

# THE "RIGHT" TO A DISINTERESTED PROSECUTOR OF CRIMINAL CONTEMPT: UNPACKING PUBLIC AND PRIVATE INTERESTS

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## I. INTRODUCTION

One of the least regulated areas of judicial power is the authority to hold individuals in contempt of court.<sup>1</sup> This power, inherited from English common law, has been decried as a relic of the "divine law of kings"<sup>2</sup> that gives judges "unbridled discretion"<sup>3</sup> to punish individuals for disobeying their orders. Indeed, at common law courts could hold individuals in contempt summarily, *i.e.*, without a trial, whenever a judge believed his order had been violated.<sup>4</sup> In recognition of the potential for arbitrary abuses of the contempt power,<sup>5</sup> the Supreme Court has accorded the accused numerous rights of due process in prosecutions for

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1. Contempt of court is the intentional violation of a court order, or misbehavior in the presence of the judge. See *Bloom v. Illinois*, 391 U.S. 194, 203-04 & nn.2, 5 & 6 (1968). The contempt power traditionally has been termed an "inherent" power of the court. *Id.* at 198 n.2 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 286-87 (1783) ("laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore . . . to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.")). In addition, numerous court rules and some state and federal statutes authorize contempt sanctions of a certain length and type for specific infractions. See *Bloom*, 391 U.S. at 206-07 n.8; Act of Mar. 2, 1831, 21st Cong., 2d sess., 4 Stat. 487; 18 U.S.C. §§ 402, 3692 (1988); 42 U.S.C. §§ 1995, 2000h (1988).

2. RONALD L. GOLDFARB, THE CONTEMPT POWER 11 (1963), cited in David J. Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, 4 B.Y.U. J. PUB. L. 239, 246 n.50 (1990).

3. Harmer, *supra* note 2, at 249.

4. *Bloom*, 391 U.S. at 194, 196 n.1, 198 n.2 (citing 4 BLACKSTONE, *supra* note 1, at 286-87).

5. *Id.* at 202 n.4 ("That contempt power . . . is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility [sic], narrowness, arrogance, and other weaknesses to which human flesh is heir.") (quoting *Sacher v. United States*, 343 U.S. 1, 12 (1952)).

criminal contempt.<sup>6</sup> Over the past century, the Court has held that alleged criminal contemnors are entitled to the presumption of innocence, proof of guilt beyond a reasonable doubt, and the privilege against self-incrimination;<sup>7</sup> notice of the charges, an opportunity to respond and call witnesses, and the assistance of counsel;<sup>8</sup> a public trial before an unbiased judge;<sup>9</sup> and a jury trial for nonpetty contempts.<sup>10</sup>

The Court adopted these rights for accused criminal contemnors based on an analogy to the rights of criminal defendants. Noting that criminal contempt "is a violation of the law, a public wrong that is punishable by fine or imprisonment or both," and that "convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the criminal defendant is the same,"<sup>11</sup> the Court has held that accused criminal contemnors' interests are essentially the same as those of criminal defendants and that the same due process rights are necessary to achieve fundamental fairness<sup>12</sup> in both realms.<sup>13</sup>

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6. The characterization of a contempt proceeding as "civil" or "criminal" depends on the purpose of the sanctions sought. A contempt proceeding is "civil" if it is brought to coerce compliance with the underlying order, and the contemnor can avoid the penalty by complying, *i.e.*, he has "the keys of the prison in his own pockets." *Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (quoting *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947)). *See also In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). In the paradigmatic civil contempt proceeding, a grand jury witness who refuses to testify is sent to jail until he or she agrees to testify. *See, e.g.*, *Shillitani v. United States*, 384 U.S. 364 (1966). In contrast, an action is for "criminal contempt" if the contemnor is given a fixed sentence as punishment for past violations of a court order. *Hicks*, 485 U.S. at 632. The distinction between civil and criminal contempt is, however, far more difficult than this simple definition suggests. *See infra* Section IV, notes 150-189 and accompanying text.

7. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

8. *Cooke v. United States*, 267 U.S. 517, 537 (1925).

9. *In re Oliver*, 333 U.S. 257, 273 (1948).

10. *Bloom v. Illinois*, 391 U.S. 194, 198 (1968). Petty cases are those resulting in sentences of six months or fewer. *Id.* at 197. In *Bloom* the Supreme Court held that "petty" criminal contempts punishable by fewer than six months did not require a right to a jury trial, consistent with the well-established rule that "petty" crimes punishable by fewer than six months do not entitle the defendant to a right to trial by jury. *Id.* at 197-98. However, the Supreme Court since has cast doubt on the "serious/petty" distinction, implying that defendants in "petty" contempt prosecutions are entitled to many of the same procedural protections as those in "serious" ones. *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 809 n.20 (1987).

11. *Bloom*, 381 U.S. at 201.

12. *Id.* at 201-02. In the criminal context, due process requires the adoption of those procedures and rights deemed "fundamental" to ensure a fair proceeding. *Id.* at 201; Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 AMER. U. L. REV. 754, 788 (1976).

13. Two types of contempt proceedings are excepted from the criminal analogy: summary contempt proceedings for in-court contempts and civil contempt proceedings. Summary proceedings, *i.e.*, those without a full trial-type hearing, are still permitted for in-court contempts that interfere with the judicial process, such as the refusal to answer a question when ordered or the refusal of

In its most recent decision concerning the rights of accused criminal contemnors, *Young v. United States ex rel. Vuitton et Fils, S.A.*,<sup>14</sup> the Supreme Court has purported to follow these precedents by adopting an additional right for criminal contemnors based on the due process rights of criminal defendants. The right to a "disinterested prosecutor" adopted in *Young* prohibits a successful litigant in a civil action from prosecuting the opposing party for criminal contempt for violation of an injunction won in the underlying civil proceeding. Under *Young* only a State prosecutor or "disinterested" private counsel appointed to act for the State may bring such criminal contempt actions.

Interestingly, however, the plurality declined to hold that a disinterested prosecutor was *constitutionally* required, ruling instead under its supervisory authority over the federal courts.<sup>15</sup> For this reason, *Young* technically does not apply to state courts. Nonetheless, the opinion has significant implications for states' contempt proceedings. Indeed, several state courts have already applied *Young* to their own procedures and

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counsel to cease a particular line of questioning. See *Young*, 481 U.S. at 798; *Bloom*, 391 U.S. at 204. In such cases, the judge already has seen the defendant's conduct and the only issues involved in the summary proceeding are the seriousness of the conduct and the appropriate sanction. See FED. R. CRIM. P. 42(a) (Judge must certify that she saw or heard conduct before imposing summary punishment for in-court contempt).

In addition, civil contempt proceedings, those in which the contemnor is capable of avoiding the sentence by complying with the order, also do not give rise to comparable rights of due process. However, because civil contemnors can be jailed indefinitely, until they express a willingness to comply with the order, the sanctions imposed in a "civil" contempt action often can be far more severe than those imposed in criminal contempt proceedings. The case of Elizabeth Morgan has brought this issue to public attention. Claiming that her former husband had sexually abused their daughter, she refused to comply with a court order to turn the daughter over to the former husband for unsupervised visitation. She spent over two years in jail for violation of the order. The Morgan case resulted in Congress' adopting legislation amending the District of Columbia Code to limit the length of time that civil contemnors can serve in custody cases. District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, Pub. L. No. 101-97, 103 Stat. 633. See also Harmer, *supra* note 2, at 256-77 (describing Morgan case and drafting of legislation to address it). The legislation had an 18-month lifespan; Congress was to make recommendations regarding its extension and civil contempt in general. However, the law has been codified in the D.C. Code without any time limitation. D.C. CODE ANN. § 11-944(b) (1991 Supp.). Harmer, *supra* note 2, at 285-87. At least two other states, Wisconsin and California, also have adopted caps (of 6 and 12 months, respectively) on civil incarceration for contempt. See NAT'L L.J., Oct. 30, 1988, at 1.

This Article does not directly address civil contempt. However, the ambiguity of the distinction between civil and criminal contempt, see discussion *infra* Section IV, notes 145-85 and accompanying text, is central to the Article's argument that all contempts have both "civil" and "criminal" aspects, and that therefore not all due process rights of criminal defendants are in fact appropriate for "criminal" contemnors.

14. 481 U.S. 787 (1987).

15. *Id.* at 809 & n.21.

found them wanting. Some courts appear to have erroneously assumed they were bound by the decision.<sup>16</sup> Others, while recognizing the non-binding nature of *Young*, have nonetheless been troubled by the decision and have suggested that the issue should be addressed under the highest state court's supervisory power.<sup>17</sup> These responses are understandable. Although only Justice Blackmun argued that the right to a disinterested prosecutor should be constitutional,<sup>18</sup> the plurality opinion reads, in both tone and reasoning, like a due process holding that ought to apply across the board.<sup>19</sup> Perhaps more important, the Court has in the past used its

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16. Department of Social Servs. v. Montero, 758 P.2d 690 (Haw. Ct. App. 1988) (*Young* requires reversal of contempt conviction prosecuted by same government department that brought underlying child support action); Carter v. Brodrick, 750 P.2d 843, 856 (Alaska Ct. App. 1988) (dicta suggesting that *Young* may require reversal of contempt prosecution by interested party's attorney in child custody case). *But cf.* Rollins v. State, 748 P.2d 767, 770 (Alaska Ct. App. 1988) (*Young* does not invalidate government's contempt prosecution when government also brought the underlying civil action, in part because *Young* relied upon only supervisory authority).

17. State *ex rel.* O'Brien v. Moreland, 778 S.W.2d 400, 407 (Mo. Ct. App. 1989) (if disinterested prosecutor issue were necessary to decide the case, case would have to be transferred to Missouri Supreme Court for decision under its supervisory authority). *See also* Commonwealth v. Hubbard, 777 S.W.2d 882, 885 (Ky. 1989) (Leibson, J., dissenting) (Kentucky Supreme Court should prohibit interested prosecutors in ordinary criminal cases under its own supervisory authority, consistent with *Young*).

Over time more courts have declined to apply *Young* to state-court proceedings because it was not a constitutional decision. *See, e.g.*, Dick v. Scroggy, 882 F.2d 192, 198 (6th Cir. 1989) (Celebrezze, J., concurring) (*Young* does not govern contempt proceeding in state court because only supervisory authority); Sassower v. Sheriff of Westchester County, 824 F.2d 184, 191 (2d Cir. 1987) (same); *In re* Marriage of Betts, 558 N.E.2d 404, 426 (Ill. App. Ct. 1990) (same), *app. denied*, 567 N.E.2d 378 (Ill. 1991); Scott v. United States, 536 A.2d, 1040, 1047 n.8 (D.C. 1987) (*Young* does not apply to District of Columbia court because only supervisory authority); Hubbard, 777 S.W.2d at 883 (because *Young* is not a due process decision it does not prohibit use of private prosecutor in homicide trial).

18. 481 U.S. at 814-15.

19. The absolute tone of *Young's* discussion of the right to a disinterested prosecutor is reinforced by the plurality's holding that an interested prosecutor so fundamentally taints a proceeding that the harmless error doctrine cannot apply. *Id.* at 809-14. In fact, in Sun Oil Co. v. Wortman, 486 U.S. 717, 728 n.2 (1988), the Court referred to *Young* as "determining the constitutionally permissible authority of courts."

Although supervisory rulings are theoretically case specific and subject to flexible application, 481 U.S. at 809 n.21, United States v. Kilpatrick, 821 F.2d 1456, 1475 (10th Cir. 1987), *aff'd sub nom.* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the *Young* holding has been treated as binding by federal courts in a variety of factual contexts. *See In re* Davidson, 908 F.2d 1249 (5th Cir. 1990) (corporate attorney may not prosecute opposing corporate party for criminal contempt); United States *ex rel.* SEC v. Carter, 907 F.2d 484 (5th Cir. 1990) (SEC attorneys who brought underlying proceeding may not prosecute criminal contempt); *In re* Hipp, Inc., 895 F.2d 1503, 1506-09 (5th Cir. 1990) (trustee in bankruptcy may not prosecute criminal contempt proceeding); Yanks v. United States, 882 F.2d 497 (11th Cir. 1989) (same). *See also* Scott v. United States, 536 A.2d 1040, 1053 (D.C. 1987) (Rogers, J., dissenting) (*Young* holding not limited to its facts, and applies to conflict-of-interest challenge to a judge in District of Columbia court), *aff'd on reh'g*, 559 A.2d 745

supervisory authority to test potential new due process rights, which it has subsequently given constitutional status.<sup>20</sup> In short, further in-depth analysis is needed both to inform any future consideration of the issue by the Supreme Court and to assist state courts that are formulating their own policies in the wake of *Young*.

The issue also demands careful examination because adoption of a right to a disinterested prosecutor could be devastating for many small-scale private litigants in state court proceedings. Litigants in domestic relations, landlord-tenant, and other small commercial cases often obtain court orders establishing their rights, and then bring enforcement actions for contempt to vindicate the rights those orders established. Private litigants typically bring such state court contempt actions by motion, without special court appointment or referral to a state prosecutor's office.<sup>21</sup> State statutes or rules limit the sentences in these actions to fines of several hundred dollars or jail sentences of six months or fewer.<sup>22</sup> If a "disinterested prosecutor" is required in such cases, enforcement actions will have to be prosecuted by the State or appointed "disinterested" counsel, or not at all. However, these are not the kinds of cases state prosecutors are accustomed to bringing. State District Attorneys, who lack sufficient time to cope with even their normal criminal caseload, undoubtedly will consider prosecutions of contempts of privately obtained civil orders too

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(D.C. 1989). This Article only addresses *Young*'s applicability to problematic state courts, as explained *infra* in note 27.

20. For example, in *United States v. Hale*, 422 U.S. 17 (1975), the Supreme Court exercised its supervisory power to reverse a conviction based on defendant's silence after being given *Miranda* warnings; in *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court adopted the right to remain silent as a due process right. See also *Kent v. United States*, 383 U.S. 541 (1966) (holding that certain minimum due process protections apply to juveniles tried under the Juvenile Court Act, without explicitly adopting them as due process rights); *In re Gault*, 387 U.S. 1 (1967) (due process clause applies to juvenile delinquency hearings). This pattern has been fairly common in the Court's past adoption of new rights for criminal contemnors. See *Cheff v. Shnackenberg*, 384 U.S. 373 (1965) (establishing right to jury trial for nonpetty contempts under supervisory authority); *Bloom v. Illinois*, 391 U.S. 194 (1968) (adopting right to jury trial as due process right); *Offutt v. United States*, 348 U.S. 11 (1954) (reversing criminal contempt conviction on grounds of judicial bias pursuant to supervisory authority); *In re Murchison*, 349 U.S. 133 (1955) (holding that criminal contempt trial before personally affronted judge violates due process). The state courts are aware of this trend. See *Peterson v. Peterson*, 153 N.W.2d 825, 828 n.3 (Minn. 1967) (noting that *Cheff* supervisory decision is likely to be extended to constitutional rule and applied to states through Fourteenth Amendment).

21. MO. CTS. & JUD. PROC. CODE ANN. § 1-202 (1989); 2 MO. RULES, Rule P4(a) (1991) ("any person having actual knowledge of the alleged contempt" may institute contempt proceeding).

