed as a "Special Assistant District Attorney." The State Attorney General appointed the attorney to represent the government both in pending civil litigation against the defendant as well as to pursue possible criminal indictments against him.<sup>243</sup> Throughout this time, however, both the district attorney's office and CCV paid the attorney's fees.<sup>244</sup> The Supreme Court of Tennessee ultimately dismissed the indictments because of the monies paid to the attorney by CCV, a special interest group. The court was concerned that the members of CCV were not themselves victims, and CCV was instead an interested party that could ostensibly create a conflict of interest within the prosecutorial office.<sup>245</sup>

Similarly, in *State v. Eldridge*, the court refused to allow a prosecution to be conducted by a private attorney who represented the victim in the underlying civil action.<sup>246</sup> The district attorney had requested that the victim's attorney be appointed a "special prosecutor[]" to pursue the murder prosecution because as he was also representing the victim in a civil matter that had been filed seven months prior and arose from the same incident,<sup>247</sup> the private attorney was conver-

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237 See Phil Berger, *A Drama That Will Rival the Ring When Tyson Faces His Accuser*, N.Y. TIMES, Jan. 22, 1992, at B9.

238 See *id.* ("The county has contracted to pay the [private lawyer] . . .").

239 30 S.W.3d 309 (Tenn. 2000).

240 951 S.W.2d 775 (Tenn. Crim. App. 1997).

241 *Culbreath*, 30 S.W.3d at 311.

242 *Id.*

243 *Id.* at 312.

244 *Id.*

245 *Id.* at 309, 312.

246 951 S.W.2d 775, 776-77 (Tenn. Crim. App. 1997).

247 See *id.* at 779 (recounting the timeline of the private attorneys' involvement in the prosecution and the related civil litigation).

sant with the facts and had spent considerable time on the case.<sup>248</sup> On review, however, the court deemed such an appointment to be a conflict of interest and therefore disallowed it.<sup>249</sup>

#### 6. *Private Counsel and Conflicts Within the Public Prosecutor's Office*

Potential conflicts of interest, of course, are not limited to private representation but may arise in circumstances involving public prosecutors as well. A district attorney may request that a private attorney handle a prosecution if the district attorney herself, or her office, has a conflict of interest.<sup>250</sup> In *Schumer v. Holtzman*, the district attorney of Kings County decided to prosecute former Congressman Charles E. Schumer;<sup>251</sup> however, the district attorney was worried about appearing biased due to past political differences and the probability that her own staff would be called as witnesses in any subsequent prosecution.<sup>252</sup> After the Governor refused to supersede her, the district attorney appointed the Dean of Brooklyn Law School as a "Special Assistant District Attorney."<sup>253</sup> The court, however, subsequently reversed the appointment because it believed that too much power had been delegated to a private attorney—not because it was a private prosecution per se.<sup>254</sup>

A similar situation arose in *Adkins v. Commonwealth*, in which a grand jury indicted the defendant for murder and the use of a firearm in the commission of murder.<sup>255</sup> Prior to the indictment, the victim's family hired a private attorney to assist in the investigation and the presentation of the case before the grand jury.<sup>256</sup> The privately retained counsel worked with the state and even participated in the decision to submit the case to the grand jury.<sup>257</sup> While the case was pending, a new Commonwealth attorney, who had previously represented the defendant's daughter in another case, was elected to of-

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248 *Id.*

249 *See id.* at 781 (discussing conflicts of interests arising from the participation of private prosecutors).

250 *See* *Schumer v. Holtzman*, 454 N.E.2d 522, 523–24 (N.Y. 1983) (discussing prohibitions and powers of district attorney and appointed special assistant district attorneys).

251 *Id.* at 523.

252 *Id.*

253 *Id.*

254 *See id.* at 525 ("The conduct challenged here is not the appointment of respondent Trager per se, but [the delegation of] power which is normally possessed only by an elected District Attorney.").

255 492 S.E.2d 833, 834 (Va. Ct. App. 1997).

256 *Id.*

257 *Id.*

ficé.<sup>258</sup> When the new attorney filed a motion to recuse herself and requested that a “special prosecutor” be appointed,<sup>259</sup> the circuit court appointed the victim’s private attorney as the “special prosecutor.”<sup>260</sup> The Court of Appeals of Virginia reversed the conviction, however, because in its view, the appointment of the victim’s counsel created a conflict of interest for the private attorney.<sup>261</sup>

The pattern emerging from these decisions is that a conflict of interest is presumed to exist when the prosecuting attorney is compensated by the victim. Legal canons traditionally require that an attorney zealously represent the interests of her client.<sup>262</sup> Certain courts have viewed a victim-appointed attorney to have an inherent conflict of interest with a prosecutor’s broader commitment to justice.<sup>263</sup> Oddly, at least post-indictment, it is unclear as to why a privately appointed attorney should have any less commitment to justice than a public prosecutor. I suspect the reason is that the court may fear that during the course of the trial, a private prosecutor might make decisions that better reflect the desires of a vengeful victim than an impartial tool of the state. In such circumstances, the concern may be that the private prosecutor might be more inclined to withhold exculpatory evidence from the defendant, be more obstructionist in terms of filing motions and conducting cross examinations, and press for a sentence that satisfies the victim’s sense of fairness rather than that of society. Victims often feel shut out of the criminal justice process.<sup>264</sup> The government is generally not present to represent the victim’s interests but rather to advance those of society as a whole.<sup>265</sup> Who then speaks for the victim? This concern for the victim’s interests and the fear that his voice is muted in the criminal justice process have led to a surge in efforts to ensure that the victim’s rights are tak-

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.* at 835–36.

262 *See* MODEL RULES OF PROF’L CONDUCT pmbl. 2 (2006) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *see also* MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980) (“The duty of the lawyer, both to his client and to the legal system, is to represent his client zealously . . . .” (footnotes omitted)).

263 *See* *People v. Benoit*, 575 N.Y.S.2d 750, 751 (N.Y. Crim. Ct. 1991) (dismissing landlord’s continued private prosecution against tenant because landlord was no longer a disinterested party having been indicted for same incident); *People v. Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. Crim. Ct. 1991) (finding inherent conflicts of interest where interested parties or their attorneys serve as private prosecutors).

264 *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) (discussing the lack of participation in the criminal justice system by laymen).

265 *See id.*



en into account. Tim Valentine has noted that “in some jurisdictions [private prosecutions are] the only way for victims of crime to get justice. You either have a private attorney to assist the state in prosecuting [the defendant] . . . or he just does not get prosecuted.”<sup>266</sup> An interesting twist on this is showcased by *Olsen v. Kopp*, in which the complainant had repeatedly asked the Morton County State’s Attorney to initiate prosecutions against his wife and two males for adultery and unlawful cohabitation.<sup>267</sup> When the State’s Attorney declined, the complainant asked the Morton County District Court to appoint a private attorney and to deduct the private attorney’s salary from the State Attorney’s salary. The district court refused to do so, and the Supreme Court of North Dakota found that the decision was within the trial court’s discretion and thus not subject to appeal.<sup>268</sup> Presumably, the trial court could have appointed private counsel; however, its decision would similarly not have been subject to review.

### C. Federal Law and Private Justice

Private prosecutions have traversed a different path in federal law. While uncommon, federal law permits private justice under certain auspices: through the creation of private causes of action in civil suits and by the establishment of so-called independent counsels. As with a private criminal prosecution, private causes of action exist to leverage private resources to buttress law enforcement efforts. The independent counsel, on the other hand, exists as a temporary government functionary.

#### 1. Federal Criminal Prosecutions

Little has been written about federal criminal law enforcement in the time period between American independence and the Constitution’s ratification. Not until the enactment of the Judiciary Act of 1789 do we see the foundation laid for a truly national criminal justice system. That Act, among other things, instituted the office of Attorney General and provided for the appointment of a marshal, one or more deputy marshals, and a U.S. Attorney for each judicial dis-

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<sup>266</sup> Tim Valentine, *Private Prosecution*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR* 226, 227 (Gary W. Bowman et al. eds., 1992).

<sup>267</sup> 593 N.W.2d 762, 763 (N.D. 1999).

<sup>268</sup> *See id.* at 767 (holding that the order denying an inmate’s request for a private attorney to initiate prosecutions against his wife and two males for adultery and unlawful cohabitation could not be appealed).

trict.<sup>269</sup> The Attorney General was empowered “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned” and to give advice and render legal opinions “when required by the President of the United States, or when requested by the heads of any of the [executive] departments.”<sup>270</sup> The section creating the U.S. Attorneys provided for “a meet person learned in the law” to act as an attorney for the United States and “to prosecute in [each] district all delinquents for crimes and offences, cognizable under the authority of the United States.”<sup>271</sup> Federal criminal offenses were thus prosecutable by the presidentially-appointed and Senate-confirmed U.S. Attorneys (originally called United States district attorneys).

Commentators have noted that this national prosecutorial system was not copied in whole from European models, but instead “drew from the existing forms that had evolved for local prosecutors in the thirteen original states.”<sup>272</sup> The Attorney General’s function was primarily one of providing legal advice to the President and his Cabinet. The prosecutorial authority was lodged within the local district offices. It is unclear whether, following the Constitution’s ratification, privately managed criminal prosecutions existed for violations of federal criminal law. What is clear, however, is that the scope of federal criminal law was far more circumscribed than today. Similarly, as no right of appeal existed in federal criminal cases early in the nation’s history, we have scant record of the nature of many federal criminal prosecutions.

Article II, Section 3 of the Constitution empowers the President to “take Care that the Laws be faithfully executed.”<sup>273</sup> Some scholars have argued, under a unitary executive view of presidential power, that an inherently executive function cannot be delegated to another branch of the government, to another governmental authority (such as an independent agency) or, presumably, to a private entity.<sup>274</sup> However, certainly courts could use their powers to enforce the law (using their judicial decrees and contempt citations, for example). In the absence of a presidentially-appointed, Senate-confirmed U.S.

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269 See Judiciary Act of 1789, ch. 20, §§ 27, 35, 1 Stat. 73, 87, 92 (1789) (providing that a marshal, deputy marshals, and U.S. Attorneys shall be established for U.S. judicial districts).

270 *Id.* § 35.

271 *Id.*

272 JACOBY, *supra* note 80, at 19.

273 U.S. CONST. art. II, § 3.

274 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 658–63 (1994) (describing how administrative practice and English practice support the notion that the Executive controls prosecutions).

Attorney, district courts could, and still can, appoint the U.S. Attorney.<sup>275</sup> And, in fact, if one turns to the practice of the newly independent states, none lodged the authority to bring criminal prosecutions exclusively under their “chief” executives.

Indeed, recent legislative history provides an example of executive authority residing in government entities other than an administration official. Although today there is no independent counsel statute in effect, in 1978 Congress passed the Ethics in Government Act, which permitted the Attorney General to appoint an “independent counsel,” separate from the Department of Justice, to investigate alleged misdeeds by certain government officials.<sup>276</sup> Initially prompted by the Watergate scandal and concerns that presidentially appointed, senior Justice Department officials could not be counted on to investigate either its own personnel or other high-level executive branch officials, the purported intent of the law was to avoid the conflict of interest that might develop if the Executive Branch was forced to investigate its own officials.<sup>277</sup> The independent counsel, as the title implies, had full prosecutorial authority. After the original law expired in 1992,<sup>278</sup> President William J. Clinton signed a new independent counsel statute into law in 1994,<sup>279</sup> which expanded the laws to include the investigation and possible prosecution of members of Congress.<sup>280</sup> In this iteration of the statute, the attorney general requests the appointment of an independent counsel while a panel of judges makes the actual appointment. The law was allowed to lapse in 1999 and Congress has not sought to re-enact an independent counsel statute.<sup>281</sup>

Although the Attorney General was directly involved in the process of appointment of an independent counsel, the individual appointed enjoyed virtual independence not only from the Executive Branch but from the government in general. Not surprisingly, the statute was challenged for being, among other things, a violation of

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275 See 28 U.S.C. § 546(d) (2003), *repealed by* Pub. L. No. 109-177, § 502, 120 Stat. 246 (2006) (current version at 28 U.S.C.A. § 546 (West 2007)).

276 28 U.S.C. §§ 591–598 (1982).

277 S. Rep. No. 95-273, at 2–3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4376, 4377–78.

278 Ethics in Government Act of 1978, 2 U.S.C. §§ 701–709 (2005), *amended by* Pub. L. No. 101–194, § 202, 103 Stat. 1724 (1991).

279 Independent Counsel Act of 1978, 28 U.S.C. § 591 (1994).

280 *Id.*

281 The Free Dictionary, Independent Counsel, <http://encyclopedia2.thefreedictionary.com/independent+counsel> (explaining that after independent counsels were used to investigate various scandals surrounding President Clinton, the law was allowed to expire).

the Constitution's exclusive grant of executive authority to the President—and officers directly controlled by him.<sup>282</sup> The D.C. Circuit struck down the statute, holding that it violated executive authority under the Constitution. The Supreme Court granted review under the name *Morrison v. Olson*. In *Morrison*, a key question before the Supreme Court was whether the act “impermissibly undermine[d] the powers of the Executive Branch or ‘disrupt[ed] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’”<sup>283</sup> Although the Court noted that the Act “reduces the amount of control or supervision” the Executive Branch exercises over the “investigation and prosecution of a certain class of alleged criminal activity,” sufficient control existed to satisfy Article II concerns.<sup>284</sup> The Court explained that because the Attorney General initiates the process by calling for the appointment of an independent counsel, the Act vested important authority within the Executive Branch.<sup>285</sup> Additionally, the Court found it significant that, once an independent counsel was appointed, the Attorney General defined the scope, or jurisdiction, of the prosecution, and the independent prosecutor was obligated to abide by the Justice Department's policies.<sup>286</sup> Finally, the Court noted that, because the Attorney General retained the authority to remove the independent counsel for “good cause,” the Executive Branch enjoyed “substantial ability to ensure that the laws are ‘faithfully executed’ by an independent counsel.”<sup>287</sup> The *Morrison* decision can thus be used as a template for permitting the private prosecution of federal criminal cases generally.<sup>288</sup>

The independent counsel, to be sure, is not quite the same thing as a privately managed prosecution—largely in the sense that the na-

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282 See *In re Sealed Case*, 838 F.2d 476, 488–89 (D.C. Cir. 1988) (holding that the Ethics in Government Act invades President's executive privileges and responsibilities, endangering individual liberty as to be unconstitutional), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

283 *Morrison v. Olson*, 487 U.S. at 695 (citation and internal quotation marks omitted) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986), and *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

284 *Id.* at 695, 696.

285 *Id.* at 696.

286 *Id.*

287 *Id.*

288 Professor Myriam Gilles has similarly argued for use of *Morrison* as a possible model for deputizing private citizens to enforce the nation's civil rights laws. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1436–37 (2000) (addressing the question of whether the Executive Branch retains sufficient control of private enforcement actions).

ture of the prosecution is supposed to reflect the public's interest and the targets are limited to certain high-level public officials. Still, the independent counsel statute demonstrates a continued understanding that government need not have<sup>289</sup> an exclusive monopoly over the prosecution of criminal acts. Presumably, if the requirements of *Morrison* are met, privately managed prosecutions could be initiated in federal court for violations of federal criminal law.

