

The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law

*“It seems likely, in sum, that the few abuses which might evade controls, in a system of private prosecution of limited scope, would constitute far less of an evil than the threat to society currently posed by the district attorney’s stranglehold on prosecuting machinery.”*¹

*“[A] municipal judge should not adopt a flat rule for or against permitting private parties, represented or pro se, to prosecute.”*²

I. INTRODUCTION

In the American criminal justice system, the appropriate prosecutor’s office is responsible for seeking justice for the victims of crime, leaving crime victims with little or no recourse following a decision not to prosecute.³ Crime victims can address this concern through the use of a private prosecutor, a process that allows victims of crime, or the families of crime victims, to hire their own attorney to bring criminal charges against the alleged perpetrator of the offense.⁴ Though common in England, only a few American states allow private prosecutions today.⁵

The state of New Hampshire allows private prosecutors to try criminal cases.⁶ Recently, the New Hampshire Supreme Court limited the reach of

1. Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L.J. 209, 229 (1955) [hereinafter Comment] (announcing need for private attorneys to prosecute crime in instances of prosecutorial inaction).

2. *State v. Harris*, 620 A.2d 1083, 1088 (N.J. Super. Ct. Law Div. 1992) (affirming decision to allow private prosecutors discretion).

3. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 389 (1986) (arguing American criminal justice system neglects crime victims).

4. See Thomas R. Vena, *Private Citizen Complaints: The Impact of State v. Storm*, N.J. LAW., THE MAG., Sept./Oct. 1997, at 14 (outlining New Jersey practice of crime victims using private attorneys to prosecute crimes).

5. Cardenas, *supra* note 3, at 359-66 (tracing history of private prosecution in England); see also *Hall v. State*, 411 So. 2d 831, 839 (Ala. Crim. App. 1981) (allowing special prosecutor to assist government prosecution in Alabama); *Commonwealth v. Hubbard*, 777 S.W.2d 882, 883 (Ky. 1989) (holding assisting private prosecutors not violative of due process clauses of U.S. Constitution); *State v. Cockrell*, 309 P.2d 316, 320 (Mont. 1957) (finding trial fair if hired attorney not guilty of conduct prejudicial to defendant); *Harris*, 620 A.2d at 1088 (ruling no per se violation of state constitution when private prosecutors handle criminal cases); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) (announcing no state constitutional reason to prevent private prosecutions); *State v. Atkins*, 261 S.E.2d 55, 57 (W. Va. 1979) (ruling right to hire private prosecutor grounded in common law).

6. *State v. Rollins*, 533 A.2d 331, 331 (N.H. 1987) (holding New Hampshire common law permits

private prosecutors in criminal cases to those cases with no possibility of imprisonment for the defendant.⁷ The court, however, did not address the issue of the constitutionality of private prosecutions as a whole.⁸ Consequently, the ruling of the New Hampshire Supreme Court allows crime victims access to the courts for minor offenses not involving a potential jail sentence when government prosecutors choose not to prosecute such crimes.⁹

Massachusetts citizens, however, do not enjoy the same rights as those in New Hampshire.¹⁰ For nearly 150 years, Massachusetts citizens have been prohibited from hiring a private attorney to prosecute a criminal offense.¹¹ Consequently, the government prosecutor wields absolute power in deciding if and when to file criminal charges based on the allegations of each case.¹² As a result, Massachusetts crime victims are left with no recourse if the prosecuting authority decides not to file formal charges.¹³ This lack of recourse frequently leaves crime victims feeling violated twice: once by the perpetrator of the crime, and once by the prosecutor who allows the offender to go unpunished.¹⁴

Federal courts do not allow the use of private prosecutors because of a concern that private prosecutors do not feel the same duty of equal justice as do government prosecutors.¹⁵ The duty of the government prosecutor is not only

criminal prosecution by private citizens). *But see* State v. Martineau, 808 A.2d 51, 52 (N.H. 2002) (ruling New Hampshire common law prevents private citizens from prosecuting "Class A" misdemeanors).

7. *Martineau*, 808 A.2d at 52.

8. *Id.* at 52 (refusing to address broad issue of constitutionality of private prosecutions). *But see id.* at 54-55 (Nadeau, J., concurring) (arguing court should ban private prosecutions in all cases).

9. *Martineau*, 808 A.2d at 53-54 (recalling private prosecutions in New Hampshire history generally involved sentences potentially no greater than imposing fine). The court cited instances of private prosecutions in cases involving violations of liquor, fishing, dog leash, and military mustering laws. *Id.*

10. *See* Commonwealth v. Gibbs, 70 Mass. (4 Gray) 146, 147 (1855) (disallowing crime victims to pay prosecuting attorneys).

11. *Id.* (allowing private prosecutors to assist public prosecutors only if unpaid for their services); Commonwealth v. Williams, 56 Mass. (2 Cush.) 582, 585 (1849) (requiring public prosecutors prosecute criminal cases and not private prosecutors).

12. Taylor v. Newton Div. of Dist. Ct. Dep't, 622 N.E.2d 261, 262 (Mass. 1993) (holding individual retains no right to institute criminal proceedings).

13. Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 489-93 (1988) (noting private citizens lack right to challenge prosecutorial inaction).

14. *See id.* at 490-91 (citing frequent dissatisfaction with decision not to prosecute offenders); Comment, *supra* note 1, at 210 (contending prosecutorial discretion creates flaw in legal justice system); *see also* Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 18 (1998) (arguing for increased role of crime victim in prosecutorial decision making). Caplow notes, "the exclusion of the victim [in the prosecutorial decision-making process] has become so routine that the victim virtually vanishes after the arrest." Caplow, *supra*, at 18.

