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Private Prosecution -- The Entrenched Anomaly

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Robinson v. Lorillard demonstrates at least two important principles regarding the elimination of racial discrimination in employment. First, it shows the vigor with which the courts will attack the system that shows the signs of perpetuating discrimination. Secondly, it reveals that the costs of this necessary effort are very high.

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Private Prosecution—The Entrenched Anomaly

Since the days of our Constitution's infancy, traditional judicial truisms have been superseded by the viable doctrines of "due process," "equal protection," and "judicial fairness." Notwithstanding this evolution, there remain seemingly impregnable citadels of judicial tradition. One such remnant of the past is the policy allowing private prosecution in criminal actions. Recently in *State v. Best*,[1] the North Carolina Supreme Court reiterated[2] its stand condoning the practice.

I. BACKGROUND AND STATE OF LAW

At common law criminal prosecution adhered to the pure form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest. The private prosecutor had the case laid before the grand jury and took charge of the trial before the petit jury.[3] Despite statutory provisions requiring a public prosecutorial system[4] and judicial repudiation of the procedure in some jurisdictions[5] private prosecution remains well entrenched.[6]

While adhering to the philosophy of the common law rule, the North Carolina courts have modified its application. Whereas the clas-

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[1]280 N.C. 413, 186 S.E.2d 1 (1972).

[2]*See, e.g.*, State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943); State v. Carden, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682 (1936); State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

[3]State v. Carden, 209 N.C. 404, 410, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936). *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[4]*E.g.*, N.C. CONST. art. IV, § 18; N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[5]*E.g.*, McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911); Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[6]*E.g.*, Handley v. State, 214 Ala. 172, 106 So. 692, 694-95 (1925); Robinson v. State, 69 Fla. 521, 68 So. 649 (1915); State v. Bartlett, 105 Md. 212, 74 A. 18 (1909); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

sic interpretation precluded any challenge to the private prosecutor,[7] North Carolina courts have reserved the final determination for the discretion of the trial judge[8] but have intimated that the practice is not to be interferred with in the absence of a showing of abuse.[9] As justification for retaining the practice it has been tersely stated that it has "existed in our courts from their incipiency."[10]

Decisions in other jurisdictions reflect diverse judicial attitudes ranging from agreement with the common law view[11] to abolishment of the practice.[12] Various jurisdictions condition allowance of the procedure on the approval of the prosecutor,[13] the state,[14] or the court.[15] Language in some decisions espouses the public duty to carry out such prosecutions.[16] Indeed, in the face of a statute that banned private prosecutors, one court ruled that the definition of "private prosecutor" did not include an attorney hired by the complaining witness to prosecute.[17] On the other side of the spectrum it has been ruled in cases involving prosecuting for contingent fees that prosecuting for the private purse of the solicitor in such cases is abhorrent to the sense of justice.[18] Another court[19] construed a statute providing for publicly financed solicitors[20] as precluding private prosecution because of its inherent private motivation. Similarly, numerous cases forbid a prosecutor to appear in any capacity where he is financially backed or is appointed by any private interest.[21] Rulings on challenges to the private prosecutor appearing before the grand jury overwhelmingly hold that prejudice to the defendant is too damaging to be tolerated[22] because the prosecutor's position

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[7]*See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[8]State v. Davis, 203 N.C. 13, 26, 164 S.E. 737, 744 (1932).

[9]State v. Carden, 209 N.C. 404, 411, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936).

[10]State v. Best, 280 N.C. 413, 416, 186 S.E.2d 1, 3 (1972). *See also* State v. Lippard, 223 N.C. 167, 171, 25 S.E.2d 594, 597 (1943).

[11]Price v. Caperton, 62 Ky. 204, 1 Duv. 207 (1864).

[12]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[13]State v. Bartlett, 105 Me. 212, 74 A. 18 (1909).

[14]Handley v. State, 214 Ala. 176, 106 So. 692, 694-95 (1925).

[15]State v. Kent, 4 N.D. 577, 62 N.W. 63 (1895).

[16]Robinson v. State, 69 Fla. 521, 68 So. 649 (1915).

[17]Warren v. State, 130 Tex. Crim. 448, 94 S.W.2d 430 (1935).

[18]Bacca v. Padilla, 26 N.M. 223, 190 P. 730 (1920).

[19]McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911).

[20]North Carolina has a similar statute. *See* N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[21]*E.g.*, Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[22]Nicholas v. State, 17 Ga. App. 873, 87 S.E. 817 (1916); Wilson v. State, 70 Miss. 595, 13 So. 225 (1893); Flege v. State, 93 Neb. 610, 142 N.W. 276 (1913); Hartgraves v. State, 5 Okla. Crim. 266, 114 P. 343 (1911).

as an officer of the court demands a degree of impartiality unlikely in the private prosecutorial setting. Those decisions abolishing or severely restricting private prosecution have generally based their determinations on the contemporary judicial philosophy recognizing its almost complete morphasis since the concept of private prosecution emerged.