Though private prosecutions for violations of the federal criminal law have been virtually non-existent in modern times, they have occurred in certain instances. One such instance involves the appointment of private counsel to enforce court orders. The Supreme Court in *Young v. United States ex rel. Vuitton et Fils, S.A.* considered the propriety of appointing private counsel in a federal criminal contempt proceeding.<sup>290</sup> Louis Vuitton Mallietier, the famed French fashion goods manufacturer, hired counsel to press a civil claim on its behalf. When the defendants in the civil suit violated the court's order, the district court appointed Vuitton's lawyers to prosecute the criminal contempt citation.<sup>291</sup> The Vuitton lawyers obtained a conviction in federal district court. Upon appeal, the United States Court of Appeals for the Second Circuit affirmed the convictions, relying in large part on the district court's determination that the convictions did not result in injustice to the defendants.<sup>292</sup> Not satisfied, the defendants petitioned the Supreme Court for review, arguing that the district court lacked the authority to appoint special prosecutors on the contempt citations.<sup>293</sup> The Supreme Court disagreed with the defendants' argument and instead found that the district court possessed the inherent authority to initiate the contempt proceedings as well as the power to appoint the special prosecutors.<sup>294</sup>

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289 Federal statutes creating private rights of action are as diverse and wide ranging as the Civil Rights Act of 1964, the Electronic Communications Privacy Act, the Americans With Disabilities Act, the Clayton Act, and the Consumer Products Safety Act. Each of these acts requires, as a predicate, that the individual availing himself of the private right of action be in some way harmed by the defendant's ostensibly unlawful conduct. For an interesting discussion of the numerous private causes of action extant in federal law, see Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002).

290 481 U.S. 787, 790, 808 (1987).

291 *See id.* at 790–92 (describing how the Court permitted Vuitton's attorneys to prosecute a criminal contempt action arising from the violation of the injunction against infringing Vuitton's trademark).

292 *See United States ex rel. Vuitton et Fils S.A. v. Klayminc*, 780 F.2d 179, 180 (2d Cir. 1985).

293 *See Young*, 481 U.S. at 800 (noting the unavailing contention of the petitioners that a contempt prosecution may only be brought by the U.S. Attorney's office).

294 *See id.* at 800–01 (describing the rationale for allowing district courts to initiate contempt proceedings and appoint special prosecutors).

The Court avoided the question whether it was constitutional to permit private counsel to undertake the prosecution. Instead, pursuant to its authority to supervise lower federal courts, the Court held that it was impermissible for the attorneys who represented the party in the related civil matter to prosecute the adverse party for contempt.<sup>295</sup> In light of the fact that those lawyers represented an adverse party in the civil case, the Court reasoned that they might not be as sensitive to the public interest presented in the contempt citations.<sup>296</sup> The Court not only ducked the potential constitutional issue represented by having a private lawyer prosecute a criminal case, but it also limited its ruling to circumstances in which the prosecution was inexorably intertwined with a parallel civil proceeding.<sup>297</sup>

## 2. Federal Models of Private Justice

While not criminal prosecutions per se, federal statutes permit private litigants to initiate *qui tam* actions and to act, in effect, as “private attorneys general” in diverse circumstances. Although federal law generally eschews private criminal law enforcement, a number of statutes do provide for alternative avenues by which an individual harmed by the defendant’s conduct may enjoy a private right of action.

### a. The False Claims Act

The False Claims Act, 31 U.S.C. § 3730, contains a provision for private *qui tam* actions that allows private citizens who provide information to the government regarding fraud committed against the government to bring a civil action “for the person and for the United States Government” to obtain a portion of the assigned damages and penalties.<sup>298</sup> The Latin phrase *qui tam* is a shortened version of the maxim “*qui tam pro domino rege, etc. quam pro se ipso in hac parte sequitur*,” which translates roughly as “[w]ho prosecutes this suit as well for the king, etc. as for himself.”<sup>299</sup> While the *qui tam* suit is almost the re-

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295 See *id.* at 809 (“[C]ounsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.”).

296 *Id.* at 805–06 (expounding on why the interest of the government and the interest of the private party may not be fully aligned).

297 See *id.* at 814 (refusing to permit a prosecutor representing the private party beneficiary of a court order in a contempt action to also represent the government in the contempt action, as the attorney would be required to “serve two masters”).

298 False Claims Act, 31 U.S.C. § 3730 (1994).

299 1 BLACKSTONE, *supra* note 24, at \*161 & n.\*.

verse of a criminal suit, where the greatest harm presumably falls upon the private citizen as victim rather than the government, the underlying idea is the same: leveraging private law suits to benefit the harmed individual as well as society in general. A private action under the False Claims Act, however, is directly related to curbing criminal conduct by the putative defendant.<sup>300</sup> Essentially, private parties who have investigated and believe that they can prove that other individuals or organizations have submitted false claims to the federal government may file a private claim in federal court.<sup>301</sup>

#### b. Environmental Crimes

Several federal environmental protection statutes allow private parties to bring law suits against those who violate the nation's environmental laws;<sup>302</sup> in fact, these citizen suits are relatively commonplace in environmental law enforcement statutes.<sup>303</sup> The Federal Water Pollution Control Act, for example, authorizes any "citizen," defined broadly as "a person or persons having an interest which is or may be adversely affected," to enforce certain provisions of the Act or to force appropriate governmental agencies to perform mandated duties under the Act.<sup>304</sup> Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), creates incentives for private parties to engage in environmental clean-up operations when identified by a private party even before they have been sued by the government.<sup>305</sup> In 2007, the

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<sup>300</sup> See S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 ("[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.").

<sup>301</sup> 31 U.S.C. §§ 3729(a)(A), 3730(b) (2006).

<sup>302</sup> Cass Sunstein has examined the rationale for, and circumstances of, so-called "citizens' suits." See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992) (noting congressional attempts to control unlawfully inadequate law enforcement through the "citizen-suit" device).

<sup>303</sup> See JAMES T. BLANCH ET AL., *CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY* 50-51 (Roger Clegg & James L.J. Nuzzo eds., 1996) ("Citizen enforcement of environmental laws has been enshrined in the major environmental statutes for years and is widely endorsed by state and federal environmental regulators, whose enforcement efforts are supplemented by citizen-plaintiffs at no cost to the public fisc."); Bucy, *supra* note 289, at 32 (noting that citizen suit provisions exist in over twenty environmental protection statutes).

<sup>304</sup> See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 888-89 (codified as amended at 33 U.S.C. § 1365 (1994)).

<sup>305</sup> See Transcript of Record at 44, *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007) (No. 06-562) ("There are more than 400,000 sites across the country that are contaminated by hazardous wastes. The amici States recognize that if these sites are to be cleaned up, it's going to take the work of private parties. In turn, we recognize that pri-

Supreme Court validated CERCLA privately initiated actions in *United States v. Atlantic Research Corp.*, holding that the statute authorizes private parties to bring cost recovery actions to recoup response costs they have incurred even where there has been no governmental enforcement activity.<sup>306</sup>

Under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision,<sup>307</sup> a private party may likewise bring suit against one who contributed to the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."<sup>308</sup> The RCRA citizen suit provision permits recovery of attorney fees. The statute expressly authorizes the courts to "award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."<sup>309</sup> Although RCRA citizen suits may be limited to injunctive relief,<sup>310</sup> they are nevertheless privately managed suits designed to enforce the nation's environmental protection laws.

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private parties rely upon cost recovery to obtain their costs and financial incentives to do the site cleanup."); *see also* *Allied Towing Corp. v. Great E. Petroleum Corp.*, 642 F. Supp. 1339, 1349 (E.D. Va. 1986) (establishing that the allegations in the private party's complaint state a claim for cost recovery under CERCLA). At least one court has held that a private litigant suing under CERCLA must first obtain governmental approval before commencing remedial actions. *See, e.g., Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1439 (S.D. Fla. 1984) (holding that a private party could not bring a cost-recovery action under CERCLA without first obtaining government approval). The EPA, however, disagrees. According to the EPA, it should be "absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery [action] under [CERCLA]." 50 Fed. Reg. 47,934 (Nov. 20, 1985). As the Honorable Judge Wallace of the Ninth Circuit noted in *Wickland Oil Terminals v. Asarco, Inc.*, "this reading . . . [is] consistent with CERCLA's broad remedial purpose . . . [and] promotes the effectiveness of private enforcement actions under section 107(a) [of CERCLA] as a remedy independent of governmental actions financed by Superfund." 792 F.2d 887, 892 (9th Cir. 1986).

<sup>306</sup> *Atlantic Research Corp.*, 551 U.S. at 139 ("By contrast, § 107(a) permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under § 107(a) without any establishment of liability to a third party.").

<sup>307</sup> 42 U.S.C. § 6972(a) (2006) ("Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf . . .").

<sup>308</sup> *Id.* § 6972(a)(1)(B).

<sup>309</sup> *Id.* § 6972(e).

<sup>310</sup> *See* Annotation, *Relief Available in Citizen's Suit Under 42 U.S.C.S. § 6972 for Violation of Federal Requirements Relating to Solid or Hazardous Waste*, 71 A.L.R. FED. 181, 182, 183 (1985) (noting that "RCRA does not specify the relief which may be available in such citizen suits," but at least one court has held that "nothing in RCRA bars injunctive relief").



### c. Antitrust Enforcement

A long-standing feature of American antitrust law is to use private parties to enforce the nation's laws prohibiting anti-competitive mergers and acquisitions.<sup>311</sup> Indeed, "[t]he reach of the U.S. antitrust laws, both in terms of subject matter and territorial application, is as broad for private lawsuits as for criminal enforcement actions by the federal antitrust authorities."<sup>312</sup> It is significant, then, that the reach of private lawsuits would be co-extensive with the reach of the criminal law in antitrust enforcement. Presumably, the parties seeking enforcement have an interest in doing so as an interested party. In fact, the Sherman Antitrust Act of 1890 allowed injured parties to seek enforcement of the nation's antitrust laws by permitting them treble damages.<sup>313</sup> The concept of using the injured party as a means of enforcing the law, then, has considerable purchase in federal law.

Similarly, the Clayton Act authorizes a private right of action to allow injured parties to recover the monetary value of the injury incurred.<sup>314</sup> The Act further authorizes private litigants to obtain injunctive relief.<sup>315</sup> To this end, the court may even restructure the market to eliminate the competitive harm created by the unlawful conduct and to ensure that the sued parties cannot continue to pursue unlawful enterprises.<sup>316</sup> Moreover, Congress also expressly allowed private litigants to obtain treble damages as a means of creating an incentive for private antitrust enforcement activity.<sup>317</sup>

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311 See 51 CONG. REC. 16,319 (1914) ("Under section 4 of the bill reported by the conferees any person injured in his business or property by anything declared to be unlawful in any antitrust law or by this act is entitled to go into any district court without regard to the amount in controversy and recover threefold damages.").

312 Neil R. Ellis, *Private Lawsuits in International Antitrust I* (Oct. 13, 2000) (unpublished manuscript, available at [http://www.fdbl原因.com/PDF/private\\_law\\_suits\\_paper.doc](http://www.fdbl原因.com/PDF/private_law_suits_paper.doc)).

313 See Sherman Antitrust Act of 1890, ch. 647, § 7, 26 Stat 209, 210 (codified as amended at 15 U.S.C. § 15 (2006)) (noting that an injured party "shall recover three fold the damages by him sustained").

314 15 U.S.C. § 15 (2006) (providing authorization for parties injured by acts forbidden under the antitrust laws to initiate a private right of action and obtain monetary damages).

315 *Id.* § 26 (affording private parties injunctive relief "against threatened loss or damage by a violation of the antitrust laws").

316 Interestingly, state governments may also initiate lawsuits challenging alleged antitrust violations under the federal antitrust laws on behalf of the consumers within their state. See *id.* § 15c(a) (authorizing state attorney generals to bring a civil action on behalf of the citizens within their respective states).

317 See 51 CONG. REC. 16,319 (1914) (reporting the statement of Mr. Floyd that "[w]e have taken, by these provisions, the business public into our confidence as allies of the Government in enforcing the antitrust laws, and given to the business men of the country who are being imposed upon by unlawful combinations remedies by which they can re-

Congress, understanding that federal enforcement authorities alone lacked sufficient resources, attempted to leverage private litigation as a way of improving antitrust compliance with the law.

Interestingly, the ability to bring private litigation spans the full range of conduct deemed unlawful under the antitrust laws—including not simply price fixing cartels, but also output restrictions, territorial allocations, resale price maintenance, other vertical restraints, and inappropriate mergers, for example. Private parties can even challenge conduct that the government declines to pursue. In fact, private parties can challenge a merger already approved by the relevant federal authorities and actually consummated.<sup>318</sup> The Act encourages the leveraging of private resources to enforce the law and illustrates just how close the federal government is to using private prosecutions of the criminal law to enforce federal standards.

#### d. Private Enforcement of the Racketeer Influenced Corrupt Organizations Act

The use of private enforcement has extended even to statutes such as the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>319</sup> which is primarily a tool of criminal prosecutors. Congress enacted RICO as part of a comprehensive crime bill intended to protect the public from “parties who conduct organizations affecting interstate commerce through a pattern of criminal activity.”<sup>320</sup> Government prosecutors use (and, some argue, abuse)<sup>321</sup> RICO as a tool to obtain lengthy prison sentences, heavy fines, and the forfeiture of any ill-gotten gains from criminal enterprises or legitimate organizations operating in a criminal manner.<sup>322</sup> Under RICO’s private attorney general provision, private individuals harmed by alleged RICO violations are authorized to sue for treble damages and to collect at-

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cover their own damages . . . without waiting upon the slow and tortuous course of prosecution on the part of the Government”).

318 See 15 U.S.C. § 26 (2006) (enabling private parties injured from a violation of antitrust laws to seek injunctive relief).

319 See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (2006) (providing that “[a]ny person injured in his business or property by reason of a violation of . . . this chapter may sue therefor in any appropriate United States district court”).

320 115 CONG. REC. 9568 (1969) (statement of Sen. McClellan).

321 David B. Sentelle, *RICO: The Monster that Ate Jurisprudence*, Remarks at the CATO Institute Seminar on RICO, Rights and the Constitution (Oct. 18, 1989) (copy on file with the Cato Institute).

322 See 18 U.S.C. §§ 1962–63 (detailing criminal penalties for individuals convicted of receiving income derived from racketeering-related activities).

torney's fees.<sup>323</sup> Indeed, with the exception that privately led prosecutions cannot seek prison terms for punishment, there is arguably little difference between private parties exacting heavy fines and the government doing so. It is generally understood that RICO's treble damages provision is intended to provide an incentive for private litigants to bring claims. Then-Senate Judiciary Committee Chairman Strom Thurmond explained that:

[T]his private cause of action was included as an incentive for victims of organized crime activity to redress wrongful actions against their legitimate businesses. Because of the limited resources available to assist the Government in its fight against organized crime, it was believed that "private attorneys general"<sup>324</sup> could supplement Government efforts.

