

Actualizing Justice: Private Prosecution Regimes for Modern Social Movements

CAROLINE L. FERGUSON*

The modern state enjoys a near monopoly over the prosecutorial system. Public officials, including local district attorneys, state attorneys general, and career prosecutors, enjoy enormous discretionary powers to decide who to charge, to determine what charges to bring, to make particular bail recommendations, to set the terms of plea bargains, and more. Rather than examining the broad discretion of the public prosecutor, this Note instead examines lesser-known private prosecution systems, where individuals, groups, and corporations bring criminal accusations.

This Note surveys the practice of private prosecution outside the United States. It then turns to look within the United States at the differing legal regimes that regulate private prosecution in the various jurisdictions that permit the practice. Ultimately, this Note asks what role private prosecution may have within modern social movements.

* Farnsworth Note Competition Winner, 2023. A.B. 2017, Harvard College. J.D./Ph.D. Candidate in Political Science, The University of Chicago. The author would like to thank Annette Nazareth and Professor Tom Ginsburg in particular for their thoughtful advice and insight. The author would also like to thank the editors and staff of the *Columbia Journal of Law and Social Problems* for their hard work and helpful feedback.

CONTENTS

INTRODUCTION	559
I. THE HISTORY OF PROSECUTION	562
II. THE PRACTICE OF PRIVATE PROSECUTION	564
A. International	564
1. <i>Common Law Countries</i>	565
2. <i>Civil Law Countries</i>	574
3. <i>Analysis of International Private Prosecution</i>	577
B. U.S. States	578
1. <i>The Modern U.S. Legal System from a Comparative Perspective</i>	578
2. <i>The United States and Private Prosecution</i>	580
III. THE ROLE FOR PRIVATE PROSECUTION WITHIN SOCIAL MOVEMENTS: #METOO AND THE BLACK LIVES MATTER MOVEMENT	589
A. Arguments in Favor of Private Prosecution	591
1. <i>Private Prosecution as a Tool for Justice for the Killing of Tamir Rice</i>	592
2. <i>Private Prosecution as a Tool for Justice for Madison Smith</i>	593
B. Arguments Against More Private Involvement in Prosecution	594
1. <i>The Cost Prohibitive Nature of Litigation</i>	594
2. <i>Malicious Private Prosecution</i>	596
3. <i>Private Prosecution Against Marginalized Communities</i>	597
4. <i>An Already Litigious and Punitive Country</i>	598
C. Benefits of the Practice through a Theoretical Lens	599
1. <i>A Liberal Race and Feminist Defense</i>	600
2. <i>Critical Legal Studies</i>	602
CONCLUSION	603

“This historical right [of private prosecution] which goes back to the earliest days of our legal system . . . remains a valuable constitutional safeguard against inertia or partiality on the part of authority.”

—Lord Wilberforce¹

INTRODUCTION

In the summer of 2020, tens of millions of Americans took to the streets to protest the excessive use of force by police officers against Black Americans.² These protests began in Minneapolis, Minnesota, the day after the killing of George Floyd.³ Derek Chauvin, the officer who knelt on Floyd’s neck for nine minutes, despite Floyd’s repeated pleas that he could not breathe, was put on trial on March 8, 2021.⁴ Ultimately, a jury convicted Chauvin of second-degree murder, third-degree murder, and second-degree manslaughter. The judge sentenced Chauvin to twenty-two years and sixth months in prison.⁵

Despite Chauvin’s conviction and lengthy prison sentence, which were widely viewed as positive steps toward justice,⁶ other violent police acts have not been prosecuted and, for the victims, justice has not been served. For example, Chauvin was also involved in the shooting of an Ojibwe man in 2006. At the time, local prosecutors did not bring charges.⁷ Additionally, U.S.

1. *Gouriet v. Union of Post Office Workers* [1978] AC 435 (HL) (appeal taken from Eng.).

2. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/U2R6-TSFN>].

3. *Id.*

4. *Id.*

5. See *State v. Chauvin*, No. 27-CR-20-12646, 2021 WL 2621001, at *1 (Minn. Dist. Ct. June 25, 2021); see also Ray Sanchez & Eric Levenson, *Derek Chauvin Sentenced to 22.5 Years in Death of George Floyd*, CNN (June 25, 2021), <https://www.cnn.com/2021/06/25/us/derek-chauvin-sentencing-george-floyd/index.html> [<https://perma.cc/A3Z4-R6UB>].

6. See *Derek Chauvin Guilty of George Floyd’s Murder: Live Updates*, NBC NEWS (Apr. 20, 2021), <https://www.nbcnews.com/news/us-news/live-blog/derek-chauvin-trial-verdict-n1264670> [<https://perma.cc/GX88-AXHR>]; see also Emma Bowman, *Minneapolis Reacts to Chauvin Sentence with Fury and Hope*, NPR (June 25, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1010384150/minneapolis-reacts-to-chauvin-sentence-with-fury-and-hope> [<https://perma.cc/25UL-V3HE>]; TaRhonda Thomas, *Local Residents, Activists React to Derek Chauvin Sentencing*, ABC NEWS (Jun. 25, 2021), <https://6abc.com/derek-chauvin-sentencing-former-minneapolis-officer-george-floyd-black-lives-matter/10831804/> [<https://perma.cc/6XSX-ZZDQ>].

7. See Priscilla Wolf, *Minneapolis Police Officer Charged in Death of George Floyd Was Involved in Shooting of Ojibwe Man in 2006*, APTN NEWS (May 29, 2020),

Senator Amy Klobuchar came under scrutiny for her record as the Minneapolis District Attorney when she refused to prosecute officers for the killing of Christopher Burns, an unarmed Black man who died at the hands of a Minneapolis police officer.⁸ Burns' death occurred just a few miles from where Derek Chauvin held George Floyd in a chokehold nearly twenty years later.⁹ And, in August 2020, Los Angeles District Attorney George Gascón opted against prosecuting two L.A. County sheriff's deputies who shot and killed 29-year-old Dijon Kizzee, a Black man who was riding his bicycle in Westmont, California.¹⁰

Today, within the United States and in most other national legal systems, publicly-funded prosecutors enjoy a near monopoly on decisions about whether, how, and whom to prosecute—a phenomenon known widely as “prosecutorial discretion.” Much of the narrative around the U.S. criminal justice system details its endemic excesses: over-policing,¹¹ over-prosecution,¹² over-criminalization,¹³ and over-incarceration.¹⁴ Such excesses abound

<https://www.aptnnews.ca/national-news/minneapolis-police-officer-charged-in-death-of-george-floyd-was-involved-in-shooting-of-ojibwe-man-in-2006/> [https://perma.cc/PAD7-7VG3].

8. See Elise Viebeck & Michelle Ye Hee Lee, *As a Prosecutor in Heavily White Minnesota, Amy Klobuchar Declined to Go After Police Involved in Fatal Encounters with Black Men*, WASH. POST (Mar. 21, 2019), https://www.washingtonpost.com/politics/amy-klobuchar-was-a-tough-on-crime-prosecutor-will-a-diverse-democratic-base-accept-her-record/2019/03/21/739e6984-4057-11e9-9361-301ffb5bd5e6_story.html [https://perma.cc/D7ET-MQYK].

9. See Janell Ross, *It's 'Nightmare Being Replayed' as Cop Faces Trial in George Floyd's Death*, TIME (Mar. 18, 2021), <https://time.com/5947706/derek-chauvin-trial-police/> [https://perma.cc/VJV8-35KE].

10. See James Queally & Alene Tchekmedyan, *L.A. County Deputies Who Shot and Killed Dijon Kizzee Will Not Be Charged*, L.A. TIMES (Nov. 15, 2022), <https://www.latimes.com/california/story/2022-11-15/los-angeles-d-a-will-not-charge-deputies-who-shot-and-killed> [https://perma.cc/2RJW-778W].

11. See Rod K. Brunson, *Protests Focus on Over-Policing. But Under-Policing Is Also Deadly*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940_story.html [https://perma.cc/N53M-ZVRE].

12. See John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html> [https://perma.cc/33J7-X2EY] (“My research has shown that the primary source of prison growth in the 1990s and 2000s has been prosecutors’ filing of felony charges against more and more arrestees, many of whom in the past would have faced misdemeanor charges or no charges at all. Ensuring that prosecutors’ opponents are able to do their jobs competently would dampen prosecutorial aggressiveness.”).

13. Christian E. Weller et al., *America's Broken Criminal Legal System Contributes to Wealth Inequality*, CTR. FOR AM. PROGRESS (Dec. 13, 2022), <https://www.americanprogress.org/article/americas-broken-criminal-legal-system-contributes-to-wealth-inequality/> [https://perma.cc/X6AF-B962].

14. *Id.*

when it comes to certain crimes and demographics, namely minority and indigent defendants.¹⁵ But, “activists . . . have also expressed concerns about equity and under-enforcement that are often lost in overly simplistic media coverage.”¹⁶ These advocates point to regular, bitter complaints from victims and their families that local prosecutors have either refused to prosecute crimes,¹⁷ or in deciding to prosecute, have sought overly lenient charges.¹⁸ Scholars and activists have explained the persistence of this apparent contradiction through a Critical Legal Studies lens¹⁹:

The very few white defendants represented by my [public defender] office sometimes appeared to receive preferential treatment from prosecutors. Although I saw no evidence of intentional discrimination based on race or class, the considerations of class- and race-neutral factors in the prosecutorial process often produced disparate results along class and race lines.²⁰

15. See Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<https://perma.cc/T8PH-K863>].

16. Corey Reyburn Yung, *Private Prosecution of Rape*, 13 CALIF. L. REV. ONLINE 86, 86–87 (2022) (internal citation omitted).

17. See Williams, *supra* note 15; Gwen Aviles, *Missouri Prosecutor Declines to Charge White Man Who Fatally Shot His Black Neighbor*, YAHOO! NEWS (Jan. 13, 2022), <https://news.yahoo.com/missouri-prosecutor-declines-charge-white-215558334.html> [<https://perma.cc/MHJ5-PJY4>].

18. Victims still express great dissatisfaction with the adversarial process, indicating that the process often feels like an extension of the crime. See, e.g., Judith Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571 (2005).

19. “Critical legal studies,” in essence, refers to the legal theory that the law is necessarily intertwined with social issues; in particular, the law has inherent social biases that reflect the biases of society at large. FRANCIS J. MOOTZ III, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY 182 (2006).

20. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007). This Note makes no claim about intentional discrimination on the part of prosecutors in choosing what crimes to prosecute and what charges to bring. The author is well-aware that conversations around prosecutorial discretion, police misconduct, and the social movements to which this Note refers in Part IV are quite political in nature. This Note avoids entering a political debate; instead, it explores the possibility of utilizing existing systems to create a more responsive criminal justice system. Those on both the political left and right may find issue with private prosecution, albeit for different reasons. This Note will discuss some of the criticisms of pursuing a system of private prosecution in its final Section, Part IV.

This Note examines the role of private prosecution²¹ as a remedy to the particular problems caused by broad prosecutorial discretion, such as underenforcement primarily in instances involving defendants in positions of power.²² It first employs a comparative lens to explore how jurisdictions outside of the United States have used private prosecution as a check on power. The Note then turns to state laws, which permit private prosecution to varying degrees within the United States. Finally, this Note examines recent social movements in the United States to ultimately propose how these movements can strategically use private prosecution to aid their efforts to achieve social change.²³

I. THE HISTORY OF PROSECUTION

Prosecution has historically been a private matter between the aggrieved party and the accused. Courts in ancient Athens adjudicated two types of disputes: private (or *dikai*) and public (or *graphai*).²⁴ In these ancient courts, there were no prosecutors, no professional lawyers, and no crime-investigating police. Rather, in private, criminal disputes, only individuals with personal interests in the case, such as victims or their family, could bring a complaint

21. The author hesitates to define “private prosecution” here, given, as will be clear in future sections, *see infra* Part III, private prosecution takes on many forms throughout the world and within the United States. Generally, “private prosecution” refers to a practice in which private individuals or groups (not the government), brings charges against an alleged, criminal perpetrator.

22. *See* W. Randolph Teslik, *Prosecutorial Discretion: The Decision to Charge*, NAT’L INST. L. ENFT CRIM. JUST. (Oct. 1975); *see also* Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002) (considering community prosecution programs); Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of “Ethical Rules” Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 753–79 (1996); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–41, 765–73 (2001).

23. Calls for private prosecution are not entirely new. In 2020, for example, former Assistant U.S. Attorney Bennett Capers argued for a radically different criminal justice system that heavily relies on private prosecution as one option in a “range of options” for victims. *See* Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020). In contrast, this Note argues that private prosecution already exists as an option in many states and, as such, could be a supplemental tool for social justice movements and individuals who all-too-often find themselves ignored by public prosecutors. Moreover, this Note surveys existing state and international laws in order to highlight the ways in which private prosecution is already a feature of our global, criminal justice system and to point out certain trends in existing private prosecution practices.

24. Kelly Lambert, *Law and Courts in Ancient Athens: A Brief Overview*, KOSMOS SOCIETY (Sept. 20, 2018), <https://kosmosociety.chs.harvard.edu/law-and-courts-in-ancient-athens-a-brief-overview/> [https://perma.cc/852P-9H5N].

to the courts.²⁵ In contrast, public cases, which were considered to be of interest to the general public, could be brought by *any* citizen—though, of course, “citizen” in Ancient Greece was defined quite narrowly.²⁶ As in Athens, ancient Rome did not employ state prosecutors.²⁷ But unlike their Athenian counterparts, Roman crimes were prosecuted by individuals with sufficient legal training.²⁸ To avoid frivolous prosecutions, Roman law developed the doctrine of *lex remmia de columnia*, or the “law of calumny,” which enabled juries to find criminal accusers guilty of wrongful or malicious prosecutions.²⁹

Today, nearly all prosecutions are brought by governments through public prosecutors. In Europe’s civil law system, most nations shifted to public prosecution around the thirteenth century.³⁰ Although the British initially maintained crime as a private affair at common law, England slowly adopted a means of public prosecution with the establishment of the London Metropolitan Police in 1829. Initially, the police were responsible for both investigating crimes and bringing charges.³¹ Even then, however, “the police officer [who instituted a prosecution] was acting not by the virtue of his office but as a private citizen interested in the maintenance of law and order.”³² In another development toward public prosecutions, the English government established the Director of Public Prosecutions in 1879. At that time, however, the Director prosecuted less than ten percent of indicted offenses.³³ Finally, in 1985, the U.K. Parliament created

25. Even homicide cases were brought as *dikai*. *Id.*

26. *Id.*; *Democracy (Ancient Greece)*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/democracy-ancient-greece/> [<https://perma.cc/S6W7-FY2V>] (The Athenian definition of “citizens” was also different from that for modern-day citizens: only free men were considered citizens in Athens. Women, children, and slaves were not considered citizens and therefore could not vote.).

