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No One Can Serve Two Masters: Arguments Against Private Prosecutors

Matthew S. Nichols*

"The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done."¹

"A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."²

"No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other."³

I. Introduction

In the early history of England the victim of a crime and his family had the right to hire a private attorney to prosecute criminal charges against the person alleged to have injured the victim.⁴ This right to employ a private prosecutor was incorporated into the common law of Virginia.⁵ The use of a private prosecutor is still permitted in Virginia even though the Common-

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1. ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936).

2. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (2000).

3. *Matthew* 6:24 (New International Version).

4. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515 (1994) (discussing historical development of the private prosecutor).

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

wealth provides public prosecutors in essentially all criminal prosecutions.⁶ While the private prosecutor allegedly occupied an important place in criminal prosecutions at common law, the modern application of the private prosecutor rule presents such a danger to the fair and impartial administration of justice that its application violates the protections guaranteed criminal defendants by the Fourteenth Amendment of the United States Constitution and Article I, Section 11 of the Virginia Constitution.⁷

The United States Supreme Court has found that the appointment as special prosecutors of attorneys retained by parties with interests in the outcome of a criminal case requires reversal of the defendant's conviction.⁸ The United States Court of Appeals for the Fourth Circuit has held that a conflict of interest on the part of the prosecutor violates the defendant's due process rights and requires the reversal of the defendant's conviction.⁹ The Supreme Court of Virginia has noted that public policy arguments may support the abolition of the private prosecutor rule and has reversed convictions obtained with the assistance of private prosecutors.¹⁰ The Virginia

6. See VA. CODE ANN. § 15.2-1627.B (Michie 2000). The Virginia Code provides that:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine.

Id.

7. See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; see VA. CONST. art. I, § 11 (providing "[t]hat no person shall be deprived of his life, liberty, or property without due process of law").

8. See *Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807-13 (1987) (holding that trial court has discretion to appoint attorney to prosecute contempt charges but that it is impermissible for adverse party's attorney to prosecute criminal contempt charges arising from related civil case); discussion *infra* Part IV.C.

9. See *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that prosecutor's simultaneous representation of the defendant's wife in divorce proceeding and prosecution of defendant for assault on wife violates the requirement of fundamental fairness assured by the Due Process clause of the Fourteenth Amendment); discussion *infra* Part IV.C.

10. See *Cantrell*, 329 S.E.2d at 26-27 (stating that "a conflict of interest on the part of

General Assembly has restricted the participation of private attorneys in the prosecution of criminal cases.¹¹ However, interested parties continue to convince Virginia trial court judges that privately retained attorneys can participate in the impartial administration of justice without prejudice to defendants.¹² The goals of these interested parties diverge from the obligations placed on the public prosecutor. Interested parties seek the conviction of particular defendants through the private prosecutor's participation. Conviction of a particular defendant often prepares the way for a subsequent, related civil suit in which the private prosecutor's client stands to benefit. As long as private prosecutors are permitted to participate in the prosecution of criminal cases, the private prosecutors' obligations to their clients place the due process rights of criminal defendants at risk.

the prosecution in itself constitutes a denial of the defendant's due process rights under art. I, § 11 of the Constitution of Virginia, and cannot be held harmless error"); discussion *infra* Part IV.C. In *Cantrell*, the Supreme Court of Virginia favorably discussed the defendant's argument that public policy supports abolishing the private prosecutor's role and held that a private prosecutor

having [a] civil interest in [a] case so infects the criminal prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law, that prejudice to the defendant need not be shown. A conflict of interest on the part of the prosecution in itself constitutes a denial of a defendant's due process rights under art. I, § 11 of the Constitution of Virginia, and cannot be held harmless error.

Id.; see also *Adkins v. Commonwealth*, 492 S.E.2d 833, 834-35 (Va. Ct. App. 1997) (holding that trial judge violated defendant's due process rights by appointing private prosecutor retained by victim's family to act as special prosecutor after Commonwealth's Attorney withdrew from the case); discussion *infra* Part IV.C.

11. See VA. CODE. ANN. § 19.2-155 (Michie 2000) (restricting the appointment of special prosecutors to situations in which the attorney for the Commonwealth is disqualified or disabled); discussion *infra* Part IV.D.

12. See, e.g., *Commonwealth v. Riner*, No. F00-265 (Va. Cir. Ct. Nov. 3, 2000) (unreported). In October 2000, the Wise County Commonwealth's Attorney was assisted in the prosecution of Charles Douglas Riner ("Riner") for capital murder, robbery, and arson, by a private attorney paid by the family of Riner's deceased wife. Riner was accused of murdering his wife, Denise Riner ("Denise"), in a house fire in August 1998. Denise's sister hired Guy Harbert ("Harbert"), an attorney from the Roanoke firm of Gentry, Locke, Rakes & Moore to assist in the prosecution. Harbert spearheaded the prosecution of Riner. The private prosecutor made the Commonwealth's opening statement, argued most of the Commonwealth's motions, objected to and argued against most of the defendant's motions, and conducted the examination or cross-examination of the major expert witnesses in the case.

The conflict of interest inherent in criminal prosecutions conducted by privately retained attorneys is clear. Equally clear is the responsibility of the Supreme Court of Virginia and the Virginia General Assembly to protect the due process rights of criminal defendants by prohibiting the employment of private prosecutors. This article will examine the arguments that are generally made in support of private prosecutors and explain why those arguments are not valid. This article also will discuss the duties of the public prosecutor, the ethical obligations of the private attorney, and the conflict of interest that results from the appointment of a privately retained attorney to assist the public prosecutor. Finally, this article will explain that the laws of Virginia provide insufficient safeguards to protect the due process rights of criminal defendants and that a rule is required which prohibits the employment of private prosecutors.

II. Private Prosecutors in Jurisdictions Other Than Virginia

The private prosecutor is defined as a member of the private bar permitted to prosecute a criminal case and retained by a private party with an interest in the outcome of that criminal case.¹³ Virginia is not the only state that permits private attorneys to participate with the government in the prosecution of criminal cases. The courts of Alabama, Georgia, Indiana, Ohio, Pennsylvania, Tennessee, Vermont, West Virginia, and Wisconsin allow privately compensated attorneys to assist in the prosecution of criminal cases in which the party compensating the attorney has an interest.¹⁴

13. Note that many courts use the terms "special prosecutor" and "private prosecutor" interchangeably. However, the term "special prosecutor" is defined in Virginia as an attorney who is appointed to act in the place of a disabled or disqualified attorney for the Commonwealth. See VA. CODE ANN. § 19.2-155 (Michie 2000) (setting out guidelines for the appointment of a special prosecutor when the attorney for the Commonwealth is disabled or disqualified); discussion *infra* Part IV.D.