15. Young v. United States (*Ex rel.* Vuitton), 481 U.S. 787, 802 (1987) (holding attorneys representing party in civil matter precluded from representing same party in prosecution). The *Young* case resulted from an earlier suit involving French leather goods manufacturer Louis Vuitton, who filed a civil suit for trademark infringement in 1978. *Id.* at 790. When the defendant in the civil suit violated the terms of the settlement agreement, a criminal contempt proceeding began, and the court appointed an attorney to represent the government. *Id.* at 791-92. The *Young* court was careful to note that while a private prosecutor may be more familiar with the case and of great assistance to the government prosecutor, the private prosecutor should never assume full control of the prosecution. *Id.* at 793-94.

to seek justice for the victims of a crime, but also to guarantee that a criminal defendant receives a fair trial within the bounds of the United States Constitution.¹⁶ Like the Massachusetts victims, federal court decisions prohibiting private prosecutors have left the victims of federal crime with little recourse in the face of prosecutorial inaction.¹⁷

This Note traces the evolution of private prosecutions from England to the colonial United States and American courtrooms today.¹⁸ The Note then examines recent New Hampshire and Massachusetts court decisions dealing with private prosecutions to further illustrate its issues and concerns.¹⁹ Through an analysis of decisions in these two states, and comparison to decisions in other states, the Note concludes that the New Hampshire system of allowing private prosecutions should be adopted in Massachusetts.²⁰ Adopting the New Hampshire model would allow crime victims the satisfaction of having defendants punished and, at the same time, guarantee that criminal defendants are afforded fair and just trials.²¹

II. HISTORY

A. Private Prosecutions in England

It has long been a common practice in England for crime victims to initiate criminal prosecutions.²² In colonial England, fears of governmental tyranny forced crime victims or their families to initiate and prosecute criminal trials.²³ Citizens feared that allowing the government to be the sole body responsible for criminal prosecutions would enable it to utilize this power to harass citizens

16. 63C AM. JUR. 2D *Prosecuting Attorneys* § 23 (2002) (outlining prosecutor's duties to accused).

17. *Supra* note 13 and accompanying text (highlighting frustration of crime victims when charges not filed against offenders).

18. *Infra* notes 22-56 and accompanying text (tracing development of role of private prosecutors in history of criminal justice).

19. *Infra* notes 57-84 and accompanying text (analyzing New Hampshire and Massachusetts decisions regarding private prosecutors' use).

20. *Infra* Part IV (concluding Massachusetts should adopt New Hampshire's private prosecution model).

21. *Supra* note 9, *infra* notes 113-16 (presenting justification for adoption of New Hampshire system).

22. Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 279-82 (2001) (introducing origins of United States criminal prosecutions); see John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515-16 (1994) (tracing origin of private prosecution to common law England); Cardenas, *supra* note 3, at 359 (tracing English history of private prosecution); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 756 (1975) (noting English origins of private prosecution).

23. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995); see Cardenas, *supra* note 3, at 361 (stating private prosecution necessary to prevent monopolistic control of power). Cardenas argues: "[A] private prosecutorial system was necessary to limit the power of the Crown. If not so limited, the power of criminal prosecution could be used for politically oppressive purposes." Cardenas, *supra* note 3, at 361.

by bringing unwarranted charges.²⁴ England's common law considered a crime to be a wrongful act against a particular identified victim, as opposed to a wrongful act against the state.²⁵ The common belief at the time, therefore, was that those in the best position to prosecute criminal cases were the victims themselves.²⁶ In fact, under common law, English citizens were able to prosecute both those who committed a crime against them and those who committed crimes against others.²⁷

The system of privately initiated prosecution thrived in England until the mid-nineteenth century, when opposition to private prosecution began to mount among the English government.²⁸ As a result of this opposition, the government established the Office of Director of Public Prosecutions in 1879.²⁹ The goal in establishing the Office of Director was to empower the government to make prosecutorial decisions.³⁰ In reality, however, the Director held no greater power than that of the average citizen, because its authority covered only certain types of prosecutions.³¹

Despite the efforts of the English government and the support of government officials, a national system of public prosecutions for all criminal trials failed to

24. *Supra* note 23 (highlighting fears of citizens if government held too much power).

25. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 7-8 (1980) (tracing English influence on American criminal justice).

26. Cardenas, *supra* note 3, at 361 (illustrating history of prosecution in England). Cardenas quotes nineteenth-century historian Sir James Stephen:

No stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to everyone by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution.

Id.

27. Sidman, *supra* note 22, at 758-59 (illustrating prosecution rights of private English citizens). Private citizens possessed the same rights as the Attorney General or Solicitor General in matters relating to criminal prosecution. *Id.* at 758; PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 10 (1958) (discussing role of private citizens in criminal prosecution). Devlin states that although any English citizen may prosecute, most choose to complain to police and leave prosecution to them. DEVLIN, *supra*, at 20.

28. Sidman, *supra* note 22, at 759 (noting beginning of English reform movement). Sidman notes that the most frequent complaints voiced against private prosecutions alleged that criminal charges were mainly intended to harass or embarrass, and were costly and time consuming. *Id.* at 760.

29. Prosecution of Offenses Act of 1879, 42 & 43 Vict., ch. 2; E.C. FRIESEN AND I.R. SCOTT, *ENGLISH CRIMINAL JUSTICE, AN INTRODUCTION FOR AMERICAN READERS* 111 (1977) (noting responsibilities of Director of Public Prosecutions); PENDLETON HOWARD, *CRIMINAL JUSTICE IN ENGLAND: A STUDY IN LAW ADMINISTRATION* 96-157 (1931) (outlining duties of Director of Public Prosecutions). The Prosecution of Offenses Act of 1879 required criminal proceedings to be brought by the Director in important or difficult cases or where inaction by a private prosecutor forced state action. HOWARD, *supra*, at 97.