27. See generally H. Galsterer, *The Augustan Empire, 43 BC–AD 69*, in 10 THE CAMBRIDGE ANCIENT HISTORY 397, 402–69 (Alan K. Bowman et al. eds., 2d ed. 1996).

28. *Id.*

29. GEORGE MOUSOURAKIS, THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW 317 (2003); MARY BEARD ET AL., RELIGIONS OF ROME, 1 A HISTORY 238 (1998).

30. Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT’L CRIM. JUST. REV. 190, 196 (2008) (internal citation omitted).

31. *Id.* at 195–96 (“Every police prosecution was a private prosecution. When instituting a prosecution, the police officer was acting not by virtue of his office but as a private citizen interested in the maintenance of law and order.” (internal citations omitted)).

32. *Id.*

33. *Id.* at 195 (“The director, appointed by the home secretary and working under the superintendence of the attorney general, was given the authority to prosecute serious indictable offenses.” (internal citation omitted)).

the Crown Prosecution Services, which was hailed as a modernization of British criminal justice.³⁴

II. THE PRACTICE OF PRIVATE PROSECUTION

While many countries, such as England, have transformed their criminal judicial systems from largely private matters to almost entirely public, several other countries and jurisdictions have continued to maintain some form of private prosecution. In these jurisdictions, private citizens or organizations may initiate criminal proceedings rather than requiring such proceedings be brought by a public prosecutor who represents the state.

This Part will discuss specific attributes of private prosecution systems³⁵—both in and outside the United States. Then, it will discuss select, high-profile private prosecution cases in countries outside the United States. This Part will synthesize these cases in order to identify general themes within the private prosecution practice to better understand when such systems are used and how governments consider the practice as a supplement to state-backed prosecutions. Ultimately, international comparators demonstrate the power of private prosecution as a particularly effective tool in two types of criminal cases: (1) when the victim is a member of a historically underrepresented group with little political influence, and (2) when the accused is a political leader in a nation plagued by government corruption. This conclusion will be particularly salient in later sections that focus on the potential for the practice as an instrument for modern-day social movements.³⁶

A. INTERNATIONAL

Unlike the United States, many nations have robust private prosecution cultures in which victims may initiate their own criminal proceedings. This section divides the discussion of international private prosecution practices into nations with

34. JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY (1995); Francis Bennion, *The New Prosecution Arrangements: The Crown Prosecution Service*, 1986 CRIM. L. REV. 3, 3–15.

35. For reasons of brevity and access to information, this Note does not mention every nation that allows private prosecutions.

36. See *infra* Part IV.

common law systems and those with civil law systems.³⁷ In common law systems, cases are decided using past legal precedents or judicial rulings. Under civil law, judges look only to statutes and ordinances and not past precedent.³⁸ This distinction is, however, less relevant in criminal cases because criminal statutes have become the norm in common law traditions since the nineteenth century. Nevertheless, emphasizing the divide in this context highlights that under either system, a right to private prosecution can exist.

1. *Common Law Countries*

About one-third of the world's population lives in common law or mixed-legal jurisdictions, in which the law combines both the civil and common law traditions.³⁹ Most common law jurisdictions were previously British colonies.⁴⁰ Even within common law countries, however, most criminal laws are codified in statutes—statutes that, in many cases, were derived from pre-existing common law rules.⁴¹

a. *Australia*

In Australia, private prosecutions can be initiated by natural persons and by corporations.⁴² Most often, private prosecutions occur when the police⁴³ choose not to prosecute an alleged offender

37. Ernest Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516, 516 (1920) (“In the common-law countries, attempts at codification have not been absent; and with regard to some branches, like criminal law, pleading and practice, and commercial paper, statutes amounting to partial codes are now in effect almost everywhere.”).

38. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA*, 112–33 (3d ed. 2007).

39. *Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems*, JURIGLOBE (July 22, 2016), <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php> [<https://perma.cc/6QB2-N8L4>].

40. Bruncken, *supra* note 37, at 516; Daniel M. Kerlan et al., *Legal Origin or Colonial History*, 3 J. LEGAL ANALYSIS, 380, 381 (2011).

41. Bruncken, *supra* note 37, at 518.

42. Fernanda Dahlstrom, *Private Prosecutions (Qld)*, GOTOCOURT (Nov. 20, 2022) <https://www.gotocourt.com.au/criminal-law/ql/private-prosecutions> [<https://perma.cc/W49G-JJE5>].

43. Chris Corns, *Police Summary Prosecutions in Australia and New Zealand: Some Comparisons*, 19 U. TAS. L. REV. 280, 291 (2000) (noting that “[i]n Western Australia the DPP [Director of Public Prosecutions] has no statutory authority to conduct summary prosecutions, which, accordingly, must be conducted by the police. In all other jurisdictions, the police can request the DPP to conduct a summary prosecution where, for example, the

after they receive a criminal complaint.⁴⁴ A private prosecution can occur in relation to any criminal offense. Such criminal offenses include summary offenses, which are offenses heard in the Magistrates Court,⁴⁵ and indictable offenses, which are offenses heard in the higher courts.⁴⁶ As demonstrated through the cases below, victims in Australia may opt to pursue private prosecution when police and public prosecutors have elected not to act in relation to a criminal complaint.

Although private prosecutions in Australia are rare, there are numerous examples in which victims bring complaints after the Australian authorities refuse to press charges. Most recently, members of Australia's New Liberals Party launched a private prosecution in February 2021 against former Federal Attorney-General Christian Porter for the alleged sexual assault of a woman who died by suicide in 2020.⁴⁷ In another case filed in 2017, a woman successfully brought a criminal claim against a former partner for domestic violence.⁴⁸ The victim took steps to prosecute the case herself after police told her that there was "a low level of public interest" in her claims of violence.⁴⁹ The private prosecution concluded in February 2020 with the judge sentencing the victim's ex-boyfriend to 130 hours of community service.⁵⁰ In another case

matter is complex or the defendant is a police officer. Private prosecutions in Australia are rare and, in relation to indictable cases, the DPP has the power to take over the private prosecution following committal").

44. *Id.*

45. John Bui, *Summary Offences: What Are They?*, MONDAQ (Feb. 20, 2023), <https://www.mondaq.com/australia/crime/1287174/summary-offences-what-are-they> [<https://perma.cc/V9YT-77YM>].

46. Michelle Makela, *Indictable Offences in Australia*, GOTOCOURT (Oct. 24, 2022), <https://www.gotocourt.com.au/criminal-law/indictable-offences/> [<https://perma.cc/RN9Q-VHHS>].

47. Sonia Hickey & Ugur Nedim, *Private Criminal Prosecution to be Launched Against Christian Porter*, SYDNEY CRIM. LAWS. (Feb. 7, 2021), <https://www.sydneycrimallawyers.com.au/blog/private-criminal-prosecution-to-be-launched-against-christian-porter/> [<https://perma.cc/45MJ-6ZQN>].

48. The details of the violence are quite graphic. Her partner admitted to "splashing petrol on his former partner and threatening to burn their house down." Ben Smee, *Woman Prosecutes Former Partner Who Doused her with Petrol in Case Queensland Police Refused*, GUARDIAN (Feb. 23, 2020), <https://www.theguardian.com/australia-news/2020/feb/24/man-pleads-guilty-to-petrol-splashing-despite-queensland-police-refusal-to-lay-charges> [<https://perma.cc/9U27-J4Q7>]. *Id.*

49. Smee, *supra* note 48.

50. Maya Oppenheim, *Woman Prosecutes Ex-Boyfriend Who Doused Her With Petrol After Police in Australia Refused*, INDEPENDENT (Feb. 25, 2020), <https://www.independent.co.uk/news/world/australasia/woman-prosecute-ex-partner-australia-petrol-domestic-abuse-police-queensland-a9355876.html> [<https://perma.cc/5TXC-DV5U>].

years earlier, a homeless man, Bruce James Rowe, brought a criminal case against the police through the use of private prosecution.⁵¹ In 2006, a police officer, Benjamin Arndt, had assaulted Rowe in the process of arresting him near a public toilet in Brisbane.⁵² Rowe appealed his conviction to the Supreme Court and his convictions were overturned.⁵³ Shortly after, he brought a criminal prosecution in the Magistrates Court charging Arndt with assault. Arndt was found guilty and fined \$1,000.⁵⁴

b. *Canada*

Canada, much like the United States, operates under a system of federalism in which a federal government imposes federal laws and provinces have their own unique provincial laws.⁵⁵ As such, the law for private prosecutions differs between the federal law and provincial law and among the provinces. All criminal law in Canada is under the exclusive jurisdiction of the federal government;⁵⁶ however, provinces and municipalities have jurisdiction over non-criminal offenses. While the federal law is the only law that deals with criminal charges, each province is responsible for its own law enforcement, including maintaining municipal police forces and criminal courts.⁵⁷

Private individuals can also prepare what is called an “information,” or a formal criminal charge which begins a criminal proceeding in court.⁵⁸ Private prosecutions in Canada, however, are quite rare. The attorney general of the province in which the proceedings are taking place may intervene and take over the case, or issue a stay of proceedings.⁵⁹ Private prosecutions in Canada

51. Arndt v. Rowe [2011] QDC 313 (Austl.).

52. *Id.*

53. *The Power in Understanding Your Rights*, AUSTL. NAT'L REV. (Dec. 14, 2021), <https://www.australiannationalreview.com/state-of-affairs/the-power-in-understanding-your-rights/> [<https://perma.cc/5MYM-QMVT>].

54. *Id.*

55. John D. Richard, *Federalism in Canada*, 44 DUQUESNE L. REV. 5, 6 (2005).

56. Constitution Act, 1867, 30 & 31 Vict., c 91(27) (Can.).

57. *The Judicial Structure*, GOV'T OF CAN., <https://www.justice.gc.ca/eng/csj-sjc/just/07.html> [<https://perma.cc/U7YT-J6CG>].

58. See 5.9 *Private Prosecutions*, *Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act*, PUB. PROSECUTION SERV. OF CAN. (Mar. 1, 2014), <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/tpd/p5/ch09.html> [<https://perma.cc/3FG3-TH9N>].

59. *Id.*

are usually restricted to certain summary conviction offenses.⁶⁰ If a state official chooses not to intervene, however, “such a private person can personally prosecute the case summarily or through counsel or an agent.”⁶¹

Recently, private actors have employed Canada’s system to prosecute cases involving animal cruelty and environmental violations.⁶² Regulations including the Health of Animals Act⁶³ and the Meat Inspection Act⁶⁴ govern physical conditions in the transportation of animals and the ways that animals are handled before and during the process of slaughter for human consumption.⁶⁵ Rather than attempting to reform the system, many advocates have instead turned to private prosecution.⁶⁶ Animal rights advocates have done so in light of the resistance they face from regulatory agencies, which lack the resources and motivation to enforce Canada’s animal cruelty statutes.⁶⁷

c. Ireland

The 2013 case *Kelly & Anor v. District Judge Ann Ryan* confirmed the continued existence of the right to private prosecution in Ireland.⁶⁸ The claimant, Patrick Halpin, summoned two bank employees, Mary Kelly and Declan Buckley, and accused them of dishonesty under Ireland’s Section 6 of the Criminal

60. See Sophie Gaillard & Peter Sankoff, *Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation*, in CANADIAN PERSPECTIVE ON ANIMALS AND THE LAW (Vaughan Black et al. eds., 2015); see also ELIZABETH SWANSON & ELAINE HUGHES, THE PRICE OF POLLUTION: ENVIRONMENTAL LITIGATION IN CANADA 178 (1990); John Swaigen et al., *Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment*, 26 J. ENV’T L. & PRAC. (2013). “Summary conviction” offenses are petty crimes in that they carry a maximum punishment of six months in jail or a \$5,000 fine. Various cases have been brought under these topics. See, e.g., *R. v. Syncrude Canada Ltd.*, 2010 ABPC 229 (Can. Alta.) (prosecuting Syncrude for killing more than 1,600 ducks that landed on the company’s tar sands tailings pond); *Lukasik v. City of Hamilton* (1999) (Can. Ont. Supp. Ct. J.) (initiating a private prosecution against the City of Hamilton, Ontario, for violating the fisheries Act by discharging toxic leachate into a local creek).

61. Peter Burns, *Private Prosecutions in Canada: The Law and a Proposal for Change*, 21 MCGILL L.J. 269, 277 (1975).

62. *Id.*

63. Health of Animals Act, S.C. 1990, ch. 21, art. 68(1).

64. Meat Inspection Act, R.S.C. 1985, ch. 25, art. 21(5).

65. See Gaillard & Sankoff, *supra* note 60, at 311–13.

66. *Id.* at 315–320.

67. *Id.* at 308.

68. *Kelly & Anor v. District Judge Ann Ryan* [2013] IEHC 321 (H. Ct.) (Ir.).