Senator Thurmond's statement serves as acknowledgement that the private civil cause of action is a means to buttress federal criminal law enforcement efforts. However, unlike the environmental and anti-trust private rights of action aimed at enforcing federal regulations, the private attorneys general provision of RICO is specifically aimed at corrupt organizations and intended to vindicate the aims of federal criminal law.<sup>325</sup>

### III. PRINCIPAL CRITICISMS OF PRIVATELY MANAGED PROSECUTIONS

Without question, the notion of privately initiated, privately managed, and privately financed criminal prosecutions remains controversial. Although commentators often see little problem with private civil law enforcement, such as in the antitrust or environmental arenas,<sup>326</sup> arguments on behalf of private criminal prosecutions are often

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<sup>323</sup> See *id.* § 1964(c) (describing civil remedies available to individuals harmed by alleged RICO violations).

<sup>324</sup> *Oversight of Civil RICO Suits: Hearings on Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c) Before the S. Comm. on the Judiciary*, 99th Cong. 2 (1985) (opening statement of Chairman Strom Thurmond).

<sup>325</sup> See S. REP. NO. 91-617, at 80-81 (1969) (elaborating on the rationale for permitting civil remedies for RICO).

<sup>326</sup> See Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 121, 175 (2008) (describing how access to the courts for suits could facilitate combat against climate change); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 957 (1985) (noting that "private enforcement helped to keep compliance issues high on the agendas of top [environmental law] agency officials and gave additional urgency to their attempts to abate the most serious violations"); Mark Seidenfeld & Janna Satz Nugent, *"The Friendship of the People": Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 271 (2005) (commencing a discussion on enforcement mechanisms created by Congress to enable the Environmental Protection Agency to achieve compliance with environmental regulation).

met with considerable hostility.<sup>327</sup> The purpose of this section is to consider several of these arguments and to examine circumstances in which privately managed prosecutions might, like citizen suits, be used to serve both public and private interests.

#### A. *Potential Constitutional Impediments to Private Prosecutions*

Of all the criticisms leveled against the use of privately managed prosecutions, the most damning are those that argue private prosecutions are inherently unconstitutional.<sup>328</sup> Such arguments, offered in both scholarly journals<sup>329</sup> and judicial opinions,<sup>330</sup> are generally tied to the Due Process and Equal Protection provisions of the Fourteenth Amendment and the Vesting Clause of Article II. First, critics argue that criminal defendants have a right under the Fourteenth Amendment's Due Process Clause to an impartial prosecutor.<sup>331</sup> In these criticisms, it is averred that a prosecutor who has any sort of stake in the criminal trial's outcome violates the process owed the criminal defendant. Second, critics argue that a system of private justice inevi-

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<sup>327</sup> See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 557 (1994) (stating that "the time has come to end the anachronistic practice of allowing private prosecutors"); Julio Pérez Gil, *Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain*, 25 LAW AND POL'Y 151, 162-65 (2003) (arguing that private actions neither strengthen democracy nor serve as a check on prosecutorial discretion); Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 286 (2001) (noting that "the need for private prosecutors in Virginia no longer exists, and has not existed since the early eighteenth century"); Sidman, *supra* note 26, at 773-74 (same); John A.J. Ward, Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1171-79 (1972) (arguing that private prosecutions violate due process and ethics rules). Indeed, one of the rare articles advocating private prosecutions appeared in 1955. See Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955). More recently, Bruce L. Benson, in *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* (1998), has encouraged private prosecution as a means of increasing victim restitution.

<sup>328</sup> See Bessler, *supra* note 327, at 558 (suggesting that "private prosecutors violate defendants' due process rights" because they "have financial incentives that public prosecutors do not" and because they "create, at the very least, an appearance of impropriety").

<sup>329</sup> See, e.g., *id.* at 557-58 (suggesting the unconstitutionality of private prosecutions).

<sup>330</sup> See, e.g., *Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (noting the unconstitutionality of permitting private prosecutions); see also *People v. Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. Crim. Ct. 1991) (commenting on the unconstitutionality of permitting private prosecutions).

<sup>331</sup> See Bessler, *supra* note 327, at 552 (stating that "[f]airness of course requires an absence of actual bias in the trial of cases," thus, "justice must satisfy the appearance of justice" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 495 (1988) ("The primary problem with these statutes is that they compromise a criminal defendant's due process right to be prosecuted by a disinterested prosecutor.").

tably benefits the rich.<sup>332</sup> While this argument does not squarely fit into any specific constitutional right, it most likely implicates the Equal Protection Clause of the Fourteenth Amendment. Finally, with respect to the private enforcement of federal criminal law, critics claim that permitting anyone outside the direct control of the Executive Branch to initiate a prosecution violates Article II's Vesting Clause,<sup>333</sup> which locates all executive power within the President.

### 1. *Due Process Concerns*

Critics of privately managed prosecutions generally posit two interrelated arguments in objecting to the appointment of such prosecutors. Essentially, it is argued that criminal defendants are owed "impartial" prosecutors as a matter of fundamental fairness and that, as such, appointing private prosecutors to a criminal case violates due process because private prosecutions entail an inherent conflict of interest.<sup>334</sup>

Certainly, the overriding due process concern is to ensure that the procedures by which the laws are applied against the individual are carried out in an even-handed manner so that the accused is not subjected to the arbitrary exercise of government power.<sup>335</sup> Exactly what

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<sup>332</sup> See Bessler, *supra* note 327, at 589–90 (comparing how public prosecutors treat criminal assaults on the poor just as seriously as they respond to those on the rich while private prosecutors treat wealthy individuals better than poor ones); Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 706 (1997) ("Privately financed victims will enjoy preferential access to justice.").

<sup>333</sup> See Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 346 (1989) ("[A]n enforcement remedy being pursued solely to protect the public interest, as distinguished from a private attorney general action with public interest overtones, is exclusively within the province of the Executive Branch." (internal quotation marks omitted) (quoting William H. Lewis, *Environmentalists' Authority to Sue Industry for Civil Penalties is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10101, 10104 (1986))); see also Calabresi & Prakash, *supra* note 274, at 660 (showing that the power to prosecute public violations of the law was historically attached to the executive power).

<sup>334</sup> See *Berger v. United States*, 295 U.S. 78, 88–89 (1935) (suggesting the primary goal of private prosecutors in criminal cases is not to ensure that justice is done but rather to win the case); *People v. Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rights."); Bessler, *supra* note 327, at 558 ("[P]rivate prosecutors violate defendants' due process rights.").

<sup>335</sup> In circumstances in which a criminal defendant has enjoyed a fair trial, represented by counsel, and with all the other benefits provided by the Bill of Rights, the issue is not how the procedure might have specifically affected him, but by general provisions of law applicable to all those in like condition, whether he is deprived of liberty without due proc-

procedures are needed to satisfy due process, however, will vary depending on the circumstances and the possible punishment the individual is facing—for example, deprivation of liberty or property.<sup>336</sup> When due process is discussed, it is generally understood in terms of either procedural due process or substantive due process.<sup>337</sup> As the nomenclature suggests, one arm of due process deals with specific procedural rights guaranteed the defendant, the other with more substantive rights enjoyed by the individual. To determine whether procedural due process interests have been met, courts look to history. Courts thus often determine due process requirements by examining the common law, including that of England during pre-colonial times. Depending upon one's interpretive philosophy, special consideration is afforded the public meaning of the law in place at the time of the Constitution's ratification.<sup>338</sup> Since private prosecutions were practiced at the time of the Constitution's adoption, they clearly satisfy this standard. Nevertheless, reference to history is not always dispositive; otherwise, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment."<sup>339</sup> Procedural guarantees to criminal defendants, in particular, experienced significant changes in the latter half of the twentieth century—changes adopted by courts to ensure greater fairness to those accused of criminal conduct.

Although due process tolerates certain variances in procedure "appropriate to the nature of the case,"<sup>340</sup> common ground exists. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified depri-

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ess of law. *See, e.g.*, *Marchant v. Pa. R.R. Co.*, 153 U.S. 380, 386 (1894) (discussing the scope of the phrase "due process of law").

<sup>336</sup> *See* *Hurtado v. California*, 110 U.S. 516, 537 (1884) (discussing what constitutes "due course of law" under the Connecticut Constitution); *see also* *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884) ("It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected.")

<sup>337</sup> *See* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (emphasizing that the categories of substantive and procedural due process are distinct).

<sup>338</sup> *See* *Twining v. New Jersey*, 211 U.S. 78, 101 (1908) (alterations to due process requirements should never entirely disregard the fundamental principles of "ancient procedure"); *Brown v. New Jersey*, 175 U.S. 172, 175 (1899) (noting that, while states maintain control over the procedure of their courts, such procedure should not conflict with fundamental guarantees of the United States Constitution); *Hurtado*, 110 U.S. at 528 ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country . . .").

<sup>339</sup> *Twining*, 211 U.S. at 101.

<sup>340</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

vation of life, liberty, or property.”<sup>341</sup> Due process thus lays down certain procedures to allow individuals to challenge the state’s attempt to deprive them of their rights.<sup>342</sup> Principles established in the Bill of Rights, especially when it pertains to criminal law, establish the basic requirements: grand jury indictment<sup>343</sup> (although not incorporated against the states);<sup>344</sup> notice<sup>345</sup> and a jury trial<sup>346</sup> before an impartial judge;<sup>347</sup> an opportunity for confrontation<sup>348</sup> and cross-examination of adverse witnesses;<sup>349</sup> and representation by counsel.<sup>350</sup> The Constitution, however, is silent on the nature or function of prosecutors.

Beyond these basic requirements, courts, lawyers, and scholars have long debated precisely what procedures are constitutionally due the criminal defendant.<sup>351</sup> Although the Constitution’s text establishes certain basic procedural requirements, the question as to whether a state-provided prosecutor is also “due” has never been answered by the Supreme Court. Similarly, the Court has never held that, as a matter of substantive due process, criminal defendants are entitled to an “impartial” prosecutor in the same way they are entitled to an impartial jury. In fact, the Supreme Court has observed that

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- 341 *Carey v. Phipus*, 435 U.S. 247, 259 (1978); *see Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases . . .”).
- 342 *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).
- 343 *See Ex parte Bain*, 121 U.S. 1, 12 (1887) (explaining the history underlying the right to grand jury indictment).
- 344 *See Hurtado v. California*, 110 U.S. 516, 516 (1884) (holding that Fourteenth Amendment due process does not necessarily require indictment by grand jury in a state prosecution murder).
- 345 *See Rosen v. United States*, 161 U.S. 29, 40 (1896) (describing a defendant’s right to know the “nature and cause of the accusation against him”).
- 346 *See Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (holding that U.S. citizens are entitled to a trial by jury in serious criminal cases).
- 347 *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”).
- 348 *See Pointer v. Texas*, 380 U.S. 400, 401 (1965) (describing the guarantee of the Sixth Amendment that a defendant in a criminal prosecution shall have an opportunity to confront witnesses against him).
- 349 *See Brookhart v. Janis*, 384 U.S. 1, 3 (1966) (accepting a statement by the defendant that “[i]f there was . . . a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it”).
- 350 *See Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (noting that the Sixth Amendment establishes a defendant’s right to counsel).
- 351 *See Mitchell N. Berman, Constitutional Decision Rules*, 90 VA. L. REV. 1, 3–18 (2004) (examining debate over *Miranda*, *Dickerson*, and other constitutional doctrines); Benjamin J. Priestler, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 891–95 (2004) (discussing constitutional interpretation of the *Apprendi* line of cases).

public prosecutors “need not be entirely ‘neutral and detached’”<sup>352</sup> and faced, in *Faulder v. Johnson*, with the issue of whether private prosecutions violated the Due Process clause, the Court declined to grant certiorari review.<sup>353</sup>

The Court has, however, required that a state provide a jury trial before an impartial judicial officer,<sup>354</sup> the right to an attorney’s help,<sup>355</sup> the right to present evidence and give argument,<sup>356</sup> and the opportunity to confront and cross-examine adverse witnesses.<sup>357</sup> The Court has even placed affirmative obligations on prosecutors, such as the requirement that each element of crime be proved beyond a reasonable doubt,<sup>358</sup> that exculpatory evidence be provided to the defendant<sup>359</sup> and that, pursuant to the defendant’s Fifth Amendment right to be free from compelled self-incrimination,<sup>360</sup> the prosecutor not comment on the defendant’s exercise of her right to remain silent.<sup>361</sup>

In *Mathews v. Eldridge* the Supreme Court established a framework for litigating due process claims and for determining what process is due the claimant.<sup>362</sup> In its decision, the Court set forth three factors that courts needed to consider before a substantive due process right could be established.<sup>363</sup> First, the Court found it necessary to determine the nature of the private interest “affected by the official action.”<sup>364</sup> Second, the Court required analysis of the possibility of “the risk of an erroneous deprivation of [the] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”<sup>365</sup> Finally, the Court required weighing of the government’s concerns (as well as its interest in having clear proce-

352 *Jerrico*, 446 U.S. at 248.

353 *Faulder v. Johnson*, 525 U.S. 1125 (1998).

354 *See Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (expressing the right to an impartial judge).

355 *See Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (requiring attorney representation at trial).

356 *See Clark v. Arizona*, 548 U.S. 735, 739 (2006) (discussing the right to present evidence); *Herring v. New York*, 422 U.S. 853, 857–58 (1975) (emphasizing the defendant’s role in the fact-finding process).

357 *See Davis v. Alaska*, 415 U.S. 308, 315–17 (1974) (expounding on the Sixth Amendment’s guarantee to confront witnesses).

358 *See In re Winship*, 397 U.S. 358, 361–62 (1970) (explaining the reasonable doubt requirement).

359 *See United States v. Agurs*, 427 U.S. 97, 110–13 (1976) (requiring prosecutors to turn over material exculpatory evidence).

360 U.S. CONST. amend. V.

361 *See Griffin v. California*, 380 U.S. 609, 615 (1965) (forbidding comment on the defendant’s right to remain silent).

362 424 U.S. 319 (1976).

363 *Id.* at 335.

364 *Id.*

365 *Id.*



dures) against whatever burdens the additional procedures might create.<sup>366</sup> To some extent, *Mathews v. Eldridge* recognizes the benefit of examining the procedures applicable in the context of a specific case as opposed to articulating a specific list of procedures that are constitutionally due.

It is possible to read the criminal procedure guarantees found in the Constitution as assuming that a prosecutor might in general be biased against the accused and will inevitably possess certain advantages over the defendant. By the time the prosecutor has initiated a case, she would be expected to harbor a bias in favor of conviction. Only during the investigative phase or at the point of deciding to pursue a prosecution might the public prosecutor be expected to be more impartial than a private one.