II. CONFLICT IN ROLES

Perhaps the one area which has changed most drastically since the inception of the doctrine permitting private prosecutors has been the role of the public prosecutor. From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done.[23] 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.[24] 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.[25]

Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly[26] adverse to that of his client in the same general matter.[27] Therefore, in view of the ethical[28] and judicial[29] restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, "private prosecutor" is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate.[30]

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[23]Berger v. United States, 295 U.S. 78, 88 (1935); NCSB CANONS OF ETHICS No. 5.

[24]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[25]McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911). *See generally* 23A C.J.S. *Criminal Law* § 1081 (1961).

[26]Parker v. Parker, 99 Ala. 239, 13 So. 520 (1893).

[27]People v. Hanson, 290 Ill. 370, 371, 125 N.E. 268, 270 (1919); People v. Gerald, 265 Ill. 448, 107 N.E. 165 (1914).

[28]NCSB CANONS OF ETHICS No. 5; *see* NCSB CANONS OF ETHICS Nos. B, C.

[29]Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[30]The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success . . . [even though] counsel employed by outside parties . . . would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes,

Besides the conceptual anomaly in the conflicting roles and loyalties of the two types of prosecutors, the practical consequences of a private advocate in today's prosecutorial role results in intolerable prejudices. Unlike their common law counterparts, modern prosecutors wield the power of the state's investigatory force, decide whom to indict and prosecute, negotiate the state's position in plea bargaining, and, because of their supposed impartiality as officers of the court, are influential in recommending punishment to the court.

In the normal private prosecutorial setting, the prosecutor remains in charge. Where the private advocate only observes the proceedings from indictment to completion of trial, arguably his presence exposes the defendant to minimal prejudice. However, since the private prosecutor's influence is not confined to the open courtroom, in which obvious prejudice could be more easily detected by the court, all stages of the judicial process must be considered in determining whether the mere presence of the private prosecutor is intollerably prejudicial. The following illustrations of the possible consequences of allowing a private prosecutor demonstrates the prejudice. Because of the varying degrees of control relinquished by the prosecutor, the following discussion by no means illustrates the actual situation in any given case, but it does indicate that the practice is fraught with possible prejudice.

One prosecutorial power that, if imprudently employed, could result in dire consequences to those suspected of a crime is the discretionary authority to decide when to prosecute. At this initial stage of the criminal proceeding, the private advocate is unlikely to play any normal role. However, though the public prosecutor decides whether to prosecute, possibly his decision may be influenced by the pressure of a privately retained attorney.

The solicitor's discretionary power to prosecute is restricted in federal criminal actions by the fifth amendment requirement that all prosecutions for infamous crimes be commenced by grand jury indictment. The function of the grand jury is to stand between the accusor and accused and determine whether a charge is well founded or possibly whether it is a result of malice or ill will.[31] However, the fifth amendment requirement of grand jury indictment does not apply to states indictments, which may be served on the formal charge of the prosecu-

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prejudice, and animosities of this clients; to secure a conviction at all hazards. McKay v. State, 90 Neb. 63, 74, 132 N.W. 741, 745 (1911).

[31]Wood v. Georgia, 370 U.S. 375, 390 (1962).

tor.[32] In this setting, a private prosecutor could, in those cases where the public prosecutor abdicated to the private attorney, use the discretion of his position at the whim of his client. Likewise, where the private prosecutor also represents a client in a civil suit arising from the same situation, the indictment power could be used as a lever to procure or enhance a financial settlement in the civil action. The reverse of this blackmail situation may be as damaging. For example, a private advocate retained by parties sympathetic to the defendant's plight could move for dismissal, fail to prosecute, or emasculate the indictment through plea bargaining.

Closely related to the power of the prosecutor to indict and prosecute is his discretionary use of the nolle prosequi.[33] Though officially in the province of the court, the employment of nolle prosequi and capias is normally left to the discretion of the solicitor.[34] Prejudices inherent in the exercise of such discretion when the possessor of it owes his loyalty to a private party seeking a conviction are repugnant to our system of justice and could lead to prolonged harassment.[35] The practice of plea bargaining is well established in the criminal process. Recently the United States Supreme Court indicated that plea bargaining is not inherently incompatible with a reasonable judicial standard and that the courts should not interfere unless there has been prosecutorial overreaching.[36] Because the allegiance owed by a private prosecutor to a possibly vengeful client must coexist with the impartiality demanded in the role of solicitor, a fair termination of any plea bargaining based on the equities of the situation is highly unlikely. The public solicitor who is in control of the plea bargaining is less likely to be fair if he is assisted and counseled by a private advocate. If the private prosecutor is given control of the plea bargaining, the interest of his client might override those of the public in determining whether a plea

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[32]Hurtado v. California, 110 U.S. 516 (1864).

[33]A nolle prosequi is merely a declaration on the part of the solicitor that he will not prosecute the suit further at this time. It is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 159 N.C. 265, 74 S.E. 740 (1912). However, the defendant may be arrested and tried again. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915); State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256 (1852).

[34]State v. Moody, 9 N.C. 529 (1873); State v. Buchanan, 23 N.C. 59 (1840); State v. Thompson, 10 N.C. 613 (1825).

