PRIVATE PROSECUTION IN AMERICA

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PRIVATE PROSECUTION IN AMERICA

Its Origins, History, and Unconstitutionality in the Twenty-First Century

John D. Bessler

PROFESSOR OF LAW
UNIVERSITY OF BALTIMORE
SCHOOL OF LAW

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In memory of

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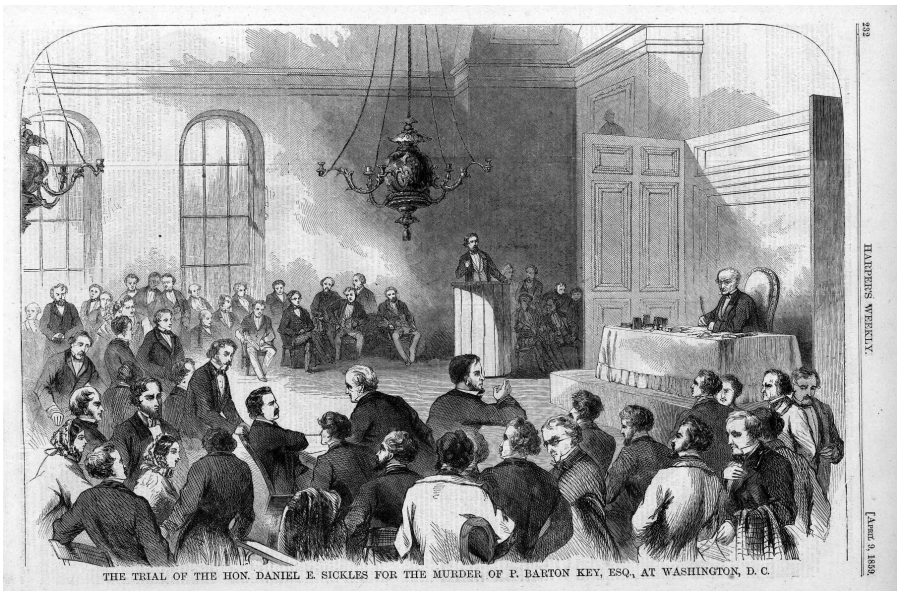
a thoughtful and dedicated public servant, a friend, trusted counselor, and man of compassion, and a champion of criminal justice reform who took a principled stand against capital punishment and who fought with integrity for human rights, racial justice, and equal protection of the laws throughout his life as a lawyer



The Trial of Daniel Sickles in Washington, D.C., 1859. Source: *Harper's Weekly*

"Justice is justly represented blind, because she sees no difference in the parties concerned. She has but one scale and weight, for rich and poor, great and small."

— William Penn, *Some Fruits of Solitude* (1693)

"*We discover no error except in the allowance of assistance in the prosecution by the counsel of private prosecutors. We are not at liberty to overlook such an error from any impression that the conviction would have been had without him. The rejection of such prosecutors is in the public interest and the rule is one which should be enforced.*"

— *People v. Hurst*, 1 N.W. 1027, 1031-32 (Mich. 1879)

"*Private prosecution has become obsolete.*"

— Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906)

"*The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.*"

— United States Attorney General Robert Jackson (1940)

"*The duty of the prosecutor is to seek justice, not merely to convict.*"

— American Bar Association Standards Relating to the Administration of Justice (3d ed. 1992)

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This book came about as a result of an invitation from Roger Fairfax, now dean of American University's Washington College of Law, to speak about private prosecution at a 2020 conference sponsored by the Southeastern Association of Law Schools ("SEALS"). I had written on that subject in the *Arkansas Law Review* back in 1994 after getting the opportunity, as a new lawyer at Faegre & Benson in Minneapolis, Minnesota, to work with attorney Sandra Babcock on a legal research project involving that topic. Now a clinical professor specializing in international human rights litigation and the faculty director of the Cornell Center on the Death Penalty Worldwide, Sandra was then representing two Texas death row inmates, Wayne East and Joseph Stanley Faulder. Both East and Faulder had been convicted of capital murder in criminal trials involving the use of privately retained lawyers hired by the murder victims' relatives, more commonly known as "private prosecutors." After getting the invitation to speak at the SEALS conference, I began the process of updating my prior research, initially with a view to simply writing a new law review article to supplement what I'd written in 1994. It quickly became apparent, though, that the issue of private prosecution was worthy of a much longer treatment, prompting me to undertake to write the book you now hold in your hands.

I am grateful to Sandra Babcock for the opportunity, all those years ago, to delve into the myriad legal issues associated with private prosecutors, including those implicating the U.S. Constitution. In addition, I am grateful to Roger Fairfax, a former colleague of mine at the George Washington University Law School, for reaching out to me about the SEALS conference. Our panel, taking up the issue of "The Private Role in Criminal Justice," involved a lively exchange of views, one moderated by Professor Jelani Jefferson Exum of the University of Detroit Mercy School of Law. In addition to Roger and me, our fellow panelists, law professors Bennett Capers, Russell Gold, Veronica Root Martinez, and Maybell Romero, also spoke about their research—and offered their perspectives—at the SEALS conference. Likewise, I am indebted to Carolina Academic Press for agreeing to publish this book. This is the fifth book I've published with Carolina Academic Press, and I've been continually impressed with its

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ABOUT THE AUTHOR

John D. Bessler teaches at the University of Baltimore School of Law and the Georgetown University Law Center. A two-time Minnesota Book Award finalist and the winner of an *Independent Publisher* book award and a Next Generation Indie Book Award for biography, he is the author of multiple books on capital punishment and in the area of American legal history. His 2014 book about Enlightenment thinker Cesare Beccaria, *The Birth of American Law: An Italian Philosopher and the American Revolution*, won the prestigious Scribes Book Award, an annual award given out since 1961 by the American Society of Legal Writers for "the best work of legal scholarship published during the previous year." He has also taught at the University of Minnesota Law School, the George Washington University Law School, Rutgers Law School, and the University of Aberdeen in Scotland, and is the editor of Justice Stephen Breyer's *Against the Death Penalty* (2016). In 2018, he was a visiting scholar at the University of Minnesota Law School's Human Rights Center and received the University System of Maryland Board of Regents' Faculty Award for Research, Scholarship and Creative Activity.