Justice (Theft and Fraud Offences) Act of 2001.⁶⁹ Although the courts eventually dismissed Halpin's prosecution, District Judge Ann Ryan held that the right to private prosecution still exists under Irish law.⁷⁰ Of course, as in most states in which private prosecution is permitted, the government maintains the right to disallow the continuation of a private prosecution.⁷¹

Private prosecution returned to the national spotlight during the peak of the COVID-19 pandemic when two residents of a university town brought a private prosecution against their landlord⁷² under Section 108 of the Environment Agency Protection Act (EAPA).⁷³ Although the EAPA was written "to establish an Environmental Protection Agency" and outline the "offence[s] under th[e] Act [that] may be prosecuted summarily by the Agency,"⁷⁴ Sadie O'Mahony and Mairead O'Callaghan filed private criminal complaints in response to "excessive noise" from COVID-19 parties.⁷⁵ A district court judge in Cork sentenced the defendant to a €1,000 fine or twelve months in prison for the breach of the noise order.⁷⁶

69. *See id.*

70. *Id.*

71. *Id.* ("It is well established that this Court can quash a summons on vires grounds, such as where the statutory preconditions for the issuing of a valid summons are not met. This court also doubtless enjoys the power to quash a summons not simply on grounds of vires, but also because the exercise of judicial power permitting the issuing of summons was itself unreasonable.").

72. Olivia Kelleher, *Cork Landlord Given Court Order After Tenants Hold 'Covid House Parties,'* JOURNAL (July 17, 2020), <https://www.thejournal.ie/landlord-covid-house-parties-5153196-Jul2020/> [<https://perma.cc/UU56-M8LT>].

73. Environment Protection Agency Act 1992 (Act No. 7/1992) (Ir.), <https://www.irishstatutebook.ie/eli/1992/act/7/enacted/en/print>, [<https://perma.cc/33A8-4ZJL>].

74. *Id.*

75. Kelleher, *supra* note 72.

76. A high court eventually overturned the ruling against the landlord, stating that the lower court's decision had been "beyond his authority, irrational, and lacking in jurisdiction." *See* Barry Roche, *Landlord Welcomes High Court Quashing of Rulings Over Students' Covid House Parties*, IRISH TIMES (Apr. 14, 2021), <https://www.irishtimes.com/news/ireland/irish-news/landlord-welcomes-high-court-quashing-of-ruling-over-students-covid-house-parties-1.4538713> [<https://perma.cc/HWC8-FJAL>]; *see also* Liam Heylin & Cieran Brennan, *Residents Disappointed As High Court Quashes Noise Order On 'Party Central' Landlord*, IRISH EXAMINER (Apr. 9, 2021), <https://www.irishtimes.com/news/munster/arid-40261688.html> [<https://perma.cc/R35S-NC8J>].

d. *New Zealand*

Despite periodic calls for the abolition of a person's right to "lay an information"—or bring a formal criminal charge⁷⁷—private prosecutions remain a part of New Zealand's system of criminal justice. The right to private prosecution existed at common law in New Zealand. However, since 2008, the right to bring a private claim in criminal court has been codified in Section 6 of the Criminal Disclosure Act 2008,⁷⁸ and private prosecutions are bound by the Act's provisions.⁷⁹

The use of private prosecutions in New Zealand is well-documented. One of the most famous cases occurred in 2003 when Jim Wallace, the father⁸⁰ of police-shooting victim Steven Wallace, brought a case against the officer who shot his son.⁸¹ Constable Keith Abbott had gunned down Steven, a twenty-three-year-old Maori⁸² man, in the rural town of Waitara after Steven had smashed the windshield of a police car during a window-breaking spree.⁸³ Jim brought the case after an internal investigation carried out by the Police Complaints Authority initially found no wrongdoing on the part of Abbott. As a result, the solicitor general declined to prosecute the case against Abbott,⁸⁴ and Jim brought the case himself. Although a jury ultimately acquitted Abbott on

77. See *When the Man on the Street Is Out for Justice*, NEW ZEALAND HERALD (Dec. 6, 2002), <https://www.nzherald.co.nz/nz/when-the-man-on-the-street-is-out-for-justice/ZNJYDAB7OWV66HCQN42RKUENSQ> [<https://perma.cc/9BQN-PR9V>] (discussing the debate over private prosecution).

78. See Criminal Disclosure Act 2008, Section 6 (N.Z.) ("In the case of a private prosecution, the person who filed the charging document and any counsel representing that person . . .").

79. See Anna Louise Prestidge, *Private Prosecution in New Zealand—A Public Concern?*, 50 VICTORIA U. WELLINGTON L. REV. 107, 109 (2018) ("New Zealand adopted many of the key features of the British criminal justice system during the country's colonisation in the early 1840s.").

80. In order to raise funds for the prosecution, Jim Wallace and his family mortgaged their home and launched a public appeal for money. See John Braddock, *New Zealand Policeman Acquitted in Private Prosecution for Murder*, WORLD SOCIALIST WEB SITE (Jan. 28, 2003), <https://www.wsws.org/en/articles/2003/01/newz-j28.html> [<https://perma.cc/29P5-E5W3>].

81. *Id.*

82. The Maori people are the indigenous, Polynesian people of mainland New Zealand. Richard Walters et al., *Mass Migration and the Polynesian Settlement*, 30 J. WORLD PREHISTORY 351, 351 (Oct. 7, 2017).

83. Braddock, *supra* note 80.

84. See *id.*; see also Wellington Higher Courts Reporter, *Investigation of Steven Wallace's Shooting in Waitara Not 'Rights Compliant'*, STUFF (Aug. 2, 2021), <https://www.stuff.co.nz/national/crime/123990662/investigation-of-steven-wallaces-shooting-in-waitara-not-rights-compliant> [<https://perma.cc/HQ9U-QX7L>].

self-defense grounds,⁸⁵ the trial gained attention and spurred media conversation around police tactics and the government's decision not to prosecute.⁸⁶

Since the Wallace case, private individuals have initiated many more private prosecutions against government officials in New Zealand. In one such case, a court security officer was accused of assaulting a man who was seeking a restraining order against the ministry and police.⁸⁷ In another, a private citizen launched a prosecution of a cabinet minister, Trevor Mallard, for punching an opposition member of parliament.⁸⁸ In the latter case, although the party bringing the prosecution—Graham McCready—was neither a “witness [nor] an interested party,”⁸⁹ he believed “the country’s lawmakers should not be above the law.”⁹⁰ Since then, McCready has become known as a whistle-blower-type figure—a figure who uses the private prosecution power to champion the rule of law to hold political leaders and influential members of society to account.⁹¹

85. Tara Shaskey, *Wallace Family Continue to Fight for Steven’s Justice in Court Next Month*, STUFF (June 11, 2020), <https://www.stuff.co.nz/national/300031246/wallace-family-continue-their-fight-for-stevens-justice-in-court-next-month> [https://perma.cc/NG8F-FD9H].

86. See Wellington Higher Courts Reporter, *supra* note 84.

87. Jono Galuszka, *Private Prosecution Against Court Security Officer May Be Dropped*, STUFF (Dec. 8, 2020), <https://www.stuff.co.nz/national/crime/300178234/private-prosecution-against-court-security-officer-may-be-dropped> [https://perma.cc/JWK6-CY5B].

88. *NZ Punch-Up MP Faces Private Prosecution*, SYDNEY MORNING HERALD (Nov. 1, 2007), <https://www.smh.com.au/world/nz-punch-up-mp-faces-private-prosecution-20071101-gdrhlq.html> [https://perma.cc/FE8D-UR7W].

89. *Id.*

90. McCready has become a repeat player in the private prosecution realm. He similarly took a private prosecution against ACT Party MP John Banks over filing a false electoral return in the 2010 Auckland mayoral election. In that case, the New Zealand Police decided there wasn’t sufficient evidence to prosecute Banks. Due to public pressure, the Crown took over the case and Banks was found guilty. See Vince Siemer, *Flawed Hero Advances Rule of Law in New Zealand*, KIWIS FIRST (Nov. 7, 2013), <https://www.kiwisfirst.com/flawed-hero-advances-rule-of-law-in-new-zealand/> [https://perma.cc/WPC6-YS4U].

91. See Siemer, *supra* note 90.

e. *England*

Although it is uncommon in England today,⁹² private prosecution survives as a viable option for crime victims.⁹³ In a 2017 case, thought to be Britain's largest-ever private prosecution,⁹⁴ the Allseas Group (a major offshore contractor) brought criminal charges against alleged "conman" Paul Sultana after he defrauded Allseas by promising a high-rate of return on a very large investment.⁹⁵ Allseas only pursued the case after the Crown Prosecution Services (CPS) found that the "evidential test set out in the Code for Crown Prosecutors was not met."⁹⁶ In the private prosecution case, the jury convicted Sultana of conspiracy to commit fraud and a judge sentenced him to eight years in jail.⁹⁷

f. *South Africa*

While South Africa's legal system has both a mix of common law and civil law features,⁹⁸ it still technically allows the right to private prosecution,⁹⁹ though with limits. For example, two or more persons cannot prosecute the same charge unless they have both been injured by the same offense.¹⁰⁰ In addition, a person may only pursue a private prosecution if he can prove substantial interest in the matter—that is, a showing that he suffered a harm or was the victim's next of kin.¹⁰¹ As in some other countries, the

92. Anecdotal evidence suggests "that the number of private prosecutions is rising" in the United Kingdom. See Danny Shaw, *Private Prosecution Success Over Fraudster*, BBC NEWS (June 11, 2018), <https://www.bbc.com/news/uk-44447254> [<https://perma.cc/75SL-DHBU>].

93. *Id.* A private prosecutor must complete an official application, summons, or warrant form and send it to the court office. A judge, magistrate, or legal adviser then decides based on the submitted form whether a private prosecution can continue and in which court it should be brought. A hearing may commence if the defendant appears and pleads not guilty to the crime. *Private Prosecutions*, GOV.UK (Feb. 22, 2022), <https://www.gov.uk/government/publications/private-prosecutions/private-prosecutions> [<https://perma.cc/9KTX-9UJ4>].

94. Shaw, *supra* note 92.

95. Louanjli, R. V [2021] EWCA (Crim) (AC) 819 (Eng.).

96. Shaw, *supra* note 92.

97. *Id.*; Sam Chambers, *Conman Jailed for Defrauding Allseas*, SPLASH247 (June 13, 2018), https://splash247.com/conman-jailed-defrauding-allseas/?utm_source=dldr&utm_medium=twitter [<https://perma.cc/E8MU-67BY>].

98. *Alphabetical Index*, *supra* note 39.

99. South African Criminal Procedure Act 51 of 1977, §§ 7,8 (1977).

100. *Id.*

101. In one famous case, a family secured the maximum sentence (15 years' imprisonment) under a private prosecution for the murder of their daughter by her

National Prosecuting Authority (NPA) in South Africa can stop a private prosecution if it wants to prosecute the matter itself.¹⁰² Historically, the courts did not allow cases to be brought by companies and associations; rather, such cases could only be brought by individuals.¹⁰³ In 2016, however, the South African Constitutional Court declared that the National Society for the Prevention of Cruelty to Animals has the statutory power to institute private prosecutions.¹⁰⁴

In 2006, the South African rights group, AfriForum,¹⁰⁵ launched the nation's first dedicated private prosecution unit, headed by Gerrie Nel, a former state prosecutor. Nel described his new role as ensuring that "everyone should be equal before the law," amidst what the media described as "accusations that the country's [NPA] is politically biased and highly selective about the prosecutions it pursues."¹⁰⁶ Since its inception, AfriForum's Private Prosecution Unit has represented victims in cases alleging sexual assault

boyfriend. See Fatima Schroeder, *Family Wins Long Fight for Justice*, INDEP. ONLINE (May 22, 2016), <https://www.iol.co.za/news/family-wins-long-fight-for-justice-2024665> [<https://perma.cc/W9SE-2TQR>].

102. See Chantelle Feldhaus & René Koraan, *Explainer: How South Africa's First Private Prosecutions Unit Will Work*, CONVERSATION (Feb. 3, 2017), <https://theconversation.com/explainer-how-south-africas-first-private-prosecutions-unit-will-work-72389> [<https://perma.cc/3FYE-LBN7>].

103. Jamil Ddamurlira Mujuzi, *The History and Nature of the Right to Institute a Private Prosecution in South Africa*, 25 FUNDIMINA (PRETORIA) 131, 154 (2019).

104. National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development and Another 2017 (1) SACR 284 (CC) at para. 65 (S. Afr.) ("It is declared that the National Society for the Prevention of Cruelty to Animals has the statutory power of private prosecution conferred upon it by section 6(2)C of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read with section 8 of the Criminal Procedure Act 51 of 1977.")

105. AfriForum has faced much criticism, including allegations that it is a "white-supremacist group." See David Nakamura, *Critics Blast Trump for Endorsing White Nationalist Conspiracy Theory on South Africa*, WASH. POST (Aug. 23, 2018), https://www.washingtonpost.com/politics/dangerous-and-poisoned-critics-blast-trump-for-endorsing-white-nationalist-conspiracy-theory-on-south-africa/2018/08/23/6c3b160e-a6df-11e8-a656-943eefab5daf_story.html [<https://perma.cc/4UHR-H746>]. AfriForum was founded to re-engage Afrikaners in the public sphere. The history of Afrikaners political participation is fraught with racial tension, as Afrikaners are members of a subgroup of the country's minority white population. Afrikaners took control of South African politics through the National Party in 1948 and enacted the apartheid regime and led under that regime until May 9, 1994. Though the highlighted AfriForum private prosecution cases are not necessarily an abuse of the private prosecution system, the author is acutely aware of the possibility of abuse.

106. See Feldhaus & Koraan, *supra* note 102.

against high-ranking officials in the government,¹⁰⁷ medical negligence suits,¹⁰⁸ and murder.¹⁰⁹

2. *Civil Law Countries*

The civil law tradition prevails in most of continental Europe and its former colonies, as well as most of East Asia.¹¹⁰ In criminal matters, however, civil law countries look nearly identical to common law countries due to the widespread codification of criminal codes.

a. *France*

In France, private prosecution is called *citation directe*.¹¹¹ A victim may only bring a private prosecution for misdemeanors and petty offenses.¹¹² French law also allows some associations to instigate private prosecutions, although only for certain, delineated offences, including racist speech, sexual violence, and child abuse.¹¹³

107. AFRIFORUM, *Trial Date Set in Sexual Assault Case Against Former Acting Judge* (May 24, 2022), <https://afriforum.co.za/en/trial-date-set-in-sexual-assault-case-against-former-acting-judge/> [<https://perma.cc/4KE6-5ZQS>].