30. Cardenas, *supra* note 3, at 361 (tracing evolution of Office of Director of Public Prosecutions).

31. Cardenas, *supra* note 3, at 362 (stating limited role of government in prosecution). Cardenas notes that the Prosecution of Offenses Act confers authority on the Director to prosecute only a few specific offenses, such as counterfeiting, treason and seditious libel. *Id.*; *see also* Sidman, *supra* note 22, at 760 (stating goals of Office of Director). The Director of Public Prosecutions differs from the American public prosecutor in that the Director only prosecutes serious or complicated crimes, not minor offenses. Sidman, *supra* note 22, at 760-61.

gain widespread support among English citizens.³² According to a 1960 study, the Director 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.³³ Private prosecution continued to thrive in England even after the establishment of the Office of Director of Public Prosecutions because it was the established tradition and the English resisted legal change.³⁴ Because of this resistance to change, private prosecutions continue to co-exist with public prosecutions in England today.³⁵

B. Private Prosecution in Colonial America

The English justice system had a strong influence on the origin of the American prosecutor, but public prosecutions began replacing private prosecutions in the United States long before the colonies gained their independence.³⁶ The first colonial courts were modeled exclusively on their English counterparts, and private individuals seeking redress through the courts initiated criminal trials.³⁷ The first American court was held in Virginia in 1619, with the governor presiding over the proceedings.³⁸ Connecticut was the first colony to formally establish a system of public prosecution using county attorneys in 1704.³⁹ Seven years later, Virginia instituted a system of county prosecuting attorneys, and by the end of the eighteenth century, the concept of public prosecution was well established in the majority of the states.⁴⁰

32. HOWARD, *supra* note 29, at 92 (describing continued prominence of private prosecutions in England).

33. JACOBY, *supra* note 25, at 8 (noting limited role of Director of Public Prosecutions in England). The police, acting as private citizens interested in maintaining justice, now initiate the majority of English criminal prosecutions. *Id.* Although the Director of Public Prosecutions may appear to have similar responsibilities to his American counterpart, in reality the two are vastly different. *Id.* at 8-9.

34. JACOBY, *supra* note 25, at 9 (illustrating continued existence of system of private prosecution).

35. HOWARD, *supra* note 29, at 92-93 (noting effects of Director on private prosecutions). Unlike other countries, England never experienced a groundswell of support for a national system of public prosecutions. *Id.* As a result, the actions of the English government in 1879 had little effect on private prosecutions, and private prosecutions continue to exist in England today. *Id.*; see JACOBY, *supra* note 25, at 33 (comparing private and public prosecution). One scholar notes, that private prosecution is the primary method of criminal prosecution in England, and that public prosecutors are rarely ever used. JACOBY, *supra* note 25, at 33.

36. Sidman, *supra* note 22, at 762-65 (tracing historical development of United States public prosecution). Virginia established the office of Attorney General in 1643, and its main duty was to initiate criminal prosecutions of special importance to the government. *Id.* at 763.

37. JACOBY, *supra* note 25, at 12 (tracing history of American court system).

38. JACOBY, *supra* note 25, at 12.

39. Sidman, *supra* note 22, at 763 (examining development of public prosecution in United States); see JACOBY, *supra* note 25, at 16 (analyzing first public prosecutors in the United States). The 1704 Connecticut statute establishing the office of county attorney stated:

Henceforth there shall be in every county a sober discreet and religious person appointed by the county court to be attorney for the Queen to prosecute and implead in the law all criminals and to do all other things necessary or convenient as an attorney to suppress vice and immorality.

JACOBY, *supra* note 25, at 16.

40. Sidman, *supra* note 22, at 763 (discussing historical origin of American prosecutorial system); see Bessler, *supra* note 22, at 516-17 (comparing public and private prosecution in colonial United States).

Despite the widespread prominence of public prosecution systems, private prosecution continued to flourish in many areas of the country throughout the nineteenth century.⁴¹ Today, every state has a public prosecutor's office, and that prosecutor is responsible for prosecuting all criminal actions occurring within that state.⁴² Even with the introduction of these public prosecutor's offices, however, today the practice of private prosecution is still authorized in various forms in many states.⁴³

C. Modern American Private Prosecution

A few states have completely forbidden privately funded prosecutors in criminal prosecutions.⁴⁴ Those states that have outlawed the practice have generally based their decisions on issues of fundamental fairness and a desire to prevent even the mere appearance of impropriety.⁴⁵ The argument is that a prosecutor representing an aggrieved party cannot actively seek justice for the victim and guarantee impartiality towards the accused.⁴⁶ The United States Supreme Court relied on a similar justification in prohibiting the use of private prosecutors in federal criminal trials in 1987.⁴⁷ The Supreme Court held that

41. Bessler, *supra* note 22, at 518 (noting continued existence of private prosecutors). There were no strict limitations on which cases could be prosecuted privately, but assault and battery cases were the most common. *Id.* at 518-19. See generally ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* (1989) (examining nineteenth-century private prosecutions in Philadelphia).

42. Sidman, *supra* note 22, at 764 (highlighting role of public prosecutors in United States today).

43. See *State v. Martineau*, 808 A.2d 51, 52-53 (N.H. 2002) (authorizing private prosecutions in New Hampshire). Private prosecutions are authorized in New Hampshire provided they are not "repugnant to the rights and liberties contained in the constitution." *Id.* at 53; *State v. Rollins*, 533 A.2d 331, 331-32 (N.H. 1987) (allowing private prosecution in limited instances). New Hampshire common law does not preclude prosecution of certain criminal complaints by private citizens, but such complaints are subject to the appropriate government prosecutor's dismissal authority. *Rollins*, 533 A.2d 331, at 331-31. The following states allow limited participation by private prosecutors: Alabama, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, U.S. Virgin Islands, Washington, and West Virginia. Bessler, *supra* note 22, at 530 n.73.

44. *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 364-65 (Minn. 1977) (disallowing private prosecutor on behalf of interested parties); *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976) (outlawing practice of private prosecutions). The *Harrington* Court held that allowing private persons to hire prosecutors and prosecute criminal defendants is "inherently and fundamentally unfair." *Harrington*, 534 S.W.2d at 48; see *Biemel v. State*, 37 N.W. 244, 247 (Wis. 1888) (rejecting use of privately hired prosecutors). The *Biemel* court ruled that attorneys paid by private parties may not assist in criminal prosecutions in Wisconsin. *Biemel*, 37 N.W. at 247.