22. See, e.g., D.C. IntraFamily Rules 7(c), 12(c) (\$300 or six months); N.Y. JUD. LAW § 751 (McKinney 1991) (\$1,000 or 30 days); D.C. IntraFamily Rule 7(c); IND. CODE § 34-4-7-6 (1986) (\$500 or three months), *repealed* by P.L. 308-1987, § 7 (1990-91 Supp).

minor and of insufficient public import to prosecute.<sup>23</sup> Nor, for the same reasons, can we expect that such cases will attract *pro bono* counsel. Without enforcement of civil orders by the "interested private parties," such orders will be virtually unenforceable and will become largely ineffective.

The *Young* Court asserted that lack of prosecutor time is an insufficient reason to permit appointment of the opposing party's private counsel. The Court relied in part on the Solicitor General's representation that the statutes appropriating funds for the operation of the federal courts would "permit reimbursement" of attorneys appointed as special prosecutors.<sup>24</sup> Appointment of such "special prosecutors," however, is not a realistic solution, particularly in state courts.<sup>25</sup> Even in federal court, there is no well-established fund to compensate appointed counsel for contempt cases, and courts have been unwilling to make such appointments without more specific statutory or judicial authorization.<sup>26</sup>

In this Article I argue that, contrary to Justice Blackmun's concurring opinion and the opinions of several state courts, courts should not expand *Young* to establish a new due process right for criminal contemnors

23. *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406 (Mo. Ct. App. 1989) (county and circuit prosecutors could not meet demand for contempt prosecutors in petty cases, bulk of which are domestic relations) (*dicta*). In fact, the District of Columbia IntraFamily Offenses Act was amended to create a private right of action in civil protection order and enforcement proceedings because the corporation counsel, the government agency assigned the role of representing petitioners under the Act, was unable to handle all of the cases. *Castellanos v. Castellanos*, 117 Daily Wash. Law. Rptr. 1192, 1194 (D.C. 1989).

24. 481 U.S. at 806 n.17.

25. *O'Brien*, 778 S.W.2d at 407. The Missouri Court of Appeals noted that "the question arises as to where do the funds come from to pay the appointed attorney to prosecute when that attorney must be 'disinterested.' The *Young* court disposed of this question in a footnote. . . . No such funds are appropriated to State courts. If one of the parties is indigent the assessment of attorney fees against that individual would be meaningless."

26. In *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982), the Second Circuit rejected the right to a disinterested prosecutor for this reason, among others:

The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available.

*Id.* at 65. The Second Circuit's view appears to be confirmed by the experiences of some counsel who have found federal courts unwilling, because of a lack of a funding mechanism, to appoint a private, disinterested contempt prosecutor, despite the *Young* footnote. Conversation with Robert Jacobs, one of the counsel in the *Young* case.

that would bind state courts.<sup>27</sup> Neither logic nor principle supports elevation of the “right” adopted in *Young* to the level of a due process right. Although the *Young* decision purports to follow the precedents establishing due process rights for criminal contemnors, it actually contradicts the spirit of those cases: unlike other due process rights, the right to a “disinterested prosecutor” representing the State does not buffer accused contemnors from State power. Rather, at least in theory, it increases the power the State brings to bear against such individuals, who otherwise would face only private-party prosecution. In addition because this requirement does not actually protect individual defendants from State power, but rather stems from a commitment to keeping our criminal justice system one of public justice and accountability, it is not appropriate in the contempt context, in which private enforcement is a key value.

In Section II of the Article, I review the *Young* decision, highlighting and clarifying the unstated assumptions on which it rests. In Section III, I examine the first of these underlying assumptions, that due process requires a “disinterested prosecutor,” questioning its validity both as a matter of historical practice and as a matter of principle. In Section IV, I analyze the second underlying assumption, that a due process requirement in the criminal context necessarily applies to criminal contempt. I discuss the limits of the “criminal analogy” on which the *Young* holding is based, and I suggest that the legal distinction between civil and criminal contempt is more a fiction than a reality. Further, even most “criminal” contempt litigation is no different from any other private action because, unlike the *Young* prosecutors, plaintiffs in contempt litigation do not normally assume the full prosecutorial powers of the State.

Finally, I conclude that even if there is a due process right to a disinterested prosecutor in criminal prosecutions, the analogy between criminal prosecutions and criminal contempt does not hold in this instance. The requirement of a disinterested prosecutor in criminal cases is based

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27. Although similar arguments can be made against application of the right in federal courts, (and it may prove equally difficult to implement there, *see supra* note 25) this Article focuses on *Young*'s applicability to state courts because: (1) *Young* has largely settled the question for the federal courts; and (2) the problem with the *Young* decision is clearest in the context of state-court proceedings, which are generally smaller and less likely to entail significant resources being brought to bear against an accused. *O'Brien*, 778 S.W.2d at 498 (Grimm, P.J., concurring) (whereas “[i]n *Young*, the attorneys were granted broad discretion to investigate and prosecute persons who might be violating the injunction[, i]n contrast, in most state cases [such as child custody and visitation disputes], an attorney would be appointed for a limited purpose of prosecuting a specific existing violation.”).

on a particular view of the role of the "public prosecutor." This role, perhaps appropriate in criminal prosecutions that seek to uphold the criminal law and effect public justice, has less place in contempt prosecutions brought by private litigants to vindicate private rights. As long as the private litigant does not assume the powers of a public prosecutor as in *Young*, contempt prosecutions to enforce orders issued in private litigation should remain available to the parties whose interests are at stake.

## II. THE YOUNG DECISION: WHAT IT SAYS AND WHAT IT MEANS

*Young v. United States ex rel. Vuitton et Fils, S.A.*<sup>28</sup> began as a trademark infringement action brought by Vuitton et Fils, S.A. (Vuitton), the well-known maker of expensive handbags, against some Korean family businesses that were manufacturing and selling inexpensive imitations of the plaintiff's merchandise.<sup>29</sup> The parties settled the district court case, agreeing to an injunction prohibiting the defendants from using Vuitton's registered trademark. The settlement also provided for payment of damages.<sup>30</sup> Still suspicious, Vuitton subsequently undertook an undercover investigation to verify the defendants' compliance with the injunction. Upon discovering that their suspicions were justified, Vuitton's attorney asked the district court to appoint him as special counsel to prosecute a criminal contempt action for violation of the injunction.<sup>31</sup> The court appointed the attorney and his colleagues to represent the United States in continuing the investigation and in prosecuting the contempt.<sup>32</sup> Upon being notified of the attorney's appointment, the U.S. Attorney's office merely wished him luck.<sup>33</sup> The attorney apparently did not need it. One month, one hundred audio and video tapes, and numerous wiretapped telephone calls later, the "prosecutors" had collected enough evidence of continuing counterfeiting operations to obtain two plea bargains and several convictions. The jail sentences ranged from six months to five years.<sup>34</sup>

On appeal to the Second Circuit, petitioners argued, *inter alia*, that the appointment of their opposing party's attorney as special prosecutor vio-

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28. 481 U.S. 787 (1987).

29. *Id.* at 790.

30. *Id.*

31. *Id.* at 791.

32. *Id.* See FED. R. CRIM. P. 42(b).

33. *Young*, 481 U.S. at 792.

34. *Id.*

lated their right to be prosecuted by an impartial prosecutor.<sup>35</sup> The Second Circuit held instead that an "interested" attorney is often the only source of information about out-of-court contempts, noting that the danger of such an attorney using prosecution as a bargaining chip in civil litigation is minimized by judicial supervision in such cases.<sup>36</sup>

On *certiorari* to the Supreme Court, the petitioners enjoyed greater success. There, they claimed that their contempt prosecution violated due process in two respects. First, they argued that the district court lacked the authority to appoint counsel to prosecute the action, and that only the U.S. Attorney may initiate a criminal contempt prosecution.<sup>37</sup> Second, they contended that any appointed prosecutor must be "disinterested," a standard that would automatically disqualify the attorney for the opposing party.<sup>38</sup>

The Supreme Court disagreed with the first argument,<sup>39</sup> but agreed<sup>40</sup> with the second.<sup>41</sup> In response to petitioners' first argument, the Court

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35. *United States ex rel. Vuitton et Fils, S.A. v. Klayminc*, 780 F.2d 179, 183 (2d Cir. 1985), *rev'd*, 481 U.S. 787 (1987).

36. *Id.* at 183-84. The court followed its earlier ruling in *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982), in upholding the contempt prosecution. The court declined to follow the Sixth Circuit's divergent ruling, which prohibited an interested civil opponent from prosecuting a criminal contempt under the court's supervisory authority. 780 F.2d at 184 (rejecting ruling of *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698 (6th Cir. 1985), *cert. denied*, 482 U.S. 905 (1987)). In addition to these court of appeals decisions, the Fifth Circuit had reached a decision similar to the Sixth Circuit's over a decade earlier. *Brotherhood of Locomotive Fireman & Enginemen v. United States*, 411 F.2d 312, 319-20 (5th Cir. 1969) (appointment of counsel for civil opponent to prosecute criminal contempt violates due process). These three circuits were the only federal courts of appeals to address this issue prior to the Supreme Court's acceptance of *certiorari* in *Young*. However, courts of appeals had addressed the issue of a disinterested prosecutor in *criminal* cases. See *infra* note 74.

37. *Young*, 481 U.S. at 793.

38. *Id.* at 802-14.

39. *Id.* at 793.

40. Although the Court held that a criminal contempt prosecutor must be "disinterested," it did not adopt petitioners' claim that this requirement was a due process right, basing its ruling instead on its supervisory authority over the federal courts. *Id.* at 809 & n.21.

41. Eight Justices agreed on each of the two basic holdings. Only Justice Scalia dissented from the holding that judges have the authority to appoint private counsel to prosecute. *Id.* at 815-25 (Scalia, J., concurring). Only Justice White dissented from the holding that a private contempt prosecutor must be disinterested. *Id.* at 827 (White, J., dissenting). Several of the Justices concurred and dissented on various other issues. See *id.* at 825-27 (Powell, Rehnquist, and O'Connor, JJ., concurring in part and dissenting in part) (private prosecution should be permitted when "harmless error"); *id.* at 814-15 (Blackmun, J., concurring) (the requirement of a disinterested prosecutor should be based upon due process rather than the Court's supervisory power).

held that a court must be able to appoint a private prosecutor of a contempt action.

The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. "[C]ourts cannot be at the mercy of another Branch [of government] in deciding whether such proceedings should be initiated."<sup>42</sup>

The District Court's appointment of private counsel to prosecute the action was therefore not improper per se.<sup>43</sup>

The Supreme Court, however, agreed with petitioners that a court may not appoint the attorney representing the beneficiary of the underlying civil order to prosecute a criminal contempt of that order. The Court reasoned that prosecution of criminal contempt is undertaken on behalf of the United States, and not on behalf of the private beneficiary of the court order allegedly violated: "The prosecutor is appointed solely to pursue 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."<sup>44</sup>

The Court emphasized a public prosecutor's unique obligation to temper his or her desire to win a case with a commitment "that justice shall be done . . . that guilt shall not escape nor innocence suffer."<sup>45</sup> Although the private party's interest in obtaining the benefits of the court order may sometimes coincide with the "[g]overnment's interest . . . in dispassionate assessment of the propriety of criminal charges for affronts to the

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42. *Id.* (citation omitted).

43. The Court did state that a court must exercise its authority to appoint a private "prosecutor" with restraint, and only in those instances in which the government fails to prosecute a referral to the U.S. Attorney. The Court did not decide whether the District Court's failure to refer the *Young* case to the U.S. Attorney's office was unlawful, however, choosing to rely on its holding that the appointment of an "interested" prosecutor was improper. *Id.* at 801-02.

44. *Id.* at 804. The Court's analysis by its terms applies only to criminal rather than civil contempt proceedings, and lower courts have consistently refused to apply *Young* to those proceedings they define as civil. *See, e.g.,* Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 790 (9th Cir. 1989) (*Young* does not preclude interested party's attorney from prosecuting contempt proceeding when sanction of suspended payment of a fine to opposing party was clearly civil and remedial); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 356-60 (7th Cir. 1988) (*Young* does not apply to civil discrimination action); *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 399 n.12 (5th Cir. 1987) (fine designed to compensate opposing party was civil and remedial, not governed by *Young*). However, as is discussed in Section IV, *infra*, notes 145-85 and accompanying text, the line between criminal and civil contempts is far from clear.

45. *Young*, 481 U.S. at 803 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Judiciary,"<sup>46</sup> the two interests may also at times diverge. The Court noted that the potential for benefit or harm to a private client should not influence a public prosecutor's decisions whether and how to prosecute.<sup>47</sup> Either bringing a "tenuously supported prosecution" or "abandoning a meritorious prosecution"<sup>48</sup> in order to obtain benefits for a private party would obstruct the administration of "impartial" justice.<sup>49</sup> Finally, the Court emphasized that "procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases,"<sup>50</sup> and stated that "[t]he requirement of a disinterested prosecutor is consistent with that trend. . . ."<sup>51</sup>

The Court's reasoning in *Young* can be reduced to two key propositions: first, that "criminal" prosecutions by private "interested" parties rather than by the State or a "disinterested" prosecutor are unjust or unfair per se; and second, that criminal contempt is no different from an ordinary crime in this respect. Sections III and IV examine these propositions in depth and show them to be based on shaky ground. Before proceeding, however, it is important to spell out the critical assumptions underlying each of these propositions.

With respect to the first proposition, the Court claimed to "establish a categorical rule against the appointment of an interested prosecutor.

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46. *Id.* at 805.

47. In enunciating this principle, the Court relied heavily on ethical rules embodied the *Model Code of Professional Responsibility*, which states that any private interest or obligation in connection with a prosecution is inconsistent with a government prosecutor's specific obligation to the public interest in "justice." See *id.* at 803 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); 18 U.S.C. § 208(a) (1988) (forbidding federal prosecutors from representing the government in any matter in which they have even an indirect financial interest)).

48. *Young*, 481 U.S. at 805.

49. In *Young* itself, because the underlying order provided for a large liquidated damage award upon a violation of the injunction, and because there were several civil actions pending between the parties (including a defamation action filed against Vuitton's attorney), there existed at a minimum "opportunities for conflicts to arise, and . . . at least the appearance of impropriety." *Id.* at 806 (emphasis in original). Moreover, the case's resemblance to a "David and Goliath" battle (between the Vuitton Corporation and small family-run Korean street vendors) could have only fueled the Court's concern that this prosecution was an abuse of prosecutorial power. Vuitton's counsel has been criticized elsewhere for his zealous methods of removing name-brand imitators. In a subsequent case, the Court severely castigated the same attorney and assessed double costs and damages against him for his overly aggressive prosecution of a similar trademark action on behalf of another client. *Warner Bros., Inc. v. Dae Rim Trading Co.*, 877 F.2d 1120 (2d Cir. 1989).

50. *Young*, 481 U.S. at 808.

51. *Id.* (citing *Bloom v. Illinois*, 391 U.S. 194, 207 (1968)).

. . .”<sup>52</sup> In fact, although the Court framed the issue as one of “interested” versus “disinterested” prosecutors, the distinction is more properly between “private” versus “public” prosecutors. This is apparent both from the language of the decision itself, from its reliance on *Marshall v. Jerrico, Inc.*,<sup>53</sup> and from subsequent decisions construing *Young*.