108. See AFRIFORUM, *Life Esidimeni Inquest: Doctor Testifies that Extreme 'Medical Neglect' Led to Patient's Death* (Jan. 3, 2022), <https://afriforum.co.za/en/life-esidimeni-inquest-doctor-testifies-that-extreme-medical-neglect-led-to-patients-death/> (describing AfriForum's Private Prosecution Unit's representation of a victim of the Life Esidimeni-tragedy, where a doctor's extreme medical neglect resulted in the death of his patients).

109. See AFRIFORUM, *Success: Magistrate Determines that NPA Ought to Prosecute Naeem Deedat* (Nov. 11, 2021), <https://afriforum.co.za/en/success-magistrate-determines-that-mpa-ought-to-prosecute-naeem-deedat/> (highlighting that AfriForum's Private Prosecution Unit prevailed in an inquest determining that a Johannesburg resident could be prosecuted for the alleged murder of his wife and four children).

110. See Mei-Fei Kuo & Kai Wang, *When is an Innovation in Order?: Justice Ruth Bader Ginsburg and stare decisis*, 20 HAW. L. REV. 835, 872 (1998) ("In a civil law system, the statute is binding; whereas, in a common law system, a prior decision concerning the statute controls.").

111. Gerald L. Kock, *Criminal Proceedings in France*, 9 AM. J. COMP. L. 253, 256 (1960).

112. See *id.* at 256–57 (elaborating that victims may petition at the Trial Court for the prosecution of misdemeanors and petty offenses, but these charges are then typically transferred to the criminal chamber of the *tribunal de grande instance*, "the court that has jurisdiction over most misdemeanors").

113. See Code de procédure pénale [C. Pr. Pén.] [Criminal Procedure Code] art. 2 (Fr.) ("Public prosecution for the imposition of penalties is initiated and exercised by the judges, prosecutors or civil servants to whom it has been entrusted by law. This prosecution may also be initiated by the injured party under the conditions determined by the present Code. . . . Any association lawfully registered for at least five years on the date of offence, proposing through its constitution to combat racism or to assist the victims of discrimination grounded on their national, ethnic, racial or religious origin, may exercise the rights granted

In 2019, for example, the victims' group La Parole Libérée brought a private prosecution against France's most senior Catholic cleric for failing to report sexual assaults of minors by a priest in his charge. After Cardinal Philippe Barbarin was found guilty of the charges, the National Secular Society President, Keith Porteous Wood, stated that, given this outcome, he hoped, "public prosecutors will reflect on why they failed to bring a case themselves, to oppose both the private prosecution through all its stages[,] and any criminal sanction for the cardinal."¹¹⁴ France's highest court, the Cour de Cassation, eventually overturned Barbarin's six-month prison sentence.¹¹⁵

b. Spain

Spanish law allows ordinary citizens to pursue criminal actions by filing criminal complaints.¹¹⁶ If a victim files a complaint directly with an instructing judge, the victim becomes a party in the case during the investigation and trial phases.¹¹⁷ This process is known as *acusación particular*.¹¹⁸ It is also common for public interest groups or other groups not directly connected to a crime to initiate a case.¹¹⁹ Groups that do so are known as *acusadores populares* (or popular prosecutors).¹²⁰

In 2008, the government of the Balearic Islands affirmed the right to private prosecutions in criminal cases concerning violence

to the civil party in respect of, first, discrimination punished by articles 225-2 and 432-7 of the Criminal Code and the creation or the possession of the files prohibited under article 226-19 of the same code, and, secondly, the intentional offences against the life or physical integrity of persons, threats, theft, extortion, and destruction, defacement and damage, committed to the prejudice of a person because of his national origin, or his membership or non-membership, real or supposed, to any given ethnic group, race or religion.”).

114. *French Cardinal Culpable over Failure to Disclose Child Sexual Abuse*, NAT'L SECULAR SOC'Y (Mar. 5, 2021), <https://www.secularism.org.uk/news/2021/03/french-cardinal-culpable-over-failure-to-disclose-child-sexual-abuse> [https://perma.cc/P6TE-7DL3]; *French Court Upholds Not-Guilty Ruling for Cardinal in Sex-Abuse Case*, REUTERS (Apr. 14, 2021), <https://www.reuters.com/world/europe/french-court-upholds-not-guilty-ruling-cardinal-sex-abuse-case-2021-04-14/> [https://perma.cc/ZZH3-CR85].

115. NAT'L SECULAR SOC'Y, *supra* note 114.

116. *See The Spanish National Court*, CTR. FOR JUST. & ACCOUNTABILITY (June 11, 2022), <https://cja.org/what-we-do/litigation/legal-strategy/the-spanish-national-court/> [https://perma.cc/YT3Q-ACSW] (“Unlike U.S. law, where criminal charges are brought only by a government prosecutor, Spanish law allows ordinary citizens to pursue criminal actions by filing criminal complaints.”).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

against women.¹²¹ In 2021, a woman and her child were murdered in Mallorca.¹²² The Bar of the Autonomous Community then instigated a successful private prosecution against their suspected killer.¹²³

c. *South Korea*

In many ways, South Korea's criminal justice system relies heavily on the state and, in particular, on the state prosecutor. The prosecutor leads the criminal investigation both by conducting the direct investigation and by instructing the police. As such, police "obey prosecutors' instructions" and serve as assistants to the prosecutors.¹²⁴ Under Korean law, prosecutors have the authority to investigate crimes, decide whether to prosecute a suspect, participate in the trial, and maintain indictment until a final court judgment, much like in the United States.¹²⁵ "Indictment by a private person" in South Korea "is not allowed."¹²⁶

Despite the immense power of the prosecutor under Korean law, the Criminal Procedure Code (CPC) provides a system to appeal a prosecutor's non-prosecution decision.¹²⁷ Prior to the Code's 2007 revision, the availability of such appeals by victims was limited. A victim could only appeal when bringing certain crimes against government officers—that is, an appeal charging abuse of power, illegal arrest and detention, or battery and cruel treatment.¹²⁸ The 2007 revision made these appeals available to

121. John Smith, *Private Prosecution Approved in Case of Woman and Child Murdered in Sa Pobra Mallorca*, EUROWEEKLY NEWS (May 25, 2021), <https://euroweeklynews.com/2021/05/25/private-prosecution-approved-in-case-of-woman-and-child-murdered-in-sa-pobra-mallorca/> [https://perma.cc/Q7EY-XS6K].

122. Chris King, *Woman and Child Found Dead in Sa Pobra, Mallorca*, EUROWEEKLY NEWS (May 17, 2021), <https://euroweeklynews.com/2021/05/17/woman-and-child-found-dead-in-sa-pobra-mallorca/> [https://perma.cc/E55D-AQUE].

123. See Smith, *supra* note 121 (reporting that the Balearic Government "authorised the Bar of the Autonomous Community to appear in a private prosecution in the judicial proceedings arising from the sexist murder of Warda Ouchene, 28, and her youngest son, in Sa Pobra").

124. Jung-Soo Lee, *The Characteristics of the Korean Prosecution System and the Prosecutor's Direct Investigation*, 53 UNITED NATIONS ASIA & FAR EAST INST. 83, 84 (1998).

125. *Id.* at 84–85.

126. *Id.* at 85.

127. Kuk Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, 8 J. OF KOREAN L. 1, 9 (2008).

128. See *id.*; see also Hyeongsasosongbeop [Criminal Procedure Act] art. 260, amended by Act. No. 7965, July 19, 2006 (S. Kor.).

all crimes.¹²⁹ If the High Court agrees with the complainant, prosecutors must then initiate the prosecution.¹³⁰

3. *Analysis of International Private Prosecution*

Although private prosecutions still make up a minority of criminal cases across the globe, their uses appear to follow a few specific trends. Outside of the United States, many of these cases are brought in two primary contexts: (1) when the victim is someone who is a member of a historically underrepresented group, or (2) when a government official, often a police officer or politician, is accused of criminal misconduct and the prosecutor has opted not to take on the case.

This survey of international comparators generally reflects the fact that public and political pressures inevitably play some role in prosecutors' charging decisions.¹³¹ When victims are members of minority groups or groups that historically have not had political power, private prosecutions can provide an opportunity for their cases to be heard—and heard as a criminal matter. Private prosecution can also play an important role in countries with higher levels of government corruption, where one may expect public prosecutors, as state employees, to be especially hesitant to bring criminal charges against other state employees. As such, if the perpetrator of a crime is particularly powerful and has, perhaps, undue influence over the public prosecutor's office, this survey suggests that private prosecution may serve as a backstop on otherwise unchecked governmental power.

129. Hyeongsasosongbeop, *supra* note 128.

130. *Id.*

131. Peter Followill, *I'm the Victim of a Crime. Can I Force the Prosecutor to Press Charges?*, NOLO (June 11, 2022), <https://www.criminaldefenselawyer.com/resources/im-victim-a-crime-can-i-force-prosecutor-bring-charge> [<https://perma.cc/BDX6-MR57>] (explaining that in several jurisdictions, prosecutors grapple with the responsibilities of serving as elected officials and the consideration of limited government recourses when deciding which crimes to pursue).

B. U.S. STATES

1. *The Modern U.S. Legal System from a Comparative Perspective*

The United States is known for its particularly punitive criminal justice system.¹³² Many view this system as not focused on rehabilitation, but rather on incapacitation—which aims to segregate, isolate, and punish convicted criminals.¹³³ In recent years, the U.S. criminal system has also seen a rise of degradation sanctions in the absence of a prison sentence, including shaming tactics like the sex offender registry or other non-traditional conditions of probation.¹³⁴

Another feature exceptional to the U.S. federal criminal system is its use of grand juries, which is largely seen as a vestige of private prosecution, used to screen out incompetent or malicious prosecutions by private individuals.¹³⁵ While the right to a grand jury is guaranteed in federal cases by the Fifth Amendment,¹³⁶ not all states impose the same requirement.¹³⁷ About half of U.S. states do not require a grand jury indictment,¹³⁸ while many others

132. PETER D. HART RESEARCH ASSOCIATES, INC. FOR OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS (2002), <https://www.prisonpolicy.org/scans/CJI-Poll.pdf> [<https://perma.cc/PJQ8-8F4E>].

133. See, e.g., Lauren Hipplewitz, Punishment vs. Rehabilitation: A Discourse on American Prison Reform & Comparative Analysis to Swedish Incarceration (May 1, 2022) (B.A. thesis, University of Connecticut); Daniel Lehewych, *The Future of the U.S. Prison System*, NEWSWEEK (Mar. 15, 2021) <https://www.newsweek.com/future-us-prison-system-opinion-1575862#> [<https://perma.cc/L5Y5-3B5H>] (“[I]f there was one word to define the nature of the current U.S. prison system it would be ‘punishment.’”).

134. See, e.g., Jeffrey C. Filcik, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 323 (1990) (using “scarlet letter” provisions, like sex-offender registration mandates, as an example of a probation condition that “reflect[s] the seriousness of the offense, . . . promote[s] respect for the law[,] and provide[s] just punishment” (quoting 18 U.S.C. § 3553(a))).

135. All other common law countries, with the exception of Liberia, instead utilize a preliminary hearing. See MARK NESTMANN, *THE LIFEBOAT STRATEGY* 110 (2011); GEORGE JOHN EDWARDS, *THE GRAND JURY: CONSIDERED FROM AN HISTORICAL, POLITICAL AND LEGAL STANDPOINT, AND THE LAW AND PRACTICE RELATING THERETO* 37 (1906).

136. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”).

137. See John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 342, 346 (2005) (explaining that many states abandoned their grand jury mandates during a mid-nineteenth century movement that portrayed these requirements as impractical and outdated).

138. See SARA SUN BEALE ET AL., 1 GRAND JURY LAW AND PRACTICE § 8:2, at 8–15 (2d ed. 1997) (“About half of the states have accepted the Supreme Court’s invitation to eliminate mandatory screening by the grand jury. In twenty-seven states, any criminal

require a grand jury indictment only for felony offenses.¹³⁹ With the spread of public prosecutors, most common law countries abandoned it; however, the United States has not.¹⁴⁰

Finally, the U.S. criminal justice system is unique in its election of state and local prosecutors, specifically the states' attorneys general and local jurisdictions' district attorneys.¹⁴¹ The election of these officials leads to concerns about incentives within the criminal justice process. According to scholars, politics has historically incentivized prosecutors to dole out harsh punishment in order to garner the support of the electorate and important interest groups, like police unions.¹⁴²

prosecution may be initiated by an information, which does not require the approval of a grand jury.”).

139. See, e.g., ALASKA CONST. art. I, § 8 (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger.”).

140. See generally Roger A. Fairfax Jr., *Grand Jury Innovation: Towards a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 345 (2010) (“In the modern criminal justice system, these functions are performed by public prosecutors, public police, and court-appointed defense attorneys. Moreover, in the absence of a grand jury, a judicial officer often will pass upon the accusations to ensure that they are supported by probable cause. Thus, the argument goes, there is no longer a need for the grand jury to perform these various roles played by modern institutional players.”). Cf. Roger Roots, *If It's not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 839 (1999) (“It was argued that allowing the continuance of common law grand jury powers would expose countless persons—many of them government agents—to unanswerable accusations in the public eye.”).

141. See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35 (2007) (noting that the United States is unique among most civil law countries in its selection of judges and prosecutors based on elections and partisan factors); see also Mirjan Damaika, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 512 (1975) (“In most American states, public prosecutors are locally elected officials with surprisingly great and virtually uncontrolled authority. . . . [H]ierarchical subordination is negligible by continental [European] standards.”); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 568 (1984) (“[T]he American prosecutor enjoys an independence and discretionary privileges unmatched in the world.”) (internal quotation marks omitted).