INTRODUCTION

In twenty-first century America, the topic of criminal justice reform has garnered a lot of public attention.[1] A number of prominent organizations and non-profits, along with countless individuals, have laudably sought to reform the country's criminal justice system, seeking to have it operate more fairly and equitably.[2] The American Civil Liberties Union, the Equal Justice Initiative, Families Against Mandatory Minimums, the Marshall Project, the Brennan Center, the Southern Center for Human Rights, and the Sentencing Project, among many others, have pushed for changes such as bail reform,[3] fairer sentencing outcomes,[4] and an end to what has been termed "mass incarceration."[5] With well-documented racial disparities and runaway sentencing severity in America's complex, multi-jurisdictional criminal justice system,[6] an array of books—Michelle Alexander's *The New Jim Crow*,[7] John Pfaff's *Locked In*,[8] Brandon Garrett's *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*,[9] and Paul Butler's *Chokehold: Policing Black Men*[10]—have, in recent years, called for major changes to criminal justice, policing, and sentencing policies.[11] George Floyd's 2020 murder in Minneapolis, along with other officer-involved killings or shootings, have sparked renewed focus on police brutality and the use of excessive force,[12] with the COVID-19 pandemic—affecting hundreds of thousands of prisoners who tested positive for coronavirus—drawing further attention to the large number of incarcerated individuals and the harsh conditions within U.S. jails and correctional facilities.[13]

Although bail, policing and sentencing reform, as well as the use of excessive force, solitary confinement[14] and the death penalty,[15] have gotten the bulk of the attention,[16] one aspect of American criminal justice—the use, albeit infrequent at this juncture,[17] of so-called "private prosecutors"[18]—has gotten relatively little, if any, attention. Private prosecution by interested parties is where the victim or the victim's family either initiates or directs a criminal case or hires a lawyer to manage or assist in a case's investigation or prosecution.[19] Private prosecutions were the norm in ancient Anglo-Saxon legal systems, and they were routinely used in England—America's mother country—well into the twentieth century.[20] Indeed, they still occur, if only

sporadically and in limited circumstances, in American states[21] and under Canadian,[22] English,[23] Irish,[24] and Scottish law,[25] as well as under other nations' laws,[26] in some cases with much greater frequency.[27] "Private prosecution as an institution," one New Jersey superior court observed in 1998, "is rooted in the English common law practice which generally relied on the victim, or the victim's relatives and friends, to prosecute criminals."[28] "In past centuries in England, in the American Colonies, and in the United States," the late U.S. Supreme Court Justice John Paul Stevens wrote in a concurrence in *Steel Company v. Citizens for a Better Environment* (1998),[29] "private persons regularly prosecuted criminal cases."[30]

Private criminal prosecutions by interested parties were thus once an entrenched, deeply rooted part of Anglo-American common law,[31] and they were used in other legal systems, too, such as in Spain[32] and the Philippines,[33] where private prosecutors worked closely with the public prosecutor. "The Anglo-American criminal trial of the seventeenth and early eighteenth centuries," observes law professor Laura Appleman, "was a very different creature than that which we have today." After noting American colonists brought with them English criminal justice traditions that included private prosecution but did not guarantee the accused the right to the assistance of defense counsel, she points out: "The standard English common-law felony criminal trial was both brief and informal; usually, both the presentation of evidence and the return of a verdict lasted only a half-hour. Private parties brought criminal charges against a defendant, and the victim or friend or relative of the victim often pursued the case personally." As Appleman notes of a then-typical proceeding: "This private prosecutor would personally testify and question witnesses, and the defendant was permitted to respond to the evidence and question witnesses on his or her own behalf. In common-law felony criminal trials of that era, the judge served to referee the proceedings, although he could also examine witnesses and answer questions of law."[34]

A close examination of past practices reveals the clear differences between then and now in the conduct of criminal prosecutions, with Professor Appleman noting that a criminal defendant centuries ago "did not obtain a copy of the indictment pre-trial, was not informed of the evidence against him or her, and could not compel witnesses on his or her behalf."[35] In England and American locales, it was, in fact, once predominantly poorly compensated constables or private detective and policing organizations[36] who investigated alleged offenses, with a number of private prosecution associations formed to prosecute offenders.[37] "[I]n the overwhelming majority of criminal prosecutions the state played no role at all," writes historian Allyson May of the English system of justice that relied so heavily on crime victims or their next of kin to prosecute criminal activity.[38] The American justice system did, in time, part ways from English practice in allowing criminal defendants to retain counsel, with that procedural safeguard specifically included in the U.S. Bill of Rights. "[T]he long-standing English common law rule in effect at the time of the adoption of the Sixth Amendment," law professor Russell Christopher writes, "utilized a disproportional allocation: misdemeanor, but not felony, defendants enjoyed the right." That

English rule, which did not guarantee the right to counsel, had been looked upon disfavorably in colonial America, with Professor Christopher pointing out that "[t]welve of the original thirteen colonies granted a right to retained counsel for serious offenses and most also granted the right for all offenses." Although the U.S. Bill of Rights originally constrained only the federal government,[39] the Sixth Amendment—incorporated against the states in *Gideon v. Wainwright* (1963)—itself provides: "In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence."[40]