14. See *Hopkins v. State*, 429 So. 2d 1146, 1154 (Ala. Crim. App. 1983) (holding 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" and that "the fact that the attorney was employed by those interested in the prosecution is wholly immaterial.") (internal citations omitted); *Allen v. State*, 257 S.E.2d 5, 7 (Ga. Ct. App. 1979) (holding that there is no valid objection when special prosecutor also represents alleged victim in civil suit arising from the same incident); *Brown v. State*, 244 S.E.2d 68, 70 (Ga. Ct. App. 1978) (holding that there is no error when trial judge refuses to disqualify special prosecutor because of representation of alleged victim's family in related civil action), *rev'd on other grounds*, 250 S.E.2d 438 (Ga. 1978); *Shuttleworth v. State*, 469 N.E.2d 1210, 1217-18 (Ind. Ct. App. 1984) (holding that prosecutor's prior representation of defendant's wife in defendant's divorce proceeding did not disqualify prosecutor from criminal action for

Other states, however, do not permit privately retained attorneys to act as prosecutors. The Supreme Court of Colorado has held that the participation of private prosecutors is improper and prejudicial to the defendant.¹⁵ Iowa statutes prohibit attorneys from assisting in criminal prosecutions that are related to civil actions in which a recovery is sought on the matters involved in the criminal prosecution.¹⁶ Some states, including Illinois, Kentucky, Massachusetts, Michigan, Nebraska, and South Dakota, have laws that prohibit a prosecutor from acting as counsel in civil cases which rely on the same facts as a criminal prosecution in which the prosecutor is involved.¹⁷ Iowa law also prohibits a prosecutor from accept

nonsupport); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) (holding that no statutory or constitutional reason exists for prohibiting private prosecutors from assisting in criminal prosecutions); *Commonwealth v. Musto*, 35 A.2d 307, 310 (Pa. 1944) (holding that it is within the trial judge's discretion to permit private prosecutor to appear in criminal case); *Commonwealth v. Dunlap*, 335 A.2d 364, 366 (Pa. Super. Ct. 1975) (holding that defendant must show actual prejudice before private prosecutor must be disqualified), *aff'd*, 377 A.2d 975 (Pa. 1977); *Wilson v. Wilson*, 984 S.W.2d 898, 899-902 (Tenn. 1998) (declining to adopt a rule of automatic disqualification for attorney representing party in divorce and prosecuting criminal contempt charge against opposing party); *State v. Ward*, 17 A. 483, 485 (Vt. 1889) (holding that appointment as prosecutor of attorney representing an adverse party in a related civil suit against defendant is within the discretion of the trial judge); *State v. King*, 396 S.E.2d 402, 411 (W. Va. 1990) (allowing attorney who, in a related civil suit, had been appointed guardian ad litem of alleged victim to prosecute the criminal case); *Bird v. State*, 45 N.W. 1126, 1126-27 (Wis. 1890) (allowing the private prosecutor to assist in criminal prosecution so long as the private prosecutor had renounced his previous employment by the alleged victim's father).

15. See *People v. Jiminez*, 528 P.2d 913, 915-16 (Colo. 1974) (prohibiting district attorney from representing party in divorce and prosecuting criminal charge arising from same facts). In *Jiminez*, the Supreme Court of Colorado stated that prosecutor's conflict of interest was patently obvious and admonished the assistant district attorney and

any others in the profession, if any there may be, who have labored under the misconception that there is nothing wrong when a district attorney acts as counsel for a litigant in a civil case, and prosecutes a criminal case based upon the facts giving rise to the civil action, we give warning: This court will not countenance or tolerate such conduct. We condemn it.

Id. (citations omitted).

16. See *State ex rel. Newby v. Anderson*, 164 N.W. 619, 619-20 (Iowa 1917) (disqualifying by statute a private attorney prosecuting criminal case and representing the victim in related civil action); *State v. Jensen*, 160 N.W. 832, 835-36 (Iowa 1917) (same).

17. See *People v. Kidd*, 81 N.E.2d 892, 895-96 (Ill. 1948) (discussing Illinois statute proscribing a prosecutor from employment in a civil case upon the same facts in a criminal case); see also *Commonwealth v. Tabor*, 384 N.E.2d 190, 195-96 (Mass. 1978) (holding that statute precluded private compensation of the district attorney or any attorney assisting him);

ing fees for prosecuting criminal cases.¹⁸ North Dakota has a similar statute, though the Supreme Court of North Dakota has declined to extend the law to apply to a privately retained special prosecutor.¹⁹ The varied treatment of private prosecutors and privately compensated prosecutors outside of Virginia weakens the argument often relied upon in support of the private prosecutor – that private prosecutors are part of an important common law tradition, which courts should leave undisturbed.

III. Traditional Arguments Supporting the Private Prosecutor Are Not Valid

A. The Historical Significance of the Private Prosecutor

A major argument raised in support of the right to retain private prosecutors is that the private prosecutor is a time honored fixture of the common law. The Supreme Court of Virginia has placed great emphasis on the notion that the private prosecutor is part of the common law and the right to retain one cannot be abolished absent a clear message from the Virginia General Assembly.²⁰ Accounts, including those relied upon by the Supreme Court of Virginia, that detail the importance of the private prosecutor at common law rely too heavily on the historical development of

Commonwealth v. Gibbs, 70 Mass. (4 Gray) 146, 147-48 (1855) (complying with statute and ordering new trial for defendants tried by prosecutor who had previously filed numerous civil actions against the defendants); *People v. Hillhouse*, 45 N.W. 484, 485-86 (Mich. 1890) (holding that conviction could not stand when prosecutor violated statute prohibiting prosecutor from representing complaining witness in related replevin action); *People v. Hurst*, 1 N.W. 1027, 1027-28 (Mich. 1879) (holding that once the attorney's position as prosecutor was secured by his participation in related civil action the participation of the attorney in the criminal action is improper); *Fitzgerald v. State*, 110 N.W. 676, 677-78 (Neb. 1907) (discussing but not applying statute that prohibits prosecutor from representing any party in civil suit based in the same facts as a criminal case in which the prosecutor is involved); *State v. Basham*, 170 N.W.2d 238, 241-42 (S.D. 1969) (holding that prosecutor barred by statute from representing complaining witness in related civil action even though cases were not simultaneously pending); *Hosford v. Eno*, 168 N.W. 764, 765 (S.D. 1918) (holding that attorney was prevented by statute from representing defendant in civil case related to criminal prosecution).

18. See *State v. Williams*, 217 N.W.2d 573, 575 (Iowa 1974) (discussing Iowa statute prohibiting prosecutor from accepting fees for the prosecution of criminal cases).

19. See *State v. Kent*, 62 N.W. 631, 635 (N.D. 1895) (holding that statute prohibiting prosecutor from accepting fees for prosecuting criminal cases did not apply to privately retained special prosecutor).