Arguably, the stronger due process concern surfaces in the context of a concern about the prosecutor's motivations and the existence of an inherent conflict whenever a private attorney handles a criminal prosecution (I will have more to say about this issue below). It is generally understood that the duty owed by a lawyer to his client is that of "zealously assert[ing] the client's position under the rules of the adversary system."<sup>367</sup> Presumably, that duty would extend to a privately hired prosecutor. Such a prosecutor should, just as the plaintiff's lawyer in a civil case should, vigorously prosecute the case on behalf of her client, presumptively the victim of the alleged crime. The Supreme Court, while never directly addressing the due process interest involved in the appointment of a private prosecutor, has recognized that prosecutors, unlike adversary counsel interested in prevailing in civil litigation, have a larger public interest at stake in ensuring that justice shall be done. In *Berger v. United States*, the Court explained the prosecutor's duty as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

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366 *Id.*

367 MODEL RULES OF PROF'L CONDUCT pmb1. 2 (2006).

improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>368</sup>

The Court offers a compelling view of the prosecutor. The implicit point made by the Court is that private counsel in civil suits are less interested in “justice” and more interested in winning the case. However, this view of the public prosecutor’s obligations is not strikingly different from the obligation shouldered by any member of the bar. After all, as a member of the legal profession, a lawyer is also “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>369</sup>

While the stakes of a civil trial may at times be significantly more substantial than those of a criminal trial—for example, paying a \$100,000 fine versus spending thirty days in jail—society tends to stigmatize criminal prosecution far more than a civil lawsuit.<sup>370</sup> As a consequence, we mandate counsel for defendants in criminal trials but generally not in civil trials.<sup>371</sup> The impecunious litigant must rely on a contingency fee to lure counsel to take a civil case. Given the “all or nothing” stakes of a contingency fee, one would expect counsel to be interested not only in prevailing, but in securing the largest award possible. Therefore, public prosecutors may appear to have less at stake than a private prosecutor would. If the private prosecutor takes the prosecution on a contingency fee basis or is himself the victim, this may be true, but does not have to be the case. To remedy the “self interest” effect, states could simply forbid contingency fees in criminal cases for private prosecutors in the same way that such fees are disallowed for criminal defense attorneys. Similarly, states could adopt rules that place an affirmative obligation on private counsel to keep the interests of the state or the public in mind as she pursues a case. And, in consideration of the adage that a man who represents himself in a proceeding has a fool for a client, states could disallow actual victims from themselves serving as prosecutors.

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368 See *Berger v. United States*, 295 U.S. 78, 88 (1935) (articulating the role of the prosecutor).

369 MODEL RULES OF PROF'L CONDUCT pmb1. 1 (2006).

370 See Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 721 (discussing “the distinction between civil and criminal sanctions” that creates a social stigma for the latter, but not the former).

371 *But see* Assem. B. 590, 10th Sess. (Ca. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0551-0600/ab\\_590\\_bill\\_20090225\\_introduced.pdf](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20090225_introduced.pdf) (proposed California “Civil Gideon” bill that was recently signed into law). For a discussion of the “Civil Gideon’s” recent ascent to law in California and relevant criticisms, see The Blackbook Legal Blog, *Introducing the “Civil Gideon,”* <http://blackbooklegal.blogspot.com/2009/10/introducing-civil-gideon.html> (last visited Feb. 16, 2010).

Still problematic, however, is the possibility that a private prosecutor, motivated by the prospect of a fee, may decide to undertake a prosecution when, in a reasonable public prosecutor's discretion, no prosecution should be undertaken at all. However, no criminal defendant has a right "not" to be prosecuted.<sup>372</sup> Rather, in federal law, as in many states, the accused have a right to grand jury indictment.<sup>373</sup> Thus, most cases undeserving of prosecution ought to be weeded out as the Framers intended. Even if the decision whether to take a case to the grand jury at all is a sensitive one, then certainly a private prosecutor could be required to obtain the local public prosecutor's approval before proceeding with a case—both in convening a grand jury or, even if a grand jury has already handed down an indictment, deciding whether it should proceed to trial. In reality, fairly simple rules can be put in place to ensure defendants' due process rights while still utilizing a private prosecutor.

The more consequential issue may not be for the defendant, but for the complainant. The defendant has no right to a conflict-free prosecution, but the complainant does, as does the public. While a lawyer's obligation is to represent zealously the interests of her client, constitutional requirements relating to the disclosure of exculpatory evidence to the defendant<sup>374</sup> and, if the interests of justice demand it, to end the prosecution altogether,<sup>375</sup> may conflict with the obligation to the complainant. Similarly, the private prosecutor's interests in advancing the complainant's cause may cause tension with her responsibility to the public at large.

It is possible, however, to mitigate the conflict in the same manner in which conflicts are handled in multi-defendant cases or where other conflicts of interest exist. Courts allow defense lawyers to represent multiple defendants in circumstances in which conflicts may exist provided that those potential conflicts are revealed to the defendants,<sup>376</sup> the defendants are made to understand them,<sup>377</sup> and

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<sup>372</sup> Cardenas, *supra* note 40, at 374–77 (examining a civilian's ability to initiate a prosecution); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 107–18 (1992) (arguing that public prosecution is not an element of fundamental fairness).

<sup>373</sup> U.S. CONST. amend. V.

<sup>374</sup> See *supra* note 359 and accompanying text.

<sup>375</sup> See *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868) ("[T]he prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option . . .").

<sup>376</sup> FED. R. CRIM. P. 44(c)(2) (stating that the court must advise each defendant in the case of a defense conflict of interest).

<sup>377</sup> See *Burger v. Kemp*, 483 U.S. 776, 797–98 (1987) (Blackmun, J., dissenting) (stating it is accepted that "trial court inquiry into whether the defendant has made a knowing and vo-

the defendants agree to waive their right to conflict-free representation.<sup>378</sup> If the private prosecutor is held to the same standard of conduct as the public prosecutor, which must be the case if such a prosecution is to survive constitutional scrutiny, then the judge may inquire of the defendant whether he understands the nature of the potential conflict and is willing, nevertheless, to waive it. In addition, if one understands the public prosecutor as the people's representative, then his agreement to appoint, or to acquiesce in the appointment of, a private prosecutor may serve as a waiver of the public interest in the prosecution.

## 2. Equal Protection Concerns

The equal protection concerns are basically two-fold: first, that the rich, who can afford private counsel, enjoy an advantage over the poor. The wealthy can pursue a prosecution in circumstances in which a person of lesser means might not be able to. Second, a defendant privately prosecuted may be worse off than had he been prosecuted by a public official who, because the public prosecutor arguably bears a larger responsibility for pursuing justice than the victim-oriented private prosecutor; thus, he will be more balanced and objective in his prosecutorial approach.

This concern about improved access to quality justice based on economic grounds is certainly a meritorious point when considering public policy, but it is difficult to fashion it as an equal protection argument. The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying any person within its jurisdiction the equal protection of the laws.<sup>379</sup> In other words, the law must treat an individual in the same manner as others similarly situated. Ordinarily, a violation of the Equal Protection Clause occurs when a state

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luntary waiver of his right to conflict-free representation is strongly encouraged, if not required").

378 Professor Davis makes a similar point with respect to private prosecutions in New York. See Davis, *supra* note 203, at 386–87 (noting that private prosecutors can avoid conflict problems under the existing framework under New York's professional conduct rules that only allow a lawyer to represent clients with divergent interests after complete disclosure where it is obvious the lawyer can adequately represent both).

379 See U.S. CONST. amend XIV, § 1. Professor Kennedy makes the related point that the "[p]referential access to justice" the wealthy may enjoy "threatens the defendant's distinct interest in equality." Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 705–08 (1997).

grants a particular class of individuals the right to engage in an activity and yet denies other individuals the same right.<sup>380</sup>

The Supreme Court has established varying tests to determine whether an equal protection violation has occurred: generally, it depends on the type of classification the state has made and its effect on fundamental rights. Traditionally, the Court finds a state classification constitutional if it has a rational basis “related to a legitimate state interest.”<sup>381</sup> The Supreme Court, however, will strictly scrutinize<sup>382</sup> a distinction when it involves a “suspect distinction.”<sup>383</sup> Here, the argument might be that the poor are discriminated against in a system that relies on private prosecution because they are unable to avail themselves of prosecutors. “In order for a classification to be subject to strict scrutiny, however, it must be shown that the state law or its administration is intended to discriminate” and that there would be no legitimate state purpose.<sup>384</sup> It would be difficult, if not impossible, to prove whether a state that permitted private prosecutions intended to discriminate against anyone. Moreover, the Court has never found economic status to be a “suspect class” in the same way as race or national origin.<sup>385</sup> The Court also applies a strict scrutiny test if the classification interferes with a fundamental right—such as a First Amendment right or the right to vote.<sup>386</sup> The Court, how-

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380 See *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2152 (2008) (“Our equal protection jurisprudence has typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’” (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961))).

381 16B AM. JUR. 2D *Constitutional Law* § 813 (2008).

382 See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 101 (1973) (Marshall, J., dissenting) (discussing fundamental rights subject to strict scrutiny); *Delight, Inc. v. Balt. County*, 624 F.2d 12, 14 (4th Cir. 1980) (describing strict scrutiny standard, but holding it does not apply); LOCAL GOV’T COMM’N, GEN. ASSEMBLY OF THE COMMONWEALTH OF PA., PENNSYLVANIA LEGISLATOR’S MUNICIPAL DESKBOOK 49 (3d ed. 2006) (clarifying the three levels of scrutiny under equal protection analysis).

383 See *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (referencing suspect classifications).

384 Kermit Roosevelt III, *Compelling State Interest*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 341, 341 (Paul Finkelman ed., 2006) (stating that strict scrutiny applies where there is “discrimination either with respect to a fundamental right or on the basis of a ‘suspect classification’”).

385 See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 29 (explaining that economic status does not receive strict scrutiny).

386 Roosevelt, *supra* note 384, at 341 (“[S]ome (although not all) infringements on fundamental rights receive strict scrutiny. Fundamental rights include textually specified rights such as the protections of speech and religion found in the Bill of Rights, and also some unenumerated rights, such as the right to travel interstate or the right of access to the courts.”). For discussion of fundamental rights in another context, see Sarah Elizabeth Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico’s Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 194 (2006).

ever, has never found an affirmative “right to prosecution.” Thus, it is difficult to see how the Court would countenance an equal protection challenge to a private prosecution on the ground of economic inequality. And while the wealthy presumably would have better access to more talented attorneys, it is unclear that the poor would be disadvantaged in a system that permitted private prosecutions as an adjunct to the general, and more common and equally available, system of public prosecutions. One could argue that, as a practical matter, if those who could afford private criminal prosecutions (like wealthy individuals or corporations) shouldered the financial burden for crimes committed against them, then more resources might be available for the government to pursue crimes committed against persons less fortunate and therefore less able to afford to hire private counsel—in turn, making “equal protection” more likely, not less.

An alternative equal protection argument might be that a particular defendant was “selectively prosecuted” and that a public prosecutor might not have brought the case. Essentially, this criticism demands that equal protection requires all individuals to be prosecuted by a public prosecutor and, that if some individuals were to be prosecuted by a private prosecution, as opposed to a public one, the Equal Protection Clause would be violated. While this sort of argument is invoked in several contexts, it would be difficult to show that the “system” of private prosecutions violated the Equal Protection Clause. After all, the system would function similarly to the public one in which one prosecutor in the District Attorney’s Office might be more inclined to recommend prosecution than another.

More likely, in situations such as these a claim would be based on an “as applied” challenge levied against a particular prosecutor and would not invalidate a system using privately managed prosecutions. Even with respect to an “as applied” challenge to an individual prosecutor, however, the claimant would have to demonstrate that similarly situated individuals were not being prosecuted. Aside from the practical difficulties of making such a showing, it is unclear a prosecution could be sustained absent a showing to the court of sufficient evidence consistent with guilt. If grand jury indictment were required prior to commencing a private prosecution, presumably no case undeserving of prosecution would go forward. Moreover, such concerns would also be alleviated to the extent that appointment of the private prosecutor was certified by the public prosecutor or the trial court. In any event, an Equal Protection challenge to private prosecutions, especially a facial challenge to a statute or rule allowing such prosecutions, would likely be of little merit.

### 3. A Unique Federal Concern: Article II and the Unitary Executive

An additional argument against the appointment of a private prosecutor—at least at the federal level—is that such an appointment violates Article II of the Constitution, which provides that “[t]he executive power shall be vested in a President of the United States of America.”<sup>387</sup> The argument is that an “inherently executive function” vested in the President cannot be delegated out either to another branch of the government, to another governmental authority outside the Executive Branch or, presumably, to a private entity.<sup>388</sup> The power to prosecute a criminal offense is such an inherently executive function, it has been argued, that a private prosecution would violate Article II.

While a fulsome discussion of federal executive power and theories about a “unitary executive” exceeds the scope of this Article, it is noteworthy that the Supreme Court has never ruled that the prosecutorial function may be exercised only by Executive Branch officials.<sup>389</sup> The Court in *Young v. United States ex rel. Vuitton et Fils S.A.*, upheld a district court’s authority to appoint a private prosecutor in a criminal contempt proceeding, even where it disallowed it under the specific factual circumstances of that case.<sup>390</sup> Of course, statutory authority similarly vests the district courts with the authority to appoint U.S. Attorneys where vacancies occur that have not yet been filled by the President.

In the seminal case of *Morrison v. Olsen*, the Supreme Court upheld the appointment of an independent counsel under the Ethics in Government Act.<sup>391</sup> The Court upheld the independent counsel’s appointment in no small part because that appointment did not rep-

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387 U.S. CONST. art. II, § 1, cl. 1. Obviously, such an argument would not be applicable to the states unless they had an Article II analogue in their own constitutions and their courts had adopted a unitary executive type understanding of state executive power.

388 See *Clinton v. Jones*, 520 U.S. 681, 697–98 (1997) (“[T]he doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch . . .”). For a discussion concerning delegations of executive power, see Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 310 (Jody Freeman & Martha Minow eds., 2009).

389 See *Clinton*, 520 U.S. at 699–700 (showing the debate regarding executive functions); *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (commencing discussion of whether the independent counsel provision violates separation of powers principles); Janet Fairchild, Annotation, *Validity, Under State Law, of Appointment of Independent Special Prosecutor to Handle Political or Controversial Prosecutions or Investigations of Persons Other than Regular Prosecutor*, 84 A.L.R. 3d 29, 40–41 (1978) (discussing violations of separation of powers); Verkuil, *supra* note 388, at 310 (laying out parameters of the duty to govern).

390 481 U.S. 787, 809 (1987).

391 *Morrison*, 487 U.S. at 695.

resent a situation in which Congress sought to increase its power at the expense of the executive authority.<sup>392</sup> Thus, the Act posed no “dange[r] of congressional usurpation of Executive Branch functions,”<sup>393</sup> nor was it “a case in which the power to remove an executive official has been completely stripped from the President;” rather, “because the independent counsel may be terminated for ‘good cause,’ the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities.”<sup>394</sup>

*Morrison* implies that, for a private prosecution to occur at the federal level, the prosecutor must be controlled to some degree by the Executive Branch and may additionally require some sort of imprimatur of the Judicial Branch. To meet this standard, a private prosecutor could be retained and deputized by the federal prosecutor’s office. Moreover, the relationship between a private prosecutor and the U.S. Attorney might be fashioned far more closely than that with an independent counsel and thus, would more easily meet the constitutional threshold. Indeed, the U.S. Attorney could retain control by approving the prosecution and, when necessary, terminating it if he or she believed it was in the interests of justice to do so.

#### B. Prudential Concerns

In addition to the constitutional arguments raised against private prosecutions, at least two significant prudential concerns must be addressed: namely, that a private prosecutor harbors an inherent conflict between the victim’s specific interests and society’s interest in justice; and secondly, that private justice systems have not generally proven successful in achieving important public policy objectives.

