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MORAL MESSENGERS: DELEGATING PROSECUTORIAL POWER

*Pamela H. Bucy**

IN the eighties, I served as an assistant United States attorney (“AUSA”), prosecuting primarily white collar crime. Lacking any law enforcement experience, lacking, in fact, much legal experience when I began the job, I learned much. Over the years as I became experienced, three things never ceased to surprise me. The first was the solemnity of the courtroom. Physically, the courtrooms were imposing: cavernous, high-ceilinged, and wood paneled. Sounds echoed throughout them. Judges sat up high and were stern—to everyone. Protocol was formal. No matter who you were, unless it was your turn to talk and you were at the podium speaking into the microphone, you did not speak. Upon entering the courtrooms, the boldest defendants became deferential. The sloppiest lawyers came prepared. The simplest proceeding became momentous. Trials were high drama.

The second fact that amazed me was the resources available to AUSAs to investigate, prepare, and try our cases. Need to see someone’s bank records? Issue a subpoena. Need hundreds of financial transactions analyzed? Call the IRS. Need surveillance? Call the FBI. Need a judge to issue court orders or search warrants? Forms, secretaries, and judges-on-call were always available. Need to convince a reluctant person to talk? Seek court-ordered immunity.

Of everything, though, the most startling revelation was the amount of power I and every prosecutor had. There were plenty of experienced prosecutors and agents to guide, advise, and help, and they did, but bottom-line, the decisions—good and bad—were mine: who, when, how to investigate; who to indict, when, and for what charges; what plea offer to extend; and how to conduct my trials, which witnesses to call, and how to present the evidence.¹ The hundreds of decisions I and other AUSAs

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1. For sources discussing prosecutorial discretion, see, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115 (1998); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Gail Heriot, *An Essay on the Civil-Criminal Distinction With Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43 (1996); Neil K. Komisar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465

made every day changed the lives of others forever. When I began at the Department of Justice (“DOJ”) I was eager and aggressive. When I left seven years later, I was humbled by the power of the office.

After seeing up close the power of federal prosecutors, I find it fascinating that the DOJ is willing to share its prosecutorial power with private individuals who are not part of the Department. This article focuses on this delegation of power. Study of it is important for three reasons: first, delegation of prosecutorial power to private individuals by the DOJ and state Attorneys General is increasingly prevalent; second, such delegation is proving enormously successful as a law enforcement tool; and third, delegation to private prosecutors is likely to expand further.

Most of the delegation of prosecutorial power by the DOJ in recent years has been in an area where the DOJ could use help: white collar crime. This context is significant because the breadth of white collar offenses allows for even greater prosecutorial discretion than usual—for public or private prosecutors.² Assessing whether conduct is fraud, or simply aggressive business tactics, is like trying to grab water. It is elusive. Business fraud that some prosecutors ignore, others charge as multiple felonies. Entrepreneurs and executives whom some prosecutors would never charge will be named by others as aiders and abettors, or co-conspirators.³ In truth, because of the nature of white collar crime, delegation of prosecutorial power in this area compounds the strengths and weaknesses of the “private attorney general” concept.

This article is the seventh, and last, in a series on the delegation of prosecutorial power to private parties.⁴ This series has offered the following observations: First, giving private individuals the right to sue for damages caused to those individuals is not new and does not delegate

(1997); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000); Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391 (1994) [hereinafter Podgor, *Corporate and White Collar Crime*]; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

2. See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997); William J. Stuntz, *The Legal Construction of Norms: Self-Dealing Crimes*, 86 VA. L. REV. 1871, 1883-85 (2000).

3. See Pamela H. Bucy, “Carrots and Sticks”: *Post-Enron Regulatory Initiatives*, 8 BUFF. CRIM. L. REV. 277, 310-12 (2004) [hereinafter Bucy, *Carrots and Sticks*] (discussing complicity liability); see also *id.* at 310-12 (discussing conspiracy liability).

4. See James F. Barger, Pamela H. Bucy, Melinda M. Eubanks, Marc S. Raspanti, *States, Statutes and Fraud: An Empirical Study of Emerging False Claims Acts*, 80 TUL. L. REV. 465 (2005) [hereinafter *Statutes and Fraud*] (discussing states’ passage of private attorney statutes); Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021 (2004) [hereinafter Bucy, *Iterated Games*]; Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603 (2004) [hereinafter Bucy, *Games and Stories*]; Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939 (2002) [hereinafter Bucy, *Private Justice and the Constitution*]; Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905 (2002) [hereinafter Bucy, *Information as a Commodity*]; Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002) [hereinafter Bucy, *Private Justice*].

much power.⁵ Second, delegating to a private individual the right to bring a *punitive* action for *public* injuries when the individual *has not personally been damaged* is new and delegates considerable prosecutorial power.⁶ Third, this latter delegation of power to private parties presents tremendous potential assistance to law enforcement when private parties bring valuable and otherwise unavailable resources to law enforcement's efforts.⁷ Fourth, delegation of prosecutorial power to private persons also risks squandering law enforcement and judicial resources, disrupting executive branch operations, and harming honest businesses.⁸ Fifth, specific statutory amendments in the delegation of prosecutorial power to private individuals are needed to maximize the benefits and to minimize the costs of this delegation.⁹ Sixth, once refined, the "private attorney general" concept should be expanded to other areas where it can be helpful, such as protection of financial markets, the environment, and against terrorism.¹⁰

Although I, and others, have studied delegation of prosecutorial power, one issue that none of us have yet addressed is whether it matters *who* prosecutes. More precisely, to the extent the law communicates and shapes society's values, does a private plaintiff who brings a civil suit communicate and shape these values differently than does a prosecutor who brings a criminal case? A related question is whether the law's communication and norm shaping functions are affected if the private person and the government prosecutor *together* pursue a case through a hybrid civil/criminal action.

Before turning to these questions in Part IV, this article addresses three preliminary issues. Part I looks at the nature of white collar prosecutions, specifically at the trend of using punitive civil actions instead of criminal prosecution. Part II examines the emerging role of private individuals as prosecutors of white collar crime. Part III briefly reviews jurisprudence about the law's expressive function.

I. THE NATURE OF WHITE COLLAR PROSECUTIONS: THE TREND TOWARD GREATER USE OF PUNITIVE CIVIL ACTIONS

In a 1992 article, Kenneth Mann identified an emerging trend: the use of punitive civil actions as an alternative to, or supplement to, criminal

5. See Bucy, *Private Justice*, *supra* note 4, at 7-8 & 13-53.

6. See *id.* at 43-45.

7. See *id.* at 53-62; see also Bucy, *Information as a Commodity*, *supra* note 4, at 940-47.

8. See Bucy, *Games and Stories*, *supra* note 4, at 677-697 & Appendix A (Charts 1-43) (listing the costs of delegating prosecutorial power); Bucy, *Private Justice and the Constitution*, *supra* note 4, at 949-978; Bucy, *Private Justice*, *supra* note 4, at 62-68.

9. Bucy, *Private Justice*, *supra* note 4, at 74-76.

10. See *id.* at 20, 76-80; cf. *Statutes and Fraud*, *supra* note 4, at 478-88 (discussing states' passage of private attorney statutes).

prosecution.¹¹ The goal of punitive civil actions, which can be brought by private parties as well as the government, is to punish.¹² Suits brought under statutes such as the Clayton Act,¹³ the Racketeering Influenced and Corrupt Organizations Act (RICO),¹⁴ and the Computer, Fraud and Abuse Act ("CFAA")¹⁵ typify such actions. These statutes provide civil causes of action for those damaged by a defendant's conduct. They carry mandatory treble damages.¹⁶ Often brought as class actions, cases invoking these statutes present enormous civil liability for defendants.¹⁷ They may be brought by anyone damaged by a defendant's conduct.¹⁸ The civil False Claims Act ("FCA"),¹⁹ which is aimed at government contractors who file false claims or otherwise defraud the federal government,²⁰ is a different type of punitive civil action. In two ways, it goes further in empowering private plaintiffs. First, the FCA carries not only treble damages but mandatory penalties.²¹ The combined damages and penalties can be huge, approaching \$1 billion in recent cases.²² Second, the

11. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798-99 (1992) [hereinafter Mann, *Punitive Civil Sanctions*] ("Punitive civil sanctions are replacing a significant part of the criminal law in critical areas of law . . . because they carry tremendous punitive power."); cf. PAMELA H. BUCY, WHITE COLLAR PRACTICE 4 (3rd ed. 2004) [hereinafter BUCY, WHITE COLLAR PRACTICE] (commenting on the tendency of white collar crime to blur the distinction between criminal and civil law and noting the increasing use of civil prosecution of white collar crime); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Crucial Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1389 (1991) [hereinafter Cheh, *Constitutional Limits*]; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198-99 & 230-31 (1991) (chronicling trends in criminal law and the resultant interchangeability of criminal law with civil remedies); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 717 (1999); Thomas Koenig & Michael Rustad, *Crimtorts as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289 (1998); Lynch, *supra* note 2, at 26-37; Podgor, *Corporate and White Collar Crime*, *supra* note 1, at 393-95 (highlighting the difficulties of applying traditional criminal sanctions to corporations guilty of white collar crime).