142. See, e.g., Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 4 (2012) (“An accumulating literature shows that impending elections sometimes cause changes in the behavior of elected judges and prosecutors. Research in Pennsylvania showed that elected trial judges became more punitive in their sentencing decisions as elections approached.”) (citations omitted). This phenomenon is described more in subsequent sections. See *infra* Part III.B.4.

2. *The United States and Private Prosecution*

In the seventeenth and eighteenth centuries, private prosecutions dominated U.S. criminal dockets.¹⁴³ Scholars have attributed private prosecution's prolificacy not just to the country's connection to the U.K. legal system but also to the widespread fear of a tyrannical government.¹⁴⁴ Slowly, government attorneys began to monopolize criminal prosecutions,¹⁴⁵ until finally, in the 1980s, the Supreme Court officially banned the use of private prosecution in federal cases.¹⁴⁶

After the ban on federal private prosecutions, and in recent decades in particular, the U.S. federal criminal justice system has renewed its focus on victims' rights. As evidenced in Part II *supra*, this focus on victims' rights follows the global trend. In the late 1990s and early 2000s, the U.S. government passed two statutes addressing the rights of victims.¹⁴⁷ Since the passage of the Crime Victims' Rights Act (CVRA) in 2004, victims in federal criminal cases have the right to be heard at any public proceeding in district court and the right to be included in any public court proceeding.¹⁴⁸ Many criminal cases in the United States, however, reside in state court. There, the rights of victims diverge depending on the state in which the case is heard.¹⁴⁹

143. See, e.g., Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 485 (2005).

144. See *id.* ("[T]he system of private prosecution was preferred because it avoided the tyranny of government prosecutors and the expense of providing for public prosecution.").

145. Cf. John Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 518–19 (1994) (explaining that many states either sanctioned or entirely outlawed the practice of private prosecutions during the nineteenth century).

146. See *Leeke v. Timmerman*, 454 U.S. 83, 87 (1981) (affirming that private citizens lack a judicially cognizable interest in the decision of a state attorney on whether to issue an arrest warrant); *Young v. United States*, 481 U.S. 787, 802 (1987) (holding that prosecution is reserved in federal cases for government prosecutors, though federal prosecutors may appoint private attorneys to prosecute cases).

147. Two federal statutes describe the Federal Government's responsibilities to crime victims. The Victims' Rights and Restitution Act (VRRRA) describes the services the Federal Government is required to provide to victims of federal crimes. 34 U.S.C. § 20141. The Crime Victims' Rights Act (CVRA) sets forth the rights a person has as a crime victim. 18 U.S.C. § 3771. For purposes of these rights and services, the law defines "victims" in specific ways.

148. The CVRA is part of the United States Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (effective Oct. 30, 2004).

149. See R.J. Miner, U.S. Circuit Judge, *Consequences of Federalizing Criminal Law*, Address Before the Attorney General's Conference (May 20, 1988), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1001&context=crim_law [<https://perma.cc/2MDN-P9ZW>] ("What may be considered serious anti-social conduct in one

Importantly for this Note, some states still allow the use of private prosecution, though the extent of private prosecution differs even within those states. Today, nearly twenty states permit—to varying degrees—private citizens to engage in some form of criminal prosecution.¹⁵⁰ Each state’s rules differ slightly in private prosecution cases. This Note identifies the various state regimes that permit the practice and highlights the states that provide particularly interesting case studies.

a. *States that Permit Private Citizens to Directly Access the Grand Jury or to Petition for Court Approval for Access to the Grand Jury*

In 1937, Alabama affirmed the right to private prosecution—with limits. In *King v. Second Nat’l Bank & Tr. Co. of Saginaw, Mich.*,¹⁵¹ the Alabama Supreme Court held that, as a matter of public policy, citizens should be permitted to bring their cases before a grand jury:

Public policy demands that the citizen . . . may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has in aid of the investigation. In this the citizen is not a prosecutor. It is not essential that he have probable cause to believe any individual to be the guilty party. He is merely performing a duty in aid of the tribunal set up to ascertain whether there is probable cause to believe a crime has been committed . . .¹⁵²

The court clarified, however, that throughout the grand jury hearing, the party bringing the matter must in good faith invite

part of the country may not be considered quite so serious elsewhere. Gambling may be offensive to the citizens of Utah but not to the citizens of Nevada.”)

150. See *Hopkins v. State*, 429 So. 2d 1146, 1154 (Ala. Crim. App. 1983) (“This court has held that a special prosecutor’s employment by the victim to represent him in a civil action arising out of the same transaction as the criminal proceeding does not deprive the defendant of a fair trial.”); *Allen v. State*, 257 S.E.2d 5, 7 (Ga. Ct. App. 1979) (holding that there is no valid objection when a special prosecutor also represents an alleged victim in a civil suit arising from the same incident); *Shuttleworth v. State*, 469 N.E.2d 1210, 1217–18 (Ind. Ct. App. 1984); *State v. King*, 396 S.E.2d 402, 411 (W. Va. 1990); *Bird v. State*, 45 N.W. 1126, 1126–27 (Wis. 1890).

151. 234 Ala. 106 (1937).

152. *Id.* at 108.

and aid in an investigation and must, at all times, truly believe that the person is actually guilty.¹⁵³ Otherwise, he or she may be found guilty or liable of malicious prosecution.¹⁵⁴ *King* remains good law, thus citizens of Alabama may continue to bring private prosecutions if they so choose.

Illinois, Maryland,¹⁵⁵ and Minnesota's¹⁵⁶ rights of private citizens to empanel a grand jury, as in Alabama, also derive from state case law. Illinois' right is arguably less expansive, as private citizens may not directly access the grand jury, but instead must petition for court approval to such access. This right was expressly permitted in a 1971 case, *People v. Sears*.¹⁵⁷ There were two issues of note in *Sears*: first, whether the public can petition to empanel a grand jury to investigate a case, and second, when a private citizen deems a grand jury investigation insufficient, whether the court can subpoena certain witnesses in response to such concern.¹⁵⁸ The Supreme Court of Illinois answered both of these questions in the affirmative. Though "the proper channel for presenting information to the grand jury is the State's Attorney," the trial court maintains jurisdiction to direct a witness to appear before the grand jury in instances where the prosecutor has failed to take action and that failure "will effect a deprivation of due process or result in a miscarriage of justice."¹⁵⁹

The facts of *Sears* are particularly salient to this Note. Barnabas Sears was a Chicago attorney who gained notoriety

153. *See id.* ("The rule of sound public policy demands no more than that the party bringing the matter to the attention of the grand jury should in good faith invite and aid in an investigation with a view to the indictment of the person actually guilty.")

154. *See id.* ("The burden is on plaintiff in an action for malicious prosecution to prove the essential elements of malice and want of probable cause.")

155. *See Brack v. Wells*, 40 A.2d 319, 321–22 (Md. 1944) (holding that as the law affords a private citizen the power to "personally present[] his case to the grand jury," the grand jury is permitted to "investigate a case which the States' Attorney in his discretion, has decided not to present to that body").

156. *See State ex rel. Wild v. Otis*, 257 N.W.2d 361, 364 (Minn. 1977) (holding that while a private citizen does not have a right to appear before the grand jury, he "is free to attempt to get the grand jury to take action and . . . the grand jury can permit an aggrieved citizen to appear as witness for this purpose" in instances where the prosecutor refuses to commence a prosecution).

157. 273 N.E.2d 380 (1971).

158. *See id.* at 386 ("The appeal with respect to this order presents two issues, and simply stated the questions before us are whether the circuit court has jurisdiction to order that the witnesses be called, and if so, whether the circumstances shown here furnish a sufficient basis for the court to do so.")

159. *Id.* at 389.

while serving as the prosecutor in the city's 1969 police raids.¹⁶⁰ These police raids resulted in the death of Fred Hampton, a prominent Black Panther leader.¹⁶¹ A judge assigned Sears to serve as special prosecutor only after a number of individuals and organizations filed petitions in state court requesting that the court assign a special prosecutor to investigate the raids.¹⁶² The lower court found that "the matters in the petition[s] are of sufficient importance to confer jurisdiction upon the Court to order a special venire to be issued for a grand jury and that public justice requires it."¹⁶³

Sears, using his prosecutorial discretion, then chose not to call certain witnesses before the state grand jury. He similarly did not investigate certain police officers and other individuals involved in the "execution of [the] search warrant for illegal weapons" in the Black Panther apartment on West Monroe Street in Chicago.¹⁶⁴ The Illinois Supreme Court ultimately found that the circumstances did not "furnish a sufficient basis for the action of the court, and the order holding Sears in contempt for refusing to subpoena [certain] witnesses [was] reversed."¹⁶⁵ The court highlighted, however, that there are circumstances in which a circuit court may hold a prosecutor in contempt for refusing to subpoena witnesses after the court directs it to do so.¹⁶⁶ This Note highlights the facts of this case to demonstrate that private prosecution in Illinois partly stemmed from an instance in which a social movement fought for minority rights against the power of the state. Private prosecution as a tool for social movements appears to be a theme throughout this survey of private prosecution regimes. Unlike in the previous states discussed, the

160. *Barnabas Sears, Lawyer in Black Panther Case*, CHI. TRIB. (Jan. 3, 1985), <https://www.chicagotribune.com/news/ct-xpm-1985-01-03-8501010516-story.html> [<https://perma.cc/8YBZ-Z35B>].

161. *Id.*

162. Paul Shapiro, *Criminal Procedure—People v. Sears—The Grand Jury*, 22 DEPAUL L. REV. 260, 263 (1972).

163. *People v. Sears*, 273 N.E.2d 380, 381 (1971).

164. *Id.* at 381–382.

165. *Id.* at 386.

166. *Id.* at 389 ("As men and lawyers we know that a grand jury cannot proceed with an investigation without the investigatory staff of the State's Attorney, the police or the sheriff, and that it cannot prepare subpoenas or indictments without assistance of counsel. It is apparent, therefore, that to adopt the rule for which Sears contends would vest in the State's Attorney the nonreviewable discretion as to what evidence is to be presented to the grand jury. This in our opinion could lead to abuse of the process, purpose and function of the grand jury and is inconsistent with its historic place in our system of justice.").

right to access a grand jury through petition—either to the court or directly—in Louisiana, Maine, Nebraska, North Carolina, Tennessee, Texas, and West Virginia comes from the states’ statutory regimes.¹⁶⁷

167. See LA. CODE CRIM. PROC. ANN. art. 437 (2010) (“The grand jury . . . shall inquire into all capital offenses” and all “other offenses triable by the district court of the parish, and shall inquire into such offenses when requested to do so by the district attorney or ordered to do so by the court.”); see also *State v. Sullivan*, 105 So. 631, 633 (La. 1925) (affirming the trial court’s denial of defendant’s motion to quash the indictment; finding it was proper for private citizens to request permission to see members of the grand jury to request an investigation of the crime; and explaining that “[a]ny person has a right to go before the grand jury and prefer a charge against another”); ME. REV. STAT. ANN. tit. 15, § 1256 (2008) (“Evidence may be offered to the grand jury by the Attorney General, the district attorney, the assistant district attorney and, at the discretion of the presiding justice, by such other persons as said presiding justice may permit.”); NEB. REV. STAT. § 29-1410(1) (West 1979) (“Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. . . . If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury if the court finds that such testimony or appearance would serve the interests of justice.”). § 29-1401(2) (2016) (authorizing district courts to call and summon a grand jury “as the district court may deem necessary”). § 29-1401(3) (requiring district courts to convene a grand jury upon a petition signed by “not less than ten percent of the registered voters of the county who cast votes for the office of Governor” in the last gubernatorial election); N.C. GEN. STAT. ANN. § 15A-626(d) (West 2022) (“Any person not called as a witness who desires to testify before the grand jury concerning a criminal matter which may properly be considered by the grand jury must apply to the district attorney or to a superior court judge. The judge or the district attorney in his discretion may call the witness to appear before the grand jury.”); § 15A-628(a)(4) (“A grand jury . . . [m]ay investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made. An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor.”); TENN. CODE ANN. § 40-12-104 (a)–(c) (West 1995) (“Any person having knowledge or proof of the commission of a public offense triable or indictable in the county may testify before the grand jury. . . . The person shall designate two (2) grand jurors who shall, with the foreman, comprise a panel to determine whether the knowledge warrants investigation by the grand jury.”); TEX. CODE CRIM. PROC. ANN. art. 20.09 (West 2021) (“The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.”); W. VA. CONST. art. III, § 17 (“The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.”); see also *State ex rel. Miller v. Smith*, 285 S.E.2d. 500, 504–05 (W. Va. 1981) (holding that petitioner-victim is entitled to a writ of prohibition that restrains the prosecutor from attempting to dissuade or discourage the grand jury from hearing from the petitioner regarding a criminal complaint on the ground that petitioner’s constitutional right to seek redress for a criminal wrong, under article 3, section 17 of the Virginia Constitution, includes a right to present a criminal complaint directly to the grand jury”; and observing that “[i]f the grand jury is available only to the prosecuting attorney and all

Since the 2017 case *State v. Chauncey*,¹⁶⁸ Nebraska's right to access a grand jury has been expanded to create further protections against government corruption. In 2008, a two-year-old child, Juliette, died in what the pathologist ruled a death by homicide. After four years with no charges filed, community members petitioned the district court to convene a grand jury as permitted under Nebraska Statutes § 29-1410.01, § 29-1401(2), and § 29-1401(3).

Defendant Dustin Chauncey, the boyfriend of Juliette's mother, did not argue that the empaneling of the grand jury was improper, given Nebraska's clear laws that the district court was within its discretion to do so. Rather, Chauncey filed a motion to throw out the indictment on the grounds that the appointment of a special prosecutor for the grand jury proceeding was improper. Chauncey believed that a state attorney should have maintained control over the proceedings. The Supreme Court of Nebraska disagreed. It observed that "[t]he [district] court found that a conflict of interest existed in this case because until the petition for a grand jury investigation into Juliette's death was filed in July 2012, the county attorney's office had declined to prosecute anyone for Juliette's death since its occurrence in July 2008," and concluded that "[t]he court . . . found that the appointment of [the special prosecutor] was proper."¹⁶⁹

This decision is particularly interesting, as "it approves of criminal prosecution wholly outside of the prosecuting authority's control."¹⁷⁰ The Nebraska Supreme Court did not determine that the prosecutor had a conflict of interest as "traditionally understood," but rather determined that the public prosecutor was unfit to try the case because he declined to prosecute it in the first place.¹⁷¹ As such, legal experts believe "the case dramatically expands the power of Nebraska citizens to initiate prosecutions without a clear statutory mandate."¹⁷² Given Nebraska's explicit statutory rules regarding private prosecution¹⁷³ and *State v. Chauncey*, which creates yet another backstop against government

complaints must pass through him, the grand jury can justifiably be described as a prosecutorial tool").