45. See *Harrington*, 534 S.W.2d at 48 (justifying prohibition against private prosecutors). Although the *Harrington* Court did not find any specific instances of impropriety by the private prosecutor in the case, it ruled against the practice in the future, stating that it "invites error from an excess of zeal" by the private prosecutor. *Id.*

46. Nichols, *supra* note 22, at 292-94 (arguing private prosecutor creates inherent conflict of interest).

47. *Young v. United States (Ex rel. Vuitton)*, 481 U.S. 787, 810 (1987) (prohibiting use of privately hired prosecutors in federal criminal trials). The *Young* Court held that prosecution by someone with conflicting loyalties challenges the objectivity of the prosecutor. *Young*, 481 U.S. at 810. The Court further held that the state must prosecute criminals in a disinterested fashion, "for liberty itself may be at stake in such matters." *Id.*; see *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (invalidating use of private prosecutors). The

the appointment of an interested prosecutor in a criminal contempt action undermined confidence in the integrity of the legal system and created an error so fundamental that it required reversal in all instances.⁴⁸

Some legal scholars, however, disagree with this rationale for prohibiting private prosecutions, arguing private prosecutors behave no differently than government prosecutors.⁴⁹ The majority of states appear to agree with these commentators, as they have not gone so far as to prohibit privately funded prosecutors entirely, but have placed restrictions on the amount of work they can do in the criminal proceeding.⁵⁰

Most United States jurisdictions allow private prosecutors to participate alongside the government prosecutor in criminal trials provided that the government consents and the government prosecutor maintains control over all aspects of the case.⁵¹ Today, private prosecution without direct government involvement is most common before magistrates, municipal courts, and justices of the peace.⁵² Courts have not specified a particular class of crimes in which private prosecutors may assist the government, but their use is most prevalent when dealing with serious offenses.⁵³ Courts allow such involvement in these cases because the victim has a greater interest in securing a conviction and the government prosecutor may need extra assistance.⁵⁴ When dealing with minor offenses, however, most jurisdictions generally allow a private prosecutor to play a far more active role in the prosecution.⁵⁵ Some states actually permit

Linda R.S. Court held that a private citizen has no right to prosecute another citizen. *Linda R.S.*, 410 U.S. at 619.

48. *Young*, 481 U.S. at 809-10 (stating underlying facts unimportant and reversal always warranted).

49. Comment, *supra* note 1, at 228 (arguing in favor of allowing private prosecutors). The author notes that history has shown that the private prosecutor "plays as fairly as his public counterpart." *Id.* The vengeance of a private prosecutor is no more damaging to the criminal process than the political ambitions of a public prosecutor. *Id.* at 228-29. Additionally, the author states that existing judicial controls limit abuses of the criminal justice system, and that stricter application of these controls in private prosecutions would minimize abuses. *Id.* at 229.

50. *Supra* note 43 and accompanying text (listing states allowing limited involvement by private prosecutors).

51. Bessler, *supra* note 22, at 529 (observing majority of jurisdictions allow limited participation by private prosecutors); Sidman, *supra* note 22, at 765 n.73 (listing states allowing assistance by private prosecutors); *supra* note 43 and accompanying text (noting states allowing involvement by private prosecutors).

52. Comment, *supra* note 1, at 221 (citing results of questionnaire sent to private prosecutors). The Yale Law Journal sent a questionnaire to three hundred public prosecutors in the then forty-eight United States. *Id.* at 210 n.8. One hundred fifty-one public prosecutors from forty-five states responded to the questionnaire, forming the basis of the author's arguments. *Id.* at 219.

53. *State v. Atkins*, 261 S.E.2d 55, 58 (W. Va. 1979) (pointing to victim's desire for guaranteeing effective prosecution and public prosecutor's need for assistance). See generally, *Goehring v. Commonwealth*, 370 S.W.2d 822 (Ky. 1963) (permitting private prosecutor assistance in armed assault case); *State v. Amsden*, 299 S.W.2d 498 (Mo. 1957) (allowing private prosecutor assistance in rape case); *Lopez v. State*, 437 S.W.2d 268 (Tex. Crim. App. 1968) (allowing private prosecutor assistance in murder trial).

54. Comment, *supra* note 1, at 219-20 (justifying assistance by private prosecutor).

55. Comment, *supra* note 1, at 221 (observing private prosecutors common before magistrates, municipal courts, and justices of the peace).

private prosecutors to handle the entire case without assistance or involvement from the state.⁵⁶

D. Private Prosecution in New Hampshire Courts

The New Hampshire Supreme Court recently addressed the issue of private prosecutions in *State v. Martineau*,⁵⁷ a case involving a criminal complaint for disorderly conduct, filed and prosecuted by a private citizen.⁵⁸ Although there is no statutory authority regarding private prosecution in New Hampshire, the court noted the state's common law has allowed the practice for many years.⁵⁹ New Hampshire law provides that a criminal case begins with the filing of a complaint, but it does not specify that the complaint must be filed by any particular person.⁶⁰ Therefore, the courts have historically held that the law allows criminal complaints to be filed, and prosecuted, by private citizens.⁶¹ The power of a private citizen to prosecute is not absolute, however, because the Attorney General retains the power to dismiss the charges.⁶²

Private prosecutors have a long history in New Hampshire.⁶³ Justices of the peace prosecuted all minor criminal offenses prior to the adoption of the New Hampshire Constitution in 1784.⁶⁴ Major criminal accusations, however, could only be prosecuted following an indictment by a grand jury or an information filed by the Attorney General.⁶⁵ Historically, private citizens could only institute criminal proceedings in cases within the jurisdiction of the justice of the peace, all of which were minor criminal offenses.⁶⁶

56. Comment, *supra* note 1, at 220 (noting private prosecutors may act alone). See generally *State v. Merski*, 333 A.2d 159 (N.H. 1975) (allowing private prosecution of dog leash law violation); *State by Tucker v. Gratta*, 133 A.2d 482 (N.H. 1957) (allowing private prosecution of simple assault case); *State v. Tufts*, 56 N.H. 137 (1875) (allowing private prosecution for violation of liquor laws).

57. 808 A.2d 51 (N.H. 2002).