20. See *Cantrell v. Commonwealth*, 329 S.E.2d 22, 25-26 (Va. 1985) (discussing that Supreme Court of Virginia will not abolish private prosecutors without clear message from General Assembly).

criminal prosecutions in England and too lightly on the development of public prosecutors within the Commonwealth. Simply put, reliance on the historical significance of private prosecutors is misplaced.

According to some scholars, criminal complaints were tried within the framework of a pure adversary system in the early history of England.²¹ This was understood as the most effective method to bring a criminal to justice.²² The English Crown assigned prosecutors to serious criminal cases, but the right of the victim to initiate criminal proceedings against a defendant was respected well into the nineteenth century.²³ Crime victims or their families were afforded the right to hire private attorneys to prosecute these cases.²⁴ The argument that the private prosecutor is a right deeply embedded in Virginia common law is less persuasive, though, once the historical context is properly understood. England lagged behind the Commonwealth of Virginia in establishing a public system for criminal prosecutions. The notion of a public prosecutor did not emerge in England until the Prosecution of Offenses Act of 1879 established the Office of Director of Public Prosecutions.²⁵ Although England did not establish a public prosecutor's office until the nineteenth century, Virginia established a public system to assist in the prosecution of criminal cases relatively early.²⁶ Virginia established the office of Attorney General in 1643 to aid the Crown in criminal prosecutions.²⁷ A formal system of county prosecutors was established in 1711.²⁸ To the extent that proponents of private prosecutors rely on the historical significance of private prosecutors at common law in England, that reliance is misplaced. Virginia's public prosecutor system pre-dates the development of a public prosecutor's office in England by more than 180 years. The factors that necessitated the private prosecution of criminal cases in England did not exist in Virginia once the Commonwealth established a county prosecutor system. When the Com-

21. See Bessler, *supra* note 4, at 514.

22. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359 (1986) (discussing historical development of criminal prosecutions in England).

23. *Id.* at 359-60.

24. *Id.*

25. *Id.* at 360-61.

26. Bessler, *supra* note 4, at 516.

27. *Id.*

28. *Id.*

monwealth assumed responsibility for criminal prosecutions, private citizens were no longer burdened by that responsibility. Even so, the right of a victim to retain a private prosecutor to assist the Commonwealth in the prosecution of criminal cases was incorporated into the common law of Virginia.²⁹ The Supreme Court of Virginia has refused to abolish the common law right to retain a private prosecutor in part because the court places too much emphasis on the history of private prosecutors in England without recognizing that the need for private prosecutors in Virginia no longer exists, and has not existed since the early eighteenth century.

B. Protecting the Rights of Crime Victims

Victims' rights groups present additional arguments for preserving the right to retain private prosecutors. The victims' rights movement has successfully supported legislation that formalizes the roles of victims within the criminal law process. The idea behind the victims' rights movement has been that the criminal law seems cold and impersonal and that the resolution of criminal cases often leaves victims feeling left out of the process or even ignored.³⁰ As a result, the victims' rights movement has pushed for legislation that gives victims a voice in the criminal law process. In addition, there has been a push by these groups to buttress the informal relationship that has always existed between prosecutors and crime victims. Corporate "victims" and insurance companies have led the charge in protecting the rights of victims to hire and retain expert witnesses, investigators, and

29. For early Virginia cases approving the use of private prosecutors see *McCue v. Commonwealth*, 49 S.E.2d 623, 630 (Va. 1905) ("The right of the public prosecutor to have associated with him an attorney to assist in the prosecution is established law in this state, and it is not a proper subject of animadversion. He is as lawfully there to assist the prosecution as counsel for the defense to defend the prisoner; and so long as he keeps within proper bounds he is not open to criticism before the jury."); *Jackson v. Commonwealth*, 30 S.E. 452, 453 (Va. 1898) (holding that the decision to allow the private prosecutor to "conduct the case, and open and close the argument before the jury" is within the discretion of the trial judge, subject to the abuse of discretion standard of review); *Sawyers v. Commonwealth*, 13 S.E. 708, 708 (Va. 1891) (holding that appointment of the victim's attorney to aid the Commonwealth is subject to abuse of discretion standard of review); *Hopper v. Commonwealth*, 47 Va. 878, 879 (1849) (holding that the prosecutor may employ a member of the bar to assist in the prosecution of a criminal case).

30. See generally Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998) (advocating a "client-centered" role for prosecutors).

attorneys to assist public prosecutors.³¹ Victims' rights advocates voice concern that the individual interests of victims are not sufficiently protected by the public prosecutor and the criminal law system. One result is the advocacy of a redefined role for the prosecutor as a "quasi" client-centered counselor.³² Proponents of this redefined role are primarily concerned that, although prosecutorial discretion "traditionally enables the prosecutor to act impartially, the exclusion of the victim has become so routine that the victim virtually vanishes after the arrest."³³ The victims' rights groups seek reforms that will secure more inclusion in criminal proceedings, and in some cases advocate elimination of the prosecutor's obligations to the public and to the protection of the defendant's due process rights.³⁴ These groups envision a fundamental departure from the established law of the country. They envision a transformation of the public prosecutor into a pure advocate and representative of the crime victim.³⁵ Such a change is contrary to our entire system of criminal justice. The laws of this country are designed to protect the due process rights of criminal defendants from the arbitrary imposition of criminal punishments. Our system is also designed to prevent vengeance from replacing justice. It is this concern that lends the greatest support to the use of impartial representatives of the government as prosecutors. The goal of the prosecutor "in a criminal prosecution is not that it shall win a case, but that justice shall be done."³⁶ This is not to say that victims have no role in the criminal law process, only that the relationship between the prosecutor and the victim must remain appropriately limited.

31. See Kirk J. Nahra, *The Role of Victims in Criminal Investigations and Prosecutions*, 33 AUG PROSECUTOR 28 (1999) (defending efforts of the insurance industry to assist in prosecution of white-collar crimes).

32. Caplow, *supra* note 30, at 8-19.

33. *Id.* at 18. The article goes on to state that "[i]ndeed, judges presumably accept the notion that the victim's case is public property and can be adjudicated without any victim participation." *Id.*

34. *Id.* at 19.

35. See Cardenas, *supra* note 22, at 358 (proposing that private parties should have standing to prosecute criminal cases); see also Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L. J. 1691 (1997) (discussing support for Victims' Rights Amendments to the United States Constitution).

36. *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that defendant was entitled to a new trial based on the cumulative effects of prosecutor's misconduct).

The prosecutor's larger duty to the public interest precludes collapsing his role into that of the victim's advocate.