Whereas a criminal defendant's right to counsel was once hotly disputed, the right of private parties to initiate prosecutions was quite clear in prior centuries. Eighteenth-century "private prosecutors" in the English-speaking world pursued both petty offenders[41] and serious felons[42] in individual cases,[43] including through capital charges[44] carrying life-or-death consequences for the accused.[45] Many nineteenth-century criminal prosecutions in American states were still being initiated and directed by private citizens, not lawyers or government-paid attorneys,[46] although it became commonplace for crime victims—commonly called "private prosecutors" in newspapers—to retain counsel to assist in such prosecutions if they could afford to do so.[47] For example, in Philadelphia, where district attorneys were not elected until the early 1850s,[48] assault and battery and petty larceny cases were typically private prosecutions[49] and, in the Commonwealth of Pennsylvania, victims directly prosecuted crimes throughout the nineteenth century.[50] In that locale, private prosecutions could be downright bizarre, with a husband's wife—as historian Allen Steinberg writes of her prosecution against her own husband in the state's early history—"prosecuting him for refusing to come to bed when called and making too much noise, preventing her from sleeping."[51] As UCLA law professor Stephen Yeazell writes of the character of private prosecutions and of how many petty offenses were litigated in that manner in nineteenth-century Philadelphia: "The overwhelming majority of these private prosecutions did not involve lawyers at all. Rather, they were brought before municipal courts in which both the prosecutor and the defendant represented themselves."[52]

In America's colonial and founding eras, state systems of criminal justice varied widely, sometimes with separate courts, as with one set up in Virginia in 1692 by virtue of "*An Act for the more speedy prosecution of slaves committing capital crimes*," for the punishment of enslaved persons.[53] All those centuries ago, ordinary citizens—whether they could afford it or not—were often tasked with seeking justice for themselves, or for their raped or murdered relatives, after being victimized by crime.[54] Only after public prosecutors' offices professionalized did private prosecutions in American states dwindle and become the exception rather than the norm.[55] At the federal level, the Judiciary Act of 1789—passed by Congress after the U.S. Constitution's ratification in 1788—took a somewhat different route, creating the positions of Attorney General and District Attorneys (now called U.S. Attorneys). Their power and prosecutorial responsibilities were explicitly divided—and dispersed and decentralized—between them, with public prosecutions being the standard practice. The

Attorney General was to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments." By contrast, District Attorneys in the various federal districts were to be persons "learned in the law". Their duty? To prosecute in their respective districts "all delinquents for crimes and offenses, cognizable under the authority of the United States." The vast majority of crimes were prosecuted at the state level, but the U.S. Congress, in its Crimes Act of 1790, provided for the punishment of treason, piracy, counterfeiting, and other offenses. Formally titled "An Act for the Punishment of Certain Crimes Against the United States," that law made an assortment of crimes punishable by death and authorized those found guilty of larceny to be publicly "whipped, not exceeding thirty-nine stripes," and fined not more than four times the value of the property stolen.[56]

In America, the administration of the criminal law—including the punishments authorized by it—has shifted over time, including at both the federal and state levels. "In the ensuring years," one legal commentator, Leslie Arffa, writes of the post-1789 period and the prosecution of federal crimes, "Congress took dispersion to a degree unthinkable in the modern era: it frequently delegated criminal law enforcement responsibility to individuals who were in no way subject to executive command, namely private citizens and state officials." As Arffa explains of early American law: "At the Founding, Congress allowed state officials to prosecute violations of federal law in state courts. Private citizens could also either 'contact[] [a] grand jury directly' or 'appear before a … state judicial officer and swear out a complaint against a suspected criminal.'" "Further," Arffa observes, "Congress passed a variety of *qui tam* provisions, which directly authorized individuals to sue under criminal statutes to enforce the law."[57] In recent years, numerous courts have stressed that federal law does not permit private criminal prosecutions,[58] which are handled by the U.S. Department of Justice and U.S. Attorneys around the country.[59] But the practice in states—with some outlawing interested private prosecutors even as others continue to utilize them—varies widely, albeit with locally elected public prosecutors and state attorneys general handling the vast majority of criminal trials and appeals.[60] Although modern-day legal commentators speak of a prosecutor's duty of neutrality[61] and to do justice,[62] early American private prosecutors were often self-interested—even financially through related civil litigation matters—in the prosecutions they commenced and conducted.[63]

In truth, America's criminal justice system many decades ago bears little resemblance to what it looks like today.[64] What were once largely private affairs, with crime victims initiating and driving the judicial process while frequently being either unable to afford counsel or ultimately accepting compensation in lieu of convictions to avoid protracted disputes and further prosecution expenses, has turned into a highly public one. Prosecutions are now controlled almost exclusively by public prosecutors whose salaries are paid by the State, not by victims and their families, though public entities still often contract with private law firms to handle some criminal cases, usu-

ally misdemeanors or petty misdemeanors.[65] Naturally, questions have thus been raised about the propriety of private prosecutions by interested parties in the twenty-first century. "The unique nature of criminal law and the corresponding unique role of the prosecutor," the Supreme Court of South Carolina observed in 2010, "illustrate the danger in allowing private prosecutions." "Because a prosecutor is an attorney representing community, rather than private interests, the prosecutor's role is very different from that of a civil attorney," that state's supreme court emphasized, adding: "If a private party is permitted to prosecute a criminal action, we can no longer be assured that the powers of the State are employed only for the interest of the community at large. In fact, we can be absolutely certain that the interests of the private party will influence the prosecution, whether the self-interest lies in encouraging payment of a corporation's debt, influencing settlement in a civil suit, or merely seeking vengeance."[66]