12. Mann, *Punitive Civil Sanctions*, *supra* note 11, at 1798 (1992).

13. 15 U.S.C. § 12-27 (1997 & Supp. 2005).

14. 18 U.S.C. §§ 1961-68 (2000 & Supp. 2005).

15. 18 U.S.C. § 1030 (2000 & Supp. 2005). *Shaw v. Toshiba American Information Systems, Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000), demonstrates the CFAA's potential as a private action. In this class action brought under the CFAA, the parties settled the action for \$2.1 billion with an additional \$147.5 million in attorneys fees. *Id.* at 961. The case centered around the allegation that Toshiba and NEC Electronics "designed, manufactured, created, distributed, sold, transmitted, and marketed faulty floppy-diskette controllers ("FCD's") containing allegedly defective microcode." *Id.* at 945.

16. Clayton Act, 15 U.S.C. § 15(a) (1997); RICO, 18 U.S.C. § 1964(c) (2000); CFAA, 18 U.S.C. § 1030 (2000 & Supp. 2005).

17. Bucy, *Private Justice*, *supra* note 4, at 17-18.

18. *Id.* at 17-19.

19. 31 U.S.C. §§ 3729-3733 (2003).

20. *See id.* § 3729(a).

21. *Id.*

22. For example, recent judgments in FCA *qui tam* cases include a \$875 million settlement from TAP Pharmaceuticals, 55 Healthcare Financial Management 10 (2002), a \$745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a \$385 million settlement with National Medical Care, Inc., a \$325 million settlement with SmithKline Beecham Clinical Laboratories, a \$325 million settlement with National Medical Enterprises, and a \$110 million settlement with Na-

FCA gives individuals who have *not* been damaged by the defendant's conduct the right to sue. "Any person,"²³ including those who have *never been affected by the defendant's actions*, may bring a lawsuit under the FCA.

All of these punitive civil actions (the Clayton Act, RICO, CFAA and FCA) apply to conduct that could also be pursued as a criminal prosecution. For law enforcement, punitive civil actions provide a number of advantages over criminal prosecution. Most obviously, the "preponderance of the evidence" standard of proof applicable in civil cases is considerably easier to meet than the "beyond a reasonable doubt" standard of criminal cases.²⁴ Also, the mens rea requirement in civil actions (usually "reckless disregard for the truth"²⁵) is easier to prove than that in the typical criminal case ("willfully"²⁶ or "intent to defraud"²⁷). Prosecutors who are concerned with sending a message often find punitive civil actions to be just as effective of a deterrent, if not more so—especially when the defendant is a corporation—than criminal prosecution, because of the large monetary judgments rendered.²⁸ In fact, punitive civil actions can provide considerable deterrence because of the "collateral consequences" that flow from a finding of liability in a punitive civil action. These consequences include "debarment" and "exclusion," which prevent individuals and companies from future contracting with federal and state governments, loss of professional licenses and credentials, loss of accreditation, and liability in related lawsuits through collateral estoppel.²⁹ These "collateral consequences" can devastate a business or professional. In addition, there are fewer procedural protections accorded defendants in civil cases than in criminal cases. The Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to confront witnesses, for example, do not apply in civil cases.³⁰ Discovery rules are broader in civil

tional Health Laboratories. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.05[A] (Aspen 2004) [hereinafter BOESE, FALSE CLAIMS].

23. 31 U.S.C. § 3729(a) (2003).

24. Bucy, *Information as a Commodity*, *supra* note 4, at 917-18; Abraham S. Goldstein, *White Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1897 (1995) [hereinafter Goldstein, *White Collar Crime*].

25. See, e.g., False Claims Act, 31 U.S.C. § 3729(b) (2003).

26. See, e.g., 18 U.S.C. § 1001(a) (2000 and Supp. 2005).

27. See, e.g., 18 U.S.C. § 1002 (2000).

28. Bucy, *Information as a Commodity*, *supra* note 4, at 918 ("The sanctions imposed in [punitive civil] actions can have enormous deterrent impact for they impose large penalties and can lead to imposition of collateral sanctions, such as exclusion from conducting future business or from one's profession altogether.")

29. See, e.g., Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 693, 720-757 (discussing collateral consequences of exclusion from government contracting, administrative penalties, suspension of payments due a provider for services already rendered under government health insurance programs, loss of professional licenses, and loss of hospital staff privileges).

30. U.S. CONST. amend. V& VI; see, e.g., Cheh, *Constitutional Limits*, *supra* note 11, at 1389-91 (detailing the constitutional rights afforded a person in criminal proceedings and how these rights may be undermined when a defendant is subject to both a criminal and a civil proceeding for the same conduct); Goldstein, *White-Collar Crime*, *supra* note 24, at 1897 (observing that civil sanctions provide fewer procedural protections, such as a lower

cases than in criminal cases where interrogatories and depositions are not allowed³¹ and where any information acquired in the grand jury must be kept secret.³² Such secrecy is an especially troublesome hurdle in white collar cases where criminal prosecutors often need to consult with civil government attorneys or other experts during the investigation to evaluate the case.³³

All of these advantages of punitive civil actions over criminal actions become more pronounced in the prosecution of white collar cases which are hard to prove.³⁴ Asking a jury to convict a defendant of white collar crime is difficult because the conduct at issue is complex, hidden deep within an organization, and often is not viewed by the public as wrong.³⁵ White collar defendants generally are respected citizens who may have done much good for their communities. They will have the resources to hire outstanding legal talent to represent them. It is little wonder that

burden of proof, than do criminal sanctions); Stephen Marks, *Utility and Community: Musings in the Tort/Crime Distinction* 76 B.U. L. REV. 215, 219-20 (1996) [hereinafter Marks, *Utility and Community*] (highlighting conceptual differences between criminal law and tort law).

31. FED. R. CRIM. P. 15(a) (depositions of witnesses permitted only upon court order after a finding of "exceptional circumstances" and "interest of justice").

32. FED. R. CRIM. P. 6(e); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423-427 (1983).

33. See, e.g., U.S. DEPT. OF JUSTICE, U.S. ATTY'S MANUAL §§ 5-11.112-11.113 (2d ed. 2005 Supp.).

34. White collar crimes, in general, are difficult to investigate and prove. *White Collar Crime: Hearing Before the S. Comm. on the Judiciary*, Pt. 1, 99th Cong., 2nd Sess. 27 (1986) [hereinafter *White Collar Crime Hearing*] (testimony of United States Deputy Attorney General D. Lowell Jensen); MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 95 (1980); JOHN E. CONKLIN, ILLEGAL BUT NOT CRIMINAL 17-18 (1977); PETER FINN & ALAN R. HOFFMAN, PROSECUTION OF ECONOMIC CRIME 4 (1976); JOHN A. GARDINER & THEODORE R. LYMAN, THE FRAUD CONTROL GAME 87 (1984).

White collar crime is rarely self-evident. *White Collar Crime Hearing*, *supra* note 34 (testimony of United States Deputy Attorney General D. Lowell Jensen); FINN & HOFFMAN, *supra* note 34. Victims of assaults know immediately when they have been assaulted, but victims of fraud may never know they have been defrauded. See AUGUST BEQUAI, WHITE COLLAR CRIME: A 20TH-CENTURY CRISIS 12, 65 (1978); EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 232 (1983); Herbert Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime*, in CRIME AT THE TOP 44, 51 (John M. Johnson & Jack D. Douglas eds., 1978). This failure to realize that one has been defrauded is due, in part, to the fact that the perpetrator is usually in a position of trust with the victim. *White Collar Crime Hearing*, *supra* note 34 (testimony of United States Deputy Attorney General D. Lowell Jensen). Because of this relationship, a fraud victim has no reason to suspect criminal activity, even when circumstances occur that would otherwise make the victim suspicious.

For sources discussing the difficulty of proving intent in white collar cases, see Sharon L. Davies & Timothy Stoltzfus Jost, *Managed Care: Placebo or Wonder Drug for Health Care Fraud and Abuse?*, 31 GA. L. REV. 373, 397-99 (1997); Stuart P. Green, *Why it's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1614-15 (1997); Peter J. Henning, *Individual Liability for Conduct by Criminal Organizations in the United States*, 44 WAYNE L. REV. 1305, 1324, 1328-29 (1998); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 563-65 (1998); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79-80 (1933); cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 488 (1997).

35. See, e.g., Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C. L. REV. 855, 875-78 (1989).

prosecutors embrace punitive civil actions in white collar cases.³⁶

II. THE ROLE OF PRIVATE INDIVIDUALS AS PROSECUTORS OF WHITE COLLAR CRIME

Under any number of statutes, private citizens who have been harmed by a defendant's conduct are given the right to bring civil suits for large damages against the defendant.³⁷ This is not new nor is this the delega-

36. The [civil] False Claims Act has been an essential tool to protect the integrity of the Medicare program To achieve this goal . . . of 'zero tolerance' of Medicare fraud and abuse . . . the Government relies on a number of enforcement options— criminal, civil, and administrative, as well as educational outreach efforts. Chief among the enforcement tools has been the False Claims Act.

TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS, TENTH ANNIVERSARY REPORT 15 (1996) (testimony of Lewis Morris, Assistant Inspector General, Dep't of Health & Human Services). See also *Hearings Before House Comm. on Judiciary, Subcomm. on Immigration and Claims*, 105th Cong., 2d Sess. 14 (1998) [hereinafter *Subcomm. on Claims Hearings*] (testimony of Donald K. Stern, U.S. Attorney, Dist. Mass. and Chair, Attorney General's Advisory Comm., Dep't of Justice) ("[T]he False Claims Act . . . has been the Department's primary civil enforcement tool to combat fraud . . ."); *id.* at 25 (testimony of Robert A. Berenson, Director, Center for Health Care Plans and Provides Administration, Health Care Financing Administration, Dep't of Health and Human Services) ("[T]he False Claims Act is an important tool for . . . law enforcement . . . to pursue fraud and abuse."). Ruth Blacker of the American Association of Retired Persons stated: Congress in recent years [has] expand[ed] statutory authority and income resources to deal with the problem [of health care fraud and abuse]. However, none of these things are likely to play a more important role in recovering improper payments or in acting as a deterrent than the False Claims Act. Use of the FCA by Federal authorities has become an important tool for fighting fraud and abuse in many programs, including the Medicare program.

Id. at 63 (statement of Ruth Blacker, National Legislative Counsel, American Association of Retired Persons).

37. Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000 (2003); Electronic Communications Privacy Act, 18 U.S.C. § 2520 (2000 and Supp. 2005); Consumer Product Safety Act, 15 U.S.C. § 2072 (1998); American's with Disabilities Act ("ADA"), 42 U.S.C. § 12101 (1995); Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1994). The ADA's provision is illustrative: "The remedies and procedures set forth in [this statute] are . . . provide[d] to any person who is being subjected to discrimination on the basis of disability in violation of this [statute]. . . ." 42 U.S.C. § 12188(a)(1) (2005) (providing standing for one who "has reasonable grounds for believing that [he or she] is about to be subjected to discrimination").

In addition to statutorily created private causes of action for victims of wrongdoing, there are court-implied private causes of action for those who have been injured by defendants' breaches of statutorily imposed duties. Judicial implication of private causes of action began in 1916 when the handhold on a boxcar gave way as a Texas railroad switchman was climbing down the boxcar. See *Tex. & Pac. Ry. Co. v. Rigsby*, 214 U.S. 33 (1916). In *Rigsby*, the Supreme Court held that Rigsby, the switchman, could bring a suit for damages under the Federal Safety Appliance Act ("FSAA"), even though the statute was a penal offense and provided no explicit cause of action for individuals. *Id.* at 38-39. The Court reasoned that railway employees were among the intended beneficiaries of the FSAA, which specifically required "secure hand holds" on all railroad cars "having ladders." *Id.* at 37. According to the Court: "[where] disregard of . . . the statute . . . results in damage to one . . . for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.* at 39.

Over the next sixty-plus years, courts liberally implied causes of action under the Securities Exchange Act of 1934. See Civil Rights Act of 1964, Titles VI, 42 U.S.C.A. § 2000 et. seq.; Commodity Exchange Act, 7 U.S.C.A. § 1 et. seq.; *Guardian Assn. v. Civil Serv. Comm'n*, 463 U.S. 582, 594 (1983) (assuming that there is an implied cause of action, without explicitly holding as such); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979); *J.I. Case*

tion of prosecutorial power this article addresses. Rather, it is statutes with the following two features that raise the policy issues targeted in this article: (1) private citizens *who have not been damaged in any way by the defendant's conduct* are given the right to file suit against defendants, and (2) the damages available are so large as to be viewed as "punitive." The civil FCA passed by Congress in 1863 contains both features.³⁸ Eyeing the success of the FCA, a number of states have passed similar statutes.³⁹ Under these statutes, private persons who wish to file suit are not required to obtain permission or clearance of any sort before suing. They alone decide who, what, how, and whether to charge a defendant.⁴⁰ Once the private individual has alerted government officials that she intends to file suit and has done so,⁴¹ the relevant prosecuting authority (state or federal, as the case may be) reviews the plaintiff's information and determines whether it will join the suit as co-plaintiff.⁴² Even if the relevant

Co. v. Borak, 377 U.S. 426-27, 430-31 (1964) (implying a cause of action under § 14(a) of the Securities Exchange Act of 1934); *see also* Morse v. Republican Party of Va., 517 U.S. 186, 232-35 (1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 356 (1982); Voting Rights Act, of 1965, 42 U.S.C.A. § 1973 et. seq.

The courts have also declined to imply private causes of action under the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 671(a)(15) (1995), *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992); Fair Labor Standards Act, 29 U.S.C. § 212 (1999); *Breitweiser v. KMS Indus., Inc.*, 467 F.2d 1391, 1393 (5th Cir. 1972) (declining to imply a private cause of action under the Fair Labor Standards Act); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971) (showing persons whose constitutional or federal statutory rights had been abridged by federal law enforcement officials).

38. 31 U.S.C. § 3730(b) (2003) provides that "a person" may bring a civil action under the False Claims Act.

The United States Supreme Court upheld the constitutionality of this provision in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) under an assignment theory. After noting that the relator, Jonathan Stevens, had not been damaged or harmed by the defendant's conduct, *id.* at 772-73, the Court held that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim . . . We conclude . . . that the United States' injury in fact suffices to confer standing on respondent . . ." *Id.* at 772-73.

39. *States and Fraud*, *supra* note 4, at 489-94 (Appendix A).

40. 31 U.S.C. §§ 3729(a)(A), 3730(b) (2003). Typical private plaintiffs (known as "relators") include current or former employees, competitors and competitors' employees, state and local governments, special interest groups (such as "Taxpayers Against Fraud"), attorneys and law firms who discover fraud in the course of representing clients in other matters. BOESE, FALSE CLAIMS, *supra* note 22, § 4.01[B]. Boese's treatise is an excellent resource on the False Claims Act.

41. The *qui tam* complaint is sealed and not served on the defendant or made public in any way. The entire action is stayed while the federal government (acting through the DOJ) is notified of the lawsuit by service of a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. §§ 3730(b)(2)-(3) (2003). The written disclosure to the government by a relator "of substantially all material evidence and information" helps the government focus its evaluation of the relator's claims. *United States ex rel. Made in the USA Found. v. Billington*, 985 F. Supp. 604, 608 (D. Md. 1997); BOESE, FALSE CLAIMS, *supra* note 22, § 4.04.

42. While the complaint remains under seal, the DOJ evaluates the case and determines whether it will intervene. BOESE, FALSE CLAIMS, *supra* note 22, § 4.05. Historically, relators who proceed on their own after the DOJ has declined to intervene as a plaintiff have enjoyed little success. Their cases are dismissed more often and their recoveries are substantially less. The litigational advantages to private plaintiffs of obtaining DOJ intervention are so substantial that the acknowledged goal of any experienced relators' attorney is to obtain the government's intervention. As one experienced relator's counsel explained:

governmental authority declines to join the lawsuit as plaintiff, the private party (known as a “relator”) is allowed to continue the case.⁴³ If the governmental entity joins the lawsuit (“intervenes”) as co-plaintiff, the private party and the government continue together to pursue the case to conclusion.⁴⁴ The relator is integrally included in the pursuit of the action.⁴⁵

In creating this unusual prosecutorial partnership,⁴⁶ Congress noted the value private parties can bring to law enforcement’s efforts to detect and deter fraud.⁴⁷ In Congress’s view, individuals within an industry or

“When evaluating a case and during the beginning stages of representing a whistle blower never forget your initial mission: persuade the government to pursue the case.” Mitchell Kreindler, *So You Wanna Be a Whistleblower’s Lawyer?*, Address before the ABA National Institute, THE CIVIL FALSE CLAIMS ACT AND QUI TAM ENFORCEMENT 5 (Nov. 28, 2001).

43. 31 U.S.C. § 3730(c)(3) (2003). If the relator proceeds as the sole plaintiff after the DOJ has declined to intervene, the DOJ may request to receive copies of all pleadings filed and deposition transcripts (at the Government’s expense). Upon a showing of “good cause,” the court may permit the Government to intervene “at a later date.” *Id.*

44. 31 U.S.C. § 3730(c)(2) (2003). During the litigation, the relator’s role may be restricted by the court “[u]pon a showing by the Government that the unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment,” 31 U.S.C. § 3730(a)(2)(C) (2003), or “[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense.” 31 U.S.C. § 3730(a)(2)(D) (2003).

45. 31 U.S.C. § 3730(c) (2003). Some relators have successfully objected to proposed settlements between the government and *qui tam* defendants. *See, e.g.,* Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1165 (S.D. Ohio), *dismissed*, 848 F.2d 190, 190 (6th Cir. 1988).