Notwithstanding the need for impartiality in the public prosecutor's office, the Virginia General Assembly responded to the concerns of victims' rights groups by enacting the Crime Victim and Witness Rights Act. Virginia Code Section 19.2-11.01 prescribes the outer limits of the obligations owed by the attorney for Commonwealth to victims of crime.³⁷ The General Assembly has determined that the official participation of crime victims in the criminal law process should include: (1) the protection of the victims' privacy and personal safety;³⁸ (2) limited financial assistance;³⁹ (3) notice of activity related to the case involving the victim;⁴⁰ (4) provisions for presenting victim impact statements;⁴¹ and (5) provision of courtroom assistance, including the use of interpreters and protection of the victims' address and personal information.⁴² There is no provision in the Crime Victim and Witness Rights Act for the appointment of an attorney to represent the victim, nor does the statute provide for the victim to retain an attorney to assist the Commonwealth.

That victims have a limited role in the criminal law process is not to say that victims have no individual redress against those who have wronged them. The tort system provides causes of action that crime victims may pursue instead of, or in addition to, the criminal sanctions pursued by the government.⁴³ Those who have been physically injured by the actions of others may bring a cause of action for battery in civil court. A murder victim's estate or survivors may be able to bring suit for wrongful death against the person believed to have killed the victim. These civil causes of action allow plaintiffs to seek compensation from those persons who injured them.⁴⁴ The criminal law and the prosecutor are not concerned with individual compensation, but in vindicating the interests of the public at large.⁴⁵

37. See VA. CODE ANN. § 19.2-11.01 (Michie 2000) (setting out provisions of the Crime Victim and Witness Rights Act).

38. § 19.2-11.01(A)(1).

39. § 19.2-11.01(A)(2).

40. § 19.2-11.01(A)(3).

41. § 19.2-11.01(A)(4).

42. § 19.2-11.01(A)(5).

43. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971) (discussing the distinction between tort causes of action and criminal prosecutions).

44. *Id.*

45. *Id.*

The civil causes of action, however, are initiated by individuals and focus on compensation for specific injured parties.⁴⁶ This is the proper domain of the private attorney and the proper mechanism for crime victims to seek redress against their wrongdoers. Criminal law and tort law have developed along very different paths because each has focused on different goals.⁴⁷ The separate goals of the two systems militate against permitting private parties to stand alongside the government in the prosecution of criminal cases. In criminal cases, prosecutors focus on vindicating the interests of the public, but those interests are jeopardized by a prosecutor focused on securing compensation for a particular, interested party.

IV. *The Employment of Private Prosecutors Violates the Due Process Rights of Criminal Defendants*

A. *The Public Prosecutor's Conflict of Interest Violates Due Process*

The prosecutor's duty is distinct from the duty a private attorney owes to an individual client. In *Berger v. United States*,⁴⁸ the United States Supreme Court described the nature of the prosecutor's role not as an adversary concerned with winning cases, but as a representative of the public obligated to the ideal that "justice shall be done."⁴⁹ In 1958, the American Bar Association Joint Conference on Professional Responsibility admonished prosecutors to recognize that their role within the adversary system must be tempered by the pledge to accomplish "one objective only, that of

46. *Id.*

47. *Id.*

48. 295 U.S. 78 (1935).

49. *Berger v. United States*, 295 U.S. 78, 88-89 (1935) (holding that defendant was entitled to a new trial based on the cumulative effects of prosecutor's misconduct). After severely criticizing the conduct of the federal prosecutor at trial, the Court went on to say that

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

Id. at 88.

impartial justice.⁵⁰ The Report of the Joint Conference notes that the prosecutor must remain unfettered by the interests of an individual.⁵¹ The prosecutor cannot act as an attorney representing a client because his obligations run to society and defendants as well as to victims of crime.⁵² The prosecutor's unique role in the criminal justice system was also addressed in the Virginia Code of Professional Responsibility.⁵³ The Code of Professional Responsibility emphasized the special duty that a prosecutor undertakes as a representative of the whole society.⁵⁴ This obligation to the whole of society prevents a prosecutor from acting as a partisan advocate for an individual victim. The prosecutor's obligations to protect the rights of the criminal defendant are addressed by the Virginia Rules of Professional Conduct.⁵⁵ Rule 3.8 of the Virginia Rules of Professional Conduct states

50. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (discussing the ethical responsibilities of lawyers). The conference report read

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.

Id.

51. *Id.*

52. *Id.*

53. VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 8-10 (1996). Ethical Consideration 8-10 states:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities differing from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense if available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Id.

54. *Id.*

55. See VA. RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (2000) (commenting

that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."⁵⁶ A public prosecutor must remain focused on the impartial administration of justice – a goal that is inconsistent with the single-minded focus required of the attorney representing a private party. The prosecutor occupies a "quasi-judicial" role that is created by the duty to seek justice.⁵⁷ When a prosecutor also owes a duty to a private party, his ability to fulfill his responsibility to protect the rights of the accused is called into question. The diverging interest in fulfilling his public duty while pursuing the interest of his individual client creates a conflict of interest from which the private prosecutor cannot escape. The United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of Virginia have held that a public prosecutor's conflict of interest renders a conviction constitutionally invalid.⁵⁸ The prosecutor's conflict of interest violates the defendant's right to a fair trial and the United States Supreme Court has suggested that this violation cannot be subjected to harmless error analysis.⁵⁹

that the office of prosecutor carries with it "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence").

56. *Id.*

57. *Id.* (discussing the role of the public prosecutor).

58. See *Berger v. United States*, 295 U.S. 78, 88-89 (1935) (holding that defendant was entitled to a new trial based on the cumulative effects of prosecutor's misconduct); see also *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that prosecutor's simultaneous representation of the defendant's wife in divorce proceeding and prosecution of defendant for assault on wife violates the requirement of fundamental fairness assured by the Due Process clause of the Fourteenth Amendment); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985) (stating that "a conflict of interest on the part of the prosecution in itself constitutes a denial of the defendant's due process rights under art. I, § 11 of the Constitution of Virginia, and cannot be held harmless error").

59. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811-12 (1987). The Supreme Court found that a determination of actual prejudice resulting from the use of private prosecutors is not required. The Court explained that

A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. "[J]ustice must satisfy the appearance of justice," and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

B. The Private Prosecutor's Conflict of Interest Must Be Imputed to the Public Prosecutor

The familiar description of the duty owed by an attorney to his client is that the attorney must "represent his client zealously within the bounds of the law."⁶⁰ This duty includes the obligation to pursue the interests of the client and to consult the client on major decisions that impact the client's interests.⁶¹ This duty is discussed in the Virginia Rules of Professional Conduct, which state that "[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship."⁶² The comments to Rule 1.3(c) state that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁶³ The attorney's goal is to secure the result that the client desires.⁶⁴ Once an attorney undertakes to represent a client, the attorney becomes the agent of the client and is not permitted to engage in activities that prejudice the interests of the client.⁶⁵ When an attorney is

Id. (citations omitted).

60. VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1996). The Virginia Code of Professional Responsibility recognized that

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means and to present for adjudication any lawful claim, issue, or defense.

Id.

61. VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1996). The Virginia Code of Professional Responsibility recognized that

[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

Id.

62. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.3(c) (2000).

63. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.3(c) cmt. 1 (2000).

64. *Id.*

65. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.3 (2000).

retained as a private prosecutor, the client's interest is that a particular defendant be convicted.

The duties a private attorney owes to third parties do not extend much further than discovery disclosure and the prohibition on giving the client advice on the commission and concealment of future criminal acts.⁶⁶ On the other hand, the public prosecutor is a representative of the people and is focused on the impartial administration of justice.⁶⁷ When an attorney representing a party who is interested in a specific outcome in a criminal proceeding is permitted to prosecute that case, the disparate duties owed by the private prosecutor must collide. It is this conflict of interest which violates the defendant's due process rights.

Presently, if a private prosecutor is permitted to assist in a criminal case, the private prosecutor must remain under the control of the public prosecutor and may only serve with the consent of the public prosecutor.⁶⁸ In addition, the private prosecutor is subject to the same standards of conduct as the public prosecutor.⁶⁹ The private prosecutor fills a subordinate position within the prosecutor's office. An attorney who is permitted to serve as a private prosecutor nevertheless takes on the obligations and responsibilities of a public prosecutor. The conflict of interest between this duty and the duty to the private party thus becomes a conflict of interest which must be imputed to the public prosecutor. The private prosecutor must act in accordance with the obligations of the public prosecutor, and Virginia law prohibits the attorney for the Commonwealth from engaging in the private practice of law or accepting fees for his work as a prosecutor.⁷⁰ Thus, the presence of a private prosecutor representing the interests of a private party creates a conflict of interest within the office of the attorney for the Commonwealth. The public prosecutor's conflict of interest through the private prosecutor results in a violation of the criminal defen-

66. See VA. RULES OF PROFESSIONAL CONDUCT Rule 4.4 (2000) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."); see also VA. RULES OF PROFESSIONAL CONDUCT Rule 4.1 (2000) (stating that "[a] lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.").

67. VA. RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (2000).

68. See *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26 (Va. 1985).

69. *Id.*

70. See discussion of Virginia Code § 19.2-155 *infra* Part IV.E.

dant's due process rights and cannot be permitted. Restricting the scope of participation of the private prosecutor does not alter the nature of the conflict of interest because the private client's interests remain a factor so long as the private prosecutor is permitted to participate in the criminal case.

C. *The Courts and the Private Prosecutor*

In 1987, the United States Supreme Court handed down its decision in *Young v. United States ex rel. Vuitton et Fils S.A.*⁷¹ In *Young*, private attorneys for Louis Vuitton, a French leather goods company, were appointed as special prosecutors by the district court to prosecute criminal contempt charges arising from a civil suit brought by Louis Vuitton.⁷² The defendants were convicted and appealed to the United States Court of Appeals for the Second Circuit.⁷³ The Second Circuit affirmed the defendants' convictions, relying on the trial judge's determination that the conviction did not result in injustice.⁷⁴ The defendants then appealed to the United States Supreme Court.⁷⁵ The defendants argued that the trial court was without authority to appoint special prosecutors.⁷⁶ The majority rejected this argument, noting that the district court's power to initiate contempt proceedings carried with it the power to appoint private attorneys to prosecute the contempt charges.⁷⁷ The Court then considered the appointment of counsel for Louis Vuitton as special prosecutors.⁷⁸ The Court did not hold that counsel acted improperly, but explained that the situation created "the potential for private interest to influence the discharge of public duty."⁷⁹

71. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987) (holding that trial court has discretion to appoint attorney to prosecute contempt charges but that it is impermissible for adverse party's attorney to prosecute criminal contempt charges arising from related civil case).

72. *Id.* at 790-92.

73. *United States ex rel. Vuitton et Fils S.A. v. Klaymenc*, 780 F.2d 179, 180 (2d Cir. 1985) (affirming defendants' criminal contempt convictions prosecuted by attorneys retained by opposing party in civil litigation from which contempt charges arose).

74. *Id.* at 184. The Second Circuit noted that the trial judge is best situated to protect against injustice and has the supervisory authority to regulate the actions of attorneys at trial so as to ensure against injustice. *Id.*

75. *Young*, 481 U.S. at 787.

76. *Id.* at 793.

77. *Id.* at 800-01.

78. *Id.* at 802-09.

79. *Id.* at 805. The Court also found that "[t]he prosecutor is appointed solely to pursue

The justices split on the issue of remedy. Justice Brennan favored per se reversal of the convictions, while Justices Powell and O'Connor, as well as Chief Justice Rehnquist, would have sent the case back to determine whether the appointment of counsel resulted in harmless error.⁸⁰ A majority of the Court expressed concern that "representation of other clients may compromise the prosecutor's pursuit of the Government's interest."⁸¹ The plurality in *Young* avoided the constitutional issue that is presented when a private prosecutor is involved in a criminal case. The Court ruled that prosecution of the criminal contempt charge by the attorneys representing an adverse party in the related civil case was impermissible.⁸² The holding was made under the "supervisory authority" of the Court though it was presented in language indicative of a due process decision.⁸³

Although *Young* is not binding on state courts, it is an important tool in analyzing the issue of private prosecutors because the Court's analysis of the role of the prosecutor and the conflict of interest created by private prosecutors is consistent with the constitutional argument set out almost twenty years previous by the United States Court of Appeals for the Fourth Circuit in *Ganger v. Peyton*.⁸⁴ The defendant in *Ganger* was charged with

the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804.

80. *Id.* at 827.

81. *Id.* at 804.

82. *Id.* at 809.

83. *Id.* Though the Court relied upon its supervisory power over the Federal courts in holding that the convictions were invalid, the majority found that:

A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.

Id. at 807. The Court determined that because the prosecutor wields such extraordinary power attorneys representing an adverse party should not be permitted to prosecute criminal contempt charges against the party-opponent. *Id.* The Court expressed concern that prosecutions conducted by the adverse party's counsel would permit the private party's interest to compromise the government's interest. *Id.* at 804.