Because the United States has a federal criminal justice system, as well as separate justice systems in the U.S. territories and all fifty states, it is, of course, hard to make sweeping generalizations about the state of the law due to considerable variations between jurisdictions. Over the centuries, though, there has certainly been a general and notable shift away from private prosecutions and toward public ones.[67] In some locales such as New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia and Texas, whether by statute, rule of criminal procedure, or case law, private prosecutions are still authorized in limited circumstances or under certain specified conditions. For example, Rule 506 of the Pennsylvania Rules of Criminal Procedure allows a private criminal complainant to seek judicial review of the denial of his or her complaint by the district attorney.[68] Where the district attorney's denial is predicated on a legal evaluation of the evidence, the trial court undertakes a *de novo* review of the matter. But where the district attorney disapproves the private criminal complaint based on policy considerations, the trial court's standard of review of the DA's decision is "abuse of discretion." In a Rule 506 petition for review, "the private criminal complainant must demonstrate the district attorney's decision amounted to bad faith, fraud or unconstitutionality" and "must show the facts of the case lead only to the conclusion that the district attorney's decision was patently discriminatory, arbitrary or pretextual, and therefore not in the public interest."[69] In addition, judicial decisions in other American states, relying on common law precedent, still permit private prosecutors to conduct or assist public prosecutors—in some cases, only for misdemeanors or offenses not subject to imprisonment. For the most part, though, criminal prosecutions in the U.S. are no longer driven primarily by private actors, as they once were, although many private law firms across the country, operating under government contracts, regularly bill and get compensated for handling misdemeanor or petty misdemeanor cases.[70]

In Anglo-American law, the shift away from private prosecutions and toward public ones has actually been quite dramatic. "Criminal prosecution," Scott Ingram, a professor of criminal justice, writes of American history and the way it once was in

light of imported, long-entrenched English norms, "had been largely a private pursuit." "Crime victims," he notes, "pursued offenders through the courts, pleading their own cases in minor matters and securing the services of attorneys in serious matters."[71] "At the time when the founding fathers gathered in Philadelphia to hash out the foundation and fabric of American law," notes another scholar, Major John Olson, Jr., a Judge Advocate for the United States Army, "the victim was the primary player in criminal trials."[72] Although modern-day crime victims have various rights, often guaranteed by state constitutional provisions or statutes,[73] it is no longer the case that crime victims are, themselves, preparing indictments or cross-examining the defendant or witnesses in court, though sometimes victims or their family members have been permitted to hire private lawyers to help pursue and prosecute criminal cases. That is not to say that private actors have not been actively involved in criminal matters and prosecutions in the last few decades. They certainly have, especially as eyewitnesses to acts of criminality. They have routinely appeared as witnesses in court, oftentimes offering victim impact statements. In addition, private attorneys—whether through a government contract or a more *ad hoc* arrangement—have been involved in criminal cases along with public prosecutors. As one commentator, Michael Edmund O'Neill, writes: "Perhaps the most notorious example of a state-hired private prosecutor was the prosecution of legendary former boxing heavyweight 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. The attorney was selected not by the victim, but, rather, the government prosecutor who would have otherwise initiated the case."[74]

There were, to be sure, a plethora of public prosecutions in early America, including, for example, of "delinquents for crimes and offences" in Georgia who were, by law, to be prosecuted by the attorney general or a solicitor general.[75] But it was a mixture of public and private prosecutions, with public prosecutions only growing in popularity over time. By the eighteenth century, one scholarly article notes, "most states had committed to the concept of public prosecutions," though "because of deficiencies in the office of public prosecutor, American citizens continued to prosecute private criminal actions in many locales during the nineteenth century."[76] Aaron Burr's highly publicized trial for treason, led by George Hay, appointed in 1803 to be the U.S. Attorney for the District of Virginia, is just one of many examples of early American public prosecutions.[77] But in those days, state and local private prosecutions, which, as in the English justice system, clearly favored the wealthy over the poor in terms of access to justice, were still common. "Private prosecutors," the victims of crime who often retained private lawyers (in some cases, more than one), conducted prosecutions of everything from murder,[78] assault and battery,[79] and trespass[80] to financial crimes,[81] defrauding creditors,[82] disturbing public worship,[83] stealing wood,[84] and causing property loss or destruction, however large or small (e.g., $17 of damage to a washing kettle).[85] Today, in sharp contrast, public prosecutors' offices routinely handle almost all serious criminal matters and, especially in urban centers,

a large percentage of less serious offenses, too. Their highly skilled, licensed lawyers—educated in law schools and, in most cases, very seasoned after years of on-the-job training—specialize in the criminal law's administration and appear before courts of law to adjudicate criminal cases. Public prosecutors represent "the state," "the commonwealth," or "the people" and do not owe fidelity to private interests.[86]

Public prosecutions are now the norm in American society. But the remnants of the country's once-extensive private prosecution system, which began to be dismantled in the early eighteenth century, still remain. "In 1704," writes University of Virginia law professor Darryl Brown of the nation's heritage, "Connecticut established what was probably the first public prosecutor's office."[87] That initial step toward public prosecution then, over many generations, became a torrent of rushing water that flowed toward America's now-dominant public prosecution system. According to the U.S. Bureau of Justice Statistics, there are currently more than 2,300 public prosecutors' offices in the United States.[88] The National District Attorneys Association, based in Arlington, Virginia, was itself formed in 1950, and—according to its website—"has more than 5,500 members across the nation representing state and local prosecutors' offices from both urban and rural districts, as well as large and small jurisdictions."[89] In fact, America's tradition of public prosecution now dates back centuries, along with a much more recent tradition of public defenders' offices to represent indigent defendants accused of crimes.[90] With the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright* (1963) accelerating the formation of public defenders' offices, such offices—like public prosecutors' offices—are now a fixture around the country. That decision put criminal defendants on a more level playing field with public prosecutors' offices, with *Gideon* holding that the U.S. Constitution's Sixth Amendment requires states to provide attorneys to indigent criminal defendants unable to afford them.[91]