Although the *Young* decision focuses on the “conflict of interest” arising when the beneficiary of the underlying order is also prosecutor of the criminal contempt action,<sup>54</sup> the Court’s reliance on *Jerrico*<sup>55</sup> demonstrates that the Court actually eschewed prosecution by *private parties* rather than by “interested” ones. In *Jerrico*, the Employment Standards Administration (ESA) of the Department of Labor sought an injunction against an employer for violations of the Fair Labor Standards Act. The same government office then brought civil enforcement action, seeking penalties for violation of the injunction. The Supreme Court held that there was no unconstitutional conflict of interest,<sup>56</sup> despite the facts that (1) the same government agency that had brought the underlying action was prosecuting the contempt; and (2) the statutory program provided that the agency would be rewarded for the prosecution with repayment of part of its administrative expenses.<sup>57</sup>

The *Jerrico* court, contrary to the *Young* court’s implication, specifically upheld the prosecution of a penalty action by the “interested” government agency which had brought the underlying action. The *Young* Court emphasized *Jerrico*’s passing statement that “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision.”<sup>58</sup> It concluded that government prosecutors may be barred from

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52. *Id.* at 814.

53. 446 U.S. 238 (1980).

54. *Young*, 481 U.S. at 804.

55. *Jerrico*, 446 U.S. at 249-50.

56. The *Jerrico* Court’s finding that the potential conflict of interest raised no due process violation may have reflected the technically civil nature of the penalty action. However, as the *Young* Court looked to *Jerrico* in constructing its framework for conflict of interest in criminal contempts, the case is fair game for analysis here.

57. *Jerrico*, 446 U.S. at 247.

58. *Id.* at 249, cited in *Young*, 481 U.S. at 807 & n.19. *Jerrico* relied much more strongly on the distinction between the greater degree of “impartiality” necessary for judges and the lesser degree required for prosecutors, a principle that the Supreme Court effectively reversed in *Young* by holding that prosecutors must be disinterested, but interested *judges* may initiate prosecutions for criminal contempt of their own orders. 446 U.S. at 242-50. See *supra* notes 42-43 and accompanying text.

prosecuting where they have a personal interest and held that in *Young*, because the contempt prosecutor already represented "an interest other than the government," a conflict existed per se.<sup>59</sup> In other words, enforcement of an order by the same party who obtained the order, even when the prosecutor has an institutional financial interest in the prosecution, is permissible *as long as the "interested" party is the government.*<sup>60</sup>

In the years since *Young*, several lower courts have clarified and made explicit that *Young's* prohibition on "interested" prosecution of contempts is actually a prohibition only on *private* "interested" prosecution of contempt. In *FTC v. American National Cellular*,<sup>61</sup> the Ninth Circuit held that *Young* did not bar an agency from bringing a criminal contempt action even when the same agency had brought the underlying civil injunctive action. The court noted that *Young* focused on the conflict between the roles of *private* and *public* prosecutors and thus did not control the case before it, in which the "interested" party was the government.<sup>62</sup> Several state court decisions have reached the same result.<sup>63</sup> As

59. *Young*, 481 U.S. at 806.

60. For a discussion of the extent to which the government is or is not in fact overly "interested" when it enforces its own orders, see *infra* notes 62, 110 and accompanying text.

61. 868 F.2d 315 (9th Cir. 1989).

62. *Id.* at 319. The court went on to hold that even a government attorney may have an improper conflict of interest in bringing a criminal enforcement action if his or her "perspective is [too closely] colored by involvement with the underlying civil action. . . ." *Id.* Because the FTC contempt prosecutors were not the same individuals who had brought the underlying civil action, and because the U.S. Attorneys' office had been consulted and had filed an appearance, the Ninth Circuit held that the FTC's prosecution "did not compromise the principles of prosecutorial impartiality and the appearance of propriety." *Id.* at 320. In a later case, the Fifth Circuit found that prosecution of criminal contempt by the same SEC attorneys who had brought the underlying civil action violated *Young's* prohibition. *United States ex rel. SEC v. Carter*, 907 F.2d 484 (5th Cir. 1990). However, the Ninth Circuit's dicta and the Fifth Circuit's holding may be inconsistent with *Young* and *Jerrico*. *Young* emphasized a "structural" conflict of interest stemming from private prosecution of contempt, rather than personal subjective overzealousness. *Young*, 481 U.S. at 806 (noting an "inherent conflict in roles"). There is surely equal "structural interestedness" in a prosecution whenever the same agency brings its own enforcement proceeding for an underlying order, whether the same individuals or other employees prosecute. See *Department of Social Servs. v. Montero*, 758 P.2d 690, 693 (Haw. Ct. App. 1988) (in child support enforcement case, facts that the office of the Corporation Counsel is a governmental agency and that the beneficiary of the court order is the State Department of Social Services "do not make the deputy corporation counsel who prosecuted this case any less 'interested'"). Moreover, in *Jerrico* there were actually extraneous incentives for prosecution, including financial and personal benefits to be derived, and yet the Court found no due process violation. Rather, the Court noted that "[p]rosecutors need not be entirely 'neutral and detached.'" 446 U.S. at 248. Given the extent of *Young's* reliance on *Jerrico*, and the *Young* Court's repeated emphasis on the conflict between *public* and *private* interests in prosecuting, a more accurate reading of these decisions might well permit a *Carter*-like prosecution, by the same government attorneys who litigated the underlying case, barring specific evidence of a personal interest

is discussed in Sections III and IV, when the new requirement is defined in terms of a "public" rather than a "disinterested" prosecutor, it becomes easier to see that this "right" protects the public more than defendants, and that it is not appropriate in the contempt context.<sup>64</sup>

The second key element of the *Young* decision was the Court's equation of procedural rights in the criminal realm with the protections due in criminal contempt. This proposition also was based on an unarticulated and inaccurate assumption: that criminal contempt, as exemplified in *Young*, brings full use of the "expansive prosecutorial powers" of the criminal justice system to bear against defendants. Throughout the opinion there runs a strong sense of outrage at the image of the powers of a public prosecutor being wielded by private parties for private gain.

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.<sup>65</sup>

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separate from any institutional interest of the government. See *Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir. 1989) (noting that Supreme Court precedents including *Jerrico* suggest numerous structural incentives for aggressive prosecution are permissible). This issue is discussed further, *infra* note 110 and accompanying text.

63. *Rollins v. State*, 748 P.2d 767, 770 (Alaska Ct. App. 1988) (when defendant violates court order in land dispute with municipal government, government may bring criminal contempt action, because municipality acts out of duty to serve public interest). Cf. *Carter v. Broderick*, 750 P.2d 843, 845-6 (Alaska Ct. App. 1988) (distinguishing *Rollins*, in which government is both civil and criminal prosecutor, from instant case, in which private party seeks enforcement of order). See also *State v. Britt*, 377 S.E.2d 79, 82 (N.C. Ct. App.) (in child abuse prosecution, because there was no underlying judgment whose enforcement would benefit one party, no "conflict" existed in the participation of mother's private attorney in criminal prosecution), *cert. denied*, 380 S.E.2d 772 (N.C. 1989). *Contra* *Department of Social Servs. v. Montero*, 758 P.2d 690 (Haw. Ct. App. 1988).

64. For purposes of this Article, the term "public" includes private counsel appointed to act on behalf of the government. As long as counsel stands in the shoes of a government prosecutor, he or she is for our purposes acting as a "public" prosecutor.

65. *Young*, 481 U.S. at 814. See also *id.* at 807 ("A prosecutor exercises considerable discretion in matters such as . . . what methods of investigation should be used [or] whether any individuals should be granted immunity."); *id.* at 811 (referring to "expansive prosecutorial powers. . ."); *id.* ("Prosecutors 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands [and] enhanced subpoena power. . . . The misuse of those methods 'would unfairly harass citizens . . .'" (quoting CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 460 (1986)).

The facts in *Young* easily inspire this sense of injustice: a well-financed corporation obtained the powers of the United States Attorney and used them to wiretap, prosecute, negotiate plea bargains, and grant immunity to its much smaller civil adversary, while continuing its civil litigation against the same adversary.<sup>66</sup> However, the *Young* opinion is not limited to these facts, but appears instead to assume that they exemplify criminal contempt prosecutions in general.<sup>67</sup> This assumption is highly inaccurate. The truth is that in most contempt prosecutions in state courts, the private "prosecutor" does *not* have available the "terrible array" of coercive powers of the State.<sup>68</sup> Rather, these cases are usually litigated as an extension of the underlying civil action, like any other civil case, pursuant to civil rules of discovery and procedure, and without any special prosecutorial powers. As described above, in many instances, small contempt actions are brought pursuant to court rules governing particular areas, such as landlord-tenant, domestic relations, and intrafamily disputes.<sup>69</sup> Additionally, contempt actions are often litigated by *pro se* parties who brought the underlying actions. Such litigants often have little if any mastery over even *civil* legal procedures. The reality of *pro se* litigation against represented defendants is a far cry from the Supreme Court's depiction of criminal contempt actions as employing "the full machinery of the state" against helpless defendants.<sup>70</sup>

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66. See *supra* notes 29-34 and accompanying text.

67. The Court referred to the Second Circuit's opinion, which explicitly ruled that these extra powers were authorized under FED. R. CRIM. P. 42(b), but did not itself explicitly address that issue. *Young*, 481 U.S. at 793 (citing *United States ex rel. Vuitton Et Fils., S.A. v. Klayminc* 780 F.2d 179, 184-85 (2d Cir. 1985)). In light of the Second Circuit's ruling, it is unlikely that the Supreme Court was completely unaware that the scope of the powers of a contempt prosecutor was a litigable issue.

68. Even Rule 42(b) and its state counterparts do not specify any particular powers to accompany appointment of a contempt prosecutor. See *Klayminc*, 780 F.2d at 184 (noting that Rule 42(b) and caselaw do not *prohibit* such powers).

69. See *supra* note 22 and accompanying text. *Castellanos v. Castellanos*, 117 Daily Wash. Law Rptr. 1192, 1193-94 (D.C. 1989) (noting that IntraFamily contempt cases are brought pursuant to IntraFamily Rules, not Rule 42(b), and distinguishing *Young* on grounds that extraordinary powers are not available in IntraFamily contempt prosecutions).

70. In *pro se* cases, the Court's portrayal of a helpless individual up against the "public glare" and "full machinery of the state" is entirely misplaced. This is especially true in light of the fact that accused criminal contemnors are constitutionally entitled to appointed counsel if they are subject to more than six months in jail. *Cooke v. United States*, 267 U.S. 517, 537 (1924). In at least some jurisdictions, such as the District of Columbia, counsel are routinely appointed for contemnors facing fewer than six months in jail. A *pro se* litigant can hardly overpower a represented defendant; yet *Young* would nonetheless bar such a "prosecution," since unrepresented petitioners are at least as *interested* as counsel.

The problem of the *pro se* contempt "prosecutor" crystallizes the issue of whether the Court's

Thus, as discussed in Section IV, the criminal analogy does not properly apply to contempt cases.<sup>71</sup> Rather, the *Young* requirement of a disinterested prosecutor should be limited to cases like *Young* in which the criminal analogy holds, *i.e.*, in which the private prosecutor acquires the full powers of a state criminal prosecutor.

### III. QUESTIONING THE "RIGHT" TO A PUBLIC PROSECUTOR

Implicit in the Court's emphasis on public versus private prosecutors is the assumption that public prosecutions are more "neutral" and thereby more "meritorious" and "just" than prosecutions by interested private parties, which are concomitantly viewed as unfair, unjust, and an abuse of prosecutorial power.<sup>72</sup> This view is inaccurate as a matter both of practice and principle.

With respect to practice, the following brief survey of the history of private prosecution of criminal actions and current state court practices will demonstrate that the Supreme Court vastly understated the degree to which private prosecution is a part of our history and the role it continues to play today in certain types of courts and cases. Secondly, as a matter of logic or principle, requiring a public prosecutor does not really protect defendants as do other fundamental due process rights of the accused. Rather it is more a systemic requirement that protects the public

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concern in *Young* is "interestedness" or "power." As the rest of this Article makes clear, I believe it is the balance of power, rather than "interestedness," which is critical to fundamental fairness.

71. Some few courts have distinguished *Young* on this ground. See *Sassower v. Sheriff of Westchester County*, 824 F.2d 184, 191 (2d Cir. 1987) (*Young* does not control state-court contempt proceeding when interested party's counsel merely engaged in "routine New York State practice" by moving for contempt and notifying the accused of his obligation to appear); *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 408 (Mo. Ct. App. 1989) (Grimm, J., concurring) (state-court contempt proceedings are more limited in scope and less involved than type involved in *Young*); *Castellanos*, 117 Daily Wash. Law Rptr. at 1194. *But cf. In re Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (refusing to compare scope of prosecutorial actions as basis for distinguishing *Young*). However, the *Young* decision was not clear in its scope and several courts have taken *Young* at its word. See *supra* notes 16 and 17.

72. *Young*, 481 U.S. at 803 ("The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is . . . that justice shall be done.") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *id.* at 808 ("personal interest . . . may bring irrelevant or impermissible factors into the prosecutorial decision.") (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980)); *id.* at 811 ("If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused . . ."); *id.* ("what is at stake is the public perception of the integrity of our criminal justice system"); *id.* at 814 ("those who wield this power [must] be guided solely by their sense of public responsibility for the attainment of justice").

interest in a public system of criminal justice. This is not the kind of "fundamental right" that properly translates to the contempt context.

### A. *Private Prosecution—A Common Law Tradition*

The *Young* Court attempted to portray its holding as consistent with common practice and precedent. The Court claimed its adoption of a right to a disinterested criminal contempt prosecutor was "consistent with [the] trend" of prior caselaw,<sup>73</sup> and stated in passing that "[m]ost states have acknowledged [the] principle" of prohibiting private prosecution of criminal cases.<sup>74</sup> In fact, however, the *Young* decision *broke* that trend when it adopted a right to disinterested prosecution of contempt; the Supreme Court had not previously established such a right for criminal defendants.<sup>75</sup> Moreover, contrary to the Court's claim, no such right has been widely established in the states; in fact, most states did and still do accept private prosecution in one form or another.

#### 1. *Historical Background*

Under the common law, both in England (until well into the nineteenth century) and the United States (until the end of the eighteenth century) the private injured party, rather than the State, brought criminal prosecutions. Originally implemented through trial by "private bat-

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73. *Id.* at 808 (citing *Bloom v. Illinois*, 391 U.S. 194, 207 (1967)). See also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2 (1988) (*Young* reaffirmed the Court's reliance "on traditional and subsisting practice in determining the constitutionally [sic] permissible authority of courts.").

74. *Young*, 481 U.S. at 808 n.19 (citing Patricia Moran, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 *FORDHAM L. REV.* 1141, 1153 n.51 (1986)). Although the note cited by the Court does state that most states prohibit a private attorney who is involved in related civil litigation from participating in a criminal prosecution, it does not support the Court's broader claim that private prosecution is generally defunct in the states.