The ethical issues raised by the potential conflicts faced by a privately hired prosecutor bear serious analysis. Such conflicts, however, are not alien to the legal system and arise in a number of different contexts. With respect to whether privately managed prosecutions will further the goals of the criminal justice system—including punishing the guilty, providing general and specific deterrence, and securing domestic tranquility—so few such prosecutions occur that it is difficult to gauge their effect. Nevertheless, scholars have examined other forms of so-called private justice, including the use of *qui tam*

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392 *Id.* at 694.

393 *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)).

394 *Id.* at 692.



actions<sup>395</sup> and the promotion of private causes of action to permit<sup>396</sup> those injured by certain activities to sue and, through the civil justice system, collect restitution. I will consider each of these arguments in turn.<sup>397</sup>

### 1. *Ethical Conflicts and the Private Prosecutor*

Ordinarily, the issue of a conflict of interest arises when counsel enjoys a pecuniary interest or has a fiduciary duty adverse to her potential client.<sup>398</sup> The underlying idea is that competing incentives prevent counsel's interests from being as closely aligned with the interests of the client. In a private prosecution, the question is whether the private prosecutor can serve both the client's presumable interest in convicting the defendant and the public's interest in justice—for "the duty of the prosecutor is to seek justice, not merely to convict."<sup>399</sup>

The American Bar Association's Model Rules of Professional Conduct examine the relationship between a lawyer and his or her clients and defines what constitutes a "conflict of interest." Model Rule 1.7, which addresses conflicts of interest involving current clients, dictates that: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The Rule explains that such a conflict exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another

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<sup>395</sup> See generally James M. Atwood, *False Claims Act—Section 3730(e)(3) of False Claims Act Bars Qui Tam Suit That Gives No Useful or Proper Return to the Government—United States ex rel. S. Praver & Co. v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994), 29 SUFFOLK U. L. REV. 949 (1995); Caminker, *supra* note 333; Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415 (1972); Charles N. Drennan, Comment, *Qui Tam Actions under the 1899 Refuse Act: Possibility of Individual Legal Action to Prevent Water Pollution*, 36 MO. L. REV. 498 (1971).

<sup>396</sup> See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); James L. Miller, *Federal Securities Laws: Private Causes of Action Under Section 17(a) of Securities Exchange Act of 1934*, 13 AKRON L. REV. 362 (1979); Wilbur Owens, *Export Controls—A Private Cause of Action Under the Export Administration Act of 1979*, 15 GA. J. INT'L & COMP. L. 371 (1985); Rita M. Theisen, *Recent Developments in Private Rights of Action Under the Unfair Claims Settlement Practices Act*, 23 TORT & INS. L.J. 19 (1987).

<sup>397</sup> While doubtless other arguments against private prosecutions may exist, those outlined here appear far more frequently both in the relevant literature and in judicial opinions.

<sup>398</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7–.8 (2006) (barring lawyers from representing clients when there are personal or professional conflicts of interest).

<sup>399</sup> STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (1993).

client, a former client or a third person or by a personal interest of the lawyer.<sup>400</sup>

The Supreme Court in *Young v. United States ex rel Vuitton et Fils S.A.*, touched on what it believed may be a conflict of interest in the context of a privately managed prosecution.<sup>401</sup> In that case, fashion leather goods manufacturer Louis Vuitton had brought suit against alleged trademark infringers who manufactured and distributed imitations of Vuitton's goods. As part of a settlement agreement, the alleged infringers agreed to a permanent injunction against any such activity.<sup>402</sup>

Having learned that the product infringement appeared to be continuing, Vuitton's attorneys requested that the district court appoint them as special counsel to prosecute the criminal contempt action for the alleged injunction violation.<sup>403</sup> The district court granted the request, appointing them as special counsel,<sup>404</sup> and a jury subsequently convicted the defendants of contempt.<sup>405</sup> Appealing to the Second Circuit, defendants argued that the appointment of Vuitton's attorneys instead of disinterested counsel was erroneous.<sup>406</sup>

The Supreme Court held that counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violation of that order.<sup>407</sup> The Court noted that because federal prosecutors have the unique duty to seek justice and not merely convict, they are prohibited from representing the government in a manner where they, their family, or their business associates have any particularized interest.<sup>408</sup> The private attorney who undertakes a prosecution, the Court concluded, should be similarly "disinterested."<sup>409</sup> Here, because the lawyers who prosecuted the case could potentially benefit in a subsequent civil suit from obtaining a criminal conviction in the case at hand, they could not be deemed "disinterested" prosecutors.<sup>410</sup> The Court thus determined that the prosecutors were necessarily interested. As a consequence, the Court refused to apply harmless error analysis in light of the per-

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400 MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2006).

401 481 U.S. 787 (1987).

402 *Id.* at 790–91.

403 *Id.*

404 *Id.* at 791–92.

405 *Id.* at 792.

406 *Id.* at 793.

407 *Id.* at 809.

408 *Id.* at 803.

409 *Id.* at 804.

410 *Id.* at 805–06.

vasive effects of appointing an interested prosecutor.<sup>411</sup> Explaining that it would require analysis not of what the private prosecutors did, but what they refrained from doing at trial and prior to trial, the confidence in the integrity of the criminal proceeding was undermined.<sup>412</sup> Nevertheless, the Court's issue was not with the private prosecution per se, but with the fact that those particular private prosecutors had a parallel interest in the case and were not sufficiently "disinterested."

Setting aside the practical concern of whether it is always the case that a prosecutor is "disinterested" in the outcome of a criminal trial, is it ever possible for a private attorney, especially one retained by the victim, to be sufficiently disinterested in a criminal prosecution? The difficulty is more apparent with an attorney hired by the victim, because an attorney has a responsibility to vigorously represent the interests of the client within the bounds of the law. It is possible that, despite the lawyer's obligation to the justice system, the incentive a lawyer has to advocate on behalf of her client may overwhelm that counsel's interest in protecting the criminal justice system or in fulfilling her duties as an officer to the court. Of course, that is a risk that all defense counsel runs—that their obligation to their clients will blind them as to their obligation to justice, more generally, but it is traditionally a risk society is willing to run on behalf of the criminal defendant.

It is markedly different when we consider a lawyer representing the interests of a victim in a criminal prosecution. Because our system is designed to give the criminal defendant the benefit of the doubt,<sup>413</sup> and because we believe those who prosecute criminal cases must also have the larger interests of justice in mind, first and foremost, there is an uneasiness that attends a victim-centric criminal justice system. Following *Vuitton*, the Fourth Circuit Court in *Person v. Miller* considered similar issues.<sup>414</sup> There, the defendant challenged a judgment from a criminal contempt proceeding that he violated a court order prohibiting him from operating a paramilitary organization.<sup>415</sup> The prosecutor in the contempt proceeding had previously represented the plaintiffs in a suit against the defendant, resulting in the court order at issue.<sup>416</sup> The district court held that the U.S. Attor-

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411 *Id.* at 809.

412 *Id.* at 809–14.

413 *See supra* note 358 and accompanying text.

414 854 F.2d 656 (4th Cir. 1988).

415 *Id.* at 659.

416 *Id.* at 658.

ney's Office was required to take control, but that the interested attorney could still assist in the prosecution.<sup>417</sup>

Ostensibly relying on the fact that *Young* does not prohibit interested attorneys from all involvement in a criminal contempt prosecution, but rather frowns on their management of such cases,<sup>418</sup> the Fourth Circuit upheld private counsel's participation so long as the government approved and retained control of the prosecution.<sup>419</sup>

The Court's underlying concern that the victims' priorities may take precedence over the more ephemeral, but no less important, demands of "justice" is understandable. This concern, however, bears closer scrutiny. Does the public's interest count for more than the victim's interest? Should it? Are prosecutors, even those privately retained, who work under the same ethical constraints as public prosecutors—albeit with perhaps different incentives—necessarily less likely to make decisions that benefit justice, writ large, to the benefit of their clients? After all, public prosecutors may identify with their victims or may place political advancement paramount in their careers. The ranks of elected officialdom are littered with former prosecutors. To think that a public prosecutor's interests may be any more noble than a private attorney's is likely more a hope than a reality.

Part of the answer to these concerns may depend upon the way in which the system of private prosecutions is structured. The legal profession has long barred arrangements wherein criminal defense lawyers are paid only if they win an acquittal for their clients.<sup>420</sup> This may have something not only to do with the "troubling" incentive created when a lawyer is only compensated when he successfully obtains an acquittal, but also with the prospect of what lawyers may do to collect their fees. Private prosecutors, if supervised by their public counterparts, and paid on an hourly, not a contingency basis, may not be any less likely to twist justice than a public prosecutor who becomes committed to the victim's cause or who is using his office for political

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417 *Id.* at 659.

418 *See* *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 806 n.17 (1987) ("The potential for misconduct that is created by the appointment of an interested prosecutor is not outweighed by the fact that counsel for the beneficiary of the court order may often be most familiar with the allegedly contumacious conduct.").

419 *Person*, 854 F.2d at 664.

420 *See* *Ormerod v. Dearman*, 100 Pa. 561, 564 (1882) (rejecting such an arrangement); MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2006) (prohibiting lawyers from entering into such fee arrangements); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 39–41 (1989) (discussing the policy of proscribing contingent fees in criminal cases).

ambitions. Nevertheless, the conflict issue is one that bears further consideration.

## 2. *The Utility of Private Justice Models*

If the ends of the criminal law are to punish the guilty and thereby to ensure enforcement of the law by achieving a greater measure of deterrence, it bears considering whether the leveraging of private resources will help attain these goals. While there is an insufficient number of private prosecutions from which to draw any sort of verifiable conclusion, private justice has long been used to enforce rights. Private rights of action and *qui tam* suits have traditionally existed as a means of harnessing private resources to obtain significant public policy objectives.<sup>421</sup>

Professor Pamela H. Bucy has produced one of the more thoughtful examinations of the utility of private rights of action. Focusing on different forms of private justice—“victim” actions designed to make the victim whole, “common good” actions that permit anyone to bring suit to address public harms, and “hybrid” actions that contain elements of the other two<sup>422</sup>—Professor Bucy concludes that using private means to enforce public law has generally not performed well in the past.<sup>423</sup> Although Professor Bucy acknowledged that “[p]rivate justice is inevitable,”<sup>424</sup> she concludes that only the “common good” type *qui tam* action found in the False Claims Act<sup>425</sup> is effective. And she reasons that is so because, first, it enables a venue to recognize the value of inside information (namely, knowledge that someone has filed a fraudulent claim) and second, because it contains a “dual-plaintiff mechanism” that permits both “government monitoring and control of private actions” and promotes “cooperation between public and private regulators” to ensure that the privately managed litigation serves the public interest.<sup>426</sup>

Professor Bucy measures “success” in somewhat different terms from what a successful criminal prosecution might bring.<sup>427</sup> In par-

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421 See Aaron R. Petty, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 863–64 (2006) (discussing the origins of *qui tam* actions).

422 Bucy, *supra* note 289, at 13.

423 *Id.* at 62–68. Several other examples highlight this criticism. Bucy identifies the high dismissal rate of private prosecutions of RICO cases as an indication of lack of merit. *Id.* at 22. Bucy also identifies the burdens on defendants and courts from private securities litigation prior to congressional reform. *Id.* at 26–29.

424 *Id.* at 79.

425 See *supra* note 298 and accompanying text.

426 Bucy, *supra* note 289, at 80.

427 *Id.* at 54.

ticular, she faults “victim” efforts that focus only on single instances of wrongdoing to recompense one specific victim and therefore have little overall impact on the “overall regulation of complex economic wrongdoing.”<sup>428</sup> Professor Bucy also criticizes “hybrid” efforts for failing to attract talented litigators.<sup>429</sup> However, neither of these criticisms need to pertain to private prosecutions. For example, if the concern is that existing citizen suits fail to attract sufficient legal talent to investigate or pursue the often complicated issues that arise in antitrust, environmental, or other regulatory suits, it must be understood that criminal prosecutions tend to involve both more motivated victims and considerably less complex factual predicates. Few criminal prosecutions involve large corporate entities (the traditional targets of RICO, antitrust, and environmental litigation), nor are they intended to contribute to a broader regulatory scheme. Instead, even fairly minor criminal prosecutions (for violent crimes or drugs) are understood both to deter the individual malefactor (via selective incapacitation) as well as to contribute to a larger scheme of deterrence.

That said, this is not to suggest that the government wholly abdicate its traditional role in supervising criminal prosecutions. Certainly, the presiding prosecutorial authority in a given jurisdiction could be required to sign off on the final decision to bring a case to a grand jury or even, in the event an indictment is handed down, to press on to a criminal trial. Professor Bucy argues that governmental supervision is a necessary component of any scheme of private justice,<sup>430</sup> and this important suggestion could be included in any system of privately managed criminal prosecutions.

### *C. Answering the Criticisms: Legal Protections for the Accused*

Although the concerns raised about private prosecutions are not insubstantial, it must not be forgotten that legal protections for the accused permeate the criminal justice system. Much of the Bill of Rights works as a code of criminal procedure, designed to protect the defendant’s liberty and property interests. Those rights help ensure a fair trial by guaranteeing certain minimal procedural protections to the accused. Those protections help to guarantee fairness and a credible outcome regardless of who prosecutes the case.

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428 *Id.* at 55.

429 *Id.* at 56.

430 *Id.* at 78.

### 1. *Pretrial Rights*

The accused's interests are greatest before a prosecution even commences. Nothing, of course, currently prevents a victim from retaining a private investigator and gathering evidence in a case. While a private investigator's powers pale in comparison to those of the police, they can undertake interviews and collect evidence—with some important exceptions. The Fourth Amendment restricts the ways in which police may collect evidence.<sup>431</sup> For example, if the police unlawfully gather evidence by conducting a search without a warrant, that evidence is excludable at trial.<sup>432</sup> Similarly, if the police obtain a confession in violation of the Fifth Amendment, there is a good chance that confession will not be admissible.<sup>433</sup> The safeguards of the Fourth and Fifth Amendments, however, only apply to state actors.<sup>434</sup> Therefore, private investigators are not subject to the same sort of rigor in terms of their collection of evidence and gathering of statements as their public counterparts.

Although private parties currently may retain private investigators to collect evidence, one way of ensuring compliance with constitutional norms would be for private prosecution statutes to exclude evidence gathered (by private parties) in violation of standard police practices. At a minimum, such a rule would provide defendants with the same sort of procedural protections they enjoy when the police lead an investigation. Of course, if the police were working with private counsel, the same strictures would naturally apply.

In addition, restrictions on standing would limit the universe of potential complainants. If private prosecutions are available only to the victims themselves, or to their immediate families, vigilante-type actions initiated by interest groups would not be possible. As with civil lawsuits, keeping the potential pool of plaintiffs small serves a useful function to ensure that cases are brought only where there is a real harm and a motivated victim.

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431 *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained by unconstitutional searches and seizures is inadmissible in court).

432 *Id.*

433 *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that a prosecution may not use statements stemming from custodial interrogation of defendants unless necessary procedural safeguards are followed). For some of the possible exceptions, see Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567 (2001).