84. *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that prosecutor's simultaneous representation of the defendant's wife in divorce proceeding and prosecution

assault arising out of a domestic dispute.⁸⁵ The defendant's wife filed for divorce as a result of the dispute and retained the attorney for the Commonwealth to represent her in the divorce.⁸⁶ The same attorney for the Commonwealth also prosecuted the assault charge against the defendant.⁸⁷ Ganger was convicted of assault and sentenced to six months in jail. The United States District Court for the Eastern District of Virginia reversed Ganger's conviction based on the fact that the attorney for the Commonwealth represented the defendant's wife in the related divorce proceeding.⁸⁸ The Fourth Circuit affirmed the court's reversal of the conviction.⁸⁹ The Fourth Circuit placed particular emphasis on the prosecutor's self-interest in securing a conviction.⁹⁰ The court noted that a conviction could affect the amount of the attorney's fee and this could have caused the prosecutor to forego plea bargaining or even the decision whether to prosecute the case at all.⁹¹ The court found that representing the defendant's wife in the divorce proceeding suggested that the attorney for the Commonwealth may have abdicated to the client his responsibility and discretion as a representative of the public.⁹² The Commonwealth conceded that the attorney for the Commonwealth should not have represented the defendant's wife in the divorce. However, the Commonwealth argued that the representation resulted in no error in the criminal case.⁹³ The Fourth Circuit rejected this contention and held that the prosecutor's conflict of interest was a per se violation of the defendant's due process rights and required reversal of his conviction.⁹⁴

As *Young* and *Ganger* demonstrate, the prosecutor's conflict of interest arises in cases in which a private party has an interest in the conviction of a

of defendant for assault on wife violates the requirement of fundamental fairness assured by the Due Process clause of the Fourteenth Amendment).

85. *Id.* at 711.

86. *Id.*

87. *Id.* at 712-13.

88. *Id.* at 711-12.

89. *Id.* at 714-15.

90. *Id.* at 714.

91. *Id.* at 713.

92. *Id.* at 714.

93. *Id.*

94. *Id.*

particular defendant.⁹⁵ The leading Virginia case on the private prosecutor's conflict of interest is *Cantrell v. Commonwealth*.⁹⁶ The defendant in *Cantrell* was charged with the first-degree murder in the death of his wife.⁹⁷ The parents of the victim hired a local attorney, Carl McAfee ("McAfee"), to assist the attorney for the Commonwealth and to "help to get [the defendant] convicted."⁹⁸ McAfee was not formally appointed as a special prosecutor by the judge, was not hired as an Assistant attorney for the Commonwealth, was not paid by the Commonwealth, and did not take an oath of office.⁹⁹ However, the parents of the victim incurred fees exceeding \$10,000 related to McAfee's participation in the case.¹⁰⁰ Cantrell was convicted and appealed, arguing that McAfee's participation violated Cantrell's right to a fair trial.¹⁰¹ The Supreme Court of Virginia acknowledged that McAfee was clearly lead counsel in the case, noting that "he examined most of the witnesses, made and responded to most of the motions and objections, and made the closing argument to the jury."¹⁰² The family of the victim in *Cantrell* also retained McAfee as counsel in a civil case in which the parents of the victim sought custody of the defendant's children.¹⁰³ The defendant argued that the custody case would be facilitated by a criminal conviction and that conviction would set the stage for a wrongful death action, which would bar the defendant from inheriting from his deceased

95. See, e.g., *Compton v. Commonwealth*, 175 S.E. 879, 881-82 (Va. 1934). In *Compton*, the county sheriff and county clerk employed a private prosecutor to assist the Commonwealth in obtaining a conviction for first-degree murder. *Id.* The Supreme Court of Virginia held in *Compton* that prejudice is presumed when an accused proves that the officer to whom the jury has been committed for the purpose of guarding them against outside influence was so interested in the verdict that he employed a private prosecutor to obtain a conviction. *Id.*; see also *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), discussed *supra*.

96. *Cantrell v. Commonwealth*, 329 S.E.2d 22, 23 (Va. 1985) (holding that possibility of prosecutor's conflict of interest rises to an overwhelming probability when attorney representing party in civil case is permitted to assist in the prosecution of criminal charges arising from facts related to the civil case).

97. *Id.* at 23.

98. *Id.* at 24-25.

99. *Id.* at 25.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

wife.¹⁰⁴ The defendant argued that obtaining a criminal conviction held such an incentive for McAfee and his civil clients that it created a conflict of interest between McAfee's duty to zealously represent the interest of his clients and his obligation as a prosecutor to administer justice impartially.¹⁰⁵

A unanimous Supreme Court of Virginia reversed the defendant's conviction.¹⁰⁶ The court held that the likelihood that McAfee's duty to his civil clients conflicted with his duty as a prosecutor to "seek justice, not merely convict" rose to the level of an "overwhelming probability."¹⁰⁷ The court determined that the degree of control which McAfee exercised over the criminal case and his conflicting duties to his civil clients and to the public created a situation in which the defendant was denied his due process right to a fair trial.¹⁰⁸ The court held that harmless error analysis did not attach and that prejudice to the defendant need not be shown once a prosecutor's conflict of interest is established.¹⁰⁹

More than a decade after *Cantrell*, the Court of Appeals of Virginia held that a trial judge violated a defendant's due process rights by appointing a private prosecutor retained by the victim's family to act as a special prosecutor after the attorney for the Commonwealth withdrew from the case. In *Adkins v. Commonwealth*,¹¹⁰ the Commonwealth argued that *Cantrell* was distinguishable on its facts.¹¹¹ The Commonwealth tried to distinguish the special prosecutor in *Adkins* from the private prosecutor in *Cantrell*, arguing that the private attorney was never formally appointed as a special prosecutor, had never taken an oath of office, and was not paid by the Commonwealth.¹¹² The Commonwealth also argued that unlike the private prosecutor in *Cantrell*, the special prosecutor in *Adkins* never represented the victim's family in civil proceedings.¹¹³ The Commonwealth argued further that because the special prosecutor ended his representation of the family when he was appointed as the special prosecutor in the crimi-

104. *Id.*

105. *Id.*

106. *Id.* at 29.

107. *Id.*

108. *Id.*

109. *Id.*

110. 492 S.E.2d 833 (Va. Ct. App. 1997).

111. *Adkins v. Commonwealth*, 492 S.E.2d 833, 835-36 (Va. Ct. App. 1997) (holding that special prosecutor's conflict of interest violated defendant's right to fair trial).

112. *Id.* at 835.

113. *Id.*

nal case, any conflict that might have once existed ceased to exist.¹¹⁴ The court rejected the distinctions offered by the Commonwealth.¹¹⁵ The court noted that the prosecutor's duty is "not merely to convict but to see that the accused receives a fair and impartial trial."¹¹⁶ The Court of Appeals of Virginia held that a special prosecutor formerly employed by the victim's family "is incapable of exercising the fair-minded prosecutorial discretion to which the defendant is entitled."¹¹⁷ The court placed particular emphasis on the prior relationship with the victim's family and the ongoing obligation that counsel incurred as the family's private attorney.¹¹⁸ The court went on to say that "[o]nce the private prosecutor who has been paid by the victim's family to obtain a conviction becomes the special prosecutor with full discretionary authority, obviously, the opportunity to give full reign to the partiality that initially existed is unchecked."¹¹⁹

D. The Cantrell Framework Allows Private Parties to Co-opt the Prosecutor's Office in Pursuit of Private Vengeance

The Supreme Court of Virginia in *Cantrell* relied on the common law history of the private prosecutor right to support the continued existence of private prosecutors.¹²⁰ The court subscribed to the view that the right to retain a private prosecutor is deeply embedded in American legal culture.¹²¹ Instead of abolishing private prosecutors, the court fashioned a test for reviewing the appointments of private prosecutors.¹²² The court determined that a private prosecutor is subject to the same standards of conduct as the public prosecutor, and cannot advocate any position that would be forbidden to the public prosecutor.¹²³ The court found the private prosecutor's

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985).