75. Indeed, several federal courts previously had upheld the constitutionality of private prosecution in criminal cases. See *Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985) (no due process violation when private attorneys in civil action conducted criminal prosecution for drunk driving); *Powers v. Hauck*, 399 F.2d 322, 325 (5th Cir. 1968) (participation of private prosecutor in murder trial does not violate due process); *Krotkiewicz v. United States*, 19 F.2d 421, 425 (6th Cir. 1927) (private interested party's attorney permitted to sit with and advise district attorney in prosecution of bankrupt company's president). *But cf.* *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (prosecution of husband for assault on wife unconstitutional when wife retained prosecutor for divorce action). In *Jones*, the Fourth Circuit distinguished *Ganger* on the grounds that the prosecutor in *Ganger* had used his position to seek an advantageous civil settlement, while in *Jones* the district attorney retained control of the prosecution and the private attorneys did not use their prosecutorial position to exact an advantage in their civil litigation. *Jones*, 776 F.2d at 1246. *Ganger* is discussed in greater detail, *infra* notes 116-22 and accompanying text.

tle,"<sup>76</sup> private prosecution evolved in the eighteenth century into the formal institution and prosecution of criminal charges by private parties, at their own expense.<sup>77</sup> Private prosecution to enact "private vengeance" has been called "one of the most characteristic circumstances connected with English criminal law. . . ."<sup>78</sup>

Although the British system of private prosecution may have been merely the result of "historical happenstance,"<sup>79</sup> it nonetheless constituted a fundamental philosophical underpinning of English criminal justice:

[N]o stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to everyone by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution.<sup>80</sup>

Thus, although private prosecution has now been supplemented, and in many respects replaced, by public prosecutions in the name of the Crown,<sup>81</sup> the English system retains the concept that the Crown brings criminal prosecutions on behalf of the injured individual, as much as or more than they are brought on behalf of the community at large.<sup>82</sup>

In the United States, the colonies initially adopted the English system of private enforcement of the criminal laws.<sup>83</sup> Prior to the end of the eighteenth century,

criminal prosecutions were generally carried on by individuals interested in

76. "[I]t was not until well into the thirteenth century that barbaric justice began to be brought under control in England, and public inquiries of witnesses began to replace trial by combat." Sidman, *supra* note 12, at 758 n.29, (citing FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 44-47 (2d ed. 1898)).

77. Sidman, *supra* note 12, at 758-59.

78. 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 245 (1883) *cited in* Sidman, *supra* note 12, at 756 n.12.

79. Sidman, *supra* note 12 at 759 (citing 1 STEPHEN, *supra* note 78, at 496-97).

80. *Id.* at 758 (quoting 1 STEPHEN, *supra* note 78, at 496).

81. *Id.* at 756.

82. For example, in prosecutions initiated by police officers (a substantial proportion of all English prosecutions), "the correct analysis is that some individual has instituted proceedings, and the fact that this individual is a police officer does not alter the nature of the prosecution." *Id.* at 762 n.57 (citing R.M. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 155 (6th Ed. 1972)). See also Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 *YALE L.J.* 209, 225 (1955) [hereinafter *Remedy*] (private prosecution in England and America has always reflected in "significant part" a policy of encouraging vindication of "private as well as public" rights) (citing 1 STEPHEN, *supra* note 78, at 496); THEOBALD MATHEW, *THE OFFICE AND DUTIES OF THE DIRECTOR OF PUBLIC PROSECUTIONS* 4 n.74 (1950)).

83. Sidman, *supra* note 12, at 763.

the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment founded and the case laid before the grand jury, and took charge of the trial before the petit jury. . . it is common knowledge that the common-law practice still prevails, to some extent at least, in inferior courts.<sup>84</sup>

In contrast to its sister system in England, however, the American system developed quickly into one that relied much more broadly on institutionalized local public prosecutors. In the late seventeenth century, state prosecutors were established in some colonies, and by the end of the eighteenth century, most states were "firmly committed to the concept of official public prosecution."<sup>85</sup> The reasons for this shift are not entirely clear, but a widespread belief in the superiority of public "disinterested" justice has taken deep root.<sup>86</sup> Statutes in every state currently establish the office of a local public prosecutor "whose duty it is to prosecute criminal actions in the name of the state."<sup>87</sup>

## 2. Current State Practices

Nonetheless, private prosecution remains far from nonexistent in the United States.<sup>88</sup> In fact, the majority of states still permit private prose-

84. *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956). See also Sidman, *supra* note 12, at 768 n.86; John A.J. Ward, Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, *passim* (1972).

85. Sidman, *supra* note 12, at 763 (citing 4 NATIONAL COMMISSION ON LAW OBSERVATION AND ENFORCEMENT, REPORT ON PROSECUTION 7 (Wickersham Commission 1931)). Sidman notes that very little has been written on the history of the system of public prosecution in the United States. *Id.* at 762 nn.58, 61. However, one recent work documents a thriving system of private prosecution as late as 1880 in the Philadelphia magistrates' courts. See Gerald Caplan, *Criminal Justice in the Lower Courts: A Study in Continuity*, 89 MICH. L. REV. 1694 (1991) (Book Review).

86. See, e.g., *State v. Peterson*, 218 N.W. 367, 369 (Wis. 1928) ("In an early day in England private parties prosecuted criminal wrongs which they suffered. . . . Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties. . . .").

87. Sidman, *supra* note 12, at 764. Such statutes typically provide that the district attorney shall "[p]rosecute or defend all actions, applications, or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; . . ." WIS. STAT. ANN. § 59.47(a) (1988), cited in Sidman *supra* note 12, at 764 n.68.

88. Even apart from direct private prosecutions, remnants of a belief in the private interest in criminal prosecutions persist. For example, the author of *Remedy*, *supra* note 82, correctly notes that some existing American criminal statutes define purely personal crimes. *Id.* at 225 n.91. Adultery statutes frequently permit only an injured spouse to initiate a prosecution. See, e.g., ARIZ. REV. STAT. ANN. § 13-1408(B) (1989); MICH. COMP. LAWS § 750.31 (1990); MINN. STAT. § 609.36(2) (1987); N.D. CENT. CODE § 12.1-20-09(2) (1985). See also *Lee v. State*, 231 P. 324, 325 (Okla. Crim. App. 1924) (adultery is a "private wrong" that must be initiated by injured party, but may be continued by State after divorce); *State v. LaBounty*, 116 P. 1073, 1073 (Wash. 1911) (adul-

cution, albeit with restrictions.<sup>89</sup>

The most common context in which private prosecutors are found is in the role of "assistant" to the public prosecutor. Commentators surveying state law have found that approximately thirty of the state courts considering the issue have upheld the use of privately employed prosecutors as assistants to state prosecutors of criminal actions.<sup>90</sup> Courts defend this practice as beneficial to the public and individual victims and harmless to defendants. They argue that private prosecution ensures prosecution by a party with an interest in competent prosecution, and that defendants are prosecuted according to the same rules regardless of who employs the prosecutor.<sup>91</sup>

Even those few states that generally outlaw private prosecutors usually permit private parties' counsel to participate to a certain extent.<sup>92</sup> Nota-

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tery is crime against spouse, not society, that may be prosecuted only by formal complaint by spouse to "prohibit intermeddling" by State). In arguing for more private prosecution of criminal offenses, *Remedy* has marshalled a number of compelling examples of American law's recognition of the private interest in criminal prosecutions, including, on the one hand, state statutes giving injured parties the right to challenge in court a public prosecutor's *nolle prosequi* decision, and on the other, the existence of statutes that incorporate the concept of punishment into private litigation, such as *qui tam* actions, multiple damages, and punitive damages. *Remedy, supra* note 82, at 225-27 and accompanying notes; *id.* at 222-23 (*qui tam* and multiple damage suits encourage private "prosecutors" by giving them a percentage of the fines obtained in the prosecution of certain crimes).

89. *State v. Harrington*, 534 S.W.2d 44, 49 (Mo. 1976) (en banc) ("[I]n most jurisdictions private prosecutors continue to participate in public prosecutions"); *Goldsby v. State*, 123 So. 2d 429, 437 (Miss. 1960) (private prosecution "represents a common law practice, and that of a large majority of the states of the Union"), *cert. denied*, 365 U.S. 861 (1961); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956). See *Ward, supra* note 83, at 1171 ("Despite statutory provisions requiring a public prosecutorial system and judicial repudiation of the procedure in some jurisdictions private prosecution remains well entrenched."); *Remedy, supra* note 82, at 218 ("Despite widespread belief that criminal actions are conducted exclusively by public officials, private prosecutors in fact play an extensive role in criminal law enforcement."). For example, in the local "Sessions Court" in Knoxville, Tennessee, private parties initiate criminal prosecutions by appearing before a magistrate and making a complaint. If a warrant issues, the accused is arrested and jailed pending arraignment, at which point the public prosecutor reviews the case and decides whether to go forward. Conversations with clinical faculty at University of Tennessee Law School.

90. *Sidman, supra* note 12, at 765-68; *Remedy, supra* note 82, at 218 n.50 (collecting cases).

91. See, e.g., *Ray*, 143 N.E.2d at 485 ("Both the public and individual litigants in such courts are sure to be mutually benefited by the services rendered by private counsel, and, if such counsel is not guilty of conduct which prevents the litigants from having a fair trial, the defendant would have no right to complain"); *State v. Kent*, 62 N.W. 631, 634 (N.D. 1895) ("We are unable to discover in the statute [establishing the office of public prosecutor] any other policy than that of transferring the control of criminal prosecutions from private to public hands.").

92. *Moran, supra* note 74, at 1152 n.46. According to the author, Massachusetts, Michigan, Missouri, New York, Nebraska, and Wisconsin "generally do not allow private prosecutors to participate in criminal prosecutions." However, "minimal participation" is permitted in some cases in those jurisdictions. *Id.*

bly, while a majority of those states that uphold the participation of private prosecutors in criminal prosecutions condition that participation on the public prosecutor's retention of "control" over the prosecution,<sup>93</sup> common practices do not necessarily conform to this rule. Rather, when a private prosecutor participates in an action, he or she often effectively becomes the main prosecutor.<sup>94</sup>

Some state courts expressly permit private counsel to conduct criminal prosecutions on their own, with the permission of the public prosecutor and the judge.<sup>95</sup> In fact, in many jurisdictions, including some of the ostensibly most restrictive, purely private prosecution is fairly common for lesser offenses, such as those brought before magistrates, justices of the peace, and housing court and domestic relations courts.<sup>96</sup>

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93. *Id.* at 1153 & nn.51, 53 (collecting cases requiring consent and/or control of public prosecutor). See *Stumbo v. Seabold*, 704 F.2d 910, 911 (6th Cir. 1983) (public prosecutor's control ensures protection of state's interest in seeking justice rather than merely convictions); *Kent*, 62 N.W. at 634 (control by public official protects against victimization of innocent people by overzealous private prosecutors).

94. *Remedy*, *supra* note 82, at 220 ("Through his role as assistant prosecutor, the private attorney frequently controls the criminal action"). In response to a questionnaire administered by the author of *Remedy*, 16% of responding prosecutors stated that private prosecutors are typically permitted to control the prosecution; 60% stated that private assisting attorneys are not restricted in their participation. *Id.* at 220 n.60.

The *Young* Court and others have distinguished between private prosecutors who merely "assist" public prosecutors and purely private prosecutions. *Young*, 481 U.S. at 806 n.17 (private counsel's "familiarity may be put to use in assisting a disinterested prosecutor . . . but cannot justify permitting [private counsel] to be in control. . ."). However, this distinction is weak. Not only does such "assistance" frequently entail practical control, but any participation by private interested counsel is vulnerable to the same conflict-of-interest charges and constitutional infirmities: an "assisting" attorney is no less obligated to "two masters" than a primary attorney. Indeed, one of the very commentators the Court relied on, see *id.* at 812 n.23, attacks private prosecutors who assist public prosecutors for the same reasons the Court relied on in outlawing control by private prosecutors. *Sidman*, *supra* note 12, at 755, 767-68, 790. Nonetheless, some post-*Young* courts have adopted the distinction between "assistance" and "control." See, e.g., *Person v. Miller*, 854 F.2d 656, 659-663 (4th Cir. 1988) (Southern Poverty Law Center attorney permitted to act as lead counsel while denominated "assistant" because "no evidence" that the U.S. Attorneys' Office did not control "critical decisions"), *cert. denied*, 489 U.S. 1011 (1989); *Commonwealth v. Hubbard*, 777 S.W.2d 882, 883 (Ky. 1989) (private counsel permitted to participate when District Attorney "retained control" and private counsel was precluded from involvement in parallel civil litigation).

95. *Hall v. State*, 411 So. 2d 831, 838-39 (Ala. Crim. App. 1981); *State v. Cockrell*, 309 P.2d 316, 320 (Mont. 1963); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1967).

96. *Remedy*, *supra* note 82, at 221 & nn.63, 64 ("[I]n at least twenty-eight states, it is a common practice for private attorneys to prosecute criminal actions in the lesser courts. Since these courts customarily have jurisdiction over all misdemeanors, private citizens may initiate criminal actions which result in jail terms up to one year"). See *Ray*, 143 N.E.2d at 485 ("[I]t is common knowledge that the common-law practice still prevails, to some extent at least, in inferior courts"). See also *Katz v. Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979) ("Private parties to civil litiga-

In some states, the right of private citizens to participate in the prosecution of certain criminal actions is affirmatively guaranteed by statute. Thus, private parties have a right criminally to prosecute violations of laws prohibiting "the evils of intemperance" in Alabama<sup>97</sup> and the election laws in Minnesota and New Jersey.<sup>98</sup> They have a right to assist the county attorney in "any matter" in Kansas and Oregon.<sup>99</sup>

Most states do place one limit on private prosecution, prohibiting any involvement in related civil litigation.<sup>100</sup> Courts typically do not offer much explanation for this rule, other than to indicate that a private prosecutor involved in related civil litigation has an irreconcilable conflict of interest between the role of private attorney seeking private advantage and that of prosecutor of a crime against the State.<sup>101</sup> Many courts have also reserved the right to exclude a private prosecutor when they deem the relationship between the prosecutor and the defendant "unfair," or when the prosecutor is hired by a party other than the victim of the crime who appears to have an extraneous interest in prosecution of the case.<sup>102</sup> In some jurisdictions, however, even attorneys involved in paral-

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tion [in Housing Court] have the right 'to press both the civil and criminal aspects of the case.' "); *People ex rel. Allen v. Citadel Management Co.*, 355 N.Y.S.2d 976 (N.Y. City Crim. Ct. 1974) (upholding purely private prosecution of landlord by tenant because offenses were petty, and district attorney too busy to be present at all such cases); *People v. Black*, 282 N.Y.S. 197, 201 (Ostego County Ct. 1935) (minor infractions of game laws do not require "heavy artillery" of Attorney General or district attorney); *People v. Lanni*, 168 N.Y.S.2d 35 (Monroe County Ct. 1957) (defendant in traffic violation has no right to choose his prosecutor); *People v. Van Sickle*, 192 N.E.2d (N.Y. 1963) (private prosecution by victim of assault and battery upheld); *People ex rel. Howes v. Grady*, 21 N.Y.S. 381 (Sup. Ct. 1892) (when district attorney absent, private counsel may conduct prosecution alone), *aff'd*, 39 N.E. 858 (N.Y. 1895); *Bartell v. State*, 82 N.W. 142 (Wis. 1900). *See* OR. REV. STAT. § 131.025 (1989) (prosecuting party in criminal case is State of Oregon "[e]xcept for offenses based on municipal or county ordinances").

97. ALA. CODE § 28-4-314 (1990).

98. MINN. STAT. §§ 211A.08(2), 211B.16(2) (Supp. 1991); N.J. REV. STAT. § 19:34-63 (1989). *See also* Sidman, *supra* note 12, at 767 n.82.

99. KAN. STAT. ANN. § 19-717 (1988); OR. REV. STAT. § 135.165 (1990). *See Remedy, supra* note 82, at 222 n.69; Sidman, *supra* note 12, at 767 & n.83.