434 *See* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (explaining that the Fourth Amendment protections against unreasonable searches and seizures applies only to government actors).

Once evidence is collected, whether by private investigators acting at the behest of a victim, or by public law enforcement officials, a useful safeguard would be to require the public prosecutor to certify that the case is neither frivolous nor a violation of the public's interest. Prosecutors traditionally wield considerable power in deciding whether to go forward with a case:

[T]he prosecutor has become the most powerful office in the criminal justice system. The prosecutor's authority is evident in bail hearings, grants of immunity, and in trial strategy. But in the areas of charging, bargaining, and sentencing, it has become clear that the prosecutor plays the pivotal role in the criminal justice process. Despite criticism, plea bargaining continues unabated. While few courts have rather unsuccessfully attempted to formulate a 'common law of prosecutorial discretion,' the authority of the prosecutor continues to grow.<sup>435</sup>

Given the understandable concerns about the interest motivating the private prosecutor, it is not unreasonable to interpose the public prosecutor in the decision whether to take a private prosecution to the grand jury (or to proceed with a criminal information).

The ABA has, in fact, adopted standards for prosecutors with respect to their charging decisions, including:

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. . . .

. . . .

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

. . . .

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.<sup>436</sup>

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<sup>435</sup> Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 741-42 (1996) (footnotes omitted).

<sup>436</sup> STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (1993).



While these rules lack the force of law, a statute allowing for privately managed prosecutions could make these rules or other similar rules binding on private attorneys conducting such prosecutions.

Additionally, legislatures could limit the crimes available for private prosecution. Much like the creation of private rights of action in civil suits, policymakers could select those crimes that, as a policy matter, make the most sense as private prosecutions. One could argue that fairly trivial crimes, such as shoplifting or misdemeanor theft, might be more appropriate for private prosecution. Shop owners, for example, might be perfectly situated to pursue minor shoplifting offenses. Alternatively, in circumstances of truly serious crime, it might be in the interests of the community to leverage private interests as a means of securing more efficient law enforcement. Determining precisely what crimes may be pursued by private prosecution should be entrusted to legislators, who work to secure the interests of those they represent and who can, more adroitly than the courts, adjust those determinations in light of the actual results of cases privately prosecuted.

Finally, grand juries could be used to screen out trivial matters or cases that are more about personal vendetta than justice. In the federal system, grand juries serve to decide whether a criminal case may go forward. Although the grand jury requirement of the Fifth Amendment has never been incorporated against the states,<sup>437</sup> many states already have grand juries and they can be used as an important barrier against the possibility of frivolous or malicious prosecution.

## 2. Trial Rights

Once the decision has been made to go forward with a criminal case after grand jury indictment, important trial rights exist to secure the accused's interests. Regardless of the grand jury's decision to indict, public prosecutors could still enjoy the authority to decide whether the interest of justice demands trial—exactly as they do in cases which they themselves manage.

Protections for the defendant, whether a case is managed privately or not, are numerous. A judge presides over the trial itself<sup>438</sup> and has

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<sup>437</sup> See *Hurtado v. California*, 110 U.S. 516, 521 (1884).

<sup>438</sup> See *Geders v. United States*, 425 U.S. 80, 87 (1976) (stating that “the judge must exert substantial control over [judicial] proceedings”); *Quercia v. United States*, 289 U.S. 466, 469 (1933) (describing the discretionary power of a judge in a jury trial).

an obligation to ensure that the defendant's rights are preserved.<sup>439</sup> Even in plea bargains, where the defendant elects to waive trial, a judge ordinarily must accept the terms of that agreement.<sup>440</sup> In a situation involving a privately managed prosecution, the public prosecutor might also ensure that the plea reflects the interests of justice and the trial judge might subject such agreements to closer scrutiny before approving them.

The same judges who preside in prosecutions managed by public officers would, of course, preside in trials managed by privately hired prosecutors. Judges in such privately managed prosecutions might, as in pro se cases, be somewhat more inclined to police the proceedings to ensure that private counsel acts in an appropriate manner. Indeed, an additional layer of protection could be adopted by requiring judges to certify the appointment of a private prosecutor retained by the victim.

As with public prosecution, all the rights and privileges accorded the criminal defendant would be present in a private prosecution. The private prosecutor would be required to prove each element of the charged offense beyond a reasonable doubt.<sup>441</sup> The defendant would enjoy the Fifth Amendment privilege against compelled self-incrimination,<sup>442</sup> be able to present witnesses<sup>443</sup> and subpoena those who refused to testify voluntarily,<sup>444</sup> enjoy the right to counsel,<sup>445</sup> and maintain all the other attendant trial-related rights. Most importantly, the greatest guarantor of liberty, the right to a jury determination, would similarly be preserved.<sup>446</sup> The only functional difference between the privately managed prosecution and the public prosecution would be the nature and authority of the individual presenting the case.

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439 See *Glasser v. United States*, 315 U.S. 60, 71 (1942) (stating that the judge must ensure that the defendant's essential rights are protected).

440 FED. R. CRIM. P. 11(c)(4).

441 See *supra* note 358.

442 See *Hoffman v. United States*, 341 U.S. 479, 485–86 (1951) (describing Fifth Amendment prohibition on any person being a witness against himself).

443 U.S. CONST. amend. VI; see *Washington v. Texas*, 388 U.S. 14, 19 (1967) (explaining that the right to present witnesses is an element of due process of law).

444 U.S. CONST. amend. VI; see *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (stating that criminal defendants have the right to government's assistance in compelling the attendance of favorable witnesses at trial).

445 U.S. CONST. amend. VI; see *Argersinger v. Hamlin*, 407 U.S. 25, 37–38, 40 (1972) (holding that no person may be denied his liberty who has been denied the assistance of counsel).

446 U.S. CONST. amend. VI; see *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (holding that the Constitution guarantees a right of jury trial in serious criminal cases).

While the Framers of the Bill of Rights included numerous procedural protections for the accused, at no point did they guarantee the nature or quality of the prosecutor. Neither the Framers nor those who drafted the various state constitutions deemed it necessary to include public prosecutors as part of the “protections” guaranteed to criminal defendants. In fact, given the Framers’ interests in balancing natural avarice and ambition through a carefully calibrated system of checks and balances, it would be surprising if they would consider a public prosecutor’s interest in “justice” to be an appropriate check against untoward behavior. Procedural rules, bar discipline, impartial judges, and, ultimately, the buffer provided by a jury of one’s peers, would likely have been deemed a better means of guaranteeing the defendant’s rights in the context of an adversarial trial.

### 3. *Ancillary Protections*

Aside from the traditional protections granted the defendant, several other potential means of guaranteeing the defendant’s interests could also be considered. First, since the early establishment of public prosecutors, such government officials have often enjoyed the authority to terminate a case,<sup>447</sup> even after grand jury indictment,<sup>448</sup> if the public interest demanded it. Public prosecutors could thus enjoy the authority not only to certify a prosecution and approve the appointment of particular counsel, but also to terminate a case at any stage of the proceeding. The power to terminate a prosecution on public interest grounds could be a significant means of preventing the possibility of an inappropriate prosecution or one that violates the public interest.

Two additional protections could also be considered: suits for malicious prosecution<sup>449</sup> and the assessment of defense costs on the complainant if any inappropriate conduct is found with respect to the private counsel. The threat of a suit for a malicious prosecution could serve as a significant deterrent to someone filing a suit to harass the accused or that is otherwise inappropriate. While public prosecutors are protected by sovereign immunity, if immunity protec-

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447 See *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (stating that the termination of a prosecution should not be determined by a judge).

448 See *United States v. Carrigan*, 778 F.2d 1454, 1463 (10th Cir. 1985) (describing a prosecutor’s authority to dismiss indictments).

449 See 42 U.S.C. § 1983 (2006) (allowing civil suits against state actors for civil rights violations).

tion was waived when private counsel undertook a case, the possibility of a tort action could serve as a deterrent against misconduct.<sup>450</sup>

Similarly, if a court decides that the prosecution was not conducted in good faith, defense costs could be assessed against the complainant. Such a deterrent would likewise not be available against a public prosecutor, but it would be useful in discouraging inappropriate private prosecutions.

Finally, as with all criminal prosecutions, statutory rights of appeal ensure that an appellate court (either federal or state) will have the opportunity to review the trial record to consider any claims the defendant might make as to the appropriateness of the privately managed prosecution. Appellate courts can thus act as a check upon any problems fomented by the use of a private prosecutor.

#### IV. PRIVATE PROSECUTORS AND THE PUBLIC GOOD RECONSIDERED

Presently, most law enforcement strategies demand government participation in the form of investigating alleged criminal conduct, leading the prosecution, collecting the fines, or running the prison facilities. At least part of the reason government came to dominate criminal prosecution stems from the notion that law enforcement represents a public good that is best financed by society and delivered by public actors. The prosecution guilds of the past simply merged and transferred their authority to government while spreading the costs to society as a whole. The state, however, need not monopolize the investigation and prosecution of crime. The public may benefit from the government leveraging private resources in the form of increased criminal prosecutions and conserved public expenditures. Several examples exist in which society may gain from permitting privately managed prosecutions as an addendum to public efforts.<sup>451</sup>

##### A. *Contours of a Model Statute*

If one accepts that private resources ought to be harnessed to enforce the law and that privately managed prosecutions may prove to be one vital piece of that effort, it is worth considering what a model statute authorizing private prosecutions might contain. I suggest only the basic contours of such a statute here, as the numerous potential

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<sup>450</sup> See *Buckley v. Fitzsimmons*, 509 U.S. 259, 272–73 (1993) (describing how a public prosecutor's absolute immunity extends to actions preliminary to the initiation of a prosecution and actions apart from the courtroom).

<sup>451</sup> See generally Comment, *supra* note 327 (arguing private prosecution could remedy unwarranted inaction by public prosecutors).

jurisdictions involved—the fifty states, the District of Columbia, and the federal government—will undoubtedly have idiosyncrasies of their own when it comes to how their criminal justice systems function.

First, private prosecutions should only be limited to certain classes of crimes. While, for reasons discussed below, it may be useful to permit private prosecutions for both felonies and misdemeanors, certain crimes do not readily lend themselves to private prosecutions. The most obvious example of crimes that ought to remain within the exclusive purview of public prosecutors is strict liability offenses.<sup>452</sup> Strict liability offenses are unique within the criminal law as they require no proof of intent; such crimes generally reflect society's decision that certain acts merit criminal punishment regardless of whether the perpetrator intended to commit them. Because society decides to exempt certain offenses from *mens rea* requirements, it makes sense to allow only public prosecutors to bring those cases. The *mens rea* requirement in traditional offenses<sup>453</sup> provides the defendant with an additional protection against ill-advised prosecution and, hence, it is more suitable for private prosecution. Similarly, public order offenses, such as rioting or disorderly conduct where there is no discernable victim, and crimes against the state, such as treason, espionage, or counterfeiting, should be left to public prosecutors.

In most other respects, a private prosecution would mirror a standard public prosecution. The process for initiating a case would be kicked off like any standard criminal prosecution. A complaint would be sworn out, evidence collected and analyzed, and the private prosecutor would determine which, if any, crime was committed. The privately retained counsel would then bring the case to the appropriate public prosecutor to determine whether the action ought to be maintained. The public prosecutor could choose to pursue the prosecution in house, quash the prosecution altogether, send the private prosecutor back to assemble more evidence, or authorize the private prosecutor to go forward.

Second, some level of oversight of private prosecutions by their public counterparts will counter concerns that a privately managed prosecution may be little more than a thinly veiled vendetta. Thus, an appropriate statute might require the public prosecutor to sign off

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452 See *Smith v. California*, 361 U.S. 147, 150–51 (1959) (recognizing the use of strict liability offenses); *United States v. Balint*, 258 U.S. 250, 251–52 (1922) (explaining that scienter is not always necessary to prove a crime).

453 See *Dennis v. United States*, 341 U.S. 494, 500 (1951) (noting that most federal criminal laws require a *mens rea* element).

before a case is brought before a grand jury or before a criminal information is submitted. Typically, any case brought by a private prosecutor ought to face scrutiny by a grand jury, and formal indictment ought to be the means by which a private criminal prosecution is commenced. Interposing both the public prosecutor and the grand jury between the filing of a case and trial should help prevent the filing of frivolous or revenge-driven prosecutions. In fact, if the jurisdiction does not permit indictment by grand jury, but only provides that a criminal information be filed, all cases filed by a private prosecutor ought to be approved by a public prosecutor.

While the private prosecutor need not be officially “deputized” by the U.S. attorney or the district attorney, all relevant constraints on prosecutors generally, peculiar to the jurisdiction in which the prosecution is taking place, should likewise be made explicitly applicable to private prosecutors. Private prosecutors, in fact, could be obligated to swear out a certificate in open court that they will abide by the rules applicable to public prosecutors and that the prosecution itself is being pursued in the interests of justice. Although public prosecutors are generally shielded from suits for frivolous or vindictive prosecution—largely as a result of the immunity they enjoy as state employees<sup>454</sup>—such immunity should be waived for private prosecutors. Thus, a private prosecutor could face personal liability if, for example, he failed to disclose *Brady*<sup>455</sup> material, knowingly brought a prosecution to harass the defendant, or did not file the suit in the interests of justice or to address the victim’s legitimate interests.

Moreover, to discourage frivolous or otherwise meritless prosecutions, a “loser pays” provision might be included so that in the event the prosecutor failed to obtain a conviction and the judge found *ex ante* that the case was not brought in good faith,<sup>456</sup> the defendant would be entitled to a reimbursement for attorney’s fees and court costs. Although such a provision merits consideration, it must be approached with trepidation for two reasons in particular. Because many defendants might have *pro bono* or state-provided counsel, some reimbursements would go to the state, which may be inappropriate in the context of a criminal prosecution. Likewise, this incen-

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454 See *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976) (holding that a state prosecutor enjoys absolute immunity from suit).

455 See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding suppression of evidence by the prosecutor violates due process “where the evidence is material either to guilt or to punishment”).

456 See David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”*, 15 *IND. INT’L & COMP. L. REV.* 583, 589–90 (2005) (discussing the history of the “Loser Pays” rule in England).

tive to “win” the case might conflict with the interests of justice, which may become apparent only as the case unfolds. It may prove problematic to hinge the payment of defense attorneys’ fees and court costs on whether a prosecution is successful. Nevertheless, such an arrangement is worth considering.

Third, at the time of trial, the judge should be informed of, and ultimately approve of, the appointment of private counsel to manage the prosecution. A judge’s involvement in a privately managed prosecution may be useful in ensuring that such a prosecution is not maintained for improper motives. As the New York Court of Appeals once explained:

A prudent magistrate should proceed with the utmost caution when he has reason to suspect that a criminal proceeding was commenced before him, not to vindicate public justice, but to serve some private purpose, and should withhold process until satisfied that the complainant is acting in good faith in behalf [sic] of the people, and not to aid personal objects.<sup>457</sup>

This is perhaps overstated in that, with a privately initiated prosecution, one would expect a personal interest motivating the prosecution, but that ought not be the sole motivation for pursuing the cause. Nor is it clear why a personal motivation, as long as it is one supported by evidence sufficient to support a grand jury indictment, is necessarily a bad thing; requiring the trial judge to formally approve the appointment of private counsel at the time of trial may be a prudent measure given the relative uniqueness of the proceeding. It might be expected that, with the certification of the public prosecutor at the start of the process, judges would routinely consent to the appointment of private counsel, but still, requiring judicial approval at such a crucial stage in the proceeding establishes an additional level of protection to the defendant. In addition, all plea agreements between a private prosecutor and the defendant should be approved by the public prosecutor’s office in addition to the judge. Judges, of course, supervise plea bargains<sup>458</sup> and must ultimately approve them.<sup>459</sup> Seldom will a judge refuse a plea bargain negotiated by counsel,<sup>460</sup> but a judge apprised that the agreement was negotiated by a private prosecutor might scrutinize such deals more carefully.