46. Passed in 1863, the FCA provided the federal government with a way of combating the fraud suffered by the Union Army when it received deliveries of defective or nonexisting military supplies. S. REP. NO. 99-345, at 8 (1986), *as reprinted* in 1986 U.S.C.C.A.N. 5266, 5273 (132 Cong. Rec. 16,22339 (1986) (statement of Rep. Berman)). According to the 1863 investigation, one thousand mules delivered to the Union army were “unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased.” *Id.* *See generally* *False Claims Act Amendments: Hearings on H.R. 3334 before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 1 (1986) [hereinafter *Hearings: False Claims Act Amendments*]; J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539 (2000) [hereinafter *Qui Tam Legislation*]; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81 (1972) [hereinafter *History of Qui Tam*].

The original FCA, passed in 1863, provided both criminal and civil penalties for its violation. In 1874, the criminal and civil provisions were separately codified. Prior to 1986, the FCA was amended several times in ways that weakened *qui tam* actions, so that they were rarely and ineffectively used. In 1986, Congress substantially amended the FCA, invigorating *qui tam* actions. The 1986 amendments increased the amount of recovery a relator could obtain, established a generous mandatory minimum recovery for relators, and relaxed provisions that had prevented many relators from filing suit. Other amendments made FCA cases easier to prove overall, thereby improving all plaintiffs’ chances of success. These amendments included relaxing the *mens rea* requirement, expanding the statute of limitations, and clarifying that the preponderance burden of proof, rather than a clear and convincing burden of proof, applies to FCA cases. The 1986 amendments also provided a cause of action for relators who suffer retribution from employers for whistleblower activities related to the FCA.

Bucy, *Private Justice*, *supra* note 4 at 45-47.

47. Beck, *Qui Tam Legislation*, *supra* note 46, at 556.

company are better positioned to detect fraud, especially complex fraud, than are outside law enforcement officials.⁴⁸ Insiders are likely to know about corporate wrongdoing long before law enforcement officials learn of it.⁴⁹ They know who is doing it, who knows about it, which records prove it, where relevant documents are located, and how to interpret facts, records and transactions.⁵⁰ The FCA's structure,⁵¹ enhanced by

48. *Id.*; cf. Complex economic wrongdoing cannot be detected or deterred effectively without the help of insiders, those who are intimately familiar with it. Inside information can alert regulators and the public to ongoing or inchoate wrongdoing; in many cases, before harm has occurred. Insiders can also guide public regulators as they investigate questionable activity and can help overcome concealment and cover-ups. Government officials confirm the importance of insiders: "Whistleblowers are essential to our operation. Without them, we wouldn't have cases." Justin Gillis, *Whistleblowing: What Price Among Scientists?*, WASH. POST, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division director at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct); see also *Health Care Initiatives Under the False Claims Act that Impact Hospitals: Hearing Before the House Subcomm. on Immigration & Claims of the Comm. on the Judiciary*, 105th Cong. 15 (1998) [hereinafter *Subcomm. on Claims Hearing*] (statement by Lewis Morris, Assistant Inspector General for Legal Affairs, U.S. Department of Health and Human Services) (indicating that the FCA, a purpose of which is to encourage whistleblowing, has been an essential tool in combating fraud).

49. Knowledgeable insiders can identify abuses that public regulators do not even know to look for. Part A Medicare fraud is a good example of this. Medicare, created in 1965, pays for most health care expenses incurred by persons over the age of sixty-five. Medicare Act, 42 U.S.C. §§ 1395-1395ggg (2003 & Supp. 2005); see Joe Baker, *Medicare: Nuts and Bolts*, 311 PLI/EST 83, 85 (2001). Medicare is divided into Part A and Part B. (The Medicare program is actually divided into three parts; however, Part C, which contains the Medicare+Choice program, is not relevant to this discussion. See *id.*). Part A reimbursements go primarily to institutional health care providers like hospitals, home health agencies, and insurance companies that contract with the federal government to process Medicare claims. Part B reimbursements go to individual providers like physicians. The process by which Part A and Part B providers seek reimbursement differs considerably in philosophy, procedure, deadlines, and reimbursement rates. *Id.*

Although health care fraud has been a top priority of the DOJ since the mid-eighties, most of the health care fraud investigations in the eighties and nineties were directed at Part B fraud. (See Pamela H. Bucy, *The Path From Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 35-36 (2000) (discussing the Department of Health and Human Services' PATH initiative, which followed its investigation of Medicare Part B payment to teaching physicians); Gordon Witkin et al., *Health Care Fraud*, U.S. NEWS & WORLD REP., Feb. 24, 1992, at 34 (providing examples of Medicare Part B fraud); see also Mark Taylor, *Spotlight on CFOs: As Feds Have Grown Savvier, Bean Counters Increasingly Have Been Targets in Fraud Probes*, 52 MODERN HEALTHCARE, June 7, 1999 (reporting that federal prosecution of healthcare cases previously focused on Medicaid fee-for-service and Medicare Part B physician fraud because the few federal prosecutors and investigating agents were trained only in simple fraud schemes). It was not until whistleblowers alerted the DOJ to various types of Part A fraud that the DOJ began to focus closely on it. (Barbara Bisno, Assistant U.S. Attorney, Southern District of Florida, Address at the American Bar Association White Collar Crime Institute, Session on Health Care Fraud, Miami, Florida (May 2000)). Today, Part A Medicare fraud is a high priority of the DOJ. Geraldine Nicholson & Lena Roberts, *Symposium: The Reasonable and Necessary Criterion and Medicare Contractor Review of Claims: Efforts to Combat Fraud, Waste and Abuse in the Medicare Program*, 43 ST. LOUIS U. L.J. 81, 84 (1999) (discussing the DOJ-administered Health Care Fraud and Abuse Control account, funded through the Medicare Part A Trust Fund).

50. Bucy, *Information as a Commodity*, *supra* note 4, at 943-44.

51. The FCA has proven to be highly effective in recruiting legal talent who have the skill and resources to handle complex, expensive cases. Because of the large recoveries available to private plaintiffs under the FCA through statutorily mandated percentages of large, fixed penalties, private plaintiffs' counsel can receive large fees since their fees tend

FCA practice,⁵² not only brings to law enforcement such “inside” information about fraud, it also brings forth capable private counsel who undertake FCA cases on behalf of relators. These counsel can provide important assistance to public prosecutors by collecting evidence, marshaling facts, conducting discovery, and preparing witnesses.⁵³

In crafting the FCA, Congress also recognized the significant hardship any private individual may encounter when filing suit under the FCA.⁵⁴

to be a combination of court-awarded attorneys fees and a percentage of the recovery they negotiated pre-trial with their clients. See, e.g., *United States ex rel. Taxpayers Against Fraud v. Gen. Elec.*, 41 F.3d 1032, 1036 (6th Cir. 1994).

52. The structural design of the *qui tam* provisions of the FCA also discourages inexperienced or unskilled counsel. Because of DOJ's resources, the goal of any relator is to convince the DOJ of a case's merit so that the DOJ will intervene and take “primary responsibility” for the case. 31 U.S.C. § 3730(c)(1) (2001); Bucy, *Private Justice*, *supra* note 4, at 51-53. Relators' counsel does this by presenting to the DOJ, at the time the complaint is filed (under seal), a thorough, well-thought-out, carefully researched report describing exactly how fraud was committed and how it can be proven in the highly complex, regulatory area of government contracting. The demanding nature of this task requires skilled counsel and deters unskilled or inexperienced counsel. Such an undertaking is simply too difficult and time-consuming for inexperienced counsel, especially if—as is almost certain—counsel is working on a contingency fee basis. *Id.* at 52, 58.

53. Bucy, *Private Justice*, *supra* note 4, at 58-59.

54. 31 U.S.C. § 3730(d) (grants private persons who serve as relators a significant percentage of any recovery); Bucy, *Information as a Commodity*, *supra* note 4, at 948-958. Surveys of whistleblowers consistently show the hardship and retribution these individuals experience. For example, in one survey of ninety whistleblowers, 54% said they were harassed at work, 82% were harassed by superiors, 80% reported physical deterioration following their whistleblowing experience, and 86% reported “negative emotional consequences, including feelings of depression, powerlessness, isolation, anxiety and anger.” Clyde H. Farnsworth, *Survey of Whistle Blowers Finds Retaliation but Few Regrets*, N.Y. TIMES, Feb. 22, 1987, at A22 [hereinafter Farnsworth, *Survey*].

Insiders who remain employed after blowing the whistle do not usually last long at work. It becomes too miserable. They face ostracism, hostility and rejection, taunting co-workers, see Robert Lipsyte, *What Happens After the Whistle Blows?*, *A Tennessee Professor's Allegations of Athletic Abuses Haunts Her Life*, N.Y. TIMES, July 20, 2000, at D1-D, abusive supervisors, see Leo Kohls, *Refusing to Drive Unsafe Vehicles*, in WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 95-97 (Alan F. Westin et al. eds., 1981), attacks on their professional abilities see Henry I. Kurtz, *Asserting Professional Ethics Against Dangerous Drug Test*, in WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 107-08, 113 (Alan F. Westin et al. eds., 1981) and sometimes, threats of physical harm (Editorial, *An Independent Police Probe for D.C.*, WASH. TIMES, Dec. 9, 1997, at A18).