100. Moran, *supra* note 74, at 1154 n.54 (collecting cases).

101. Most such decisions rely on state statutes or public policy, but some courts have alluded to the constitutional right to a fair trial. *See, e.g., State v. Harrington*, 534 S.W.2d 44, 49 (Mo. 1976) (en banc) (public prosecutor "is not an advocate in the ordinary sense of the word . . . his primary duty is not to convict but to see that justice is done. . . . [He] should have no private interest . . . [but] is charged with seeing that the criminal laws of the state are honestly and impartially administered.") (quoting Ward, *supra* note 86, at 1173); *Peterson v. Peterson*, 153 N.W.2d 825, 830 (Minn. 1967) (due and orderly process is better assured if the [criminal contempt] prosecution is conducted by an attorney for the state"); *Born v. State*, 397 P.2d 924, 942 (Okla. Crim. App. 1964), *cert. denied*, 399 U.S. 1000 (1965), *overruled by Brookins v. State*, 602 P.2d 215 (Okla. Crim. App. 1979).

102. *Remedy, supra* note 82, at 221 n.62 (citing cases barring prosecution by attorneys who

lel civil litigation have been permitted to prosecute criminal actions.<sup>103</sup>

In sum, while it is fair to say that private interested parties are not free to prosecute criminal actions in all cases, private prosecution—far from being an artifact of an ill-considered past practice—is still common, and subject to “widespread approval,”<sup>104</sup> or at least, expressly protected from elimination by most states. Although this does not preclude the Supreme Court from outlawing private prosecution of criminal contempt, it contradicts the *Young* Court’s implicit assumption, discussed earlier, that such a right is already widely established in criminal cases. The prevalence of the practice also gives rise to a greater need for clear and explicit reasoning before it is abandoned.<sup>105</sup> The *Young* decision unfortunately lacks such reasoning.

### *B. Public Prosecution Is Not An Essential Element of Fundamental Fairness*

The Supreme Court, other courts adopting the right to a disinterested prosecutor in criminal actions, and various commentators have argued that private prosecution is incompatible with fundamental fairness<sup>106</sup> because it is, primarily, unfair to defendants,<sup>107</sup> and, secondarily, unfair to the public.<sup>108</sup> Neither of these rationales survives careful scrutiny. Unlike previously established due process rights, the disinterested prosecu-

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refused to identify their clients, who represented government officials, or who represented another previous suspect of the crime). See *State v. Best*, 186 S.E.2d 1, 3 (N.C. 1972) (court has discretion to appoint private prosecutors); *State v. Cockrell*, 309 P.2d 216, 320 (Mont. 1957) (private prosecution permitted as long as trial is “fair and impartial” and there is no “conduct prejudicial to defendant”); *Ward*, *supra* note 84, at 1172 (“the practice is not to be interfered with in the absence of a showing of abuse”).

103. See, e.g., *Dick v. Scroggy*, 882 F.2d 192 (6th Cir. 1989) (no due process violation when prosecuting attorney agreed to represent victim in state court civil action before criminal trial completed); *Hopkins v. State*, 429 So. 2d 1146, 1154 (Ala. Crim. App. 1983) (prosecutor hired by victim or family who also represents them in civil action does not violate due process); *Cockrell*, 309 P.2d at 319-20 (attorney for assault victim in civil action may prosecute criminal action).

104. *Moran*, *supra* note 74, at 768.

105. “The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Schall v. Martin*, 467 U.S. 253, 268 (1984) (pretrial detention of juveniles is not unconstitutional) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

106. *Moran*, *supra* note 74, at 1157 n.64.

107. *Young*, 481 U.S. at 804; *State v. Harrington*, 534 S.W.2d 44, 48-50 (Mo. 1976) (en banc); *Ward*, *supra* note 83, at 1173; *Sidman*, *supra* note 12, at 768-77, 776, 781.

108. *Young*, 481 U.S. at 804-05; *Ward*, *supra* note 84, at 1175; *Moran*, *supra* note 74, at 1161.

tor as defined by *Young* does not protect defendants from the power of the State. Nor does it necessarily further the public interest in neutral justice. Rather, it maintains a *public* system of criminal justice. Although valid, this interest is not equivalent to a fundamental right that should be a requirement of due process. Moreover, as discussed in Section IV, any such right does not properly apply to the contempt context.

### 1. Defendants' Interests

Private prosecution is seen as unfair to defendants in two respects. First, it is argued that the criminal prosecutor has the full "machinery of the state" at his or her command, and that use of such powers for private advantage is inherently unfair to defendants.<sup>109</sup> Second, courts and commentators frequently assert that private prosecutors will not exercise "prosecutorial discretion" in a fair, neutral, or just manner because private parties inevitably seek only "to convict," while a disinterested public prosecutor, with no particular interest in prosecuting or convicting a particular defendant, seeks more flexibly to "do justice."<sup>110</sup>

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109. *Young*, 481 U.S. at 814. See *supra* note 73.

110. See *Young*, 481 U.S. at 805 ("The Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. . . . A [private] prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client"); *id.* at 808 n.18 (a private prosecutor's "undivided loyalty is pledged to a party interested only in a conviction") (quoting *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (6th Cir. 1985), *cert. denied*, 482 U.S. 905 (1987)). See also *Ward*, *supra* note 84, at 1173 ("The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain. It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence."); *Sidman*, *supra* note 12, at 781 ("To the extent that the attorney retained by private, interested parties is permitted to influence this discretionary process, the defendant may be denied the unbiased exercise of the prosecutor's judgment."); *Moran*, *supra* note 74, at 1164 ("a public prosecutor new to the case may be more likely to offer alternative resolutions of the contempt charges such as civil rather than criminal contempt or plea bargaining if he believes they are in the interest of justice."); *id.* at 1164 n.101 ("To the extent the criminal prosecution is primarily motivated by the vindictiveness of a civil client, a disinterested prosecutor would be more likely to apply principles of fairness in his recommendations to the judge."). See also *Flege v. State*, 142 N.W. 276, 277 (Neb. 1913) (Attorney who has represented the victim's brother could not—but a public prosecutor must—"enter upon the trial with the single purpose of impartially seeking to know the truth, protecting the rights of defendant, and seeing that they were maintained, if need be, at all hazards."); *Biemel v. State*, 37 N.W. 244, 247-48 (Wis. 1888) (a criminal case is likely to be unfair "if the prosecution is . . . desirous of procuring his conviction").

This vision of the public prosecutor as seeking only to present "the whole transaction as it was, regardless of whether it tends to establish . . . guilt," *Polo Fashions, Inc.*, 760 F.2d at 705, is difficult to square with the reality of criminal prosecutors' work. A prosecutor's professional success usually

With respect to the first concern, requiring a public prosecutor does *not* afford greater protection of individual defendants from the abuse of state power. Rather, as discussed in Section II, most minor criminal contempt proceedings in state courts until now have been litigated by private parties without the broad array of prosecutorial powers acquired in *Young*. The *Young* rule would *require* appointment of a State prosecutor with full state powers to prosecute such cases. Thus, broad application of *Young* to state contempt proceedings would require that defendants, who otherwise would be litigating against a private party with only the powers of a civil litigant, will now confront a State or appointed prosecutor commanding full prosecutorial powers. This would work a dramatic change in the balance of power for most contempt cases in state courts, ironically creating the exact opposite result of that intended.<sup>111</sup>

The second reason private prosecution is considered unfair to defendants is that private prosecutors allegedly have a singleminded (or “vindictive”) dedication to prosecuting and convicting the defendant, while public prosecutors, whose sole obligation is to “do justice,” are allegedly more circumspect, less eager to prosecute, and more flexible in considering alternative resolutions.<sup>112</sup> This position is untenable for two reasons:

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rests on the number of convictions brought in, not the balanced view of “justice” with which cases are assessed. Perhaps for this reason, criminal prosecutors are at least as notorious for their zeal to prosecute and convict as are private attorneys. See *Dick v. Scroggy*, 882 F.2d 192, 196 (6th Cir. 1989) (“Politically ambitious and aggressive prosecutors are by no means uncommon, and the zeal of the prosecutor who covets higher office or who has a personal political ax to grind may well exceed the zeal of the prosecutor who has the kind of interest, [having been retained by victim to bring tort action], we are assuming in the case at bar.”); *Remedy*, *supra* note 82, at 228 (“experience has demonstrated that the private prosecutor plays as fairly as his public counterpart”). See also *Secret Touches*, MOTHER JONES, Sept.-Oct. 1991, at 46 (detailing incident of child abuse by adult friend, prosecutors’ inconsistent and deceptive treatment of father and abused child, and motive to convict for sake of personal glory without regard to well being of abused child, rehabilitation of offender, or wishes of victim and family). The *Flege* image of prosecutors seeking only “truth” is in fact incompatible with the basic premise of the American adversarial system: that “truth” is not established by direct inquiry, but by permitting two opposing parties to advocate their opposing positions to the best of their abilities. *Scroggy*, 882 F.2d at 197 (“prosecutors are supposed to be advocates”).

111. This absurdity was recognized by the D.C. Superior Court in *Castellanos*, 117 Daily Wash. Law Rptr. at 1194 (rejecting application of *Young* to intrafamily cases in part because the private litigant does not acquire the full powers of the State under the IntraFamily Rules). See also *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 407-08 (Mo. Ct. App. 1989) (Grimm, P.J., concurring) (“circumstances in a federal case like *Young* are different than those which quite often arise in state court cases.”) However, most other state courts that have rejected application of *Young* have simply noted that it was not constitutionally based. See *supra* note 17. Other courts have felt compelled to follow *Young* and to reject their existing procedures for private contempt litigation. See *supra* note 16.

112. See *supra* note 72.

first, it is factually inaccurate; and second, it is belied by the Supreme Court's acceptance of other institutional incentives for prosecution that fundamentally compromise the exercise of prosecutorial discretion not to prosecute.<sup>113</sup>

The assumption that public prosecutors are objective, neutral, and flexible—whereas private prosecutors are overzealous, singleminded, and inflexible—is distorted at best. A public criminal prosecution serves only one interest: punishment for the crime, without particular consideration to the victim's needs or wishes.<sup>114</sup> Injured parties have a wide array of needs and desires, however, which may or may not include vengeance.<sup>115</sup> Thus, as a number of cases and examples show, private parties are in fact *more* likely to seek flexible resolutions of their disputes than are public prosecutors. Such flexible resolutions may in fact punish the defendant less while satisfying the private party who seeks to protect his or her hard-won rights embodied in a violated court order.

This trade-off was at the heart of two cases pre-dating *Young*. In both *Davenport v. State*<sup>116</sup> and *Ganger v. Peyton*,<sup>117</sup> the prosecutor of an assault against a spouse either had previously represented or was then representing the victim in a divorce action. In both cases, the courts held that such prosecutions lacked fundamental fairness and violated due process.<sup>118</sup> The *Ganger* court relied in part on indications that the prosecuting attorney had offered to drop the assault charge if the defendant would agree to a favorable property settlement in the divorce action.<sup>119</sup> Even assuming this "worst case" scenario occurred in either case, how-

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113. *Young*, 481 U.S. at 793-80 (judges may insist on prosecution for criminal contempt of their own order even after public prosecutor declines). See *Scroggy*, 882 F.2d at 195-97 (suggesting that Supreme Court's decisions indicate that various institutional incentives for prosecution do not render prosecution unconstitutionally biased). See *infra* notes 125-31 and accompanying text.

114. Whether punishment constitutes retribution, deterrence, or rehabilitation, is not at issue here and does not change the fact that state prosecution is singlemindedly devoted to punishment, and is certainly not designed to further individual victims' interests. See *supra* note 110.

115. See *Secret Touches*, *supra* note 110. This is particularly true in contempt, as distinct from ordinary crimes. In contempt, the petitioning party has an ongoing interest in some form of relief that affirmatively benefits him or her, such as implementation of the violated order, or relief for the violated right. Sometimes conviction and a jail sentence best serves the private purpose, but often other forms of remedial relief are more effective. See *infra* notes 188-89 and accompanying text.

116. 278 S.E.2d 440 (Ga. Ct. App. 1981).

117. 379 F.2d 709 (4th Cir. 1967). The defendant in *Ganger* sought to overturn his state-court convictions in federal court. Because state law afforded one of the convictions no habeas corpus relief, the Fourth Circuit agreed to decide the due process issue. *Id.* at 710-11.

118. *Davenport*, 278 S.E.2d at 441; *Ganger*, 379 F.2d at 712.

119. *Ganger*, 379 F.2d at 711-12.

ever, the dual role of the prosecutor was at least as likely to *help* the defendant as to hurt him, by offering a resolution to the criminal action other than incarceration or fines. Although negotiation of a civil agreement to resolve a criminal prosecution raises questions for the *attorney* under existing ethical rules,<sup>120</sup> it surely is in the *defendant's* interest at least to have the option of negotiating an alternative to the criminal prosecution.<sup>121</sup> Purely public prosecutions do not provide such "flexible" resolutions.

Private parties' interests in alternative dispositions are not limited to cases in which there is parallel civil litigation at stake. Again, the facts of the *Ganger* and *Davenport* cases, concerning domestic assault, are suggestive. In many such cases of assault, when the victim knows the perpetrator, the victim's overriding priority is to assure her future safety and to obtain a remedy for damages already done. Although she may seek jail time for her attacker, she might prefer other alternatives, including a suspended sentence with counseling, agreement to a restraining order, and/or restitution for damages. Public prosecutors may or may not seek such dispositions; however, prosecutors are not trained to inquire into and seek to effectuate *victims'* interests in a prosecution. Such alternative resolutions do not fit the paradigm of criminal prosecution, and victims who seek them are sometimes said to be "abusing the criminal pro-

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120. See Sidman, *supra* note 12, at 773-80 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1980) (prohibiting representation of two or more clients with potentially conflicting interests); various state statutes prohibiting prosecutors from participating in parallel civil actions). Although Sidman views private prosecution as an inherent conflict of interest for the private counsel, the Supreme Court's exception for private "assistant" prosecutors, see *Young*, 481 U.S. at 806 n.17, suggests that a lawyer may represent a private victim and the State at the same time without fatally violating ethical requirements.

A perhaps more obviously applicable ethical prohibition is the principle that lawyers must not "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." See, e.g., D.C. RULES OF PROFESSIONAL CONDUCT Rule 8-4(g). This rule, although consistent with the public interest in ensuring that our criminal justice system represents the public and not particular individuals, does not purport to maximize *defendants'* interests. A different set of ethical rules that would not prohibit the mixing of civil and criminal remedies is conceivable. Indeed, this rule is absent from the ABA's latest version of the *Model Rules of Professional Conduct*. However, such a topic is beyond the scope of this Article.

121. *Ganger*, 379 F.2d at 711. See Moran, *supra* note 74, at 1161 n.77 ("Such unfairness [*i.e.*, dealmaking] is not necessarily disadvantageous to a defendant, who may be quite happy to exchange information or money for the prospect of a lighter sentence in the criminal action."). The Supreme Court has also acknowledged that an "interested" prosecutor might choose to drop a prosecution in exchange for a civil settlement. *Young*, 481 U.S. at 804. However, the Court makes no effort to reconcile this recognition with the general thrust of the opinion that "interested" prosecutors harm defendants' interests.

cess."<sup>122</sup> Moreover, even if some prosecutors' offices use alternatives to prosecution of domestic violence, such a blanket policy may be no more in a given victim's interests than a blind policy of aggressive prosecution. An attorney who represents the victim will, by definition, focus on the victim's needs, *whatever they may be*, rather than automatically following a blanket governmental policy.<sup>123</sup>

This multi-faceted view of victims' wishes could well be extended to other types of cases, such as burglary or fraud. It is not clear why the variety of victims' interests has not been acknowledged in the caselaw and literature, which pervasively assumes that while public prosecutors will weigh a wide variety of options, all victims seek only to convict.<sup>124</sup>

The second flaw in the claim that *Young* protects defendants' opportu-

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122. Caplan, *supra* note 85, at 1706 n.26.