121. *Id.*

122. *Id.* at 26.

123. *Id.* (citing *State ex rel. Moran v. Ziegler*, 244 S.E.2d 550, 552-53 (W. Va. 1978) (holding that private prosecutor must abandon the role of a partisan advocate and must be held to the same standards as the public prosecutor)).

role to be limited.¹²⁴ The right to have a private prosecutor assist the prosecution lies within the discretion of the trial judge.¹²⁵ The court noted that the private prosecutor: (1) cannot initiate a criminal proceeding or appear before the grand jury;¹²⁶ (2) may only participate with the express consent of the attorney for the Commonwealth;¹²⁷ (3) may make closing arguments only within the trial court's discretion;¹²⁸ (4) may not participate in plea decisions or decisions to enter a nolle prosequi;¹²⁹ and (5) must remain under the continuous control of the public prosecutor.¹³⁰ Finally, the court held that the possibility that "private vengeance has been substituted for impartial application of the criminal law" precludes harmless error analysis.¹³¹ The court explained that a prosecutor's conflict of interest alone results in a denial of the defendant's due process rights.¹³² However, the court's failure to abolish the private prosecutor leaves open the opportunity for private prosecutors to appear in Virginia criminal cases.

The list of factors set out above limits a private prosecutor to an advisory role or to limited participation at trial when that attorney also has an interest in the outcome of a related civil case. However, exploration of some hypothetical situations that slightly change the facts of *Cantrell* demonstrates that the limitations placed on private prosecutors by the Supreme Court of Virginia are insufficient to protect defendants from private vengeance.

124. *Id.*

125. *Id.* (citing *State v. Atkins*, 261 S.E.2d 55, 58-59 (W. Va. 1979) (holding that appointment of private prosecutor is within the discretion of the trial judge)).

126. *Id.* (citing *Nichols v. State*, 87 S.E. 817, 820-21 (Ga. Ct. App. 1916) (holding private attorney may not advise grand jury and prosecute the case arising from the grand jury indictment)).

127. *Id.* (citing *State v. Bartlett*, 74 A. 18, 19 (Me. 1909) (holding that trial court alone has authority to appoint private attorney to act as prosecutor)).

128. *Id.* (citing *Sawyers v. Commonwealth*, 13 S.E.708, 708 (Va. 1891) (holding that decision to allow private prosecutor to make closing argument lies within the discretion of the trial judge)).

129. *Id.* (citing *Ganger v. Peyton*, 379 F.2d 709, 712-13 (4th Cir. 1967) (holding that private prosecutor may not participate in decisions related to plea negotiations)).

130. *Id.* (citing *State v. Moose*, 313 S.E.2d 507, 512-13 (N.C. 1984) (holding that use of private prosecutor does not require reversal if public prosecutor retained control over the private attorney)).

131. *Id.* at 26-27.

132. *Id.*

Consider the case of a criminal defendant ("defendant") charged with capital murder and robbery in the death of his wife. The victim's family ("the family") initiates a civil wrongful death suit against defendant and retains an attorney in the civil case ("the civil attorney"). Through this attorney the family also files for custody of the defendant's children. The family retains another attorney from another firm ("the private prosecutor") who is permitted to serve as a private prosecutor in the criminal case. Under *Cantrell*, the trial judge might well refuse to remove private prosecutor because he does not technically represent the victim's family in the related civil suit. The fact that the private prosecutor does not represent the family in the civil case does not lessen the impact that the private prosecutor's performance in the criminal case will have on the civil proceeding. The private prosecutor will know that for his clients a favorable resolution of the civil matter would be aided by success in the criminal proceeding. This creates an incentive for the private prosecutor to fashion his strategy in the criminal trial in the way to best facilitate a favorable result for the client in the civil case. However, because the family is represented in the civil case by the civil attorney it is possible for the trial judge to find no conflict of interest for the private prosecutor.

Another conflict of interest could arise when the private prosecutor has knowledge of witness bias through the relationship with the interested party. The interested party wants the defendant convicted and may do or say things to make a conviction more likely. If that takes place in the presence of the private prosecutor, he is presented with a conflict between his duty of loyalty to the client and his duty as a prosecutor to reveal to the defendant exculpatory information under the doctrine of *Brady v. Maryland*¹³³ and its progeny.¹³⁴ The *Brady* line of cases places an affirmative

133. 373 U.S. 83 (1963).

134. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (holding that suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution). See, e.g., *Strickler v. Greene*, 527 U.S. 263, 283 (1999) (holding that if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*); *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (holding that suppressed evidence is to be considered collectively, not item by item); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that *Brady's* disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (holding that promise made to witness in exchange for

obligation on the prosecutor to make known to the defendant any exculpatory information.¹³⁵ Evidence of witness bias obtained by the private prosecutor through the relationship with the interested party falls into this category,¹³⁶ but the private prosecutor's duty to the client is to keep such information secret. The private prosecutor is likely to resolve the conflict in favor of the client and to the detriment of the defendant. Again, if the family is represented in a civil proceeding by the civil attorney the court might gloss over the very real conflict of interest with which the private prosecutor is presented. Whether the private prosecutor makes strategic decisions that advance the interested party's claim in civil court or conceals information that should be revealed to the defendant, the *Cantrell* restrictions do not guarantee that the defendant's due process rights will be protected. A party who has an interest in the outcome of a criminal case could perhaps escape *Cantrell* by dividing resources between private prosecutor and civil attorney.

E. The Virginia Code Since Cantrell: Restricting the Role of the Private Bar in Criminal Prosecutions

There is no statutory provision in the Virginia Code or the Virginia Constitution that permits a private prosecutor to assist the attorney for the Commonwealth. However, Virginia Code Section 19.2-155 allows the appointment of a special prosecutor to act *in place of* the attorney for the Commonwealth.¹³⁷ A special prosecutor may be appointed if: (1) the attorney for the Commonwealth is related to the accused; (2) the trial judge and the attorney for the Commonwealth determine that the relationship between the accused and the attorney for the Commonwealth renders improper the participation of the attorney for the Commonwealth in the case; or (3) the attorney for the Commonwealth is unable to perform his duties due to sickness, a disability, or other temporary reason.¹³⁸ The statute requires that the trial judge appoint an attorney for the Commonwealth

testimony is within scope of *Brady* and government's nondisclosure of *Brady* material must be attributed to prosecutor).