There are health effects for whistleblowers. Studies show that whistleblowers experience stress-related physical symptoms during their whistleblowing experiences, including difficulty sleeping, anxiety, panic attacks, depression, suicidal thoughts, feelings of guilt and worthlessness, loss of appetite and weight, high blood pressure, heart palpitations, hair loss, nightmares, headaches, weeping, and tremors. K. Jean Lennane, “Whistleblowing”: *A Health Issue*, 307 BRITISH MED. J. 667, 668 (1993). See generally DEAN B. PESKIN, SACKED! WHAT TO DO WHEN YOU LOSE YOUR JOB 1-23 (1979) (discussing the emotional traumas associated with job loss).

Families of whistleblowers suffer also, with forced moves, scaled-back living, marital stress, depletion of savings, and health problems. Lennane, *supra* at 668.

Job loss is probably the most consistently identified consequence of blowing the whistle, although whistleblowers may experience informal, job-related repercussions short of job loss or prior to job loss, such as isolation, abuse, forced psychiatric referral, impossible demands by supervisors, threats of defamation or disciplinary actions, demotion, or reassignments. *Id.* at 668-69; MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATION AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* 79-80 (1992); Alan F. Westin, *Conclusion: What Can and Should Be Done to Protect Whistle*

To help overcome disincentives to file suit, Congress made sure the FCA provides a large monetary reward to insiders who come forward and file suit. "Relators" are guaranteed a generous percentage of any judgment recovered,⁵⁵ and because FCA judgments can be quite large,⁵⁶ a successful relator's share can be very significant. Recent FCA judgments, for example, have topped \$875 million, \$745 million, and \$385 million.⁵⁷ Recent relators' awards have been \$95 million, \$44.8 million, and \$28.9 million.⁵⁸

Interestingly, over the years another incentive for relators has evolved: favorable publicity. Headlines praise whistleblowers. For example, in 2003, *Time* Magazine named three whistleblowers, Cynthia Cooper of WorldCom, Colleen Rowley of the FBI, and Sherron Watkins of Enron, as "Persons of the Year."⁵⁹ Given the disdain in which whistleblowers sometimes are held by the general public,⁶⁰ such positive, public reinforcement is important.⁶¹

Enlisting support of private citizens by giving them prosecutorial power is not a panacea, however. Experience with the FCA has shown some of the costs of delegating prosecutorial power. Law enforcement has to spend time and effort providing guidance to private party litigants and monitoring FCA lawsuits brought by private parties. Because law enforcement has scarce resources, diverting resources to provide this guidance means that law enforcement can not pursue other meritorious enforcement activities.⁶² Also, concern by law enforcement and businesses that ill-informed or vindictive persons may file non-meritorious

Blowers in Industry, in WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 132-33 (Alan F. Westin et al. eds., 1981).

There are cultural disincentives to providing information about wrongdoing by others. Whistleblowers often face ostracism from long-time friends and colleagues once it becomes known that they have volunteered information of wrongdoing. Albert D. Clark, *Ethical Implications of Whistle Blowing*, 42 *LA. B.J.* 364, 365 (1994).

55. If the government joins the relator's case, the relator is guaranteed at least 15% of any judgment or settlement and the court can award more—up to 25%. If the government does not join the lawsuit, the relator is guaranteed 25% and could receive up to 30%. 31 U.S.C. § 3730(c)(3) (2003).

56. For example, recent judgments in FCA *qui tam* cases include an \$875 million settlement from TAP Pharmaceuticals, 55 *HEALTHCARE FIN. MGT.* 10 (2002); a \$745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a \$385 million settlement with National Medical Care, Inc.; a \$325 million settlement with SmithKline Beecham Clinical Laboratory; a \$325 million settlement with National Medical Enterprises; and a \$110 million settlement with National Health Laboratories. BOESE, *FALSE CLAIMS*, *supra* note 22, § 1.05[A].

57. *FCA News: Top Qui Tam Recoveries of the Year 2000*, 21 *TAXPAYERS AGAINST FRAUD Q. REV.* 16, 20-21 (2001) [hereinafter *FCN News*] (reproducing a November 2, 2000, press release from Department of Justice).

58. *Id.*

59. Richard Lacayo & Amanda Ripley, *Persons of the Year*, *TIME*, Dec. 30/Jan. 6 (2003). *Time* explained why it chose them for its honor: "These women were . . . heroes at the scene . . . They were people who did right just by doing their jobs . . . with the bravery the rest of us always hope we have and may never know if we do." *Id.* at 32.

60. See *supra* note 30.

61. Bucy, *Information as a Commodity*, *supra* note 4, at 969.

62. Bucy, *Private Justice*, *supra* note 4, at 64.

suits under the FCA stymies law enforcement's flexibility when dealing with regulated industries. Even when industry and government officials wish to draft broad, hortatory, and ambitious guidelines that give regulators and industry flexibility, they may opt not to do so because such broad guidelines subject industry to expansive liability at the hands of private litigants.⁶³ Moreover, litigation arising from privately-brought FCA actions binds regulators through precedent created since *qui tam* relators and DOJ prosecutors rely upon common causes of action.⁶⁴

FCA actions brought by relators also impose costs on the judicial system. Courts are called upon to resolve conflicts between law enforcement officials and private litigants in FCA cases.⁶⁵ Disputes arise when the DOJ and the relator disagree about how to conduct the case: whether certain discovery should proceed, whether settlements should be accepted, whether the case has merit, and whether it should be dismissed. Not only are judicial resources consumed by the need to resolve conflicts between plaintiffs, but refereeing between public and private plaintiffs thrusts the courts into the sensitive position of evaluating, even micro-managing, the executive branch's exercise of prosecutorial discretion.⁶⁶

The FCA attempts to address these problems by imposing a series of quality controls and checks and balances on relators' conduct, such as requiring would-be relators to provide the DOJ with extensive information about any lawsuit they intend to file prior to filing;⁶⁷ requiring that relators' lawsuits remain sealed until the DOJ evaluates the case and decides whether to join as plaintiff,⁶⁸ or even to move for dismissal;⁶⁹ and giving the DOJ authority to seek restrictions on the relator's conduct of the case.⁷⁰

In summary, although legislatures have not yet adequately addressed the problems created by delegation of prosecutorial power to private individuals,⁷¹ such public-private partnerships are feasible models for effective law enforcement. This prosecutorial partnership has proven successful and is likely to be extended.⁷²

63. *Id.* at 64-65.

64. *Id.* at 66.

65. *Id.* at 67-68; Bucy, *Private Justice and the Constitution*, *supra* note 4, at 959-961; Bucy, *Games and Stories*, *supra* note 4, at 619-624.

66. Bucy, *Private Justice and the Constitution*, *supra* note 4, at 959-961.

67. 31 U.S.C. § 3730(b)(2)-(3) (2003).

68. *Id.* § 3730(b)(2).

69. *Id.* § 3730(c)(2)(A).

70. 31 U.S.C. § 3730(a)-(c) (2003).

71. Commentators have argued that the FCA would work more effectively if DOJ was more pro-active in moving for dismissal of frivolous or ill-considered relator lawsuits. Bucy, *Private Justice*, *supra* note 4, at 72 n.384 (list of commentators). Additional reforms are also needed, such as mandatory delay of discovery by plaintiffs until after the court has ruled on defendant's motion to dismiss, imposition of a heightened pleading standard, greater sanctions for relators who bring frivolous FCA actions and abolition of joint and several liability in FCA lawsuits. Bucy, *Private Justice*, *supra* note 4, at 70-76.