123. See *Secret Touches*, *supra* note 110. This discussion is not intended to suggest that a non-criminal prosecutorial policy is best for domestic violence. Indeed, it is this author's view that criminal prosecution is in the best interests of most domestic violence victims. The fact that some such victims are ambivalent about putting their attackers in jail may be a function of many factors, including discouragement received from the prosecutors and police, fear of retaliation by the abuser, financial dependence on the abuser, concern about the impact of incarceration on the parties' children, and reluctance to take such harsh action against an intimate. See Beth Elfrey, *Compelling a Reluctant Spouse: A Prosecutorial Device to Stop Domestic Violence* (1991) (unpublished manuscript on file with author). See generally, Lisa G. Lerman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice*, RESPONSE (1981, 1983); RUSSELL DOBASH, *Violence Against Wives* 222 (1979). In fact, studies suggest that the single most important factor affecting victims' follow-through is the commitment of the *prosecutor* to prosecution. Lerman, *supra*, at 20-22; LENORE WALKER, *THE BATTERED WOMAN* 213-15 (1979). The complexity of intrafamily violence victims' feelings about prosecuting their attackers does not lessen the criminality or severity of the violence or the importance of a strong criminal justice response. However, it *does* exemplify the multiplicity of victims' interests and the inaccuracy of the assumption that victims seek "only to convict." Moreover, when the "prosecution" is for *contempt* for violation of a *civil* order previously awarded to protect the victim, the victim's interest in controlling the nature and timing of the prosecution is entitled to greater weight than in a criminal prosecution by the State.

124. See *supra* note 110. Defenders of *Young* may also argue that private plaintiffs will prosecute more cases than the public prosecutor, and that the overall result is detrimental to defendants, even if some of those prosecutions may result in alternative dispositions. However, it is questionable whether there is a due process right to prosecutorial inaction. See *Remedy*, *supra* note 82. See also *infra* notes 138-49 and accompanying text. Proponents of the economic approach to law also suggest that if the number of prosecutions increases, penalties should be reduced, because certainty of enforcement has increased. See, e.g., Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 284 (1983). However, it must be remembered that private prosecutions of *contempt* were the *norm* prior to *Young*, and that penalties in contempt are limited in most states. Application of *Young* will effect a reduction in enforcement, without an *increase* in penalties, thereby tilting the system excessively in favor of contemnors. Finally, if *Young* is taken at its word, its purpose was not to limit prosecutions, but to have them brought by the State rather than by a private party. As demonstrated above, prosecution by the State, rather than by private individuals, is not necessarily in defendants' interests.

nities to benefit from prosecutorial restraint lies both in the *Young* decision and other Supreme Court opinions. As mentioned in Section II, before reaching the question whether an interested private party may prosecute criminal contempt, the Court had to decide whether the trial court possessed the authority to appoint *any* private counsel to prosecute a contempt.<sup>125</sup> The petitioners argued that criminal contempts are “conventional crimes, prosecution of which may be initiated only by the Executive Branch.”<sup>126</sup>

The Supreme Court roundly rejected the argument. “The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches’. . . Courts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated.”<sup>127</sup> The Court further stated that since contempt prosecutions “are not intended to punish conduct proscribed as harmful by the general criminal laws . . . [but rather,] to serve the limited purpose of vindicating the authority of the court[,]”<sup>128</sup> courts must retain the authority “to initiate such proceedings when the need arises.”<sup>129</sup> Most important, although not necessary to its decision, the Court went further and held that this power must trump the power of the executive branch to exercise prosecutorial discretion.<sup>130</sup> Thus the Court held: “a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied.”<sup>131</sup>

Herein lies the greatest irony of the *Young* decision. While the second half of the opinion purports to remain loyal to the lofty goals of protecting defendants from abuses of “official power,” the first half of its opinion actually commits a sweeping retrenchment of that protection.

If “impartiality” is the core reason for a disinterested prosecutor, and if the beneficiary of an underlying order is considered too “interested” to control criminal contempt prosecutions, surely the judge issuing the or-

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125. *Young*, 481 U.S. at 793-802.

126. *Id.* at 797.

127. *Id.* at 796.

128. *Id.* at 800.

129. *Id.* at 801.

130. “If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution.” *Id.*

131. *Id.*

der, whose authority is directly flaunted when his order is violated, is no less "interested" in the order's enforcement.<sup>132</sup> As Justice Scalia argued in his concurrence, authorizing judges to initiate contempt prosecutions, in contravention of the prosecutor's discretion not to prosecute, has the potential for creating "the most tyrannical licentiousness."<sup>133</sup>

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132. The importance of prosecutorial discretion as a protection against judicial abuse is especially clear in light of the well-established rule that violation of a court order can be "contempt" even if the order is subsequently struck down as unlawful or unconstitutional. *See, e.g.,* Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 827 (5th Cir. 1976). *United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984), presents a classic example of the potential for judicial abuse in this context. In *McKenzie*, the district court issued a prior restraint against CBS, Inc., enjoining its broadcasting a story on the homicide trial of several police officers. *Id.* at 908. Although the Fifth Circuit twice refused to affirm the injunction, and although the U.S. Attorney refused to prosecute the contempt (after a request by the judges of the Eastern District of Louisiana) on grounds that it ran afoul of the First Amendment, the district court appointed private prosecutors. *Id.* at 910. When all of the judges of the Eastern District were disqualified from hearing the case, the action was brought in the Western District of Louisiana. *Id.* The "impartial" Western District court dismissed the action on the ground that the underlying orders were unconstitutional. *Id.* at 910-17. The private prosecutors appealed the dismissal. Finally, the Fifth Circuit dismissed the appeal on the ground that the private prosecutors no longer had authority to prosecute the contempt because the dismissal of the action constituted the revocation of their appointment. *Id.* at 911.

Although *McKenzie* was ultimately resolved in the defendants' favor, only the largest, most pecunious defendants can afford or stomach such extended and tortuous litigation to avoid conviction for criminal contempt at the behest of an outraged, but constitutionally tainted court. Such cases cannot be uncommon. For example, similar issues were presented in the trial of Manuel Noriega with respect to transcripts possessed by Cable News Network. Thus, the best that can be said for the Supreme Court's holding that courts "must" not be at the mercy of the executive branch in seeking enforcement of their own orders is that the Court projects onto judges a degree of objectivity and transcendence not universally found in the fallible human beings who inhabit the bench.

133. *Young*, 481 U.S. at 820 (Scalia, J., concurring) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)). Justice Scalia argued passionately that the majority's holding elevates the judiciary over the other branches of government, in violation of the doctrine of separation of powers. 481 U.S. at 816-18. At least two courts of appeal have agreed. *See United States v. Cox*, 342 F.2d 167 (5th Cir.) (a court may not initiate a contempt prosecution if the United States Attorney's Office declines to prosecute because executive discretion controls), *cert. denied*, 381 U.S. 935 (1965); *In re Sealed Case*, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, the Supreme Court further undercut its professed concern for assuring the neutral exercise of prosecutorial discretion in initiating prosecutions. There the Court upheld the federal "Special Prosecutor" statute authorizing courts to appoint special prosecutors to investigate and prosecute particular government officials. The Supreme Court did not respond to the D.C. Circuit's trenchant objections to the statute: that such a prosecutor, whose very "*raison d'être*" is to prosecute a particular individual, would have "unique incentives to seek an indictment"; and that such a prosecutor would be unable to exercise "wise prosecutorial discretion," which is rooted in a knowledge of the "ongoing process" of law enforcement, including measuring this case "against past cases in relation to broader considerations of sound deployment of prosecutorial resources . . . factors [that] often counsel against prosecution." 838 F.2d at 509-10.

For more in-depth analysis of the judicial power to initiate contempt prosecutions, see Neal Devins & Steven J. Mulroy, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt*

Indeed, *Young's* aggrandizement of judicial power at the expense of prosecutorial discretion flies directly in the face of the Court's earlier decisions, decisions on which the *Young* Court purports to rely. These decisions illustrate that defendants' rights in contempt prosecutions are most at risk, not from biased *prosecutors*, but from biased *judges*. Thus, in *Bloom v. Illinois*, the Court adopted a right to jury trial because "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament."<sup>134</sup> A jury trial was necessary because of "the unwisdom of vesting the judiciary with completely untrammelled power to punish contempt, and . . . the need for effective safeguards against that power's abuse."<sup>135</sup> Twelve years later, in *Jerrico*, the Court crystallized the distinction between prosecutors and judges, holding that "the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge."<sup>136</sup> In short, the decision provides *Young* as the sole exception to the rule that judges are subject to far stricter conflict-of-interest restrictions than are prosecutors.

Thus, far from enhancing protection of defendants from overweening State power, *Young* tips the scales of power against defendants, by requiring public rather than private prosecutors of contempt, and by authorizing judges to initiate contempts when prosecutors refuse. In both these respects, the decision strays far from the original intent of the very cases on which it relies.<sup>137</sup>

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*Prosecutors in Young v. United States ex rel. Vuitton Et Fils S.A.*, 76 KY. L.J. 861 (1987-88). See also James A. Cohen, *Self-Love and the Judicial Power to Appoint a Special Prosecutor*, 16 HOFSTRA L. REV. 23 (1987). Devins and Mulroy argue that independent prosecutorial discretion is no less vital in criminal contempt than it is in ordinary crimes. Devins & Mulroy, *supra*, at 863-68. Although I agree that *Young* overextends judicial powers, I do not agree that crimes and criminal contempt are indistinguishable. See *infra* notes 150-89 and accompanying text.

134. *Bloom v. Illinois*, 391 U.S. 194, 202 (1967).

135. *Id.* at 202, 207.

136. *Jerrico*, 446 U.S. at 243, 242-49. The quotation refers to *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1973), in which the Court invalidated prosecutions from which *mayors* acting as judges stood to benefit financially. 446 U.S. at 242-43.

137. The dangerous trend toward judicial "tyranny" established by *Young* can be seen in at least one post-*Young* circuit court of appeals decision that a court may proceed with a criminal contempt prosecution without appointing *any* prosecutor. *In re Grand Jury Proceedings*, 875 F.2d 927, 933-34 (1st Cir. 1989) (Assistant U.S. Attorney charged with contempt of court order prohibiting continuation of Grand Jury proceeding). The First Circuit found that the district judge was "impartial" as opposed to *Young* in which the private-party prosecutor was "biased." *Id.* at 934. The court further noted that the exercise of prosecutorial discretion *not* to prosecute is "largely illusory" when a de-

## 2. Public Interest in "Impartial" Justice

Even if it could be proven that public prosecution is more protective of defendants' interests than private prosecution, the assumption that justice and due process are better served by public prosecution is still subject to dispute. "Justice" is not necessarily commensurate with whatever best protects defendants' interests. And indeed, because private prosecution is not uniformly disadvantageous to defendants, the Supreme Court and commentators attempt to rest the disinterested prosecutor requirement on more universal principles. Thus, the *Young* Court noted, private prosecution also may also be unfair because "a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges."<sup>138</sup> Similarly, commentators have argued that, "[l]ike all other aspects of a criminal prosecution, plea and sentencing recommendations should result from an impartial evaluation of how best to serve the interests of the public, not those of complaining parties."<sup>139</sup>

Such statements beg the critical question: what makes a criminal prosecution "impartial," "meritorious," or in "the public interest"? Courts and commentators repeatedly equate public "disinterested" prosecution with "impartiality," "fairness," and "doing justice," as though the equation is self evident. Yet although a defendant may benefit when a public prosecutor declines to prosecute a case despite the victim's desire for prosecution, such a refusal is not necessarily "fair" or "just" to defendants or the public. For example, it is fairly clear that the *Ganger* court viewed the prosecution of a wife beater by a counsel retained by the wife as improper in part because it circumvented the existing policy of non-prosecution of spousal assaults.<sup>140</sup> However, although policies of non-prosecution were in the past accepted as a neutral exercise of

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defendant's conduct is unquestioned and in light of *Young's* holding that the court may supersede the prosecutor's exercise of its discretion not to prosecute. *Id.* at 934. *But cf. In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990) (neither opposing counsel nor judge may act as prosecutor of criminal contempt).

138. *Young*, 481 U.S. at 805.

139. Moran, *supra* note 74, at 1161.

Such unfairness is not necessarily disadvantageous to a defendant, who may be quite happy to exchange information or money for the prospect of a lighter sentence in the criminal action. But in a criminal prosecution, the rights of the defendant are only one consideration. The public also has an interest in impartial administration of the criminal laws.

*Id.* at 1161 n.77 (citing *People v. Superior Court*, 561 P.2d 1164, 1173 (Cal. 1977); *People v. Zimmer*, 414 N.E.2d 705, 708, (N.Y. 1980)).

140. *Ganger v. Peyton*, 379 F.2d 709, 712-13 (4th Cir. 1967).

prosecutorial discretion, such systematic refusals to treat family violence as subject to the criminal justice system are based on bias against female victims and unconstitutional permission for violence against women in the family. In the past ten years, courts repeatedly have found that policies of nonarrest in family violence cases violate the rights of victims to due process and equal protection.<sup>141</sup>

On the other side of the coin, the bringing of even a criminal prosecution that gives a civil plaintiff a civil advantage nonetheless may be independently warranted. Nor is it self evident that a negotiated outcome trading a criminal prosecution for private interests is inherently "unjust."<sup>142</sup> When none of these factors is present, and the sole objection is that the prosecutor represents the victim, there is even less concrete basis for considering the prosecution unjust or not in the public interest.<sup>143</sup>

The most obvious "objective basis" for determining when a prosecution is "just" is the nature and sufficiency of the evidence. However, *Young* made clear that the mere facts of a case are not dispositive. The Court rejected "harmless error" analysis, under which prosecution by an interested prosecutor would be permitted if the evidence were ample enough to justify prosecution per se.<sup>144</sup> Rather, the plurality claimed instead that the use of an interested prosecutor is so "fundamental[ ]" an error that it taints the integrity of the criminal proceeding, regardless of the strength of the evidence against the accused.<sup>145</sup> It is even less obvious that the mere identification of the prosecutor with the victim, *i.e.*, as their counsel, is inconsistent with the "public interest."

Thus, the courts' and commentators' conclusory discussions offer no

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141. See, e.g., *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984). See also Jessica L. Goldman, Note, *Arresting Wife Batters: A Good Beginning to Stopping a Pervasive Problem*, 69 WASH. U. L.Q. 843 (1991). Other examples of improper failures to prosecute abound. The author of *Remedy*, *supra* note 83, advocates use of private prosecution as a remedy for the "unwarranted" inaction of public prosecutors because "corruption, political ambition, or insufficiency of funds and personnel" often cause prosecutions to be dismissed. *Id.* at 210. The author refers specifically to the findings of a Congressional Committee (the "Kefauver Committee"), which investigated crimes unprosecuted due to corruption during the 1950s. *Id.* at 210 nn.4, 5. To the author's list of improper reasons for non-prosecution could be added bias against women or minorities, as much as against prosecution of family violence.