58. *Id.* at 51 (examining use of private prosecutors in New Hampshire).

59. *Id.* at 52-53 (tracing development of New Hampshire common law). The court noted the only limitation on the use of private prosecutors is they not be "repugnant to the rights and liberties contained in the [New Hampshire] constitution." *Id.* at 53; see *Gratta*, 133 A.2d at 482 (noting private prosecution for assault not uncommon).

60. N.H. REV. STAT. ANN. § 592-A:7 (2001) (establishing procedure for initiating criminal trial). The statute provides, "[c]riminal proceedings before a district or municipal court shall be begun by complaint, signed and under oath, addressed to such court, briefly setting forth, by name or description, the party accused and the offense with which he is charged." *Id.*

61. *State v. Rollins*, 533 A.2d 331, 331 (N.H. 1987) (allowing private prosecution in New Hampshire). The court stated that New Hampshire common law does not preclude prosecution by private citizens. *Id.*

62. *Gratta*, 133 A.2d at 482 (upholding power of Attorney General to dismiss unwarranted charges).

63. See *State v. Gerry*, 38 A. 272, 274 (N.H. 1896) (allowing use of private prosecutor in New Hampshire criminal trials).

64. *State v. Jackson*, 43 A. 749, 751 (N.H. 1899) (outlining duties and responsibilities of justice of the peace); *Gerry*, 38 A. at 279 (defining authority of justice of the peace). In 1784, the justice of the peace had jurisdiction over criminal offenses punishable "by a fine not exceeding 40 shillings, by whipping, or by setting in the stocks." *Gerry*, 38 A. at 279.

65. *Gerry*, 38 A. at 274 (delineating responsibilities of Attorney General).

66. *State v. Martineau*, 808 A.2d 51, 53 (N.H. 2002) (analyzing history of private prosecutions in New

Additionally, the New Hampshire Constitution justifies the continued existence of private prosecutions in the state.⁶⁷ The New Hampshire Supreme Court in *Martineau* reasoned that private prosecutions must be allowed to continue to exist because the state legislature has never specifically outlawed the practice.⁶⁸ However, the court recognized the impossibility of determining which of today's crimes would have constituted minor offenses within the justice of the peace's jurisdiction in the eighteenth century.⁶⁹ Consequently, the court refused to allow private prosecutions in New Hampshire when the potential penalty is imprisonment.⁷⁰ Despite the unanimity of the *Martineau* decision, some justices argue private prosecution should be outlawed in all instances, including minor offenses.⁷¹ The court's refusal to address the larger issue of whether private prosecution violates the constitutional rights of defendants permits the continued practice of private prosecution of minor offenses in New Hampshire.⁷²

E. Private Prosecution in Massachusetts Courts

Beginning in 1849, Massachusetts was the first state to disapprove of the practice of private prosecution.⁷³ Subsequently, in 1855, the Supreme Judicial Court of Massachusetts outlawed the practice of private prosecution altogether.⁷⁴ As a basis for its decision, the court pointed to a Massachusetts

Hampshire).

67. N.H. CONST. pt. II, art. 90. The New Hampshire constitution states in pertinent part

All the laws which have heretofore been adopted, used, and approved, in the province, colony, or state of New Hampshire, and usually practiced on in the courts of law, shall remain and be in full force, until altered and repealed by the legislature; such parts thereof only excepted, as are repugnant to the rights and liberties contained in this constitution. . . .

Id.

68. *Martineau*, 808 A.2d at 53 (arguing legislature responsible for changing law, not courts).

69. *Id.* at 53 (quoting *State v. Jackson*, 43 A. 749, 754 (N.H. 1899)) (noting difficulty equating early punishment to current sentences).

70. *Id.* at 54 (disallowing private prosecutions for class A misdemeanors); N.H. REV. STAT. ANN. § 625:9 (2002) (defining class A misdemeanors). Class A misdemeanors are defined as any crime for which the penalty is imprisonment for less than one year. N.H. REV. STAT. ANN. § 625:9 IV(a)(1).

71. *Martineau*, 808 A.2d at 54-55 (Nadeau, J., concurring) (arguing private prosecution presents opportunity to abuse justice system). Justice Nadeau stated that private criminal complaints are frequently filed in doubtful cases with the underlying motivation being to harass or vex the defendant. *Id.* at 55.

72. *Id.* at 51 (prohibiting private complaints only for offenses greater than class A misdemeanors).

73. See *Commonwealth v. Williams*, 56 Mass. (2 Cush.) 582, 585 (1849) (prohibiting compensation of prosecutor by private individuals). The *Williams* Court upheld the criminal conviction of the defendant because there was no evidence that the attorney assisting the state prosecutor received payment from any private individual. *Id.* Although the court never explicitly addressed the issue, the opinion indicates that the conviction would have been overturned if the crime victim had compensated the private attorney. *Id.*

74. *Commonwealth v. Gibbs*, 70 Mass. (4 Gray) 146, 147 (1855) (prohibiting prosecution by attorney with pecuniary interest in outcome of case). The *Gibbs* case involved a private attorney appointed by the court to act in place of the district attorney, who was unavailable for trial. *Id.* The appointed attorney, however, was concurrently involved in several civil actions against two of the *Gibbs* defendants and was defending a slander action brought by one of the *Gibbs* defendants. *Id.* at 146. These other cases involved the same basic

statute prohibiting public prosecuting attorneys from receiving direct compensation from crime victims.⁷⁵ Although not specifically addressed in the statute, Massachusetts courts have applied this prohibition to both private prosecutors and their public counterparts.⁷⁶ In the early twentieth century, however, Massachusetts courts refused to overturn convictions based solely on the appearance of a privately-compensated prosecutor.⁷⁷

More recent decisions follow a strict interpretation of the statute as an absolute prohibition against private prosecution in the Commonwealth.⁷⁸ In 1993, for example, the Supreme Judicial Court ruled that the right to bring a criminal prosecution in Massachusetts belongs exclusively to the state and not to private individuals.⁷⁹ This decision sent a clear message to crime victims that the only way to seek justice was through the use of a government prosecutor, not a privately-hired attorney.⁸⁰