American history is complex, full of both sordid and uplifting chapters, from slavery, lynchings, and state-sanctioned executions driven by racial prejudice in the former category to the civil rights and women's suffrage movements in the latter. Private prosecutions are, certainly, part of America's knotty past, and America's modern-day criminal justice system cannot be truly understood without analyzing the impact of racial prejudice and knowing about historical practices, including the now largely forgotten history associated with private prosecutions. As explained later in the book, overt racism shaped colonial and early American laws, with racial discrimination at times influencing the very *method* of prosecution—public versus private—selected by state officials. With Philadelphia's private prosecutors—the crime victims or their chosen representatives—taking on (as one description puts it) "the solemn and majestic" responsibility of prosecutors well into the nineteenth century,[92] history shows that only gradually did American public prosecutions surpass—and then, in time, far exceed—private ones.[93] In the modern era, criminal justice reform is still very much a work in progress.

American jurisdictions, historical records demonstrate, acted much earlier than the British Parliament in making the transition from largely private to mostly public

prosecutions, though there are lots of variations in America, in terms of the exact timing of the switch, because of the country's system of federalism.[94] "[P]ublic prosecution in the common-law world," Vincent Chiao explains in *Criminal Law in the Age of the Administrative State*, "first arose in a systematic way in North America."[95] After the colony of Connecticut moved to public prosecutors in 1704, Virginia and other locales followed suit.[96] As Chiao writes of the Anglo-American world's transition—albeit an incomplete one, replete with scores of legislative enactments and judicial rulings over the years—from private to public prosecutions: "Private prosecutions remained the norm in England until much later: the office of the Director of Public Prosecutions was not created until 1879, and another century went by before the Crown Prosecution Service was created in 1986. Admittedly, the practice of private prosecution persisted in the United States well after the introduction of public prosecutors, 'because some wealthy crime victims did not trust the low-paid, often inexperienced, and understaffed public prosecutors.'" "[A]lthough private prosecutions remain possible today," Chiao adds of the current state of affairs, "that power is typically thoroughly circumscribed by official discretion."[97] The job of the prosecutor involves life-changing decisions and lots of discretion, and that is, obviously, one of the major concerns about putting such enormous power into private hands.

In hindsight, certain trends in the law reveal themselves and become clear. While a modern-day Pennsylvania federal judge has aptly observed that "private criminal prosecutions once characterized the common law,"[98] that system of private prosecution came under attack across the United States. In the late 1830s in Kentucky, when a private prosecutor was paid a $1,000 fee by the deceased's relations and friends in a high-stakes capital murder case, the defense attorney—in his argument to jurors—excoriated the practice of private prosecution as a violation of due process and the presumption of innocence.[99] And when New York congressman Daniel Sickles was famously put on trial for murdering his wife's lover, Philip Barton Key II, the District of Columbia's handsome District Attorney and the son of Francis Scott Key of "The Star-Spangled Banner" fame, in Lafayette Square, just across the street from the White House, one of his defense attorneys, Edwin Stanton, took a pointed swipe at the use of a private prosecutor. That, notably, was one of the earliest cases in which the "temporary insanity" defense was successfully invoked. The Key family had hired a private attorney, James Carlisle, to join the public prosecution team, and after questioning if the prosecution had engaged in "destruction of evidence," Stanton—in a loud, passionate voice—decried "private prosecutors" in a dig at Carlisle's role.[100] Two prosecutors—a public and a private one—actually handled the case, but the appearance of Mr. Carlisle, the private prosecutor, was said to have created "an unusual spectacle" in the courthouse. Stanton argued that the prosecution was trying to "lead" his client, Daniel Sickles, "to the gallows by those who are malignantly seeking for his blood."[101] Stanton, the talented lawyer, later became Abraham Lincoln's Secretary of War.[102]

The law's history traverses many eras—from medieval to colonial to modern times. The first U.S. civil rights acts were passed by Congress in 1866, 1870, 1871 and 1875,[103]

and federal judges—in delivering grand jury charges—once frequently warned against the dangers of "private prosecutors."[104] In the nineteenth century, though, private prosecutions were still being used with considerable regularity in American states—and by the end of the nineteenth century, a number of state courts had blessed the entrenched practice in one fashion or another.[105] As historian Robert Ireland wrote in a 1955 article about the prior use of private prosecutors in American states: "By 1820, most states had established local public prosecutors known by a variety of names, including state's attorney, county attorney, district attorney, and commonwealth's attorney. Yet, because of deficiencies in the office of the public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." "Privately funded prosecutors," Ireland explained, "most often appeared in murder trials, including some of the most famous of the nineteenth century." "Perhaps the most famous," he noted, "involved the trial in Boston in 1850 of Harvard University professor, John White Webster, for the murder of Dr. George Parkman." Parkman's family had hired George Bemis, a prominent lawyer, to assist the attorney general, John Clifford, in the prosecution. As Ireland summed up the historical use of the practice: "Privately funded prosecutors appeared in many of the famous trials of the avengers of sexual dishonor including those of Daniel Sickles, Amelia Norman, Laura D. Fair, 'Little Phil' Thompson, Harry Crawford Black, George W. Cole, James Nutt, and Daniel McFarland. These celebrated trials and others, including relevant cases found in *American State Trials*, constitute the basic source of information about the realities of privately funded prosecution in the nineteenth century United States."[106]