72. Bucy, *Private Justice*, *supra* note 4, at 76-79. The FCA has been heralded as one of the most effective crime-fighting tools ever devised. For example, in fiscal year 2000 the "United States collected a record \$1.5 billion in civil fraud recoveries," most of which, \$1.2

III. THE LAW'S EXPRESSIVE FUNCTION

South St. Louis in the early 1900s was full of poor, recent immigrants. It was a rough place. Among the troublemakers, one stood out. Responding to neighbors' complaints, a police officer went to the man's home. From prior visits to the home, the officer knew that two people lived there, the man and his young daughter. Eventually, the man came to the door. Drunk, he snarled, "What do you want?" The officer explained, "We've had reports, sir, that, well, you've been having relations with your daughter." Staring blankly at the officer, the man grumbled, "So?" The officer continued, "You can't do that. It's wrong." Perplexed, the man answered, "Why not? She's my daughter."⁷³

This story demonstrates the law's role in communicating values, or attempting to communicate values.⁷⁴ Prosecution for crimes is one of soci-

billion, was collected through a private justice action, the *qui tam* provisions of the False Claims Act (FCA). *FCA News*, *supra* note 57, at 18 [hereinafter *FCA News*]. As one Department of Justice official explained in 1996: "The recovery of over \$1 billion demonstrates that the public-private partnership encouraged by the statute [the FCA] works and is an effective tool in our continuing fight against fraudulent use of public funds." *TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS, TENTH ANNIVERSARY REPORT 15* (1996) (quoting Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Dept. of Justice); *see also Subcomm. on Claims Hearing, supra* note 48, at 15 (Donald K. Stern, U.S. Attorney, Mass. Dist., and Chair, Attorney General's Advisory Comm., U.S. Dept. of Justice, stating that "the False Claims Act . . . is a critical [civil enforcement] tool in fighting and deterring."); *id.* at 15, 19 (Lewis Morris, Assistant Inspector General for Legal Affairs, Office of Inspector Gen., U.S. Dep't of Health and Human Services, asserting that "[t]he False Claims Act has been an essential tool to protect the integrity of the Medicare program." To achieve this goal "of 'zero tolerance' of Medicare fraud and abuse . . . the Government relies on a number of enforcement options—criminal, civil, and administrative, as well as educational outreach efforts. Chief among the enforcement tools has been the False Claims Act."); *id.* at 25 (Dr. Robert A. Berenson, director, Center for Health Care Plans and Providers Administration, Health Care Financing Administration, U.S. Dep't of Health and Human Services, claiming that "the False Claims Act is an important tool for . . . law enforcement . . . to pursue fraud and abuse.").

[To deal with health care fraud and abuse,] Congress in recent years [has] expand[ed] statutory authority and [increased] resources to deal with the problem. However, none of these things are likely to play a more important role in recovering improper payments or in acting as a deterrent than the False Claims Act. Use of the FCA by Federal authorities has become an important tool for fighting fraud and abuse in many programs, including the Medicare program.

Id. at 63 (statement of Ruth Blacker, member, National Legislative Counsel, American Association of Retired Persons).

73. This is a story told by a friend, the grandson of the officer who allegedly had this encounter. My friend is a creative story teller, to put it mildly. I don't know if the story is true, but its point about the expressive function of the law is well taken. For sources discussing this expressive function of the law, see note 74 *infra*.

74. Sources discussing the expressive function of the law include: ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); *Symposium: The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Harry V. Ball & Lawrence M. Friedman, *The Use Of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 221-222 (1965); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 949, 953, 979 (1997); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 DUKE L. J. 1, 22, 24, 37 (1990); Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389; Robert C. Ellickson,

ety's most potent ways of expressing cultural expectations of behavior. Incest, rape, sexual assault, and whatever else the father may have committed in the above story are crimes that convey society's notions of right and wrong. Together, legislators who pass laws, judges who apply laws, and police and prosecutors who enforce laws, communicate society's notions of morality. Clearly, the father had missed basic cues of society's values. The legal system responded.

Numerous scholars have written on the law's expressive function. This "norms and law" scholarship views norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty."⁷⁵ In other words, norms are values reflected in society. Norms and law scholars suggest, not surprisingly, that the law works most efficiently when it is based on norms that are accepted by most members of society.⁷⁶ Most of us would applaud officers who arrest and prosecutors who convict the father who engages in sexual relations with his minor child because these officials are enforcing values we recognize and accept. It is not clear, however, that the same approval accompanies law enforcement's efforts to prosecute all laws. White collar crime is a prime example.

Juries' struggles in recent cases demonstrate society's ambivalent attitude toward white collar crime. Examples abound. Dennis L. Kozlowski,

Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 CHI.-KENT L. REV. 23 (1989); Michael Harper, *Comment on the Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 23, 26 (1996); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 407 (1958); Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 351, 362, 365 (1997); Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2445 - 2448 (1997); Sanford H. Kadish, *Some Observations on the use of Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 435-440 (1963); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. REV. 1795, 1863 (1992); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, see especially 397-400 (1997); Richard H. McAdams, *Comment, Accounting for Norms*, 1997 WIS. L. REV. 625 (1997); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (Rasmusen focuses on the employment consequences of the stigma associated with being convicted of a crime); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206-209 (1996); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. L. REV. 857 (1994); Robinson & Danley, *supra* note 34, at 457, 471-72, 474 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

Cf. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (people obey the law if they believe it is just), 58-60 (aside from other factors such as fear of punishment, people obey the law if they believe it is legitimate), 64 ("The most important normative influence on compliance with law is the person's assessment that following the law accords with his or her sense of right and wrong.") (1990).

But see Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 19-20 (1996) (his "hunch" is that the expressive function of the criminal law is "limited"; "family, friends, religious leaders, even newspapers and television" do more to affect our core beliefs than does the law).

75. McAdams, *The Origin, Development and Regulation of Norms*, *supra* note 74, at 340.

76. See, e.g., *id.* at 358-366; ELLICKSON, *ORDER WITHOUT LAW*, *supra* note 74, at 6-8; Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 979 (1997); Robinson & Danley, *The Utility of Desert*, *supra* note 74, at 454.

CEO of Tyco, and Mark H. Swartz, Tyco's CFO, were charged with grand larceny, securities fraud, conspiracy, and falsifying business records.⁷⁷ Their first trial ended, after six months of trial, with a hung jury,⁷⁸ although their re-trial resulted in a guilty verdict.⁷⁹ Richard Scrushy, founder and CEO of the nation's largest provider of rehabilitation services, HealthSouth, was accused in a multi-count fraud indictment arising from a \$2.7 billion overstatement of HealthSouth earnings.⁸⁰ After five months of testimony and twenty-eight days of deliberation,⁸¹ the jury found Scrushy not guilty on all counts. Theodore Sihpol, former Bank of America Corp. broker, was acquitted on twenty-nine counts of larceny, falsifying records and other charges.⁸² The jury hung on four counts. New York Attorney General Eliot Spitzer plans to retry Sihpol on these counts.⁸³

Ambivalence by the public to law enforcement's efforts to pursue white collar crimes demonstrates another basic point of norms and law scholarship: the law can "shape" or influence norms.⁸⁴ This influence can be passive, as when the law simply expresses and communicates accepted norms of society, or more active, as when the law seeks to change accepted norms. Arguably, prosecutors' recent surge of white collar prosecutions is an "active" effort to shape society's norms. By aggressively pursuing white collar crime, prosecutors educate society about the nature of white collar offenses: why these offences are harmful and why the rest of us should not commit them. When the law "shapes" society's norms, the law is operating as a "norm entrepreneur."

In the above story, the police officer communicated accepted norms of society when he responded to the father's incestuous conduct toward his daughter. The officer's comment to the father, "You can't do that. It's wrong," was the initial step of such communication. Presumably, the father's arrest, indictment, and conviction will follow, all reiterating the officer's initial communication of the value, "It is wrong." Because the father's behavior is clearly viewed by society as wrong, prosecution of the father, unlike the prosecution of white collar offenses, demonstrates the law's "passive" influence on society's values.

77. Mark Maremont & Chad Bray, *Tyco Trial Jurors Say Defendants Weren't Credible*, WALL ST. J., June 20, 2005, at A1 [hereinafter *Tyco Jurors*].

78. Carrie Johnson, *For Prosecutors, Shorter is Sweeter*, WASH. POST, June 18, 2005 at D1.

79. *Tyco Jurors*, *supra* note 76.

80. Reed Abelson & Jonathan Glater, *A Style That Connected With Hometown Jurors*, N.Y. TIMES, June 29, 2005, at C1.

81. Dan Morse, Chad Terhune & Ann Carrns, *HealthSouth's Scrushy is Acquitted*, WALL ST. J., June 29, 2005 at A1.

82. *Id.*

83. Arden Dale, *Moving the Market: Spitzer Plans to Retry Sihpol on 4 Counts in Fund-Trade Case*, WALL ST. J., July 8, 2005 at C3.

84. See, e.g., Dau-Schmidt, *supra* note 74, at 35; McAdams, *supra* note 74, at 348.

IV. IMPACT ON THE LAW'S EXPRESSIVE FUNCTION WHEN PRIVATE CITIZENS ARE GIVEN PROSECUTORIAL POWER

A. MORAL AMBIGUITY: THE DIFFERENCE BETWEEN INCEST AND FINANCIAL FRAUD

Return to the misbehaving father, let us assume that the father's neighbors do not know what he has done to his daughter. They do know that police have arrested him, taken him into custody, charged him with a crime, and convicted him. From this information, the father's neighbors likely will conclude that the father has done a bad thing. They likely would not have this view, however, if the police, the prosecutor and the jury (assuming the father goes to trial rather than pleading guilty) are viewed as corrupt, ignorant, or otherwise motivated by issues not relevant to guilt (for example, racial, ethnic, or religious stereotypes). If that were the case, the neighbors more likely will view the allegations as untrue, unfounded, and motivated by ill-will. The point is that the respect in which the justice system is held is essential to the system's ability to communicate.

Of course, if the father's neighbors know that he has been having sexual relations with his minor daughter, they will conclude that he has done a bad thing, regardless of whether the judicial system becomes involved. Because incest and rape of a minor are universally viewed as morally wrong, no one, other than a sociopath, needs law enforcement to identify the wrongfulness of such acts. In fact, if it becomes known that law enforcement officials knew of, but ignored, the father's conduct, law enforcement's reputation would suffer.