Many scholars feel Massachusetts is at the forefront of this area of criminal law and encourage other states to put an end to private prosecution as well.⁸¹ Ironically, the primary justification for prohibiting private prosecutors in the United States today is the same rationale used to justify the continued existence of private prosecutors in England more than 200 years ago.⁸² Legal scholars argue that allowing private prosecution will lead to an influx of criminal cases that have no merit and are only filed to harass or publicly embarrass the accused.⁸³ The majority of states appear to disagree with these scholars, as Massachusetts' complete ban on private prosecution continues to be the

underlying facts as the *Gibbs* case. *Id.*

75. MASS. GEN. LAWS ch. 12, § 30 (2002). The statute provides that no public prosecutor can receive payment from a private prosecutor or interested party for the performance of his prosecutorial duties. MASS. GEN. LAWS ch. 12, § 30; *see* *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477, 491 (1830) (interpreting statute to prohibit private prosecutions). The court held that the statute supposes that prosecutors only receive their government salary. *Knapp*, 27 Mass. (10 Pick.) at 491.

76. *Gibbs*, 70 Mass. (4 Gray) at 147 (prohibiting use of private prosecutor based on statutory interpretation).

77. *See* *Commonwealth v. Herman*, 149 N.E. 198, 198 (Mass. 1925) (allowing private prosecutor to aide government in prosecution).

78. *Commonwealth v. Tabor*, 384 N.E.2d 190, 195-96 (Mass. 1978) (invalidating prosecution by privately-paid attorney).

79. *Taylor v. Newton Div. of Dist. Ct. Dept.*, 622 N.E.2d 261, 262 (Mass. 1993) (prohibiting private individual from filing criminal charges). The *Taylor* Court held that a private citizen has no constitutional right to prosecute others. *Id.* Additionally, the *Taylor* Court held that while citizens lacked the right to institute criminal proceeding, they could proceed civilly. *Id.*

80. *See* Sidman, *supra* note 22, at 769 n.87 (stating effect of Massachusetts ruling).

81. *See* Bessler, *supra* note 22, at 550-53 (contending private prosecutions unconstitutional); Nichols, *supra* note 22, at 284-86 (describing arguments in favor of private prosecution as invalid); Sidman, *supra* note 22, at 773-80 (examining ethical issues surrounding use of private prosecutors).

82. *See* Nichols, *supra* note 22, at 289-91 (arguing against private prosecution); *see also* Bessler, *supra* note 22, at 550-57 (opining private prosecution unconstitutional).

83. *See* *State v. Martineau*, 808 A.2d 51, 55 (N.H. 2002) (Nadeau, J., concurring) (warning of private prosecution's inherent danger). Judge Nadeau cautions that when private prosecution is allowed, there is "too much opportunity for abuse and too little motivation for detachment." *Id.*

minority position in the United States.⁸⁴

III. ANALYSIS

A. Guaranteeing Constitutional Rights of Criminal Defendants

One of the most common arguments advanced against the use of private prosecutors is that they violate the constitutional rights of criminal defendants.⁸⁵ This is the primary justification for the prohibition against private prosecutors in Massachusetts.⁸⁶ Nevertheless, this argument overlooks important safeguards imposed by courts to prevent these infringements.⁸⁷ In New Hampshire and other states, courts must review the decision to use a private prosecutor on a case by case basis.⁸⁸ The court weighs the presence of an interested prosecutor against the due process rights of the defendant.⁸⁹ If a court determines that the involvement of a private prosecutor would result in an unconstitutional proceeding, the court does not allow the private attorney to prosecute and leaves the prosecution in the hands of the government.⁹⁰ Such safeguards not only ensure that the rights of criminal defendants are not violated, but also enable crime victims to bring their perpetrators to justice.⁹¹

84. *Supra* note 43 and accompanying text (enumerating states allowing private prosecution in some form).

85. U.S. CONST. amend. V (protecting individual rights); *see* Bessler, *supra* note 22, at 550-58 (urging against use of private prosecutors). The due process clause of the Fifth Amendment prohibits the federal government from depriving an individual of "life, liberty, or property, without due process of law." U.S. CONST. amend. V. Bessler argues that due process prohibits even the appearance of impropriety in criminal trials and that because a private prosecutor presents that appearance, it violates the constitutional rights of criminal defendants. Bessler, *supra* note 22, at 555-56.

86. *Commonwealth v. Tabor*, 384 N.E.2d 190, 196 (Mass. 1978) (viewing district attorney as responsible for securing fair and impartial trial). The Court opined that the prosecuting attorney should be as disinterested and impartial as the judge trying the case. *Id.* at 196 n.14. In the court's view, a private prosecutor will never satisfy the impartiality standard governing criminal prosecutions. *Id.* at 196.

87. *See* *State v. Rollins*, 533 A.2d 331, 331 (N.H. 1987) (highlighting imposed limits on private prosecution). The *Rollins* Court noted that any private prosecution remains subject to the appropriate government prosecutor's authority to dismiss the charges. *Id.*

88. *See* *Martineau*, 808 A.2d at 53. The *Martineau* Court refused to prohibit private prosecutions entirely, instead holding that they are permissible as long as they are not "repugnant to the rights and liberties" of the N.H. constitution. *Id.* The Court added that determination of whether prosecutions are repugnant to the constitution requires a case by case analysis. *Id.*; Sidman, *supra* note 22, at 772 (noting some courts review use of private prosecutors on case by case basis).

89. *See* Sidman, *supra* note 22, at 772 (balancing right to hire private prosecutor against constitutional rights of defendant).

90. *See* *Rogowicz v. O'Connell*, 786 A.2d 841 (N.H. 2001) (ruling impermissible for court to appoint interested private prosecutor in criminal contempt action). The *O'Connell* Court ruled that an interested prosecutor would deny the defendant's due process rights and, consequently, did not allow the private prosecution to proceed. *Id.* at 844.