Through the years, the American use of private prosecutors has created some unique constitutional law arguments and legal controversies—from whether private prosecutors should be forced to pay the costs of ill-founded prosecutions[107] to how much control, if any, a public prosecutor can cede to a private prosecutor.[108] In a recent case, *Rehberg v. Paulk* (2012), the U.S. Supreme Court observed that, "in 1871, it was common for criminal cases to be prosecuted by private parties," but that "private prosecutors, like private plaintiffs in civil suits, did not enjoy absolute immunity from suit." "Instead," the Supreme Court noted, "'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution if the complainant acted with malice and without probable cause." However, "[i]n the decades after the adoption of the 1871 Civil Rights Act," a piece of legislation passed to protect Black citizens from the Ku Klux Klan, the Court emphasized in *Rehberg* of the country's history, "the prosecutorial function was increasingly assumed by public officials, and common-law courts held that public prosecutors, unlike their private predecessors, were absolutely immune from the types of tort claims that an aggrieved or vengeful criminal defendant was most likely to assert, namely, claims for malicious prosecution or defamation." "This adaptation of prosecutorial immunity," the Court stressed in *Rehberg*, "accommodated the special needs of public, as opposed to private, prosecutors."[109] Today, it is esti-

mated that there are approximately 5,800 federal prosecutors,[110] with scores of public prosecutors at the state and local levels.[111]

Current practices as regards the legality or illegality of private prosecutions (or restrictions on them) differ wildly among individual countries[112] and, in the U.S., among American states.[113] In a 2018 article in the *Minnesota Law Review*, scholar Darryl Brown writes: "[M]any countries continue to authorize private citizens to initiate criminal prosecutions when public officials do not, and others allow privately funded attorneys to assist or supplement public prosecutors in litigating criminal cases." "Canada, Australia, New Zealand, and England and Wales," he explains, "all continue to allow private prosecutions, and fifteen of the twenty-eight member states of the European Union grant victims some comparable authority." "Details vary across jurisdictions," Brown observes of such prosecutions, "but everywhere private prosecutors' authority is limited by oversight from public prosecutors and courts."[114] American states take far different approaches, with some outlawing them altogether while others embrace or tolerate them in one form or another. Another scholar, Mugambi Jouet, puts it this way of the use of private prosecutors in continental Europe, known for its inquisitorial civil law system: "In misdemeanor cases and, to a lesser extent, in felony cases, continental systems generally allow victims to act as private prosecutors, which enables them to directly summon the accused to court and seek to prove his guilt without the involvement of government prosecutors."[115]

For the moment, suffice it say that a wide variety of private prosecution mechanisms still exist around the world. In fact, within the context of the U.S. legal system, a specific distinction has been made by American scholars between "victim-retained private prosecution" and "outsourced prosecution." *Victim-retained private prosecution,* one source notes, refers to "the practice of allowing the victim of a crime to retain private counsel … to bring a prosecution on the victim's behalf." In contrast, *outsourced prosecution* refers to "situations in which the Government hires a private lawyer or law firm (the 'outsourced prosecutor') to handle some portion of a prosecution."[116] "[V]ictim-retained prosecutors," Professor Roger A. Fairfax, Jr., then at the George Washington University Law School, has noted, "generally are authorized only to assist the public prosecutor or, in rare circumstances, to step in and perform the prosecutorial role when the government declines to do so in a given case."[117] In a 2010 law review article, Fairfax pointed out of the outsourcing of the prosecutorial function by local governments: "[A] significant amount of prosecution outsourcing already is being undertaken by smaller jurisdictions across the nation. These governments, with limited budgets for criminal justice administration, often turn to the private bar for prosecution services." "Rather than spend scarce resources on a traditional public prosecutor," Fairfax wrote, "some governments will pay private lawyers or law firms to prosecute criminal matters within the jurisdiction."[118]

Legal systems are not static, and over the centuries, prosecution methods have not remained the same. Throughout U.S. and world history,[119] private prosecutors undeniably played a significant role in countless criminal cases,[120] and they still appear in

at least some places,[121] whether in capital or other felony cases, or for lower-level or petty offenses.[122] "Private prosecution dominated criminal justice during the colonial period," explains historian Allen Steinberg, who studied early American practices in Philadelphia's criminal justice system.[123] "Colonists who arrived on North American shores," legal commentator Carolyn Ramsey concurs, "brought with them a tradition of allowing crime victims to initiate and prosecute their own cases."[124] Such private prosecutions have included instances where the state's ultimate sanction—the death penalty—was sought and obtained. In Joseph Stanley Faulder's capital murder case in Texas, two private attorneys were paid approximately $90,000 to prosecute Faulder for the 1975 murder of an elderly widow. Although a public prosecutor was assigned to the case, that public prosecutor's participation was limited to jury selection, where he questioned a few prospective jurors, and to putting into the record a deceased hearsay declarant's testimony. That prosecutor even took a day off from the trial to go golfing.[125] Sentenced to death for the murder, Faulder—a Canadian citizen[126] known to his family and friends in Alberta as "Stan"—was executed by lethal injection in 1999 despite a legal challenge to the use of private prosecutors in his case.[127]