168. 890 N.W.2d 453 (Neb. 2017).

169. *Id.* at 459.

170. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:2 (2d ed. 1997).

171. *Id.*

172. *Id.*

173. NEB. REV. STAT. § 29-1410.01 (1979).

corruption and poor prosecution, Nebraska arguably maintains the most robust state regime.

Finally, New Mexico¹⁷⁴ and Oklahoma¹⁷⁵ are the only states which have enshrined the right to private prosecution in their state constitutions. New Mexico's Supreme Court confirmed just how strong the constitutional right to public petition to convene a grand jury is in the case of *Cook v. Smith*.¹⁷⁶ That 1992 dispute involved registered voters who, under New Mexico's Constitution, petitioned the district court to convene a grand jury and appoint a special prosecutor to investigate alleged misconduct at the Albuquerque Technical-Vocational Institute.¹⁷⁷ The voters alleged fraud, malfeasance, improper disbursement and handling of public funds, improper employment practices, destruction of public records, and other abuses of power.¹⁷⁸ The district court denied the petition, believing it maintained discretion over whether to convene the grand jury.¹⁷⁹ On appeal, the New Mexico Supreme Court cited a provision of Oklahoma's state constitution, which "as a practical matter[, is] identical" to New Mexico's.¹⁸⁰ Using the

174. N.M. CONST. art. II, § 14 ("[A] petition therefore signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the country.").

175. OKLA. CONST. art. II, § 18.

176. 834 P.2d 418 (N.M. 1992).

177. *Id.* at 419.

178. *Id.*

179. *Id.*

180. *Id.* at 421. Compare N.M. CONST. art II, § 14 ("A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.") with OKLA. CONST. art. II, § 18 ("A grand jury shall be composed of twelve (12) persons, any nine (9) of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a district judge upon his own motion; or such grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county equal to the number of signatures required to propose legislation by a county by initiative petition as provided in Section 5 of Article V of the Oklahoma Constitution, with the minimum number of required signatures being five hundred (500) and the maximum being five thousand (5,000); and further providing that in any calendar year in which a grand jury has been convened pursuant to a petition therefor, then any subsequent petition filed during

logic of the Oklahoma Supreme Court,¹⁸¹ the New Mexico Supreme Court held that if the petition complies with New Mexico law, the district judge must convene the grand jury.¹⁸²

b. *States in which a Private Citizen May Initiate Action by Filing an Affidavit or Other Application for a Criminal Complaint*

Eleven states currently permit private citizens to initiate criminal actions by filing affidavits or formal complaints. Arizona, Idaho, Kentucky, Massachusetts, New Hampshire, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wisconsin all have some statutory or common law scheme to allow private citizens to circumvent the public prosecutor.¹⁸³ It is important to

the same calendar year shall require double the minimum number of signatures as were required hereunder for the first petition; or such grand jury shall be ordered convened upon the filing of a verified application by the Attorney General of the State of Oklahoma who shall have authority to conduct the grand jury in investigating crimes which are alleged to have been committed in said county or involving multicounty criminal activities; when so assembled such grand jury shall have power to inquire into and return indictments for all character and grades of crime. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.”)

181. See *State ex. rel. Harris v. Harris*, 541 P.2d 171 (Okla. 1975).

182. *Cook v. Smith*, 834 P.2d 418, 422 (N.M. 1992).

183. ARIZ. R. CRIM. P. 2.4 (providing that a criminal proceeding may commence either by (1) “a complaint is made upon oath before a magistrate” and the magistrate finds that “probable cause to believe” that defendant committed an offense; or by (2) “a complaint is signed by a prosecutor”); IDAHO CODE ANN. § 19-504 (West 2008) (“When a complaint . . . alleg[es] facts constituting the commission of a public offense,” and the magistrate so finds, “the magistrate shall order the clerk of the court to file the complaint and refer the complaint to the appropriate county or city prosecuting attorney for further action.”); In Kentucky, private citizens may swear out criminal complaints, though such individual complaints are limited to domestic violence, neighborhood disputes, thefts, minor assaults, zoning violations, and bad checks. Then, a prosecutor must decide to file a criminal charge. See *File a Criminal Complaint*, LOUISVILLEKY.GOV, <https://louisvilleky.gov/government/county-attorney/file-criminal-complaint> [<https://perma.cc/4EBW-HTPT>]; MASS. GEN. LAWS ANN. 218 § 35A (West 2004) (“If a complaint is received by a district court, or by a justice, associate justice or special justice thereof, or by a clerk . . . , the person against whom such complaint is made, if not under arrest . . . , shall, in the case of a complaint for a misdemeanor or a complaint for a felony received from a law enforcement officer who so requests, . . . be given an opportunity to be heard personally or by counsel. . . . The court, or said officer thereof, may upon consideration of the evidence, obtained by hearing or otherwise, cause process to be issued unless there is no probable cause[.]”); *State v. Martineau*, 808 A.2d 51, 52 (N.H. 2002) (finding that New Hampshire continues to recognize the common law practice of allowing private citizens to initiate and prosecute private citizen’s criminal complaints only for offenses that are not punishable by imprisonment; and concluding that the private citizen is barred from prosecuting her criminal complaint charging defendant with a class A misdemeanor on the ground that it is punishable by imprisonment up to one year); OHIO REV. CODE ANN. § 2935.09(D) (West 2006) (“A private

note that many of these statutes limit this right to only certain violations. For example, in a 2001 case, *Cronan ex rel. State v. Cronan*,¹⁸⁴ the Rhode Island Supreme Court affirmed that state law authorizes prosecution by private complaint only for criminal offenses that are punishable by less than one-year imprisonment or a fine of no more than \$1,000.

c. Other Forms of Non-Public Prosecutor Action in Criminal Proceedings

Two states, New Jersey and Virginia, have statutory regimes that permit other private actions within criminal proceedings. Most of these regimes involve victims hiring their own lawyers to try criminal cases. New Jersey, for example, adopted a court rule allowing any attorney to appear on behalf of any complaining witness and prosecute the action for and on behalf of the state or of the municipality when a public prosecutor does not appear in

citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record. . . . As used in this section, 'reviewing official' means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate."); PA. R. CRIM. P. 506 (2001) ("When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay. . . . If the attorney for the Commonwealth . . . disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the court of common pleas for review of the decision."). R.I. GEN. LAWS ANN. § 12-10-12 (West 2017) ("Subject to any other provisions of law relative to the filing of complaints for particular crimes, any judge of the district court or superior court may place on file any complaint in a criminal case other than a complaint for the commission of a felony or a complaint against a person who has been convicted of a felony or a private complaint. . . ."). § 12-12-1.3 (West 1986) ("An offense which may be punished by imprisonment for a term not exceeding one year or a fine not exceeding one thousand dollars (\$1,000) may be prosecuted by complaint."); W. VA. R. CRIM. P. 3 (West 1995) ("The complaint is a written statement of the essential facts constituting the offense charged. The complaint shall be presented to and sworn or affirmed before a magistrate in the county where the offense is alleged to have occurred. Unless otherwise provided by statute, the presentation and oath or affirmation shall be made by a prosecuting attorney or a law enforcement officer showing reason to have reliable information and belief."); WISC. STAT. ANN. § 968.26(2)(am) (West 2022) ("If a person who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within the judge's jurisdiction, the judge shall refer the complaint to the district attorney or, if the complaint may relate to the conduct of the district attorney, to another prosecutor. . . .").

184. 774 A.2d 866 (R.I. 2001).

cases involving cross-complaints.¹⁸⁵ In *State v. Harris*, a New Jersey Superior Court judge held that “a municipal judge should not adopt a flat rule for or against permitting private parties, represented or *pro se*, to prosecute. The decision is discretionary and should be based on the seriousness of the case [and] whether the municipal prosecutor consents to stand aside.”¹⁸⁶

Virginia similarly recognizes a common law right of a crime victim or the victim’s family to assist in the prosecution by retaining private counsel.¹⁸⁷ The private prosecutor’s role in such case is, however, “limited.” According to the Virginia courts, the “public prosecutor must remain in continuous control of the case.”¹⁸⁸ Utah’s private prosecution regime, on the other hand, stems from its state constitution.¹⁸⁹

III. THE ROLE FOR PRIVATE PROSECUTION WITHIN SOCIAL MOVEMENTS: #MeTOO AND THE BLACK LIVES MATTER MOVEMENT

Social movements focus on “empower[ing] oppressed populations to mount effective challenges and resist the more powerful and advantaged elites.”¹⁹⁰ The Black Lives Matter (BLM) and #MeToo movements, both of which emerged relatively recently, aim to empower groups that have historically been disempowered by political and social systems. BLM began after Florida neighborhood watchman George Zimmerman was acquitted of shooting a Black teen, Trayvon Martin, in 2013.¹⁹¹ The movement gained support following the subsequent deaths of

185. N.J. Court Rules, R. 7:8-7 (2007) (“The court may permit an attorney to appear as a private prosecutor to represent the State in cases involving cross-complaints. Such private prosecutors may be permitted to appear on behalf of the State only if the court has first reviewed the private prosecutor’s motion to so appear and an accompanying certification submitted on a form approved by the Administrative Director of the Courts. The court may grant the private prosecutor’s application to appear if it is satisfied that a potential for conflict exists for the municipal prosecutor due to the nature of the charges set forth in the cross-complaints. The court shall place such a finding on the record.”).

186. *State v. Harris*, 620 A.2d 1083, 1088 (N.J. Super. Ct. Law Div. 1992).

187. *See, e.g.*, *Cantrell v. Com.*, 329 S.E.2d 22, 28 (Va. 1985).

188. *Id.* (internal citation omitted).

189. UTAH CONST. art. VIII, § 16 (“If a public prosecutor fails or refuses to prosecute, the Supreme Court shall have power to appoint a prosecutor *pro tempore*.”).

190. DERIC SHANNON & DAVITA SILFEN GLASBERG, *POLITICAL SOCIOLOGY: OPPRESSION, RESISTANCE, AND THE STATE* 150 (2010).

191. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [<https://perma.cc/KQ25-KSXQ>].

two Black men, Michael Brown and Eric Garner, at the hands of the police. Despite the ebb and flow of BLM's popularity,¹⁹² it has maintained its national mission to change Black communities' relationship with police.¹⁹³ One of the ways BLM works to achieve this goal is by encouraging prosecutors to charge police officers who use excessive force on Black and brown people.¹⁹⁴ BLM leaders and supporters also fund and campaign for progressive prosecutors.¹⁹⁵

The #MeToo movement originated in 2006 when sexual assault survivor and activist Taran Burke used the phrase "Me Too" on social media when she shared her own experience with sexual assault.¹⁹⁶ Despite the term being coined in the early aughts, the movement only gathered mainstream attention in the "wake of a sweeping *New York Times* investigation" detailing the "sexual harassment and abuse against the Hollywood mogul Harvey Weinstein," with "more than twelve million posts on Facebook in less than twenty-four hours" that read #MeToo.¹⁹⁷

Both of these movements have relied on protests and public demonstrations to garner public support. But, in addition to the court of public opinion, these movements have also turned to formal courts—through both civil and criminal channels. This Part will consider how social movements, particularly BLM and #MeToo, have utilized the right of private prosecution in the United States, and will examine the benefits and drawbacks of expanding this approach. Ultimately, this Note contends that the social movements' utilization of the forms of private prosecution already permitted in U.S. states, could produce two distinct benefits to help them advance their causes: a direct one, via

192. Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June but Remains Strong Among Black Americans*, PEW RSCH. CTR. (Sept. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/> [https://perma.cc/X3X9-BNYK].

193. See generally BLACK LIVES MATTER, 2020 IMPACT REPORT (2020), <https://blacklivesmatter.com/2020-impact-report/> [https://perma.cc/55HB-DNPT].

194. German Lopez, *Police Officers Are Prosecuted for Murder in Less Than 2 Percent of Fatal Shootings*, VOX (Apr. 2, 2021), <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> [https://perma.cc/2JYJ-JAJT].

195. Megan Cassidy & Michael Williams, *Progressive Prosecutor or Politician? Alameda County D.A. Draws Praise, Scrutiny After 2 Police Shooting Decisions*, S.F. CHRON. (Oct. 22, 2020), <https://www.sfchronicle.com/local-politics/article/Progressive-prosecutor-or-politician-Alameda-15679394.php> [https://perma.cc/J9RG-TBGU].

196. MEIGHAN STONE & RACHEL B. VOGELSTEIN, AWAKENING: #METOO AND THE GLOBAL FIGHT FOR WOMEN'S RIGHTS 1 (2021).

197. *Id.*

movement-initiated processes; and an indirect one through pressure on prosecutors.

A. ARGUMENTS IN FAVOR OF PRIVATE PROSECUTION

As argued throughout this Note, private prosecution can be used to fill the gaps left by public prosecutors, which—for reasons of political economy—will often involve crimes against women, Black people, and other marginalized groups.¹⁹⁸ Internationally, those at the fringes of political power use private prosecution to bring their often overlooked criminal cases before judges and juries. As such, it could be an instrument for BLM and #MeToo leaders to employ when prosecutors opt against bringing a case.¹⁹⁹ In fact, marginalized people within the United States, both

198. *But see* Jeffrey Bellin, *A World Without Prosecutors*, 13 CALIF. L. REV. ONLINE 1, 6 (“Rather than turn away from public prosecutors, it may make more sense to support them, stressing the importance of declinations and dismissals as a core function of the public prosecutor’s role.”). Bellin, however, responds to Caper’s article, *supra* note 23, by looking at private prosecution from the perspective of the over incarceration problem within the United States. He considers the power of the progressive prosecutor movement. No doubt this movement may have an impact on over incarceration and discriminatory enforcement that benefits the wealthy and powerful at the expense of minorities. This Note suggests, however, that in addition to these changes, there are already laws in place, namely private prosecution laws, that can serve to undergird other changes.