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457 *People ex rel Livingston v. Wyatt*, 79 N.E. 330, 333 (N.Y. 1906).

458 *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 747 (2001).

459 *See id.*; *see also* FED. R. CRIM. P. 11(c)(3)(A).

460 *See* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 36 (2004) (explaining that a judge will usually accept an agreement reached by the parties).

Fourth, private prosecutors should not be permitted to collect fees contingent on a “successful” prosecution. The Model Rules of Professional Conduct have long banned the collection of contingency fees in criminal cases.<sup>461</sup> Although this ban has been attacked by some commentators,<sup>462</sup> it remains in place in virtually every jurisdiction in the United States. “[C]ontingent fees,” it has been explained, “create complementary dangers of overzealous and compromised representation.”<sup>463</sup> Effectively, this overzealous representation theory “begins from the premise that contingent fees make an attorney and her client, in essence, joint venturers for the purpose of the litigation.”<sup>464</sup> And, “[b]ecause the lawyer’s fee, as well as her psychic satisfaction and future reputation, will depend on the outcome of the proceeding, she will have, it is thought, a greater incentive to win, and thus a greater incentive to engage in corrupt practices that enhance her prospects of winning.”<sup>465</sup> While this arrangement was analyzed in the context of contingent fees for defense lawyers, the same basic reasoning applies to private prosecutors as well. Although Professor Pamela Karlan questions whether this is a legitimate assumption to make, and notes that “no hard empirical support [exists] for the proposition that criminal defense lawyers are less capable of resisting these incentives than . . . their civil counterparts,”<sup>466</sup> one can perhaps make a greater claim that a prosecutor, who has certain obligations beyond those to the client/victim, ought not be in the position of accepting fees contingent upon a successful prosecution of the defendant. To remove all possibility of concern, the ban on contingency fees in criminal cases ought to be maintained.

Similarly, prosecutors ought not be allowed to share in the proceeds from the collection of a criminal fine. A private prosecutor should not be incentivized to seek the highest possible fine in order to enrich himself. The simple solution to discourage such behavior is simply to prevent either the lawyer or the client from sharing the proceeds of any available fine. This differs, however, from the collection of restitution. The amount of restitution must be proven by the victim; hence, it may not be inappropriate for a private prosecutor to

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461 See *supra* note 420 and accompanying text.

462 See Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 595 (1993) (suggesting that a continuing ban on contingent fees in criminal cases should be relaxed).

463 *Id.* at 610.

464 *Id.*

465 *Id.*

466 *Id.*



enter into an arrangement in which he will share in the proceeds of any court-ordered restitution.

Fifth, the supervising public prosecutor should be able to terminate the prosecution “in the interests of justice” at any point either prior to trial or on appeal. Endowing the public prosecutor with such authority is plainly in accord with historical arrangements between public and private prosecutors, and furthers the government’s interest in controlling criminal litigation. The defendant should always have the option of appealing to the public prosecutor to quash the proceeding. This ability to terminate a prosecution will ensure that frivolous or vengeful prosecutions are kept to a minimum.

*B. Paradigmatic Examples Illustrating the Utility of Private Prosecutors*

Private prosecutions, if they are to be resurrected and placed back into the criminal justice system’s mainstream, must confer a benefit on that system and should enjoy a comparative advantage over public prosecutions in certain cases. Several concrete examples exist in which, for a variety of reasons, a private prosecution may be preferred, or act as a compliment to a public prosecution.

If the overall number of prosecutions increases by permitting privately initiated cases, deterrence efforts ought to be more successful. An increased number of prosecutions should have an effect upon specific deterrence,<sup>467</sup> in that a greater number of criminals will presumably face consequences for their actions. In the event the number of prosecutions increases, general deterrence efforts should also benefit,<sup>468</sup> as potential offenders see more individuals being prosecuted. Similarly, if the private bar is incentivized to engage in a certain amount of private sleuthing, the detection of crime will improve, thereby providing greater bite to deterrence strategies.

Second, by leveraging private resources, state prosecutorial resources may be conserved and better directed at state or national priorities which may benefit indigent victims. While it has been argued that private prosecutions inevitably allow the rich “better justice” than the poor, there are alternate ways of looking at the issue. If the rich command greater attention in the criminal justice system by virtue of their wealth, one might argue they are already over-represented when it comes to the investigation and prosecution of crime. The govern-

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<sup>467</sup> See Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 950 (1966) (describing the effects of punishment on deterrence).

<sup>468</sup> See *id.* at 960 (“Very few people would violate the law if there were a policeman on every doorstep.”).

ment operates with scarce resources; therefore, for every prosecution it undertakes on behalf of a corporate victim—which may be beneficial because of the number of victims or the perceived benefit of a greater deterrence—it must forgo (holding resources otherwise constant) some other potential prosecution. If, however, a well-heeled victim can bring his own prosecution relying on his own resources, then (provided the government's commitment to criminal prosecution remains the same) the government's resources are freed up and may, arguably, be used on a prosecution that might benefit a victim with access to fewer resources.

Aside from the overarching interests of improving deterrence efforts by increasing the overall number of prosecutions and conserving scarce government resources, private prosecutions may enjoy certain comparative advantages over those initiated by the government. In certain situations, for example, the putative victim may have knowledge or skill lacked by the government to pursue a case. In such circumstances, a private prosecutor may be in a better position to press a case. Moreover, some fairly common sorts of crimes may be difficult to prosecute either because they are so large they may consume a disproportionate share of prosecutorial resources, and involve multiple victims, or are so small that they are simply ignored by prosecutors.

Finally, conflicts within a prosecutor's office or circumstances in which the police may be the offenders may demand that prosecution comes from outside the public offices—much like the former federal independent counsel statute, which prized independence from the government in pursuing the prosecution of a public official. I will thus offer several paradigmatic examples in which private prosecutions may offer a comparative advantage.

### *1. Specialized Knowledge*

#### a. Computer Crime

With the transition of so much personal,<sup>469</sup> financial,<sup>470</sup> and corporate<sup>471</sup> data to the Internet, not to mention the ability to communicate

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469 See Reid Kanaley, *The E-Files*, PHILA. INQUIRER, Apr. 8, 1999, at F1 (discussing the extent to which individuals reveal personal information on the internet).

470 See Letitia Stein, *Health Records Go from Cabinet to Computer*, ST. PETERSBURG TIMES, Mar. 22, 2009, at A1 (describing how people have become comfortable managing their financial information online).

anonymously with people all over the world,<sup>472</sup> the Internet has become a favorite target for fraudsters, hackers, and garden variety thieves.<sup>473</sup> Successful cybercrime, however, often requires fairly sophisticated perpetrators who engage in careful planning.<sup>474</sup> With the world wide web being a vast collection of computers and servers scattered over the globe, cybercrime, in all its various guises, can be difficult to detect.<sup>475</sup> Even where the crimes themselves may be discovered, it is often difficult to identify the perpetrator.<sup>476</sup> Such hurdles make cybercrime challenging to prosecute. While governments around the world have increased dramatically their efforts to battle cybercrime, this is an endeavor in which government lacks any sort of comparative advantage over private industry.

Private industry, with its access to well-paid programming talent, enjoys an advantage over the government in terms of preventing, investigating, and detecting cybercrime.<sup>477</sup> This is not, however, to denigrate government efforts: “[I]t is simply not possible for investigators and prosecutors to become instant experts in every type of system, in light of the wide array of computers and operating systems on the market. . . . We will often need the victim to assist us in our efforts.”<sup>478</sup> The government does not, and cannot, maintain a monopoly over the specialized knowledge to detect and prosecute cyber-

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471 See Erin Ailworth, *Firms Sending Investors to the Web: While Corporations Save Cash by Putting Shareholder Data Online, Printers Lose Business*, BOSTON GLOBE, Feb. 4, 2009, at B5 (describing how much corporate data is posted online).

472 See Al Teich et al., *Anonymous Communication Policies for the Internet: Results and Recommendations of the AAAS Conference* (The Info. Soc’y, Working Copy Version 14, 1999) (noting that anonymous communication is a valuable feature of the internet).

473 See Federal Trade Commission, *Facts for Consumers: Dot Cons* (Oct. 2000), <http://www.ftc.gov/bcp/edu/pubs/consumer/tech/tec09.shtm> (last visited Feb. 16, 2010) (describing ways in which con artists use the internet to defraud consumers).

474 See Phillip Hallam-Baker, *Prevention Strategies for the Next Wave of Cyber Crime*, NETWORK SECURITY, Oct. 2005, at 12, available at <http://complianceandprivacy.com/WhitePapers/VeriSign-NESE-20051005.pdf> (analyzing various types of cyber crime).

475 See *Securities Fraud on the Internet: Hearing Before the Permanent Subcomm. on Investigations, Comm. on Gov’t Affairs*, 106th Cong. 25–31 (1999) (statement of Richard J. Hillman, Associate Director of Financial Institutions and Markets Issues, General Government Division) (noting some of the challenges of regulating cybercrime).

476 See *id.* at 27 (“Another ongoing challenge is coordinating oversight amongst . . . regulators[.] . . . Internet frauds can be initiated from virtually anywhere in the world.”).

477 See Michael Edmund O’Neill, *Old Crimes in New Bottles: Sanctioning Cybercrime*, 9 GEO. MASON L. REV. 237, 279 (2000) (describing private victims’ ability to detect and punish cybercriminals).

478 *Id.* at 276–77 (internal quotation marks omitted) (quoting Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 946 (1996)).

criminals.<sup>479</sup> If the talent to pursue cybercriminals lies in the hands of private industry, so does the incentive to ferret it out:

The infrastructures at issue are largely privately owned. Those private owners have a substantial economic stake in protecting their investments . . . . Those who own and operate these systems are in the best position to understand and prioritize this range of threats and what is necessary to mitigate them.<sup>480</sup>

Indeed, government officials have themselves recognized the need for private actors to become involved:

[G]overnments, even if we all work together, will not be able to meet these challenges alone. We need the private sector to be involved. In fact, the private sector must take the lead in certain areas, especially in protecting private computer networks, through more vigilant security efforts, information sharing, and, where appropriate, through cooperation with government agencies.<sup>481</sup>

While the government may need to target more immediate needs, and distribute its resources accordingly, the private sector may be able to commit its resources, particularly adept at detecting and investigating, to prosecute certain cybercriminals.

In fact, cooperation among private sector industries may work to provide significant deterrence for potential cybercriminals. Companies may have the same incentives that the guilds of old had to band together and fund the investigation and prosecution of cybercriminals. Where prosecution is all but assured once a cybercrime is detected, the private sector players may be incentivized to cooperate to deter such crimes.<sup>482</sup> Ultimately, such private efforts may dramatically increase the security of the internet.

479 See *Internet Security: Hearing Before the Comm. on Commerce, Science, and Transportation*, 106th Cong. 26 (2000) (statement of Michael A. Vatis, Deputy Assistant Director, FBI, National Infrastructure Protection Programs) (describing the use of cyber intrusion to implement a criminal conspiracy by Vladimir L. Levin); see also James K. Robinson, Assistant Attorney Gen. for the Criminal Div., U.S. Dep't of Justice, Remarks at the International Computer Crime Conference: Internet as the Scene of Crime (May 29–31, 2000), available at <http://www.justice.gov/criminal/cybercrime/roboslo.htm> (arguing that government cannot meet the challenges of cybercrime without support from the private sector).

480 Michael J. O'Neil & James X. Dempsey, *Critical Infrastructure Protection: Threats to Privacy and Other Civil Liberties and Concerns with Government Mandates on Industry*, 12 DEPAUL BUS. L.J. 97, 103 (1999/2000) (footnote omitted).

481 Robinson, *supra* note 479.

482 For a demonstration that people often resolve their disputes cooperatively without the use of law, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). See also Bruce L. Benson, *Emerging from the Hobbesian Jungle: Might Takes and Makes Rights*, 5 CONST. POL. ECON. 129, 129 (1994) (suggesting that violence over scarce resources may be avoided if property rights develop along with voluntary participation in a governance scheme).

### b. White Collar Financial Fraud

A second example where privately managed prosecutions might prove beneficial is in the context of pursuing white collar fraud crimes. As of this writing, the United States is in the middle of its most significant economic recession in at least a quarter-century. Fraud cases abound. In certain situations, victims may be better positioned to mount an investigation and then marshal the resources to privately prosecute a cause. Shareholder suits have been useful tools to address shareholder losses.<sup>483</sup> Suits such as those brought by Tyco International shareholders against PricewaterhouseCoopers for its role in an accounting fraud scheme that ended with several of Tyco's principal executives going to prison have been successful.<sup>484</sup>

Under such circumstances, the opportunity for disgruntled shareholders to bring a privately managed criminal case against the fraudulent players may be a reasonable way of ensuring justice. The victims, for example, may be able to provide forensic accounting methods far superior to those available to the government. Moreover, they may be better situated to invest the resources necessary to pursue a complex fraud case of this sort not only by expending resources, but also by being in a better position to organize potential witnesses.

A complex fraud investigation of this sort can demand an enormous commitment of resources, not just in terms of attorney time, but also in the services of economists, forensic accountants, and financial analysts.<sup>485</sup> The government might find its resources stretched to the breaking point if it were forced to investigate multiple fraud cases of this magnitude and might be forced to forgo certain investigations or prosecutions altogether. By leveraging private resources, it becomes easier to pursue multiple fraud investigations, and if corporations with substantial resources pursue fraud, government resources may be freed to assist fraud victims who lack the ability to prosecute themselves.

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483 See Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1733 (1994) (explaining that shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers).

484 See Chad Bray, *Court Upholds Convictions of Former Tyco Executives*, WALL ST. J., Oct. 17, 2008, at B3 (reporting that the New York Court of Appeals upheld the convictions of former Tyco officials); Sarah Johnson, *PwC Settles Tyco Case for \$225M*, CFO, July 6, 2007, <http://www.cfo.com/article.cfm/9461453?f=related> (describing \$225 million dollar class action settlement).

485 See Aviva Abramovsky, *An Unholy Alliance: Perceptions of Influence in Insurance Fraud Prosecutions and the Need for Real Safeguards*, 98 J. CRIM. L. & CRIMINOLOGY 363, 366 (2008) (noting the many resources necessary to stage a financial fraud prosecution).