In another, even more recent capital case, in Kansas, a Wyandotte County judge, despite some personal misgivings, ruled in 2019 that private lawyers had to be allowed to assist in the death penalty prosecution of a man charged with killing two sheriff's deputies, Theresa King and Patrick Rohrer. Thirty-year-old Antoine Fielder was charged with capital murder after the fatal shooting in June 2018 of King and Rohrer while they were escorting Fielder back to jail after a court hearing in a robbery case. "Under Kansas law," *The Kansas City Star* reported, "crime victims can pay for lawyers to assist prosecutors as 'associate attorneys,' and the families of Rohrer and King have hired married law partners Tom Bath and Tricia Bath." Attorneys for the Kansas Death Penalty Defense Unit argued that the law in question had never been used in a capital case, contending that its application raised "novel constitutional, statutory and ethical issues." But the Baths cited Kansas Supreme Court precedents allowing crime victims to hire private attorneys. The Wyandotte County District Attorney had no objection to the Baths' participation, and District Judge Bill Klapper, though finding the private prosecutors' involvement in the case "inherently problematic," ruled that Kansas law allowed their participation.[128] While former Johnson County assistant district attorney Tom Bath, who, as a private prosecutor, had previously helped convict another man, university professor Thomas Murray, for killing his ex-wife,[129] Tricia Bath was an assistant Wyandotte County district attorney before going into private practice.[130]

Though its use has waned considerably in American life over the last century and a half, the antiquated practice of private prosecution thus continues to be a reality. "Private prosecution," one commentator, George Dession, observes of the idiosyncratic tradition that raises significant ethical, legal, and conflict of interest issues, "was a medieval institution, going back to a time when the civil and the criminal were not well differentiated and the chief purpose of the law was to preserve the peace by

providing an orderly substitute for private vengeance through proceedings in the courts."[131] A "tort" is a wrong, with early English law not making a clear distinction between criminal and civil violations.[132] In medieval times, "kin vengeance" was common among Germanic peoples and in English and Scandinavian societies.[133] Yet, with private prosecutions by interested parties persisting in some American locales, court challenges—some successful and some not—have continued to be made to such increasingly rare prosecutions. Those challenges have come in capital cases, but also ones involving petty offenses. In a recent New Jersey case, a practicing lawyer, Howard Myerowitz, was convicted of a petty disorderly persons offense by the complainant's private counsel. In that case, *State v. Myerowitz* (2015),[134] the Appellate Division of the Superior Court of New Jersey held that the complainant's private counsel could not prosecute the harassment charge without completing a very specific private prosecution certification form required by New Jersey law.

To better understand private prosecution as it exists today in American states, whether for felonies or lesser offenses, one must explore its long history abroad and domestically, the subject of the first part of this book. Notably, England and Scotland diverged substantially in their approaches to handling prosecutions, and that diverse history informed the American experience. In the United States, private prosecution—the custom inherited from England—used to be a fairly routine practice in multiple places into the nineteenth century.[135] It would remain so until public prosecution became the American norm and public prosecutors' offices steadily grew in reputation and size and, under the leadership of elected county and district attorneys, professionalized.[136] "In the late eighteenth and early nineteenth centuries," one scholar notes of early American public prosecutors, "prosecutors were still part-timers who spent much of their practice on noncriminal matters."[137] In 1868, the year that the U.S. Constitution's Fourteenth Amendment was ratified, private prosecutions in Pennsylvania—the birthplace of the Declaration of Independence and the Constitution—were common.[138] Private prosecutions—as the book recounts—were frequent in other locales, too, with at least some states in the South moving to public prosecutions for very different reasons than their northern counterparts.

Professor Eric Freedman at Hofstra University observed in 2016 that a comprehensive account of America's gradual, as-yet-incomplete transition from private to public prosecutions has yet to be written, an assessment shared in Jason Twede's recent Ph.D. thesis, "Go Public: How the Government Assumed the Authority to Prosecute in the Southern United States."[139] But whatever this book may do to rectify that scholarly gap, it is already crystal clear from the existing scholarly literature and the history of crime and punishment that, over time, a number of U.S. states—whether legislatively or through judicial decisions—outlawed or restricted private prosecutions,[140] even as other states continued to allow their use[141] or turned aside legal challenges to privately retained lawyers conducting criminal trials.[142] Police departments, correctional and sentencing practices, and American public prosecutors' offices are being scrutinized more than ever in the modern era,[143] with many practices—from cash bail and choke-

holds to other policing techniques, and harsh sentences for non-violent drug offenders—increasingly in the public spotlight. The use of capital charges that, upon offenders' convictions, send men and women to death row, have also come under intense scrutiny, especially as the federal government resumed the use of executions in 2020 and early 2021 after a 17-year hiatus, with the Trump Administration's Justice Department executing inmates—thirteen in all—in rapid succession even in the midst of the COVID-19 pandemic.[144] Flying under the radar, though, the lesser known practice of private prosecution—the legal tradition rooted in England,[145] used extensively in colonial[146] and early America[147] and elsewhere,[148] and still in use in select American locales—has largely escaped public scrutiny. That practice, as with the others, should be subject to reexamination and a fully developed critique.

A prosecutor's duty, it has been repeatedly emphasized, is to "do justice."[149] "Doing justice," as one source emphasizes, "means that the prosecutor should attempt to convict only those who actually are guilty, not simply those against whom a conviction can be obtained."[150] Public prosecution units must therefore serve the public interest, not private interests, and when individual prosecutors stray from that appointed mission and responsibility, courts do not—and should not—hesitate to find prosecutorial misconduct.[151] Yet when victims or their relatives retain private lawyers to prosecute an accused, it creates an inherent—a *structural*—conflict of interest,[152] raising serious ethical,[153] due process,[154] and equal protection[155] issues. The American Bar Association's Model Rules of Professional Conduct contain an entire provision—Rule 3.8—titled "Special Responsibilities of a Prosecutor," and those ethical rules contain separate provisions governing such topics as the attorney-client relationship and the duties of an attorney. Rule 1.2 of the Model Rules of Professional Conduct, for example, states in part that "a lawyer shall abide by a client's decisions concerning the objectives of representation."[156]