199. In addition to the Wayne Reyes case mentioned in the introduction, another famous instance of non-prosecution is the now-famous Trevor Bauer instance. In February 2022, the L.A. District Attorney’s office announced it would not prosecute L.A. Dodgers Pitcher Trevor Bauer for alleged sexual assault. Bill Shaikin & Richard Winton, *Trevor Bauer Will Not Face Criminal Charges Following Sexual Assault Allegation*, L.A. TIMES (Feb. 8, 2022), <https://www.latimes.com/sports/dodgers/story/2022-02-08/trevor-bauer-will-not-face-criminal-charges-following-sexual-assault-allegation> [<https://perma.cc/S8SQ-EHZZ>]. At the time, two women accused Bauer of nonconsensual acts during sexual encounters. A third woman has since come forward. *See* Gus Garcia-Roberts, *As MLB Suspends Trevor Bauer, A New Accuser Speaks Out*, WASH. POST (Apr. 30, 2022), <https://www.washingtonpost.com/sports/2022/04/29/trevor-bauer-abuse-accusations/> [<https://perma.cc/8THU-G9W8>]. One of the accusers sought a restraining order six weeks after meeting with detectives from the Pasadena Police Department, as she was “deeply concerned that no arrest ha[d] been made or charges filed.” Shaikin & Winton, *supra*. Despite calls for a criminal charge, after a five-month review of the police investigation, the L.A. District Attorney announced that it was “unable to prove the relevant charges beyond a reasonable doubt.” *Id.* Major League Baseball has since suspended Bauer for 194 games under its domestic abuse and sexual assault policy. Beth Harris, *LA Dodgers Cut Pitcher Trevor Bauer After Suspension Reduced*, AP NEWS (Jan. 6, 2023), <https://apnews.com/article/los-angeles-dodgers-mlb-sports-trevor-bauer-san-diego-a13d0862eb7a76b930c2d587603a69ed> [<https://perma.cc/RGY2-ZUPJ>]. While the two women who accused Bauer of assault in California cannot avail themselves of private prosecution given that state’s laws, the third woman in Ohio could use certain options if the prosecutor there refuses to bring a case and she so chooses.

through social movements and not, have already utilized private prosecution regimes to the extent that such regimes are available.

1. *Private Prosecution as a Tool for Justice for the Killing of Tamir Rice*

Since the start of BLM, this author has identified one instance in the United States in which a Black victim's family availed itself of their rights under a semi-private prosecution system. The family of Tamir Rice, a twelve-year-old Black boy who was carrying a toy gun when he was shot and killed in a Cleveland Park by Officer Timothy Loehmann, brought an affidavit to an Ohio Municipal Court Judge to initiate the criminal process.²⁰⁰ They did so under Ohio Law R.C. 2935.09(A)²⁰¹ and R.C. 2935.09(D).²⁰²

The judge ruled that there was probable cause to charge Loehmann with murder, involuntary manslaughter, reckless homicide, negligent homicide, and dereliction of duty. While the affidavit was “intended to jumpstart the process of prosecution” and “increase pressure on [Cuyahoga County Prosecutor Timothy McGinty], [the] murder charge ultimately ha[d] to go through a grand jury.”²⁰³ Because only the state prosecutor may bring evidence to a grand jury in this way, however, this anemic form of “private prosecution” is certainly not a panacea. It is a petition for prosecution, not prosecution itself. That being said, it undoubtedly is a way to add pressure to prosecutors who may otherwise be inclined to resist prosecution in these cases. A few months after the judge's order, “Cuyahoga County prosecutors [began]

200. *In Re: Affidavits Relating to Timothy Loehmann & Frank Garback* (Cleveland Mun. Ct. June 11, 2015).

201. “As used in this Section, ‘reviewing official’ means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate.” OHIO REV. CODE ANN. § 2935.09(A) (West 2006).

202. “A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official's normal business hours resume.” § 2935.09(D).

203. David A. Graham, “Probable Cause” in the Killing of Tamir Rice, ATLANTIC (June 11, 2015), <https://www.theatlantic.com/politics/archive/2015/06/tamir-rice-case-cleveland/395420/> [https://perma.cc/CR7Q-64CJ].

presenting evidence in the police shooting of 12-year-old Tamir Rice to a grand jury,” indicating that the pressure campaign through the affidavit was successful in at least presenting the charges to a grand jury if not a criminal case.²⁰⁴

2. *Private Prosecution as a Tool for Justice for Madison Smith*

In February 2018, then-college student Madison Smith engaged in what was at first a consensual, sexual encounter with a friend, Jared Stolzenburg.²⁰⁵ Almost immediately, however, Stolzenburg “began slapping her face and strangling her while continuing intercourse.”²⁰⁶ The day after the assault, she immediately told her parents that she was raped, reported her rape to the police, and went to a nearby hospital for a forensic exam. Smith later told investigators that she feared for her life.²⁰⁷

Despite Smith’s efforts to press charges,²⁰⁸ which included meeting with a local prosecutor, the District Attorney’s office declined to file the rape charges.²⁰⁹ After three years of prosecutorial inaction,²¹⁰ Smith became the first citizen to convene a grand jury for a sex-crime charge using an 1887 Kansas law that allows citizens to “go around reluctant prosecutors to seek an

204. See Cory Shaffer, *Grand Jury Hearing Evidence in Tamir Rice Shooting*, CLEVELAND.COM (Oct. 27, 2015), https://www.cleveland.com/metro/2015/10/grand_jury_hearing_evidence_in.html [<https://perma.cc/3D2V-F7RC>]. Ultimately, the grand jury declined to indict the officers. See Corky Siemaszko et al., *Grand Jury Declines to Indict Officers in Tamir Rice Case*, NBC NEWS (Dec. 28, 2015), <https://www.nbcnews.com/news/us-news/grand-jury-declines-indict-officers-tamir-rice-case-n486876> [<https://perma.cc/6QXK-24TP>].

205. Peter Kendall, *A Prosecutor Says No to a Rape Charge, so a College Student Calls Her Own Grand Jury*, WASH. POST (May 19, 2021), https://www.washingtonpost.com/national/a-prosecutor-says-no-to-a-rape-charge-so-a-college-student-calls-her-own-grand-jury/2021/05/18/2ea9a130-b766-11eb-a5fe-bb49dc89a248_story.html [<https://perma.cc/HD6B-PTKM>].

206. *Id.*

207. *See id.*

208. *But see* Yung, *supra* note 16, at 89–92 (addressing some important, practical considerations that make rape-related private prosecutions, in the way that Capers envisions it, particularly difficult. These considerations are as follows: (1) police gatekeeping in which police officers prevent rape complaints from advancing through the criminal justice system; (2) fears and actual retaliations from the accused against the accuser; (3) victims’ not being able to recover from the rape because they are now forced to engage in the grueling criminal justice process even more directly; and (4) judges and jurors not believing the victim).

209. *See* Kendall, *supra* note 205.

210. After initially refusing to press charges, the local district attorney did seek a conviction on aggravated battery, but Smith “has never considered [the February attack] as anything other than rape.” *Id.*

indictment on their own.”²¹¹ In order to convene the grand jury, the law required Smith to gather signatures of support, which she ultimately succeeded in doing.²¹²

Although the grand jury did not ultimately deliver the charge Smith sought, she “had no regrets about pursuing the case,” as her extraordinary efforts “brought a lot of awareness to the fact that a lot of sexual assaults get pushed under the rug and ignored.”²¹³

B. ARGUMENTS AGAINST MORE PRIVATE INVOLVEMENT IN PROSECUTION

This Note anticipates criticisms to social justice movements utilizing, normalizing, and expanding private prosecution. The following section will address five of these possible criticisms, and respond with counter arguments to each.

1. *The Cost Prohibitive Nature of Litigation*

The cost-prohibitive nature of private prosecutions is arguably the most significant concern for possible detractors. Unlike state prosecutions, private prosecutions require the victim—or generally, the individual or organization bringing the case—to finance at least some part of the prosecution. The wealthy and privileged are thus most able to act as private prosecutors. Such a result could further perpetuate inequalities already prevalent in the criminal justice system. In fact, state-centered prosecution began in part due to the high cost and unequal access to privately-funded justice:

Prior to 1829, the constables did not play a key role in public prosecutions. . . . [T]he bulk of all prosecutions remained the

211. *Id.*

212. Some scholars dismiss the entire idea of private prosecutions, instead arguing for more support for public prosecutors as they make discretionary choices. This Note argues, however, that private prosecutions (1) already exist in many states, and (2) are necessary because progressive public prosecutors simply do not currently provide a functional solution to underenforcement. As such, the remainder of this section addresses counterarguments one may make to the idea of expanding the use of existing private prosecution systems, rather than highlighting arguments against their existence altogether.

213. Peter Kendall, *A College Student Who Called Her Own Grand Jury Doesn't Get the Rape Charge She Sought for Her Attacker*, WASH. POST (Nov. 3, 2021), <https://www.washingtonpost.com/nation/2021/11/03/college-student-who-called-her-own-grand-jury-doesnt-get-rape-charge-she-sought-her-attacker/> [https://perma.cc/559W-Q3L8].

responsibility of the citizen victim. Private prosecutions could however be an expensive and time consuming exercise and, from at least the 1690s, various ‘Associations for the Prosecution of Felons’ were established to spread the costs of private prosecutions between the constituent members of the Association. These associations would also arrange for a lawyer to conduct the prosecution on behalf of the victim. It appears that these associations were an important mechanism of crime control for at least two hundred years from the late 1600s, with hundreds in existence at any one time and estimates of up to 4000 in total throughout this period.²¹⁴

These same concerns about the cost of private prosecution persist today. *The New Zealand Herald* discussed the financial barriers of private prosecution for many who would otherwise pursue it: “[T]he cost of private prosecutions using expert investigators and lawyers—legal aid is not given for private criminal prosecutions—is often an insurmountable barrier.”²¹⁵ Access to justice remaining in the hands of the wealthy and powerful may thus exacerbate the problems with public state prosecution.

Perhaps possible private prosecutors could use crowdfunding mechanisms in order to mitigate the high cost of prosecution.²¹⁶ In fact, much like one may respond to fears of over-incarceration, one could argue that citizens should put money into criminal suits in which the law is not on their side. If they do so and lose because of what one might consider “bad” laws, they may then be more aware of flaws in the justice system and be incentivized to attack these deficiencies at their sources—state legislatures.

As such, even if victims can access the funds necessary to finance private prosecutions, the time and money may be ill-spent, as the suits may be unsuccessful (from the victim’s perspective). Arguably, public prosecutors generally are in the best position to determine whether the law will favor a victim’s position. Some may argue that, due to their expertise in criminal law, and their

214. Corns, *supra* note 43, at 283.

215. *When the Man on the Street Is Out for Justice*, *supra* note 77.

216. See Bruno Gonzalez-Cacheda & Celso Cancela Outeda, *Political Crowdfunding and Resource Mobilization for Collective Action: The Keys to Success*, 67 *TECH. IN SOC’Y* 1, 5 (2021); Becky Sullivan, *More Than \$2.7 Million Has Been Raised for the Children of a Uvalde Teacher*, NPR (May 30, 2022), <https://www.npr.org/2022/05/30/1102059629/fundraiser-ualde-teacher-children> [<https://perma.cc/77C7-GBWH>].

experiences with judges and juries, public prosecutors are well-situated to filter out cases that are not winnable under existing law—however troubling the crime.

In any event, and as exhibited through the survey of U.S. states' legal regimes, most state systems do not require a monetary commitment to *initiate* a private prosecution. States generally only allow private complaints or private petitions. These forms of private prosecution should not be particularly cost-prohibitive. Most states, once the grand jury is convened or after it has indicted, return the power of prosecution to the public prosecutor or special prosecutor.

2. *Malicious Private Prosecution*

Critics of expanding the use of private prosecution may point to the possibility of individuals maliciously bringing charges. In fact, one Minnesota Supreme Court judge found that the low rates of private prosecutions are “not surprising[,] because to permit such prosecutions would entail grave danger of vindictive use of the processes of the criminal law and could well lead to chaos in the administration of criminal justice.”²¹⁷ In the BLM sphere, many worry that more criminal prosecution for police officers' missteps will prevent them from properly performing their duties as protectors of the peace.²¹⁸

All U.S. state criminal law systems, however, have safeguards to prevent malicious complaints. Many state courts in jurisdictions in which private prosecution remains legal (at least to some extent) have considered the possibility of vindictive prosecution. Consider a New Jersey district court that heard a criminal case through a private complaint of assault and battery, where the municipal prosecutor did not prosecute the action.²¹⁹ The court noted that “[w]hile there is the possibility of frivolous suits and vindictive behavior by some complainants, abuses are checked and deterred by the court's discretion and by the various

217. State *ex rel.* Wild v. Otis, 257 N.W.2d 361, 365 (Minn. 1977).

218. Megan Cloherty, *Policing Through Change: Officers Leaving the Job Fear Prosecution, not Reforms*, WTOP NEWS (Jan. 25, 2021), <https://wtop.com/local/2021/01/policing-through-change-officers-leaving-the-job-fear-prosecution-not-reforms/> [<https://perma.cc/4Y46-VRWJ>].

219. New Jersey v. Kinder, 701 F. Supp. 486, 487 (D.N.J. 1988) (finding that Deborah Hadley, a letter carrier for the U.S. post office, accused her supervisor, William Kinder, of “pushing her with his body”) (internal citation omitted).

other remedies available for malicious prosecution.”²²⁰ As previously discussed, the grand jury is one such check on malicious prosecution. Many states with some form of private prosecution maintain a grand jury requirement for indictment as well.²²¹ Even without a grand jury requirement, a private individual must obtain approval from a state judge to begin formal prosecutorial proceedings.