### c. Trademark and Copyright Enforcement

Another useful avenue for private prosecutions might be in the context of criminal trademark and copyright violations. With the advent of the Internet, and the ease with which media may be copied and distributed, copyright law has become increasingly important.<sup>486</sup> Illegal music downloading has been rampant,<sup>487</sup> and in the last decade, the recording industry has sought to pursue illegal downloaders.<sup>488</sup> While the publishing and recording industries have sought, with limited success, to enjoin violators,<sup>489</sup> criminal prosecutions have also been used in an effort to deter unlawful conduct.<sup>490</sup> In 2008, for example, Kevin Cogill pleaded guilty to one count of misdemeanor criminal copyright infringement for illegally uploading nine pre-release Guns N' Roses tracks for the long-awaited album, "Chinese Democracy."<sup>491</sup> Geffen Records, a division of the largest record label group, Universal Music Group (UMG),<sup>492</sup> pressed the case.<sup>493</sup>

While no one would begrudge Geffen's right to distribute its property as it (and Axl Rose) sees fit, one might question the allocation of government resources to prosecute an individual (not an organization) who distributed nine pre-release Guns N' Roses tracks. Geffen would doubtless be in a better position than the government

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486 See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 63–65 (2002/2003) (describing copyright law as an evolving body of law capable of providing protection for creative works in the digital age).

487 See Chad Silver, *Censure the Tree for Its Rotten Apple: Attributing Liability to Parents for the Copyright Infringement of Their Minor Children*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 977, 977 (2006) ("Illegally downloading music is a common practice among children and one more serious than it may initially appear.").

488 See Mikel R. Boeve, *Will Internet Service Providers Be Forced to Turn in Their Copyright Infringing Customers? The Power of the Digital Millennium Copyright Act's Subpoena Provision After In Re Charter Communications*, 29 HAMLIN L. REV. 117, 118–20 (2006) (describing Recording Industry Association of America efforts to curb copyright infringement, including software tracking and copyright infringement suit filing).

489 See Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1018 (2002) (noting negotiations with the record companies and music publishers "did nothing to prepare either one for the vastly increased ability of consumers to themselves copy and distribute sound recordings").

490 See Valerie R. Sherman, Note, *Bootleggers Beware: United States v. Martignon Upholds Congressional Power to Enact "Copyright-Like" Legislation Through the Commerce Clause*, 58 DEPAUL L. REV. 185, 188 (2008) (noting that 18 U.S.C. § 2319A "imposes criminal penalties on a person who infringes an author's copyright by recording and distributing the author's live musical performances").

491 Dave Itzkoff, *Copyright Guilty Plea*, N.Y. TIMES, Nov. 12, 2008, at C2.

492 Kate Holton, *Warner Overtakes EMI in Recorded Market Share-Data*, REUTERS, July 18, 2007, <http://www.reuters.com/article/technology-media-telco-SP/idUSL1781138320070718>.

493 Michelle Quinn & Swati Pandey, *Blogger Arrested in Music Leak*, L.A. TIMES, Aug. 29, 2008, at C1.

to track and identify those who would infringe upon its property rights. And, in the event blood could not be squeezed from a turnip in the context of a civil suit, why not permit the company to prosecute the case itself?

A similar situation arises in the context of movies and books. Why not permit Marvel Comics the opportunity to track and prosecute those persons who would illegally distribute pirated copies of the Spider-Man or Ironman movies or their companion comic books? In all likelihood, many of those violating criminal copyright and trademark laws would not be organized criminal conspiracies, but would instead be individuals. Given the amount of illegal downloading and distribution of copyrighted materials on the web, it would be more efficient to let the companies with an interest in protecting their copyrighted materials monitor, track, and ultimately prosecute those who would violate their rights. The sheer volume of such infringements makes it difficult, if not impossible, for the government to pursue such violations.

Nor is it at all clear that the government should, or would, prioritize such cases. To an interested industry, however, considerable motivation would exist for them to pursue violators. Presumably, if a larger number of violators were prosecuted without using scarce government resources, greater deterrence would be obtained and the overall number of such violations might decrease. As it stands, many offenders discount the likelihood they will ever be apprehended, much less prosecuted.

## 2. *Collective Action Issues*

### a. Environmental Crimes

Environmental crimes typically involve the unauthorized disposal of hazardous material or discharge of pollutants.<sup>494</sup> Such crimes have increasingly come to the fore as society has gained a greater understanding of the seriousness of such offenses.<sup>495</sup> Even a fairly small infraction, such as dumping used batteries in a landfill or draining chemical fertilizers into creeks and ponds may have dangerous long-term effects. Often, it is not a single action, in and of itself, that

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<sup>494</sup> Martin Harrell et al., *Federal Environmental Crime: A Different Kind of "White Collar" Prosecution*, NAT. RESOURCES & ENV'T, Winter 2009, at 3, 3.

<sup>495</sup> See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 217 (1991) ("Obviously, environmental crime is important, and knowing violations . . . do not merit leniency.").

causes significant harm, but instead the culmination of a series of such acts.<sup>496</sup> Unfortunately, the resources committed to fight environmental crimes tend to trail those committed to investigate and prosecute traditional common law crimes that are commonly viewed as more serious and immediately threatening to society. To the extent such prosecutions are brought, they tend to be brought against large players and for grave infractions. Fairly minor offenses, despite their potential harm, tend to go unremarked, and the sentences for environmental crimes seldom reflect their harm to society. Concern about harsh sentences, particularly in innocuous cases where the criminal intent is unclear, has led to complaints about raising penalties for such offenses.

Environmental lobbying groups, however, enjoy considerable popular support<sup>497</sup> and are often well-funded.<sup>498</sup> If such groups were empowered to investigate and prosecute environmental crimes on behalf of specified victims, it might be possible to increase levels of awareness about such crimes and, correspondingly, increase deterrence such that penalties themselves need not be adjusted. An increase in the likelihood of prosecution, in and of itself, may help discourage such activities and, as a result, the penalties themselves may not need adjusting.

#### b. Community Initiatives

Other more minor crimes, which nevertheless can have a significant cumulative effect, may also be good candidates for private prosecutions. Shoplifting, one of the most common crimes in the United States, is not often prosecuted. District attorneys' offices seldom want to commit substantial resources to combat what is a fairly minor offense. However, such offenses are costly to the retail industry. Not unlike the problem with environmental crimes, shoplifting has an enormous cumulative effect upon the economy. While the penalties for shoplifting could be increased substantially, few would consider that fair. Instead, a sound deterrence strategy would be to increase the likelihood of detection and prosecution. If detection is in-

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<sup>496</sup> Jason M. Lemkin, *Deterring Environmental Crime Through Flexible Sentencing: A Proposal for the New Organizational Environmental Sentencing Guidelines*, 84 CAL. L. REV. 307, 330 (1996).

<sup>497</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1567 (2007) (describing popular support for a clean environment).

<sup>498</sup> See Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL'Y F. 9, 27 (1998) ("Former student protesters may now be active primarily through their checkbooks . . .").



creased, without the threat of a subsequent prosecution, however, deterrence efforts would founder. Nevertheless, it remains unlikely that public officials will ever commit significant resources to prosecute such offenses. If a large retailer such as Walmart, however, when plagued with losses stemming from shoplifting, could prosecute these infractions, they might be able to attain a greater level of deterrence, or again like the guilds of bygone eras, the retailers in a shopping mall may unite to prosecute shoplifters. Presumably, at least some offenders, faced with an increased likelihood of both detection and prosecution, may be deterred.

This “broken windows”<sup>499</sup> approach to minor offenses extends also to interested communities. Numerous communities across the country are plagued with “open air” crimes such as drug trafficking or prostitution. While vice squads will occasionally conduct neighborhood sweeps, many such crimes, even if readily detected, go unprosecuted. And for good reason—available public resources tend to be devoted, as they should, to more serious offenses. If a community decides that to improve its quality of life it needs to work with the police to bring private prosecutions for relatively minor offenses such as public drunkenness, prostitution, or overt drug dealing, then permitting it to do so may well go far in cleaning up troubled neighborhoods. While it is true that many such neighbors will lack sufficient resources to hire a private prosecutor, some will be able to gather the necessary resources and others may have the opportunity for pro bono legal assistance from the private bar. Regardless, if some prosecutions occur, they may prove to have a significant deterrent effect in neighborhoods blighted by criminal activity. Often, it may not be enough simply for the police to disrupt such activities; instead a prosecution must follow. If private resources can be marshaled to improve the community’s health, should they be prohibited?

### *3. Alleviating Potential Conflicts Within the Public Prosecutor’s Office*

One additional circumstance in which privately managed prosecutions might play a role is when the public prosecutor’s office may have a conflict of interest. Ordinarily, in situations such as when a member of the prosecutor’s office is under criminal investigation, the

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<sup>499</sup> James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, ATLANTIC MONTHLY, Feb. 1989, at 46, 46–52, available at <http://www.theatlantic.com/politics/crime/safehood.htm> (“[T]he problem of ‘broken windows’: If the first broken window in a building is not repaired, then people who like breaking windows will assume that no one cares about the building and more windows will be broken.”).

prosecution will be maintained by a different office (either a neighboring jurisdiction or a separate sovereign)<sup>500</sup> or will be brought by specially appointed independent counsel.<sup>501</sup> With respect to federal law, Congress enacted the Ethics in Government Act of 1978,<sup>502</sup> which created the independent prosecutor as an acknowledgement of the inherent conflict that exists whenever a member of the Executive Branch comes under criminal investigation.<sup>503</sup>

While most offices presumably have protocols in place for dealing with official misconduct and while criminal violations by government actors hopefully are aberrations, it has been argued that in certain circumstances government agencies are slow to prosecute wrongdoing by government actors. Human Rights Watch, for example, has accused local governments and federal officials alike of failing to pursue instances of police brutality.<sup>504</sup>

The organization alleges that shoddy internal investigations failed to hold police officers accountable for abusive acts and that prosecutors seldom pursued criminal investigations.<sup>505</sup> Whether such abuses are as common as they have been alleged, an important point remains: government is probably not at its best when forced to investigate itself. The Constitution's Framers understood the need for a system of carefully calibrated checks and balances. The various bar associations throughout the country similarly understand the importance of addressing potential conflicts of interest. It is doubtless difficult to investigate and prosecute, one of your "own." In fact, the criminal prosecution of police officers remains infrequent. "Local prosecutors might be reluctant to pursue cases against officers accused of criminal civil rights violations because they typically work closely with police to prosecute criminals."<sup>506</sup> The federal prosecution of officers under criminal civil rights statutes is equally rare.<sup>507</sup> In Fis-

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500 CODES OF PROFESSIONAL RESPONSIBILITY: ETHICS STANDARDS IN BUSINESS, HEALTH, AND LAW 777-78 (Rena A. Gorlin ed., 4th ed. 1999).

501 *Id.* at 778.

502 *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 594, 92 Stat. 1824, 1869 (1978) ("[A] special prosecutor . . . shall have . . . full power and *independent* authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice . . ." (emphasis added)).

503 Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2310 (1998) (describing the history of the Ethics in Government Act).

504 HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 25 (1998).

505 *Id.* at 85.

506 *Id.*

507 *See id.* at 93 (reporting that of the 10,129 civil rights cases reviewed in 1996, merely .2 percent "resulted in official misconduct cases filed for prosecution").

cal Year 2007 (the latest date for which information is available), for example, the Justice Department touted:

From fiscal year 2001 to fiscal year 2007, the Department of Justice convicted over 50 percent more defendants with official misconduct, or color of law, violations than were convicted from fiscal year 1994 through fiscal year 2000 (391 vs. 256).<sup>508</sup>

Three hundred ninety-one prosecutions in a six-year period in light of the thousands of state and federal law enforcement officials suggests that either the ranks of law enforcement are particularly pure, or such cases are simply not being pursued.

While special counsels can be established to pursue such cases, there exists a role for privately managed prosecutions undertaken by, or on behalf of, victims. Civil rights organizations, for example, might be eager to pursue such cases. Although care must be taken in such situations, basic conflict of interest principles suggest that a prosecutor acting outside the government's employ may be well-positioned to pursue such cases.

#### CONCLUSION

The power to bring a criminal prosecution carries with it great responsibility. So great is that responsibility and so awesome the power wielded by a prosecutor that it is cabined by numerous procedural protections such as grand jury presentment and judicial approval. As a historical matter, victims once often initiated criminal prosecutions. For the victim, the criminal prosecution enabled him to vindicate his interests, receive restitution for his loss, and achieve a certain amount of personal justice. Over time, with the expansion of government, the number of private prosecutions began to wane and government began to monopolize law enforcement. Such prosecutions never wholly disappeared, however; indeed a number of states continue to allow privately managed criminal prosecutions. At the same time private criminal prosecutions have waned, the use of private attorneys general and the institution of private causes of action have become common means of augmenting states' law enforcement efforts.

Although many scholars have argued that criminal defendants have a constitutional right to an "impartial" (i.e., public) prosecutor, the Supreme Court has never so held. Nor is it clear that defendants ought to possess such a right on due process or equal protection

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<sup>508</sup> Dep't of Justice, Fact Sheet: Hate Crimes and Prosecution of Civil Rights Violations (Nov. 15, 2007), [http://www.justice.gov/opa/pr/2007/November/07\\_crt\\_921.html](http://www.justice.gov/opa/pr/2007/November/07_crt_921.html) (last visited Feb. 16, 2010).

grounds. The Framers of both the Constitution and Bill of Rights, doubtless aware of the existence of private criminal prosecutions, recognized the need to protect defendants' interests, and therefore established important procedural protections to ensure that criminal trials would be fair. While the Framers explicitly provided rights to counsel, grand juries, impartial judges, public trials, and petite juries, private prosecutions were never forbidden.

Empowering victims to bring such actions, in addition to commanding historical support, has considerable attraction. Aside from providing the victim with a sense of "justice," privately managed criminal prosecutions may improve criminal law enforcement overall. Not unlike Adam Smith's theory of the "invisible hand,"<sup>509</sup> private prosecutions themselves may benefit not only the individual victim, but the public at large. Private vengeance, rightly pursued, may lead to public good. After all, the resources government may designate to enforce criminal laws are necessarily scarce. As criminals, at least those for whom crime is a rational choice, decide to engage in prohibited conduct, they inevitably weigh the likelihood of detection, prosecution, and expected punishment.<sup>510</sup> Accordingly, as the resources of private prosecutors are combined with those of the state, the greater is the community's capacity to detect and prosecute crimes and punish the duly convicted.

Arguably, the most efficient way of increasing the deterrent effect of the criminal law is to increase the likelihood of detection.<sup>511</sup> If increased detection, however, is not buttressed by the likelihood of subsequent prosecution, deterrence goals may not be attained. Given the limitations on increasing sanctions, private prosecutions may provide a useful means of leveraging private resources to combat crime and thereby increase the likelihood of deterrence. If common-sense restrictions of private prosecutions are adopted to protect the defendants' interest in fair trials and to vindicate the public's interest in criminal law enforcement, such prosecutions should be permitted, especially in circumstances in which the private prosecutor may hold a comparative advantage over the public prosecutor, or in situations in which the cost of a prosecution to the government may outweigh its interests in pursuing the cause. Private prosecutions, while hardly a panacea, may nevertheless usefully augment the efforts of government in enforcing the criminal law.

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509 See *supra* note 14 and accompanying text.

510 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968).

511 *Id.* at 176.