91. *See* *Commonwealth v. Hubbard*, 777 S.W.2d 882, 883 (Ky. 1989) (holding private prosecutors do not violate due process rights of defendants); *see also* Comment, *supra* note 1, at 228 (arguing for allowance of private prosecutors to satisfy crime victims). The author notes that the interest of individuals to vindicate personal grievances justifies private prosecutions. Comment, *supra* note 1, at 227-28.

In the event that a court errs in its decision to allow a private prosecutor in a criminal case, the appeals process offers a remedy.⁹² An appellate court can review the decision of the lower court to allow private prosecution, and, if the review shows that the prosecution infringed on the defendant's constitutional rights, the court should overturn the defendant's conviction.⁹³ Appellate review also guarantees the protection of criminal defendants' rights because an appellate court has the benefit of retrospective review of the lower court proceeding for constitutional rights violations.⁹⁴

B. Preventing the Filing of Criminal Complaints Without Merit

Opponents of private prosecutions argue that people will initiate suits only in hopes of harassing or publicly embarrassing the defendant.⁹⁵ Courts have addressed this concern and have ensured that the court system is not used as a venue for the public airing of private feuds.⁹⁶ The groundless complaints of private prosecutors will never proceed to trial because the government's prosecuting attorney has the right to dismiss any criminal complaint.⁹⁷ While a private prosecutor has authority to initiate criminal proceedings in some jurisdictions, the authority is never absolute because the government may interject at any stage of the process and request the court to dismiss the criminal charges.⁹⁸ The government's oversight of private prosecution addresses the concern that private prosecutions will result in an influx of unsubstantiated criminal complaints.⁹⁹

The ethical constraints of the Code of Professional Responsibility bind private prosecutors, as they bind all attorneys, and govern their actions in criminal proceedings.¹⁰⁰ Courts should adopt a system of sanctions for attorneys who file criminal complaints without merit similar to the sanctions

92. See *Commonwealth v. Tabor*, 384 N.E.2d 190, 192 (Mass. 1978) (reversing decision of trial court allowing private prosecutor).

93. Comment, *supra* note 1, at 220-21 (providing grounds for reversal of trial court decision). The author states that appellate courts will generally not overturn a successful private prosecution unless the attorney violates the defendant's right to a fair trial. *Id.*

94. See Comment, *supra* note 1, at 221 (stating grounds for reversal). The author notes that courts can reverse a conviction if the relationship between the defendant and the private prosecutor resulted in unfairness, which is a determination that can only be made at the conclusion of the trial. *Id.*

95. See *Waldron v. Tuttle*, 4 N.H. 149, 151 (1827) (noting private prosecutions often result from private quarrels). The Court observed that private prosecutions often arise from doubtful cases or an intent to harass an opponent. *Id.*

96. See *State v. Rollins*, 533 A.2d 331, 332 (N.H. 1987) (ruling private criminal complainants have no prosecutorial immunity).

97. See *id.* at 331 (citing authority of state attorney general to dismiss charges).

98. See *State by Tucker v. Gratta*, 133 A.2d 482, 482 (N.H. 1957) (vesting ultimate prosecutorial authority in government prosecutor).

99. *Id.* (allowing state attorney general to dismiss groundless charges).

100. Bessler, *supra* note 22, at 538-39 (outlining ethical concerns of private prosecutors); see also *People v. Van Sickle*, 192 N.E.2d 9, 11 (N.Y. 1963) (requiring private prosecutor to follow same rules as public law officer).

available in civil suits.¹⁰¹ The prospect of losing their professional license or paying monetary damages should deter attorneys from filing baseless claims merely to harass an opponent.¹⁰² As a result, attorneys would only file privately initiated criminal complaints for legitimate and factually supported charges.¹⁰³

C. Concern for Victim's Rights

Criminal defendants are not the only interested parties in criminal proceedings, as the victims of crime also have a sincere interest in seeing justice carried out.¹⁰⁴ In the absence of private prosecution, crime victims are left with little or no recourse when government prosecutors decide not to pursue a criminal complaint.¹⁰⁵ In states without private prosecution, crime victims lack the ability to challenge a government decision against prosecution.¹⁰⁶ As a result, victims' rights organizations in many states have lobbied for legislation that would increase the role of the victim in the prosecution of offenders.¹⁰⁷ Corporate victims and insurance companies are lobbying most adamantly, but individual victims have also complained that the current prosecution process ignores their concerns.¹⁰⁸ While vengeance should not replace justice in the criminal prosecution process, the system should not allow crime victims to feel unnoticed or unimportant.¹⁰⁹

101. See FED. R. CIV. P. 11(c) (providing sanction procedure). A judge has the authority to impose any sanction that may be necessary to deter repetition of inappropriate conduct. *Id.* at 11(c)(2).

102. See *State v. Rollins*, 533 A.2d 331, 332 (N.H. 1987) (noting possibility of malicious prosecution action). The *Rollins* Court refused to grant a private prosecutor the absolute prosecutorial immunity enjoyed by the district attorney and ruled that a private prosecutor exposes himself to a tort action of malicious prosecution for filing a groundless complaint. *Id.* at 332-33.

103. *Rollins* at 331-32 (opining lack of immunity for private prosecutors acts as safeguard against malicious prosecution); Comment, *supra* note 1, at 230 (suggesting court discretion will prevent undesirable prosecutions). The author proposes that court approval of all private prosecutions will serve as a safeguard against unfounded and malicious actions. Comment, *supra* note 1, at 230-31.

104. Sidman, *supra* note 22 (providing arguments in favor of private prosecution). In Sidman's view, one of the strongest arguments in favor of private prosecutions is the opportunity given crime victims to seek justice in the event of prosecutorial inaction. *Id.* Sidman notes that private prosecutors also allow for the vindication of private grievances, and more importantly, they protect the rights of crime victims. *Id.*

105. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (affirming lack of recourse for prosecutorial inaction). The *Linda R.S.* Court held that unless a private citizen is either prosecuted or threatened with prosecution, the citizen lacks standing to contest the authority of the prosecuting attorney. *Id.*; Comment, *supra* note 1, at 228 (illustrating individual left with no recourse when prosecutor fails to act). The author notes that unless a crime victim is able to bring criminal charges through his own attorney, he is left with no alternative when a public prosecutor refuses to act. Comment, *supra* note 1, at 228.