3. *Private Prosecution Against Marginalized Communities*

The cases and history highlighted in this Note suggest that private prosecution is most often used as a tool for marginalized communities. Such a pattern, however, is not always the case. Certain groups, for example, may pursue charges that “progressive” prosecutors²²² have declined to pursue.²²³ Angela Davis, in her recent *The Perils of Private Prosecution*, hinted at just this, saying, “[c]rime victims have all kinds of motivations—some worthy and some not so worthy.”²²⁴

At a high level, the use of private prosecution for so-called unworthy motivations amplifies the debate over who is “marginalized” in the United States. With the rise of progressive prosecutors, citizens supporting a traditional “law-and-order” regime will argue that they are politically disenfranchised and could use private prosecutions to serve their interests.

Ultimately, the solution to what some may consider to be a drawback—that private prosecution can be used for *any* social movement—lies not with the decision to prosecute privately or

220. *Id.* at 492.

221. The states which require grand jury indictments for serious crimes which also have private prosecution statutes are Kentucky, New Hampshire, New Jersey, North Carolina, Ohio, Texas, and Virginia.

222. Many progressive prosecutors campaign on not prosecuting low-level crimes like not paying transportation fees, marijuana, misdemeanors, and prostitution. *See, e.g.*, Sonia Moghe, *Manhattan District Attorney Announces He Won’t Prosecute Certain Crimes*, CNN (Jan. 6, 2022), <https://www.cnn.com/2022/01/06/us/alvin-bragg-manhattan-district-attorney-crimes-prosecution/index.html> [https://perma.cc/AYE2-P6SQ]; Matt Daniels, *The Kim Foxx Effect: How Prosecutions have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [https://perma.cc/55SK-CSHY].

223. For example, a group concerned with drug use in its state may form for the purpose of bringing charges against Black and Brown people for nonviolent possessory drug crimes. Further, left-leaning critics may predict greater reliance on private prosecution in opening the floodgates to accusations of electoral fraud and election official malfeasance.

224. Angela J. Davis, Online Symposium, *The Perils of Private Prosecution*, 13 CALIF. L. REV. ONLINE 7, 12 (2022).

publicly, but with the criminal laws themselves. Prosecutorial discretion and private prosecution regimes are not panaceas; rather, they are backstops. The heart of criminal prosecutions lies in the law and with the state legislatures who create the law. If a social movement, like BLM, wants to prevent private prosecution transforming into a tool to be used against the movement's goals, it must work to change the laws themselves, not only who implements them.

4. *An Already Litigious and Punitive Country*

Critics may alternatively argue that the already overly litigious and punitive nature of American society would be exacerbated by private prosecutions.²²⁵ Indeed, the United States undoubtedly is the most litigious society in the world.²²⁶ Americans spend about 2.2 percent of GDP (\$310 billion a year) on tort litigation.²²⁷ The litigiousness could be a sign that frivolous lawsuits would be better handled outside of court or are evidence of malicious suits. Perpetuating this culture of litigiousness into the criminal realm could increase the potential for malicious suits and the inefficiencies with cases brought that would be better handled outside of court.

With regard to the criminal sphere, the United States is the most punitive system in terms of incarceration rates. In total, over two million people are currently detained in U.S. penitentiaries;²²⁸ that is, 629 people in prison per every 100,000 people.²²⁹ The next highest country in terms of prison population is China, with just 119 people incarcerated per every 100,000.²³⁰ Supporters of the

225. See, e.g., Benjamin Levin, Online Symposium, *Victims' Rights Revisited*, 13 CALIF. L. REV. ONLINE 30, 31 (2022) ("I argue that private prosecution won't solve what I see as the fundamental problems with the U.S. criminal system. I worry that the victim driven prosecution that Capers envisions risks re-entrenching punitive impulses and legitimating institutions of punishment.").

226. Paul Rubin, *More Money in Bad Suits*, N.Y. TIMES (Nov. 16, 2010), <https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits> [https://perma.cc/372X-NEDQ].

227. Aleks Jakulin, *Why Are We Such a Litigious Society*, STAT. MODELING, CAUSAL INFERENCE, & SOC. SCI. (Dec. 3, 2015), <https://statmodeling.stat.columbia.edu/2015/12/03/why-us-litigious/> [https://perma.cc/CN36-44QG].

228. *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total> [https://perma.cc/5N8Q-Y2PL].

229. *Id.*

230. *Id.*

prison abolition movement may predict greater rates of incarceration as a result of increased prosecution. They may argue that private prosecution could add to an already disproportionately large prison population, while many advocates are pushing to rein in the overuse of incarceration as a punishment tactic.²³¹

As mentioned in response to malicious prosecution generally, safeguards exist to protect would-be defendants from such abuses. Most states with a private prosecution system still require a grand jury indictment or a state court judge to confirm the complaint alleges enough to bring a case.

Two additional counterarguments may address further concerns over mass incarceration: (1) that private prosecution does not inherently mean that more people will be imprisoned, and (2) that even if private prosecution leads to greater incarceration, justice requires the same punishment for the same level of wrongdoing. To expand on the first response, there could (and perhaps should) be efforts to explore other forms of punishment. In fact, if those who typically evade state prosecution (e.g., people with greater proximity to power) begin to face possible prison time, prison reform and moves towards abolition might accelerate. In other words, if more powerful people begin facing more serious punishment and constraints on liberty, then they or those within their circle of influence may recognize incarceration as an injustice and work towards the reforms that prison abolitionists seek. The second counterargument is retributivist in nature—the punishment must match the crime. Perhaps, as many would likely argue, if we punish some with imprisonment but not others, the United States is not properly satisfying retributive norms. Why, for example, should one found guilty of a drug-related crime be sentenced to years in prison, while another accused of sexual assault not face a trial at all, let alone suffer equal or greater punishment?

C. BENEFITS OF THE PRACTICE THROUGH A THEORETICAL LENS

In addition to the practical counterarguments discussed above, the author considers a very high-level overview of the theoretical arguments in favor of expanding the use of private prosecution,

231. See Robin Ferguson Shaw, *Angela Y. Davis and the Prison Abolition Movement*, Part II, 12 CONTEMP. JUST. REV. 101, 103 (2009).

particularly to advance social movements. Generally, scholars have historically viewed private prosecution as a check on government. As Lord Neuberger, then-President of the Supreme Court of the United Kingdom, said in 2012, “[t]here is no doubt that the right to bring a private prosecution is still firmly part of English Law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities.”²³²

As I have argued, private prosecution can, in fact, be a means to ensure that those who are often overlooked within the traditional prosecutorial system are able to find relief through the criminal system. Beyond this, it ensures a check on power—not just on prosecutorial discretion, but also on other government action intended to chill legal sanctions. Much of this section stems from ideas espoused by not only Lord Neuberger but also Anthony Alfieri in his 2002 piece calling for prosecutors to be more localized through a neighborhood-based system.²³³

1. *A Liberal Race and Feminist Defense*

As in community prosecution, liberalism is central to the theoretical underpinnings of private prosecution. Liberalism in its most classic, Lockean form was a theory of property rights in which a government’s role is to protect individuals from other citizens’ overreach in order to uphold the fundamental rights of “life, liberty, and property.”²³⁴ When a crime goes unpunished, the government, from a liberal perspective, has failed to uphold the social contract—wherein it is responsible for enforcing the laws of society in exchange for citizens willingly subjecting themselves to these laws.

Without private prosecution, some worthy cases would not be prosecuted.²³⁵ The states that have systems to encourage

232. *R (on the application of Gujra) v. Crown Prosecution Service* [2012] UKSC 52 (appeal taken from Eng.).

233. Alfieri, *supra* note 22, at 1474. The theoretical underpinnings for Alfieri’s push towards localizing prosecutors within the neighborhoods that they bring charges fit well into a perhaps more radical suggestion of private prosecutors.

234. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 87, 123, 209, 222 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

235. See *New Jersey v. Kinder*, 701 F. Supp. 486, 491 (D.N.J. 1988); *Voytko v. Ramada Inn of Atl. City*, 445 F. Supp. 315, 328 n.21 (D.N.J. 1978); *State v. Imperiale*, 773 F. Supp. 747, 748 (D.N.J. 1991) (stating that in many instances the prosecutor, “because of the nature

prosecutors to bring cases are encouraging the government to uphold the Lockean social contract. Whether citizens provide affidavits to initiate a case or privately prosecute wrongdoings perpetuated against them, they ensure that the government protects them from future violations of liberty.

Private prosecution can be a tool for the critical race movement as well. From a race perspective, “communities of color often labor under the burdens of living and working in crime-ridden, abandoned inner cities beleaguered by poverty and unemployment. Crime and privation may weaken the conditions for autonomy’s actualization, though they do not preclude it.”²³⁶ Similarly, liberal feminism provides a particularly salient defense to the use of private prosecution in movements like #MeToo. Liberal feminist theory seeks to eviscerate barriers to gender equality in order to allow women complete individual rights of action and choice.²³⁷ A liberal feminist would argue that coercion through domestic violence, assault, sex work, and rape “impinge upon women’s rights and freedoms.”²³⁸ Further, when these wrongdoings are unprosecuted and unpunished, women cannot achieve their full potential.²³⁹ They universally do worse.²⁴⁰

of the complaint combined with limited resources, chooses not to prosecute a particular complaint or category of complaints . . .”).

236. Alfieri, *supra* note 22, at 1481.

237. For arguments supporting the viability of a liberal feminist approach, see generally Linda C. McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992). See also Catriona Mackenzie & Natalie Stoljar, Introduction: The Autonomy Refigured, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 13–19 (2000).

238. Alfieri, *supra* note 22, at 1485 (citing Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism, and Feminist Discourse*, 10 HASTINGS WOMEN’S L.J. 37, 40–45 (1999); Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 464–74 (1999)).

239. Mary Wollstonecraft famously claimed that a woman should be more than just the “toy of man, his rattle.” MARY WOLLSTONECRAFT, VINDICATION OF THE RIGHTS OF WOMAN: WITH STRUCTURES ON POLITICAL AND MORAL SUBJECTS 102 (London: Walker, Scott 1891) (1789). John Stuart Mill agreed, arguing that society should give the “utmost latitude . . . for the adaptation of general rules to individual suitability; and there ought to be nothing to prevent faculties exceptionally adapted to any other pursuit, from obeying their vocation.” JOHN STEWART MILL, THE SUBJECTION OF WOMEN 92 (London: Longmans, Green, Reader, and Dyer 1878).

240. Karen McQueen, Jodie Murphy-Oikonen, Ainsley Miller & Lori Chambers, *Sexual Assault: Women’s Voices on the Health Impacts of Not Being Believed By Police*, 21 BMC WOMEN’S HEALTH 217, 4–6 (2021); Dr. Zoe Morrison, Dr. Antonia Quadara & Cameron Boyd, “Ripple Effects” of Sexual Assault, 7 AUSTL. CTR. FOR THE STUDY OF SEXUAL ASSAULT 1, 8 (2007) (finding a “ripple effect” of sexual assault going beyond the victim to family members, friends, and society as a whole).

2. *Critical Legal Studies*

Finally, the author briefly turns to a defense of private prosecution through the lens of critical legal studies (CLS). CLS—central to political discourse today through partisan debates over its more specific offshoot, critical race theory—originated in the 1970s in large part as a response to legal formalism.²⁴¹ CLS argues that law is indeterminate in nature, and the text of the law does not explain the outcomes of legal disputes. Rather, CLS theorists “argue that judicial decision making is not politically neutral. . . . CLS [theorists] consider judicial decision making itself . . . to be ideological in the sense that the outcomes of legal decision making are informed and influenced by conservative ideology.”²⁴² In other words, law is devised to maintain the status quo. The maintenance of social norms through law nearly always is to the detriment of those in groups that have historically not held political power, of course including, but not limited to, women and Black Americans. Beyond the laws themselves having this purpose and outcome, “judicial decision making,” which, in the context of this Note would inevitably include prosecutorial decisions, would likewise be designed to uphold the status quo under a CLS framework. As Alfieri says, “[t]he stance of resistance deduced from critical race theory [or more broadly critical legal studies] seeks out . . . discrimination in the criminal-justice system in advocacy, adjudication, and policing.”²⁴³

Once CLS scholars establish that law is inherently conservative—that is, it maintains existing power dynamics—the question then is what remedies exist to reformulate laws and legal institutions to achieve justice and equality. Roberto Unger, a notable CLS scholar, argues that one task of CLS is “working . . . within” the legal tradition, by using “legal materials,” to further radical aims.²⁴⁴ These existing “materials” include private prosecution. Expanding the use of private prosecution is

241. J. Paul Oetken, *Form and Substance in Critical Legal Studies*, 100 YALE L.J. 2209, 2211 (1991).

242. Stefan Sciaraffa, *Critical Legal Studies: A Marxist Rejoinder*, 5 LEGAL THEORY 201, 201 (1999).

243. Alfieri, *supra* note 22, at 1489 (internal citation omitted).

244. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 580 (1983).

consistent with the CLS framework and a viable option to address persistent inequities in the U.S. criminal justice system.²⁴⁵

CONCLUSION

Perhaps in response to the recent rise in political polarization, activists have turned to creative uses of the legal system in order to achieve social changes no longer possible through the traditional, political process.²⁴⁶ Private prosecution is another extra-political option. In other nations, the use of private prosecution has proved particularly effective in cases often disregarded by public prosecutors, such as those involving government misconduct or victims who are members of underrepresented communities. Though not possible at the federal level, private prosecution may be utilized in state courts to help the goals of recent social movements, such as BLM and #MeToo. While private prosecution is not without detractors, it could serve as an important, ancillary tool to achieve greater access to justice for those who may be otherwise overlooked and ignored by public prosecutors.

245. Alfieri, *supra* note 22, at 1489.

246. Consider, for example, SB 8, which grants private citizens the authority to sue to enforce Texas' state abortion law. TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–171.208 (West 2021).