For our purposes of viewing the communicative impact of appointing private prosecutors, another hypothetical is helpful. Assume the CEO of a public company has authorized false reporting of the company's finances. When the CEO's neighbors hear of this conduct, chances are they will not immediately conclude that the CEO has done a wrong thing. Unlike the news of the father's rape of his daughter, which is *malum in se* conduct, false reporting of financial data is not universally viewed as bad or evil. In fact, depending upon their backgrounds and professions, the CEO's neighbors may assume that the CEO is a victim: that he has been wronged, scapegoated, targeted unfairly, or misunderstood by business neophytes or uninformed law enforcement officials. At worst, they may think that the CEO and his staff simply made mistakes because of arcane government regulations or accounting rules. Once the CEO is arrested, however, some of his neighbors will probably change their minds and conclude, simply because he was arrested, that his conduct was more wrong than they initially assumed. When the matter advances further and the CEO is charged with and convicted of crimes, either after a public trial or a public plea of guilty, more neighbors are likely to conclude that the CEO did a bad thing. Law enforcement's response of arrest, indictment and conviction helps to communicate this. But again, this is

true only to the extent the neighbors respect law enforcement's ability, motives and actions.

Now, our question: what happens to the law's communicative ability when private citizens join law enforcement and together allege that the CEO has falsified company finances? If the private citizen is a knowledgeable and respected individual, a highly-placed executive in the CEO's company, for example, the public's perception of the wrongfulness of the CEO's behavior is likely to increase. If, in addition to joining public prosecutors in asserting that the CEO has done a wrong thing, this executive explains publicly, in ways that only an insider can do, how and why the CEO's conduct is wrong and who has been harmed by his conduct, this executive will enlighten law enforcement as well as the public about the CEO's activity. In this way, the private individual enhances the communicative impact of the law.

If, however, the private citizen who joins public prosecutors lacks a business background, is ill-informed about the business transactions at issue, or appears to have an ulterior motive (scorned for a promotion perhaps), her involvement with law enforcement likely will muddle the message otherwise sent that the CEO has done something wrong. Identifying this individual as law enforcement's prosecution partner likely will perpetuate the bias that the CEO is the victim of bungled and misplaced allegations. In addition, of course, an ill-informed individual will not be able to articulate well for the public why and how the CEO's conduct is wrong.

This is the first, and not surprising, lesson of recruiting private citizens to serve with public prosecutors. A "quality" individual increases the law's expressive function. A "less than quality" individual decreases this function. In short, law enforcement inherits the strengths and weaknesses of the "private attorneys general" who join it.

B. PRIVATE PROSECUTORS AND PROFIT

Assuming that the "quality" of the private individual who joins prosecutors affects the expressive function of the law, the question arises whether it matters whether an acknowledged "quality" relator stands to profit personally by joining ranks with law enforcement. This is a relevant question because a number of the private attorney general statues bestow generous financial rewards on individuals who join prosecutors in successful actions.⁸⁵ Although research consistently shows that whistleblowers rarely are motivated by the potential for monetary gain,⁸⁶

85. 31 U.S.C. § 3730(d) (2003); see text and accompanying notes 55-58 *supra*.

86. The characteristic that appears to dominate in the "whistleblower personality profile" is a strong sense of right and wrong. Philip Jos et al., *In Praise of Difficult People: A Portrait of the Committed Whistleblower*, 49 PUB. ADMIN. REV. 552, 558 (1989); Jacqueline P. Taylor, *The World of Whistleblowers: Are They Sinners or Saints?* WOMEN OF COLORADO.COM, ¶ 15 (Feb. 2, 1998) at <http://www.womenofcolorado.com/Articles/le020298.asp> (last visited Nov. 15, 2005).

we understandably question an individual's credibility when she stands to gain financially by bringing suit.

As every prosecutor who has dealt with an informant knows, any informant confronts credibility issues if he is compensated (either financially or in the form of reduced charges) for his cooperation with law enforcement. However, the typical informant is not an appropriate frame of reference for evaluating private attorneys general. The typical informant is a person who has been deeply involved in significant prior criminal activity before his cooperation with law enforcement. In fact, it is his criminal history that makes him valuable to law enforcement as an informant. Worse from a credibility stand-point, most informants have participated in the criminal activity at issue, although again, this is exactly why they are valuable to law enforcement in the case at hand.⁸⁷

By comparison, a typical private attorney general has not been involved in prior criminal activity and, while she may be aware of the activity at issue, she was not involved in it other than to complain about it. The FCA, in fact, limits the financial award to private litigants who have been involved in the criminal activity at issue.⁸⁸ Thus, a relator in an FCA case rarely provides key, if any, testimony. Rather, the relator's common role is to assist law enforcement in *investigating* questionable activity. She does so by explaining what was going on, identifying potential witnesses and documents, and by providing context about the company, the industry and the transactions at issue.⁸⁹ Also, for practical purposes, the judges of a relator's credibility are DOJ attorneys. DOJ attorneys are the ones to decide whether the relator is believable and knowledgeable enough for DOJ to devote resources investigating the relator's allegations, and to join the relator as a co-plaintiff.⁹⁰ They are

87. The recent testimony of Kenneth Rice, a former Enron executive and government witness in a fraud prosecution of five other Enron executives, is an apt example. Rice testified about a key presentation to analysts; on cross examination it became clear that the presentation was never made. John R. Emshwiller, *'Cooperators' May Complicate Trials*, WALL ST. J., May 9, 2005 at C5. As one expert notes, "By definition, you are dealing with dishonest people." As noted by the Wall Street Journal:

Mr. Rice's testimony also highlights a broader and potentially more disturbing question regarding the reliability of admitted criminals who testify against former colleagues in hopes of obtaining reduced penalties. While use of such "cooperators" is often essential to obtaining convictions, even prosecutors admit it is a dangerous business. Some cooperators simply lie in hopes of getting a lighter penalty. Some others, in their desire to please prosecutors, convince themselves they are telling the truth even if they aren't.

Id.

88. 31 U.S.C. § 3730(d)(3) (2003).

89. Bucy, *Games and Stories*, *supra* note 4, at 611-14 (description of assistance rendered by the relator in *United States ex rel. Alderson v. Quorum Health Group*); 617-19 (description of assistance rendered by relator in investigation of Smith Barney); 616 (discussing assistance rendered by relators in general); Bucy et al., *Statutes and Fraud*, *supra* note 4, at 465-70 (discussing the assistance of Zachery Bentley in bringing a state qui tam lawsuit against Ven-a-Care).

90. Bucy, *Games and Stories*, *supra* note 4, at 646-54 (discussing the government's decision-making process when a relator is available; note that the government is referred to as "R" (regulator) and the relator is referred to as "P" (private party)).

important judges. Realistically, without the DOJ's resources, the relator's case is over.

Because of the difference in relators and most cooperating informants and because the judges of most relators credibility are DOB attempts rather than juries, it would not appear that the prospect of financial gain would tarnish a relator's credibility or ability to communicate the wrongfulness of white collar crime.

C. HOW TO RECRUIT "QUALITY" PRIVATE PROSECUTORS

Accepting that the law's expressive function is enhanced when respected, knowledgeable private individuals join prosecutors in pursuing white collar offenders and that this function is diminished when disrespected or ill-informed private individuals join law enforcement; the challenge is clear: how can law enforcement recruit quality individuals and discourage the others? Again, the FCA model provides some guidance.⁹¹ Most FCA statutes include the following features that seek to entice respectable and knowledgeable individuals as relators: requiring relators to provide the DOJ with extensive information about suspected fraud before filing suit;⁹² requiring that the FCA suit be filed in camera⁹³ so as to protect a defendant's reputation from frivolous charges for fraud; and giving the DOJ statutory powers to monitor the relator's conduct in a case.⁹⁴ In addition, FCA practice has evolved to encourage "quality" relators and to discourage others. In particular, the DOJ is more likely to intervene in a case when quality relators, counsel, and information is presented.⁹⁵ Since a case's chance of success is improved considerably when the DOJ intervenes, weak cases brought by ill-informed relators tend to go away if the DOJ opts not to intervene.⁹⁶

These statutory features and FCA practice are helpful in encouraging "quality" private attorneys general and in discouraging others. However, before more "quality" individuals are willing to join law enforcement and serve as private prosecutors,⁹⁷ two currently accepted "norms" need to change. First, there needs to be a stronger societal consensus that economic wrongdoing is bad and should be deterred.⁹⁸ Second, there needs

91. There are other challenges such as ensuring that the private individuals do not bring frivolous or ill-conceived suits, absorb resources of government agencies that review or investigate charges brought by such individuals, discourage industry from setting ambitious goals for itself, generate precedent harmful to public prosecutors' efforts, waste judicial resources when courts respond to ill-conceived private actions. Bucy, *Private Justice*, *supra* note 4, at 62-68.