106. *Supra* notes 104-05 and accompanying text (outlining limited rights of criminal victim in case of prosecutorial inaction).

107. Nichols, *supra* note 22, at 286-87 (advocating rights of crime victims). Nichols states that the general idea behind the victims' rights movement is that the criminal law can be "cold and impersonal," and can leave victims feeling like they are not an integral or necessary part of the process. *Id.* at 286.

108. See *id.* at 286-87 (tracing history of victims' rights movement).

109. Comment, *supra* note 1, at 228 (arguing need for crime victims to participate in prosecution). The

Private prosecutors enable crime victims to play a more active role in criminal prosecution and help minimize crime victims' discontent with the criminal justice system.¹¹⁰ States allow those victims an increased measure of certainty that suspects will be brought to justice by permitting crime victims to hire their own attorneys to prosecute offenders.¹¹¹ Crime victims have an integral role in the criminal justice system, and by denying them the opportunity to actively participate in the prosecution of offenders, their faith in the system diminishes.¹¹²

D. The New Hampshire System as a Model for Massachusetts

New Hampshire allows criminal prosecutions by private attorneys only when the penalty for the offense excludes jail time.¹¹³ This is a successful model because it allows private citizens to prosecute minor offenses that might not typically induce government action.¹¹⁴ The New Hampshire system allows the government to concentrate resources on the prosecution of serious offenses, and it gives private citizens comfort in knowing there is recourse in the event of prosecutorial inaction for minor offenses.¹¹⁵ As a result, private prosecutions in New Hampshire benefit both the prosecutors focusing on major offenses and citizens concerned with punishing those who commit minor offenses against them.¹¹⁶

In Massachusetts, the prohibition of private prosecutors puts crime victims at the mercy of the government's decision to prosecute or not.¹¹⁷ If

author notes that although courts are generally reluctant to allow personal grievances to enter the court system, "release of private vengeance through the criminal law is a historic policy which retains some validity today." *Id.*

110. See Nichols, *supra* note 22, at 286 (suggesting victims' rights groups looking for more involvement in prosecutions); Comment, *supra* note 1, at 230 (proposing citizens welcome availability of private prosecutors). The author concludes that American and English citizens have demonstrated that they are willing to take action to combat prosecutorial misconduct through a system of private prosecution. Comment, *supra* note 1, at 230.

111. Comment, *supra* note 1, at 229 (viewing private prosecutors as benefit to crime victims). The author concludes that private prosecution will give victims an incentive to challenge the conduct or inaction of the government prosecutor. *Id.*

112. See Comment, *supra* note 1, at 209-10 (arguing prosecutorial inaction creates deficiency in criminal law); see also Cardenas, *supra* note 3, at 384 (noting crime victims' contempt for justice system). Cardenas notes that the majority of crime victims do not believe they have been treated fairly or justly by the criminal justice system. Cardenas, *supra* note 3, at 384.

113. State v. Martineau, 808 A.2d 51, 54 (N.H. 2003) (concluding private prosecutions prohibited for offenses involving imprisonment).

114. See *supra* note 9 and accompanying text (highlighting private prosecutor involvement in prosecution of minor offenses).

115. Cardenas, *supra* note 3, at 383 (justifying private prosecution on public policy grounds). Cardenas specifically notes that private prosecutions can be beneficial in complicated cases where the prosecutor needs assistance. *Id.*

116. Cardenas, *supra* note 3, at 383 (noting benefits of private prosecution). Cardenas states that private prosecutors are beneficial both to the public prosecuting authority and the victims of crime and their families. *Id.*

117. See Cardenas, *supra* note 3 at 389-90 (tracing neglect of crime victims in American criminal justice

Massachusetts were to adopt a limited system of private prosecution like that in New Hampshire, some of these crime victims would have another alternative.¹¹⁸ A system of limited prosecution would benefit Massachusetts crime victims because they could pursue punishment of perpetrators in the event of prosecutorial inaction.¹¹⁹ The New Hampshire system proves that limited private prosecution works effectively and benefits crime victims, and a similar system in Massachusetts would arguably have the same results.¹²⁰

IV. CONCLUSION

The American criminal justice system is fundamentally flawed because private citizens are at the mercy of the government prosecutor. The government prosecutor is unable to effectively prosecute every possible criminal complaint within his or her jurisdiction. As a result, private citizens are frequently the victims of crimes that simply will not be prosecuted. Private prosecutors can solve this problem without violating criminal defendants' constitutional rights.

The New Hampshire system of allowing private prosecution for misdemeanor criminal offenses affords New Hampshire victims an active role in pursuing justice. Massachusetts should adopt the New Hampshire system and provide its citizens the same comfort. Allowing private prosecutions in Massachusetts would forewarn potential criminals that all offenses are punishable, regardless of how minor they may seem in comparison to other crimes. The inherent punishability of all offenses could deter criminal action and reduce crime in the Commonwealth. Similarly, victims of misdemeanor crimes in Massachusetts would have access to recourse that guarantees the punishment of offenders.

Private criminal prosecutions are beneficial for Massachusetts, and other states, because they will lessen the burden on state prosecutors. Private prosecutions will also allow private citizens to participate more actively in the prosecution of minor offenses. For these reasons, as well as those mentioned previously, Massachusetts would benefit from a system of private prosecution.

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system).

118. See *Vena*, *supra* note 4, at 14 (illustrating benefits of private prosecution).

119. Comment, *supra* note 1, at 209-10 (examining flaw in legal justice system created by prosecutorial discretion).

120. See *State v. Martineau*, 808 A.2d 51, 52-53 (N.H. 2002) (allowing limited private prosecution in New Hampshire courts). The *Martineau* Court traced the history of private prosecution in New Hampshire and noted it has been a successful system since its inception. *Id.*