142. *But cf.* *Moran*, *supra* note 74, at 1161 (plea bargains and sentencing recommendations resulting from civil concessions by the defendant are "inherently unfair" to defendants).

143. *Caplan*, *supra* note 85, at 1706 n.26 (noting that under Philadelphia's system of private prosecution battered women's complaints were taken seriously).

144. *Young*, 481 U.S. at 809-14.

145. *Id.*

objective standards by which the "justness," "appropriateness," or "impartiality" of plea bargains or charges are measured, and to which agreements reached through private bargaining can be compared. Without an explicated theory of criminal justice that articulates criteria or a principle by which to measure the "justness" of prosecutions, the assumption that public prosecutions are inherently more fair or just than privately initiated ones is simply unsubstantiated.<sup>146</sup>

This argument is not intended to suggest that public prosecution of crimes is "unjust." It merely suggests that "justice" in this context is simply a stand-in for decisionmaking on behalf of the public, rather than private parties. Public prosecution should be seen for what it is: a reflection of social values or mores that treat individual crimes as crimes against the State, in which the public has a fundamental interest. There can be little doubt that a powerful and meaningful criminal justice system requires public enforcement rather than private vindication.<sup>147</sup> The system of public prosecution constitutes, within human and institutional limitations, society's best attempt at implementing a criminal justice system according to society's priorities and values; it can be said to approximate the public interest, however inefficiently defined and implemented. Society has every right to choose to implement its system of criminal justice through such a public system.<sup>148</sup> This choice, however, should not be confused with a greater protection of defendants' rights, or, necessarily, with "justice."

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146. For example, "[a] moralist might have some difficulty with the proposition that it was 'unjust' for a person who behaved as irresponsibly as Mr. Dick did [drunk driving] to be prosecuted on the most serious charge that could be brought for such conduct." *Dick v. Scroggy*, 882 F.2d 192, 195 (6th Cir. 1989). Rather, in the absence of other objective criteria, it is certainly arguable that prosecutions are "justified" whenever victims care enough and possess the capacity to pursue them. As in civil litigation, not every such case will be justified, but the victim's motivation may be at least as neutral and objective a basis for approximating "justice" as the system currently in place. *Young*, 481 U.S. at 809-14.

147. See, e.g., FRANKLIN E. ZIMRING, PERSPECTIVES ON DETERRENCE 4-5 (1971) (punishment through criminal justice system operates as a "teacher of right and wrong . . . the threat and example of punishment by a legal system will communicate to the individual that the legal system views the threatened behavior as wrong, and this information will also affect the moral attitudes of the individual") (quoted in WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 25 (1986)).

148. The *Young* opinion repeatedly acknowledges the public-interest dimension of the right to a disinterested prosecutor in its discussion of harmless error. See *Young*, 481 U.S. at 811 ("appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general"); *id.* ("what is at stake is the public perception of the integrity of our criminal justice system"); *id.* at 813 ("[p]ublic confidence in the disinterested conduct of that [prosecutorial] official is essential").

In sum, the “right” adopted in *Young* is not comparable to other due process rights of accused criminal contemnors. Rights such as the right to notice, counsel, proof beyond a reasonable doubt, and trial by jury<sup>149</sup> provide defendants with greater protection from the power of the State, assuring that proof of guilt is substantial and ensuring that the defendant will have the opportunity to offer a meaningful defense. Compared with such rights, a “disinterested prosecutor” does not provide insulation from the State, but ensures prosecution by the State with its full powers; it does not minimize or reduce the likelihood of conviction or the harshness of available penalties, but potentially limits and rigidifies penalty options. It does not create neutral or merciful prosecution decisions, but permits the judges themselves to initiate and adjudicate prosecutions. It is, in other words, unlike all other rights of accused criminal contemnors, a right not inherently protective of defendants. Rather, it derives fundamentally from the public’s interest in a publicly enforced criminal justice system. This interest, no matter how important, is one that should not be transferred to the contempt context.

#### IV. LIMITS OF THE CRIMINAL ANALOGY

Even if the right to a disinterested prosecutor were established as fundamental in the criminal realm, the Supreme Court’s second key proposition—that the same right automatically should apply in the contempt context—is wrong. The analogy of criminal contempt to ordinary crimes is necessarily limited, and it falls apart specifically when considering who prosecutes the action.

*Bloom* best summarized the rationale for the “criminal analogy”:

Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . . [It is] indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates. . .

. . .

[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes.<sup>150</sup>

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149. See *supra* notes 7-10 and accompanying text.

150. *Bloom v. Illinois*, 391 U.S. 194, 201-02 (1967).

Of the two rationales for the criminal analogy offered by *Bloom*—the *impact* on the defendant, and the *purpose* of the proceeding—it is clear that the first alone is an insufficient basis upon which to equate a contempt proceeding with a criminal prosecution. The impact on the accused of a civil (or summary) contempt proceeding may include extended incarceration, and may be every bit as severe as—or more severe than—the impact of many criminal prosecutions; yet a civil contemnor is afforded none of the due process protections to which criminal defendants are entitled.<sup>151</sup> The criminal analogy must therefore rest on the perceived similarity of purpose between criminal contempt proceedings and criminal prosecutions.<sup>152</sup> Thus, the Supreme Court has repeatedly stated that both types of proceedings are similarly brought to uphold the institutions and laws of our government by punishing those who infringe them.<sup>153</sup> A contempt prosecution “vindicate[s] the court’s authority,” while a criminal prosecution vindicates the authority of the criminal laws.<sup>154</sup>

The flaw in the analogy is that criminal contempt proceedings also have inherently civil purposes and aspects. These practical and theoretical differences between criminal contempt proceedings and criminal prosecutions highlight the inappropriateness of grafting a public prosecutor requirement onto contempt proceedings.

Although entire bodies of law and procedure rest on the accepted distinction between criminal and civil contempts, the proper line between them is actually far from clear. Traditionally, courts have looked to the purpose of the sanction imposed. A sanction designed to compensate the opposing party or to coerce his or her compliance with the order is paradigmatically “civil,” while a purely punitive sanction is typically

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151. See *supra* note 13; Henry M. Hart, Jr., *The Aims of the Criminal Law*, reprinted in ABRAHAM S. GOLDSTEIN & JOSEPH GOLDSTEIN, *CRIME, LAW AND SOCIETY* 61, 64 (1971) (noting that criminal and civil law cannot be distinguished on the basis of severity of sanctions, since, “with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.”).

152. The *Bloom* Court appeared to base its holding primarily upon the impact on the defendant, and only mentioned the analogous purposes of the proceedings as an afterthought. *Bloom*, 391 U.S. at 201. However, other cases have increasingly focused on the supposedly parallel purposes of criminal contempt proceedings and criminal prosecutions. See *Shillitani v. United States*, 384 U.S. 364, 369 (1966) (“It is not the fact of punishment but rather its character and purpose that serve to distinguish criminal from civil contempt”) (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

153. *Bloom*, 391 U.S. at 201; *Young*, 481 U.S. at 797.

154. *Young*, 481 U.S. at 804; see *infra* notes 180-85 and accompanying text.

“criminal.”<sup>155</sup> However, the simple distinction between coercing compliance and punishing past behavior is difficult to sustain.

In crucial respects, both coercive and punitive purposes are always present in both civil and criminal contempt. Unlike a criminal prosecution, in which the violation of law typically has occurred in the past, contempt of a court order almost always involves an ongoing issue between the parties. Thus, even a determinate sentence imposed as “punishment” to “vindicate the court’s authority” will inevitably also “coerce” future compliance with the ongoing injunction, *to the future benefit of the private party*.<sup>156</sup> For this reason, although “criminal” contempts are technically said to be purely to vindicate the court’s authority, courts often have acknowledged that criminal contempt proceedings also protect private interests.<sup>157</sup> Conversely, “coercive” sanctions, such as the two-and-a-half-year jail term Elizabeth Morgan served for violating an order relating to child visitation,<sup>158</sup> are also inherently “punitive.”

The confusion between civil and criminal contempt has been widespread.<sup>159</sup> One of the most trenchant examples arose in *Shakman v.*

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155. “If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.” *Gompers*, 221 U.S. at 441. See *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976) (if purpose is to compel obedience or to compensate victim, action is civil contempt).

156. Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 240 (1971) (as long as an injunction continues to have meaning into the future, there is something “left to coerce”). The very concept that punishment is retrospective while “coercion” is prospective is inconsistent with the well-respected view of criminal punishment as a means of coercing future obedience to law. Then-professor Oliver Wendell Holmes, Jr., after noting that the “general purposes of criminal and civil liability are the same,” said, “[p]revention would accordingly seem to be the chief and only universal purpose of punishment.” Oliver Wendell Holmes, Jr., *Theories of Punishment and the External Standard*, reprinted in GOLDSTEIN & GOLDSTEIN, *supra* note 151, at 27, 31. Dobbs critiques the *Gompers* decision and others for spawning a number of “deviant” tests for distinguishing between criminal and civil contempt and argues that the only meaningful criterion is whether the sentence is determinate or indeterminate. Dobbs, *supra*, at 240. For a discussion of this criterion, see *infra* notes 166-71 and accompanying text (discussing *Hicks v. Feiock*, 485 U.S. 624 (1988)).

157. *Hicks v. Feiock*, 485 U.S. 624, 635-36 (1988) (citing *Gompers*, 221 U.S. at 443); *In re Debs*, 158 U.S. 564, 596 (1895) (“a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.”). See also *United States v. Halper*, 490 U.S. 435, 447 (1989) (“civil proceedings may advance punitive as well as remedial goals, and, conversely . . . both punitive and remedial goals may be served by criminal penalties.”).

158. See *supra* note 13.

159. It is not uncommon to find appellate reversals of contempt trials on the grounds that the proceeding should have included due process protections, because the contempt is, with hindsight, found to be “criminal.” See, e.g., *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418 (1911); *Buffington v. Baltimore County, MD.*, 913 F.2d 113, 134-35 (4th Cir. 1990) (because a fine payable to

*Democratic Organization*.<sup>160</sup> In that case the plaintiff class had obtained an injunction against local government officials prohibiting coercion of their employees to engage in political activity in support of the administration of Chicago Mayor Richard Daley. However, the "Daley machine," famous for its effective marshalling of political patronage, proved difficult to dismantle. In defending against the plaintiffs' contempt action on appeal, the defendants claimed that, since they were found to be in contempt for past acts violating a prohibition of the court, the proceeding must have been criminal, and that they had been deprived of the appropriate due process protections. In rejecting the defendants' claim, the court noted that the distinction between civil and criminal contempts depends on whether the relief sought is punitive, to vindicate the authority of the court, or remedial, for the benefit of the complainant.<sup>161</sup> In determining into which category this proceeding fell, however, the court found itself at a loss: the pleadings, which sought a fine and "conditions to purge the contempt," were no help because, as in most contempts, "the relief sought may be appropriate for either criminal or civil contempt."<sup>162</sup> Since it could not base its finding on the pleadings, the court sought to read the plaintiffs' minds, to determine whether they had sought "punishment" or "coercion."<sup>163</sup> Although the petition was based on past acts in violation of the injunction, the court found it reasonable to conclude that the proceeding was intended to "assure future compliance during the remaining highly critical time before the city election." The relief was, thus, "not necessarily to punish the 'past completed acts,' . . . but rather to coerce. . . ."<sup>164</sup>

This convoluted analysis demonstrates that, prior to imposition of a sanction, most contempt actions can be defined equally appropriately as punitive (criminal) or remedial (civil), because they are, in fact, both.<sup>165</sup>

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court is criminal, not civil, contempt proceeding lacked requisite due process protections), *cert. denied*, 111 S. Ct. 1106 (1991); *Universal City Studios, Inc. v. Broadway Int'l Corp.*, 705 F.2d 94 (2d Cir. 1983) (setting aside unconditional prison terms because proceedings lacked the due process protections required in criminal proceeding).

160. 533 F.2d 344 (7th Cir.), *cert. denied*, 429 U.S. 858 (1976).

161. *Id.* at 349.

162. *Id.*

163. *Id.* at 349-50.

164. *Id.* at 350.

165. One court attempted to relieve the confusion by propounding the theory that civil contempt consists of three stages, the first two of which are coercive and the third of which is punitive. *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981). The court defined the three stages: (1) issuance of an order; (2) issuance of a conditional order threatening a penalty; and (3) issuance of the

In partial recognition of the inevitable overlap of purposes and attendant confusion in determining whether a contempt proceeding is civil or criminal, the Supreme Court, in *Hicks v. Feiock*,<sup>166</sup> recently refined the analysis<sup>167</sup> so that the distinction would rest on a single factor. In *Hicks*, the Supreme Court held that a state law putting the burden of proving inability to pay child support on the violator of a support order was unconstitutional in a criminal contempt proceeding, because it shifted the burden of proof of a "crime" from the state to the defendant. In its opinion, the Court attempted to lay to rest the various theories described above that lower courts had used in distinguishing between civil and criminal contempt. And it explicitly reduced the analysis to the single question of whether the sentence could be purged by compliance.<sup>168</sup> The aphorism most often associated with this doctrine is the phrase that a proceeding is civil only if the imprisoned individual "carries the keys to the jail in his own pocket."<sup>169</sup>

In explicating its single-factored definition, the *Hicks* Court went further than prior courts, specifically rejecting the view that a suspended sentence conditioned on fulfilling certain obligations is "civil" because the contemnor may avoid imposition of the sentence by complying with the conditions.<sup>170</sup> Because suspended sentences also occur in criminal prosecutions, the Court found that suspension of a sentence cannot render a contempt proceeding "civil." Instead, the Court treated the suspension of the sentence as incidental to the imposition of a determinate

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penalty. *Id.* at 1184. Although the third stage no longer offers the contemnor an opportunity to avoid the penalty, but rather simply imposes the penalty, the *Blevins* court concluded that this stage remains a "civil" proceeding, free of criminal due process protections. *Id.* at 1185-86. *See also* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989) (imposition of daily fines after violation of order containing threatened fines is part of civil contempt proceeding), *cert. denied*, 110 S. Ct. 2206 (1990). Although this view is not without persuasive effect, the problem highlights the inherently self-defeating character of the distinction between civil and criminal contempt: at the third stage the proceeding is no longer "coercive" but is purely punitive. Yet if it were treated as a "criminal" proceeding, a common procedure for imposing *civil* contempt sanctions would no longer be available. A similar problem with respect to suspended sentences is discussed in *Dobbs*, *supra* note 137, at 245 ("it may be wrong to attempt a solution based purely on logic here. There is no ready basis for the selection of one premise over another . . .").

166. 485 U.S. 624 (1988).

167. Although state law usually governs criminal and civil proceedings, when federal constitutional protections are at issue, state law is not dispositive of the question. *Id.* at 631.

168. *Id.* at 640.

169. *Id.* at 633 (citing *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947)). *See also In re Nevitt*, 117 F. 448, 461 (8th Cir. 1900).

170. *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 789 (9th Cir. 1989); *Zapata v. Zapata*, 499 A.2d 905, 908-09 (D.C. 1985).

sentence, and noted that a suspended sentence is in itself a "punishment" that cannot be wholly purged.<sup>171</sup>

The Court's litmus test *may* be helpful in creating a bright line between criminal and civil contempt.<sup>172</sup> However, in so expanding the definition of criminal contempt, the Court has also drifted far from its original rationale for the criminal analogy.