135. See *supra* note 134.

136. See *Carter v. Burch*, 34 F.3d 257, 259-60 (4th Cir. 1994) (holding that evidence of witness bias falls within the scope of *Brady*).

137. See VA. CODE ANN. § 19.2-155 (Michie 2000) (setting out guidelines for the appointment of a special prosecutor when the attorney for the Commonwealth is disabled or disqualified).

138. *Id.*

from another jurisdiction to act as special prosecutor.¹³⁹ Only in a few situations is it appropriate for the judge to appoint a private attorney. The appointment of a private attorney is allowed only if: (1) appointment of another attorney for the Commonwealth is inappropriate; or (2) an attorney for the Commonwealth or assistant is not available and good cause is shown.¹⁴⁰

The General Assembly amended the statute in 1996.¹⁴¹ Prior to the 1996 amendments, Section 19.2-155 authorized the appointment of an attorney-at-law to fill a vacancy created by a disqualified or disabled attorney for the Commonwealth.¹⁴² The language of the statute prior to 1996 simply directed the trial judge to appoint an attorney to act in place of the disabled or disqualified attorney for the Commonwealth.¹⁴³ The statute as amended restricts the trial judge's authority to appoint members of the private bar as special prosecutors. The new language of Section 19.2-155 demonstrates a preference for appointing attorneys for the Commonwealth to act as prosecutors and signals the reluctance of the General Assembly to involve private attorneys in the prosecution of criminal cases.¹⁴⁴

This statute does not authorize the appointment of an attorney to assist the attorney for the Commonwealth.¹⁴⁵ Rather, it authorizes compensation of that attorney and provides that the attorney is authorized to act in place of the prosecutor so long as the attorney for the Commonwealth is disabled or disqualified.¹⁴⁶ But the authority of the trial judge to appoint a member of the private bar as a replacement attorney for the Commonwealth has been curtailed. The amendments to the special prosecutor statute can be characterized fairly as an attempt by the General Assembly to push the private bar out of the arena of criminal prosecutions. This is important because permitting private prosecutors to assist the Commonwealth is at odds with the efforts of the General Assembly to limit the appointment of private attorneys as special prosecutors. It is not logical that the General

139. *Id.*

140. *Id.*

141. *Id.*

142. See VA. CODE ANN. § 19.2-155 (Michie 1975) amended as VA. CODE ANN. § 19.2-155 (Michie 2000).

143. *Id.*

144. See VA. CODE ANN. § 19.2-155 (Michie 2000).

145. *Id.*

146. *Id.*

Assembly would limit the appointment of a private attorney as a temporary replacement for the attorney for the Commonwealth while condoning the practice of permitting private attorneys to assist in criminal prosecutions. The signal from the 1996 amendment to Section 19.2-155 is that the General Assembly wanted to limit the participation of the private bar in criminal prosecutions to those rare circumstances when an attorney for the Commonwealth is temporarily disabled or disqualified and another attorney for the Commonwealth cannot be appointed in his place.

Virginia Code Section 15.2-1630 permits the appointment of part-time assistant attorneys for the Commonwealth.¹⁴⁷ These part-time assistants are permitted to engage in the prosecution of criminal cases while maintaining a private practice.¹⁴⁸ These positions are disappearing, however. In the last two decades, the Compensation Board has continuously reduced the number of part-time assistant positions available.¹⁴⁹ For example, available records indicate that in 1995 there were thirty-four positions available for part-time assistant attorneys for the Commonwealth.¹⁵⁰ By 2000, that number decreased to only thirteen positions.¹⁵¹ The Compensation Board expects this number to be reduced even further.¹⁵² Because fewer positions are available, fewer private attorneys will prosecute criminal cases as part-time assistant attorneys for the Commonwealth. This is another example of the trend toward moving the private bar out of criminal prosecutions. The steady elimination of part-time assistant attorney for Commonwealth positions and the restrictions on appointment of private attorneys as special prosecutors are not clear signals that the General Assembly has decided to abolish the private prosecutor. However, there is clearly a move to separate the private bar from the business of prosecuting criminal cases and that move erodes support for continuing to permit private prosecutors to participate in criminal cases.

147. VA. CODE ANN. § 15.2-1630 (Michie 2000) (permitting the Compensation Board and the local municipal government to allow part-time assistant attorneys for the Commonwealth to continue the private practice of law).

148. *Id.*

149. E-mail from Cindy Waddell, Commonwealth Compensation Board (Mar. 20, 2001, 11:35:00 EST) (on file with author). Cindy Waddell would not release the records to the author, but assured the author that the information contained in the message was correct.

150. *Id.*

151. *Id.*

152. *Id.*

V. Conclusion

Private prosecutors cannot be justified on historical grounds or on grounds that they provide access to justice for the otherwise disenfranchised. Since the eighteenth century, the Commonwealth has entrusted the attorneys for the Commonwealth with the responsibility of conducting criminal prosecutions. In this capacity, public prosecutors fulfill dual roles as representatives of the people of the Commonwealth and as impartial administrators of justice. The attorneys for the Commonwealth have immense power over the life and liberty of defendants. Because the prosecutor has so much power, it is crucial that he not be encumbered by interests that could impede the detached, impartial exercise of his duties. When private attorneys are appointed as prosecutors to assist in specific criminal cases, the public prosecutor's office cannot escape the interests of the party that retains the private prosecutor. Disinterested parties do not provide private prosecutors. Parties that have interests in the outcomes of specific criminal proceedings provide private prosecutors to ensure that the private parties' interests are protected. Permitting interested parties to employ private attorneys to assist in the prosecution of criminal cases results in the "overwhelming probability" that private vengeance will supplant the prosecutor's duty to ensure the rights of defendants.¹⁵³ The Supreme Court of Virginia recognized this in *Cantrell*, but expressed unwillingness to put an end to the abuse of defendants' rights at the hands of private prosecutors.¹⁵⁴ The General Assembly has amended the Virginia Code to move away from the appointment of members of the private bar as special prosecutors, but has not explicitly abrogated the common law right to retain a private prosecutor.¹⁵⁵ The courts and the legislature are hesitant to abolish the antiquated common law rule permitting private prosecutors. Perhaps the fear of appearing soft on crime prevents the court and legislature from abolishing private prosecutors. Perhaps the issue does not weigh heavily on the minds of judges and legislators. Regardless of the reasons behind the failure to abolish the private prosecutor right, due process demands that Virginia must abolish the institution of the private prosecutor, whether through the authority of the Supreme Court of Virginia or the law-making power of the General Assembly.

153. *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26 (Va. 1985).

154. *Id.*

155. See VA. CODE ANN. § 19.2-155 (Michie 2000).