Although private prosecution is, to one degree or another, still in use in many regions of the world[157]—and thus in many individual countries,[158] from Argentina,[159] Montenegro,[160] and New Zealand,[161] to Russia,[162] Serbia,[163] and Spain,[164] and from China[165] Finland,[166] and Taiwan,[167] to Croatia,[168] Kenya,[169] and South Africa[170]—private prosecution now constitutes a small percentage of American criminal prosecutions, especially in felony cases. By contrast, back in the mid-1950s, the practice was relatively common, with sixty-two percent of public prosecutors responding to a survey indicating that they permitted privately hired attorneys to assist in criminal proceedings.[171] The questionable practice of private prosecution,[172] despite the long-standing efforts to put a stop to it, stubbornly remains a reality in various American states—sometimes only for misdemeanors or petty offenses[173]—as well as in specific countries in Africa,[174] Asia,[175] Europe,[176] and elsewhere in the Americas.[177] But the practice has already been outlawed in *some* American states, including heavily populated California,[178] and greatly restricted in others,[179] leading one to legitimately ask: should the practice[180] finally be outlawed altogether? It is that question that this book, *Private Prosecution in America*, seeks to address.

The U.S. Supreme Court has not been entirely silent on the subject, though it has yet to weigh in with the full weight of its authority to interpret the U.S. Constitution. In 1987, the Supreme Court, in *Young v. United States ex rel. Vuitton et Fils, S.A.*,[181] relied on its "supervisory authority" to overturn contempt convictions secured by counsel for an interested party.[182] In that case, in what could foreshadow a U.S. Supreme Court ruling that the use of private prosecutors violates the U.S. Constitution,[183] the Supreme Court ruled that the appointment of counsel for an interested party created opportunities for conflicts of interest to arise and at least an appearance of impropriety.[184] In making its decision, the Supreme Court in *Young* declined to rely on any provision of the U.S. Constitution,[185] instead using its "supervisory power," thus leaving open, for another day, the issue of the constitutionality of private prosecutions.[186] The U.S. Supreme Court and other courts have frequently invoked the "appearance of impropriety" standard in judicial proceedings,[187] and this book argues that, in assessing the practice of interested private prosecutions, courts should carefully examine the U.S. Constitution's Due Process and Equal Protection Clauses.

In 2010, in *Robertson v. United States ex rel. Watson*,[188] the U.S. Supreme Court again came close to addressing the constitutionality of private prosecutors. However, the Supreme Court—over a vigorous dissent, and the language of the U.S. Constitution's due process of law and equal protection guarantees notwithstanding—ultimately decided it was not the appropriate time to address the issue.[189] The U.S. Constitution's Fifth Amendment provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law,"[190] and the Constitution's Fourteenth Amendment—making provisions of the U.S. Bill of Rights applicable to the States[191] after the Fourteenth Amendment's ratification in 1868[192] and a series of U.S. Supreme Court cases interpreting it[193]—also guarantees: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[194] In *Robertson*, writes Tulane University law professor Tania Tetlow, the Supreme Court "came tantalizingly close to addressing" the private prosecution issue but "a majority of the Court decided that the relevant issues were not clearly presented by the facts of the case, and the Court denied certiorari as 'improvidently granted.'"[195]

This book, an extended and much-expanded sequel to an *Arkansas Law Review* article I wrote on the topic of private prosecutors more than 25 years ago,[196] argues that the U.S. Constitution should, at long last, be read to bar interested private prosecutions as a matter of law. Certainly, much has changed in American law and society since the country's founding era and the nineteenth century when private prosecutions were once so prevalent. In this, the third decade of the twenty-first century, the U.S. Supreme Court must thus no longer turn a blind eye to the practice and all the obvious ethical red flags raised by it. Instead, the Supreme Court must give credence to the inherently problematic nature of interested private prosecutions, then act to ensure the criminal justice system's integrity. Given America's now long-standing tradition of using public instead of private prosecutions[197] to adjudicate criminal

responsibility and to administer justice,[198] and given the infrequency of interested private prosecutions in terms of actual cases brought, adjudicated, or tried in court,[199] the U.S. Supreme Court should declare unconstitutional the increasingly arbitrary and rare use of such prosecutions as a violation of due process[200] and equal protection of the laws.[201]

Way back in 1783, before the U.S. Constitution's ratification, Benjamin Franklin—the American founder, inventor, polymath, and scientist—expressed a concern about "private Resentment" in the criminal justice system.[202] In the twenty-first century, there is simply no appropriate justification for continuing to allow interested private prosecutions. Some state legislatures and judicial systems have already outlawed interested private prosecutors, and more should do so.[203] Lawmakers certainly have the power to forbid them, and state supreme courts are also free to interpret their own state constitutions to protect individual rights in a manner that would bar interested private prosecutions. Prosecutors have immense power. Although grand juries were intended by America's founders to check abusive power, Chief Judge Sol Wachtler, of the New York Court of Appeals, warned in the mid-1980s that a prosecutor has such enormous influence that a grand jury could be convinced to "indict a ham sandwich."[204] That immense power necessitates that prosecutors not be biased or prejudiced. Allowing interested private prosecutions in capital cases and criminal matters where an accused's life or liberty is at stake is particularly egregious. At the next available opportunity, the U.S. Supreme Court—using the U.S. Constitution's Due Process and Equal Protection Clauses, and safeguarding the Eighth Amendment's protection against "cruel and unusual punishments" to avoid arbitrary and capricious results[205]—should itself thus explicitly hold that private prosecutions by interested parties are unethical, unconstitutional, and violate the fundamental rights of the accused.[206] A twenty-first century reading of the U.S. Constitution demands no less.