As discussed earlier, the criminal analogy was based on an alleged parallel between the purposes of criminal prosecutions and criminal contempt prosecutions: both seek to send a clear message upholding and enforcing the authority of the law. But the *Hicks* "determinate/indeterminate sentence" test vastly broadens the range of contempt proceedings that fall into the category of "criminal" contempt, sweeping into the category many sanctions tailored specifically to benefit the private opposing party rather than to "punish" a violation of public law. For example, as three Justices argued in their dissent in *Hicks*, the suspended sentence in that child support contempt proceeding, conditioned on payment of arrearages and future obligations, was clearly designed primarily to *coerce* payment of the money owed for the benefit of the petitioner.<sup>173</sup> This is far from the paradigm of a proceeding to vindicate

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171. *Hicks*, 485 U.S. at 639 n.11.

172. It may not even succeed at this, however. For example, the Court did not resolve whether imposition of a penalty after initial imposition of a conditional sentence is treated as a "criminal" or "civil" proceeding. See *supra* note 169. Although the decision states that a fine payable to the court is "punitive" and therefore a "criminal" sanction, it suggests that suspension of such a fine would render the sentence "remedial" and "civil." 485 U.S. at 632. This holding is of course inconsistent with other parts of the decision, which established that the mere suspension of a sentence of *incarceration* does not render the sanction "civil." *Id.* at 639 n.11. In fact, the principle that suspended sentences are "criminal" contempts has not been fully followed in the lower courts. See, e.g., *Brown v. Filson*, 117 Daily Wash. Law Rptr. 1901, 1902 (1989) (continuing earlier order suspending sentence in ostensibly civil contempt proceeding in child custody and visitation dispute).

Notably, although *Hicks* tried to replace the ephemeral "purpose" test with its single-factored determinate/indeterminate test, the next year the Supreme Court, in *United States v. Halper*, 490 U.S. 435 (1989), revived a variation of the purpose test. In *Halper*, the Court held that, for purposes of double jeopardy, a civil sanction constitutes "punishment" when it "cannot fairly be said solely to serve a remedial purpose . . ." *Id.* at 448.

Both past tests and the *Hicks* test are vulnerable to the criticism that they "put the cart before the horse," *i.e.*, that they require the sentence to be issued before it can be determined whether the proceeding is civil or criminal. Harmer, *supra* note 2, at 248.

173.

The sanction imposed on respondent is unlike ordinary criminal probation because it is collateral to a civil proceeding initiated by a private party, and respondent's sentence is suspended on the condition that he comply with a court order entered for the benefit of that party. This distinguishes respondent's sentence from suspended criminal sentences imposed outside the contempt context.

the authority of the court or the law.<sup>174</sup> By the same token, it is hard to see why—if this sentence is “criminal” despite the remedial sanction and the focus on the opposing party’s interests—the indefinite incarceration of the contemnor, if he refuses to comply with the same conditions, should be called “civil.”<sup>175</sup>

The Court’s attempt to create a bright line separating criminal from civil contempts thus only highlights the difficulty of sustaining the distinction. At this point, it should be recalled that courts’ reliance on the criminal analogy traditionally has been constrained by the recognition that contempt is “sui generis.”<sup>176</sup> For example, it has long been recognized that contempt proceedings need not proceed by indictment or information,<sup>177</sup> and that juveniles may be tried for contempt in nonjuvenile courts.<sup>178</sup> But the difference between contempt and a criminal case goes

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*Hicks*, 485 U.S. at 650 (O’Connor, J., dissenting).

Suspended sentences are especially common in the contempt context, precisely because there is an ongoing relationship between the parties and a need for specific future compliance with the existing order. In contrast, in criminal cases, suspended sentences do not typically reflect an ongoing relationship between the defendant and the victim, or affirmative obligations that must be met. Rather they serve as a warning and incentive to a defendant not to commit another crime (as well as an acknowledgment, in many cases, that time already has been served pending trial).

174. *Cf. id.* at 638 (stating that purpose of proceeding was “wholly ambiguous”).

175. Because sanctions in civil contempts can be so severe, numerous commentators have called for the application of full due process protections to civil contempt proceedings. *See, e.g.*, Goldfarb, *supra* note 2, at 175; Harmer, *supra* note 2, at 255-56. In this author’s view, this should be accomplished by eliminating the distinction between criminal and civil contempt whenever jail is contemplated, with the possible exception of summary proceedings for in-court contempts. However, treating all contempts as “criminal” for purposes of due process need not mean that all due process protections of criminal defendants, such as the right to a disinterested prosecutor, attach to accused contemnors. Rather, as argued in Section III, *supra*, the rights granted contemnors should be those that actually protect accused individuals from an unbalanced or unfair contest. For a comprehensive discussion of the applicability of constitutional procedural constraints to “quasi-criminal” or nominally civil proceedings, see Mary Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991). On the specific question of whether civil contemnors are entitled to the same due process protections as criminal contemnors, Professor Cheh appears to endorse the Supreme Court’s distinction, that incarceration when one is “capable” of compliance does not require the same protections as incarceration after the fact. *Id.* at 1368.

176. *Jencks v. Goforth*, 261 P.2d 655, 661 (N.M. 1953). *See also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911) (“Contempts are neither wholly civil nor altogether criminal”); *Sassower v. Sheriff of Westchester County*, 824 F.2d 184, 189 (2d Cir. 1987) (criminal contempts have “unique status as quasi-criminal sanctions”) (quoting *United States v. Martinez*, 686 F.2d 334, 343 (5th Cir. 1982)); *United States v. Nunn*, 622 F.2d 802, 803 (5th Cir. 1980) (contempt proceedings have “special constitutional status”).

177. *Dobbs*, *supra* note 156, at 235. *See also United States v. Bukowski*, 435 F.2d 1094, 1101-02 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

178. *Dobbs*, *supra* note 156, at 235 n.216.

deeper than these holdings. If one thinks in terms of what makes the criminal law "criminal," rather than "civil," it is apparent that contempt is fundamentally different in principle and function from a crime.<sup>179</sup>

One of the most thoughtful explorations of the essence of the criminal law appears in an essay on "The Aims of the Criminal Law," by the legal and philosophical scholar Henry Hart.<sup>180</sup> In attempting to arrive at this essence, Hart first dismissed numerous characteristics that might be thought to define criminal law, such as the following: (1) Criminal law constitutes a set of prohibitions or affirmative requirements; (2) these commands are made on behalf of the community as a whole to the community as a whole; (3) violation of these commands subjects the violator to sanctions; (4) criminal law embodies injuries to society that society is generally interested in preventing; (5) criminal proceedings are brought by public officials; and (6) criminal sanctions are harsher than civil sanctions.<sup>181</sup> Hart points out that none of these characteristics in fact distinguishes criminal law from civil law. For example, torts and contracts law also constitute a set of commands that bind all members of the community, violations of which subject the violator to penalties. Moreover, society has a profound interest in upholding the law of torts and contracts, both civil and criminal actions are brought by government officials, and civil sanctions can be every bit as harsh as many criminal sanctions.<sup>182</sup>

What then, distinguishes a criminal sanction from a civil sanction? In Hart's view it is "the judgment of community condemnation which accompanies and justifies its imposition."<sup>183</sup> "[T]he criminal law . . . de-

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179. Devins & Mulroy, *supra* note 133, challenge the principle that contempt is *sui generis*, arguing that this notion derived from an erroneous unreported judicial decision transported from common-law England. *Id.* at 870-71. They also claim that "contempts *are* violations of the general criminal law," because a federal statute explicitly makes violations of judicial decrees punishable by fines or imprisonment. *Id.* at 874 (emphasis in original) (citing 18 U.S.C. § 401 (1988)). However, this argument misses the boat: § 401 merely codifies the common-law contempt power. It does not make contempt a *crime*; contempt is still set apart from other criminal acts explicitly designated "crimes." Moreover, the argument does not account for the inherent difference in the nature and function of contempt and ordinary crimes discussed above.

180. Hart, *supra* note 151. Hart was Professor of Law at Harvard University, was co-author with Herbert Wechsler of *The Federal Courts and the Federal System* (1953), and is considered a father of the "legal process" school of legal thought. See HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

181. HART & SACKS, *supra* note 180, at 63-64.

182. *Id.* at 64.

183. *Id.* at 65.

fines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility."<sup>184</sup> A "crime" is "not simply anything which a legislature chooses to call a 'crime'. . . ." Rather, it is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."<sup>185</sup>

Held up to this definition of what makes a proceeding essentially criminal, it is apparent that contempt proceedings are, at root, different. While a criminal proceeding is brought on behalf of the entire community to enforce fundamental community *mores*, a contempt proceeding is brought to enforce an order obtained through private litigation for the benefit of an individual private party. While a criminal prosecution upholds laws that society has determined are essential to a civilized society, a contempt proceeding enforces an order that never would have become "law" but for the individual efforts of private citizens on behalf of their own particular interests.<sup>186</sup> Apart from a generalized social interest in "vindication of courts' authority," society has no particular stake in enforcement of private orders. And society's *practical* interest in such vindication does not compare to the "moral condemnation" or "minimum conditions of man's responsibility to his fellows" embodied by the criminal law.<sup>187</sup> Rather, the "public interest" in vindication of judicial authority through contempt is more akin to the public interest in enforcement of the civil law: both are a means to an end of ensuring that social, economic, political, and legal interactions are conducted according to certain understood rules. Important though both the enforcement

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184. *Id.* at 70.

185. *Id.* at 65. In other words, crimes are those acts that society would view as morally heinous even if they were not illegal: e.g., contract violations are typically considered wrong *because* they are illegal, and not necessarily because they are inherently immoral. See James Fitzjames Stephen, *Of Crimes in General and of Punishments*, reprinted in GOLDSTEIN & GOLDSTEIN, *supra* note 151, at 17 ("The substantive criminal law . . . relates to actions which, if there were no criminal law at all, would be judged of by the public at large much as they are judged of at present."). After reviewing various criteria for distinguishing "criminal" and "civil" proceedings, Professor Cheh arrives at a similar conclusion. Cheh, *supra* note 175, at 1359-60 (arguing that adjudication of criminal guilt entails "a public restatement of social boundaries and a public reinforcement of the concept of individual responsibility.").

186. See *supra* note 173.

187. "The People are not concerned in contempt actions in the sense that such actions are in violation of the peace and dignity of society." *People v. Goss*, 141 N.E.2d 385, 391 (Ill. 1957). See also *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406 (Mo. Ct. App. 1989) (rejecting disinterested contempt prosecutor in dicta, while acknowledging adoption by Missouri Supreme Court of such a right in criminal cases).

of the civil law and respect for judicial authority are, neither equates to criminal law in inherent moral force or significance.

In light of this difference between contempt and criminal actions, it is not surprising that criminal prosecutions traditionally<sup>188</sup> have been prosecuted by the State, while contempt proceedings are typically initiated and prosecuted by the injured private party. The reasons for this are clear: in contempt, the private party has obtained a particular order benefiting that party. Once the order has been violated, the private party seeks enforcement to protect his or her own specified legal interests. Indeed, only the private party is aware of his or her order's violation and can bring it to the court's attention. The Supreme Court's pronouncements notwithstanding, even when "punitive" determinate sentences are sought in contempt, such a sanction is inevitably still a means of enforcing an ongoing order *for the benefit of the party to the order*. In contrast, criminal behavior is not adjudicated until the police recognize it as criminal and the prosecutors bring it to court as a matter of State interest.

The fact that private parties traditionally and naturally prosecute contempt proceedings is the fundamental difference between criminal and contempt proceedings. This difference is not incidental, but is an essential aspect of contempt; and it is precisely this private enforcement role that makes any contempt difficult to categorize as purely criminal.<sup>189</sup>

Thus, the *Young* Court's ruling barring private parties from prosecuting criminal contempts, by eliminating the right to bring a criminal contempt action privately, would make contempt proceedings fit the criminal analogy by fiat. But because contempt proceedings fundamentally are matters of private interest in a way that criminal prosecutions are not, forcing the former into the pigeonhole of the latter is neither appropriate nor justified.

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188. *But cf. supra* notes 91-108 and accompanying text.

189. Historically some courts and commentators have judged contempt actions to be "civil" if litigated by private parties and "criminal" if brought by the State. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445-48 (1911) (reversing jail sentence because private parties' bringing of proceeding and award of costs to complainant indicate a civil proceeding); *Universal City Studios, Inc. v. Broadway Int'l Corp.*, 705 F.2d 94, 96 (2d Cir. 1983) (when evidence was presented by attorney for party securing order and there was no "designation" of the proceeding as "criminal" contempt, the proceeding was civil); OWEN M. FISS, *INJUNCTIONS* 833 (1972) (civil contempt proceeding is tried by the parties as part of the main case; criminal contempt is between the government and the defendant only). However, the "identity of the prosecutor" test has been criticized as a "deviant" means of distinguishing between civil and criminal contempt. *Dobbs, supra* note 137, at 239. This test should not survive the Supreme Court's decision in *Hicks*, 485 U.S. at 638 (participation of District Attorney not by itself dispositive of whether proceeding is criminal).

## V. CONCLUSION

To the extent private litigants bring contempt actions to enforce their own orders, such actions should not be forced into the ill-fitting mold of a governmental criminal action by extending *Young* to create a due process requirement of a disinterested prosecutor. However, when a court appoints and grants the private party powers of a governmental prosecutor, such as investigative powers, wiretap authority, the authority to plea bargain and to grant immunity—as was the case in *Young*—the party has obtained powers available only to the government, and the balance of power has shifted markedly against the defendant. In such cases, the appointed counsel has taken on the role of a prosecutor for the government. Then, because of the fundamental unfairness of giving a private party governmental powers to be brought to bear against an opposing party, only a “disinterested” attorney should be appointed to represent the State.

Such a rule would fairly reflect the legitimate concerns of the *Young* Court about abuse of the “full machinery of the State.”<sup>190</sup> This rule also would protect the rights of private parties to bring motions to enforce their private orders in the majority of state court cases, in which contempts are prosecuted without additional specially granted powers.<sup>191</sup> Adoption of such a rule should not require creation of a due process right because it depends on the authority granted to the prosecutor by the court in particular cases. Rather, the determination of when a “disinterested” prosecutor of contempt is required should be made by the states’ highest courts under their supervisory authority, based on their understanding of their state’s procedures in particular types of cases.<sup>192</sup> It is fitting for state courts to shape their own policies on this matter, because the realities of state civil litigation, a far cry from the relatively glamorous case before the Supreme Court in *Young*, must inform any meaningful resolution of this issue.

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190. See *supra* notes 68-70 and accompanying text.

191. The *Castellanos* court distinguished *Young* as a case in which “a civil plaintiff was authorized by the trial judge to utilize extraordinary means to facilitate the prosecution of a civil defendant for criminal contempt . . .” *Castellanos v. Castellanos*, 117 Daily Wash. Law Rptr. 1192, 1194 (D.C. 1989).

192. See *Commonwealth v. Hubbard*, 777 S.W.2d 882, 885 (Ky. 1989) (Leibson, J., dissenting) (arguing that state supreme court should exercise its supervisory authority to adopt disinterested prosecutor requirement); *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 407 (Mo. Ct. App. 1989) (noting that this issue would have to be resolved by state supreme court).