92. 31 U.S.C. § 3729(a)(A) (2003); Bucy, *Private Justice*, *supra* note 4, at 949-51, 958-59.

93. 31 U.S.C. § 3730(b)(2) (2003).

94. 31 U.S.C. § 3730(c) (2003).

95. Bucy, *Private Justice*, *supra* note 4, at 50-52, 58, 68-69.

96. *Id.* at 58.

97. For a discussion of the disincentives for individuals in joining prosecutors see Bucy, *Information as a Commodity*, *supra* note 4, at 948-58.

98. For a discussion of the corrosive impact of economic wrongdoing on individuals and society as a whole; see Bucy, *Information as a Commodity*, *supra* note 4, at 928-40.

to be a shift in perceptions of loyalty: we must be willing to put the welfare of our larger community ahead of loyalty to those near at hand.⁹⁹

When there is a strong societal consensus that economic malfeasance is wrong, more people will be willing to blow the whistle on it. When the government successfully prosecutes (either civilly or criminally) economic wrongdoing, the justice system builds this consensus. For government officials to build this consensus more effectively, however, the government needs to send a clearer message. It can do so.

“Lying, stealing, and cheating.” No matter how complex a white collar case may be, if prosecutors are not able to explain to a jury how what’s really at issue is simply lying, stealing, and cheating, juries will, and should, acquit. As every experienced prosecutor knows, obfuscation and tedious, laborious presentation of evidence is a sure route to acquittal. Policy-makers, whether in the DOJ or Congress, should take note of this standard lore of trial strategy. Public perception matters. White collar offenses need to be explained¹⁰⁰ to the public, as well as to juries. It is, after all, members of the public who sit on juries, elect legislators, and apply pressure on political leaders. Perhaps most importantly, it is members of the public who communicate norms to each other. When filing false financial records is universally viewed as wrong, and harmful to the rest of us, those who engage in such conduct will be scorned by society. This communication of values is more powerful than anything prosecutors or legislators can do to influence behavior.¹⁰¹

For this reason, the DOJ, Congress, and other policy-makers should do more to communicate to the public the wrongfulness of financial misdeeds. Strategic use of the prosecutor’s “bully pulpit” is one way to do so.¹⁰² Clear, concise, comprehensible indictments that explain to the public, as well as to the jury, what happened and why it is harmful are key. Press releases issued by prosecutors that better explain what occurred and who is hurt are essential. While most prosecutors’ offices routinely issue press releases at various stages of a criminal matter, explanations of what happened and how the conduct affects victims too often are lacking. Especially after a matter has concluded and there is no concern about prejudicing a fair trial, a gripping account of the facts and impact on victims is feasible. Greater attention by prosecutors to their

99. For a discussion of how whistleblowing challenging existing mores of loyalty, see Bucy, *Information as a Commodity*, *supra* note 4, at 963-66.

100. For discussions of the importance of communicating to the public about white collar prosecutions, civil and criminal, see Bucy, *Games and Stories*, *supra* note 4, at 632-33, 652-53 (discussing “signaling” to industry and the public that occurs from filing and pursuing lawsuits); Bucy, *Information as a Commodity*, *supra* note 4, at 969-70 (discussing the importance of publicity in recruiting whistleblowers); Bucy, *Iterated Games*, *supra* note 4, at 1031-32.

101. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1597-1600 (2000); Richard A. Epstein, *Enforcing Norms: When the Law Gets in the Way*, 7 RESPONSIVE COMMUNITY 4, 9-14 (1997); Lynch, *supra* note 2, at 46.

102. Cf. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1799 (2000).

role as “norm entrepreneurs” and their duty to educate the public will help build greater societal consensus that economic cheats truly are wrong and harmful.¹⁰³

In addition to more thoroughly explaining to the public what is at stake, prosecutors need to win more and lose less. “Guilty” is a powerful statement. It communicates that citizens have determined that a defendant has done a bad thing and deserves the community’s condemnation. A defendant’s sentencing communicates that we should expect to pay dearly for doing this bad act.¹⁰⁴ Convicted defendants go to prison. Their assets are forfeited. They suffer public scorn, loss of job, emotional pain, embarrassment, uncertainty, and family stress. They incur enormous legal fees. Their companies, shareholders, employees, bondholders, and customers suffer.

A “not guilty” verdict sends just as powerful of a message. Although a “not guilty” verdict means only that the government failed to prove its case beyond a reasonable doubt, the public generally perceives “not guilty” as “innocent.” In fact, to most people, “not guilty” often communicates that the government has unfairly targeted and victimized the defendant.

Prosecutors can ill-afford to lose a criminal case. This brings us back to punitive civil actions. Pursuing economic wrongdoing civilly and successfully is better than criminally prosecuting such wrongdoing and losing. Whenever success in a criminal action is uncertain, prosecutors should utilize punitive civil actions instead of criminal prosecution. In white collar cases, uncertainty often is present. One need only recall recent ill-fated white collar criminal prosecutions to confirm this.¹⁰⁵ Richard Scrushy, indicted CEO of HealthSouth, Inc., faced thirty-six felony counts on fraud and money laundering charges. Five CFOs (every CFO in the history of HealthSouth, Inc.)¹⁰⁶ testified under oath that Scrushy¹⁰⁷ directed a \$2.7 billion fraud at HealthSouth.¹⁰⁸ Pundits described the evi-

103. Cf. Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 370 (1999); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1897-99 (2000).

104. Cf. Lynch, *supra* note 2, at 44-47; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000).

105. Morse, Terhune & Carrns, *supra* note 81, at A1.

106. *Id.*

107. *Id.*

108. Abelson & Glater, *supra* note 80, at C1.

dence as “strong,”¹⁰⁹ “overwhelming,”¹¹⁰ and “massive.”¹¹¹ They were wrong. The jury returned verdicts of “not guilty” on every count. One can only speculate as to why there was such a disconnect between the pundits and jurors, but clearly, using a punitive civil action instead of criminal prosecution would have enhanced the government’s chance of success.

Before respected and knowledgeable individuals will join prosecutors in proving that colleagues have committed fraud, “the value of loyalty and service to the larger community must be viewed as paramount to the value of loyalty to . . . one’s company or industry.”¹¹² The justice system can help shift this norm of loyalty by publicizing the important and valuable role of individuals who have become private attorneys general. Since most cases where individuals join prosecutors conclude in settlement, there are few high profile trials dramatizing this assistance. Thus, proactive and constant publicity is necessary.

V. CONCLUSION

With great power comes great responsibility. Prosecutors initiate proceedings that will forever change someone’s life. To share this power with private individuals who stand to personally profit and who are not subject to the cultural and professional constraints on prosecutors is a significant policy decision. This article has addressed this decision. It does so by focusing on the issue of whether delegating prosecutorial power affects the law’s expressive function and its ability to communicate values of right and wrong. In the area of economic misconduct, which generally is not viewed as evil, this communicative function of the law is especially important. Prosecution of economic misconduct communicates that such conduct is wrong, that it will be detected and prosecuted, and that those who do it will be punished, shamed, and suffer bad consequences. Such a message can deter others from engaging in such conduct.

109. “It’s a stunner [the not guilty verdict] given how strong the government’s case seemed to be.” (quoting Gregory J. Wallance, a former prosecutor and current partner at Kaye Scholer, New York). *Id.*

Experts on white-collar crime said the case gave federal prosecutors their best chance yet in the corporate scandals to secure the conviction of a former chief executive. Fourteen former HealthSouth executives and accounting managers who have already pled guilty to various fraud charges—including all five of the company’s former chief financial officers—are expected to testify against Mr. Scrusby.

Milt Freudenheim & Eric Lichtblau, *Former HealthSouth Chief Indicted by U.S.*, N.Y. TIMES, Nov. 5, 2003, at C1.

110. Associated Press, *Scrusby Acquitted of Fraud at HealthSouth*, N.Y. TIMES, June 29, 2005 (“Joel Androphy, a Houston attorney who specialized in white-collar cases, called the evidence against Scrusby ‘overwhelming.’”).

111. Associated Press, *Jury Acquits Scrusby on All Counts in Fraud Trial*, N.Y. TIMES, June 28, 2005 (“A corporate law specialist who had followed the trial was stunned. ‘There was a mass of evidence against him. I certainly expected the jury to convict.’”).

112. Bucy, *Information as a Commodity*, *supra* note 4, at 963.

This article has suggested that the law's expressive function can be enhanced but also harmed when prosecutorial discretion is delegated to private individuals to whom power has been delegated. This outcome depends upon the "quality" of the individual. To recruit more "quality" individuals to serve as private attorneys general, our judicial system should recognize its role as a "norm entrepreneur." "Norm entrepreneurs" change existing values in society. Thus, before more "quality" individuals will be willing to serve as "private attorneys general" joining law enforcement to battle white collar crime, there must be broader societal recognition that economic misconduct is wrong. There must also be a greater loyalty to the community at large than to one's work colleagues. This brings us full circle: deputizing more "quality" private prosecutors will help these norms evolve.