[35]Coupled with the prosecutor's discretionary power to prosecute, this device could be employed to blackmail an accused.

[36]Brady v. United States, 397 U.S. 742 (1970).

to a lesser crime[37] should be accepted.

With the development of the concept of the public prosecutor as an unbiased officer of the court has evolved the influence on the bench of the prosecutor's recommendations for punishment. A solicitor is under a duty to weigh all the mitigating and exculpatory circumstances in arriving at a fair recommendation. Such a duty would be meaningless if the private prosecutor, intent on conviction, possessed the responsibility.

Perhaps the most important power of the prosecutor is his discretion to choose what evidence is submitted to the court.[38] Through the evidence-collecting machinery available to prosecutors such as police investigatory agencies, the prosecutor uncovers both exculpating and inculpating evidence, which may not be discoverable by the defense despite an array of Supreme Court decisions that have proscribed the suppression of evidence which would exonerate the defendant.[39] Notwithstanding the court's admonishments, the prosecution still determines which evidence is exonerating and which is not. This discretion of the prosecution to determine initially what constitutes discoverable evidence should not be tainted with self-dealing.

Finally, at least some jurymen have confidence that the obligations imposed on the prosecutor will be faithfully observed. Consequently, improper suggestions and insinuations from the prosecutor are apt to carry much weight against the accused.[40] Notwithstanding the presence

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[37]The duty incumbent upon the office of prosecutor to ask for a verdict for a lesser offense when the facts and circumstances warrant presents a similar problem in the private prosecutorial setting. *See* State v. Josey, 112 S.C. 20, 99 S.E. 768 (1919). Again there is a discrepancy between the duty of a public prosecutor and that of a private advocate.

[38]At common law, the state was under little duty to disclose to the defense any information concerning the defendant's case. For a more complete description of the common law tradition, see People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[39]The common law approach to prosecution's immunity from defense discovery has been diluted somewhat by the application of the fourteenth amendment to certain prosecution tactics. The prosecution cannot intentionally use perjured testimony against the defendant at trial. Mooney v. Holohan, 294 U.S. 103, 111 (1935). *See also* Miller v. Pate, 386 U.S. 1, 7 (1967). The state is under a duty to correct perjured testimony when presented. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959). In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In addition, Court has strongly intimated that the prosecution is under a duty to initiate disclosure of evidence of the defense if the evidence will exonerate the defendant. Giles v. Maryland, 386 U.S. 66 (1967).

[40]Berger v. United States, 295 U.S. 78 (1935). There has also been concern about the appearance of a prejudiced solicitor before the grand jury. Nichols v. State, 17 Ga. App. 593, 87 S.E. 817 (1916).

of the private prosecutor, in most situations arising during the criminal proceeding the public solicitor or the court is in a position to avoid any resulting prejudice. This is not true, however, in the situation in which the private advocate examines a witness, addresses the jury, or argues to the bench. On such occasions, the harm is inflicted the instant an unwarranted implication or vituperation is released. Likewise, in some instances the mere presence of a private prosecutor is likely to bolster any inference of the guilt of the defendant in the minds of the jury, since the jury probably would ascribe more credence to a prosecuting witness who had invested heavily in the prosecution

III. Due Process Considerations

The fourteenth amendment due process clause is viewed as incorporating traditional notations of fundamental fairness implicit in the concept of liberty;[41] it is a mandate to the states to afford the defendant the fundamental fairness essential to the concept of justice.[42] To determine if a defendant has been deprived of due process by a particular practice, the crucial question is whether the practice inherently is so prejudicial as to infringe the defendant's fundamental right to a fair trial.[43]

As applied to the private prosecution situation, the constitutional question depends on whether a procedure that demands impartiality on the part of the prosecutor becomes impermissably tainted when substantial private influence is interposed. The question is easily answered in the negative when the public prosecutor remains in complete control of the litigation and his decisions are unaffected by the presence of the private prosecutor. The answer should be different once the private prosecutor, who is paid to obtain a conviction, actually assumes any degree of influence, because his inherently biased suggestions and actions may compromise a crucial and effectively dispositive exercise of

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[41]Palko v. Connecticut, 302 U.S. 319 (1937).

[42]Lisenba v. California, 314 U.S. 219 (1941); Foster v. Illinois, 332 U. S. 134, 136 (1947). The emphasis is upon basic fairness, not upon compliance with the Bill of Rights, and a state procedure may be held to violate due process even though its operation is not contrary to any specific guarantees of the first eight amendments. Israel & LaFave, Criminal Procedure in A Nutshell 7 (1971). This "federalism" theory, though subordinated to the "selective incorporation" theory several years ago has recently re-surfaced in the Supreme Court's opinions. Williams v. Florida, 399 U.S. 78, 117-43 (1970) (Harlan, J., concurring and dissenting).

[43]Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring, interpreting the majority opinion).

prosecutorial discretion.[44] Moreover, the difficulty in determining whether in specific cases the private prosecutor has actually prejudiced the defendant militates toward a ruling that private prosecutors should be banned in all cases, especially since the countervailing state interest in continuing the practice is miniscule. Arguably, any process which subjects the accused to the abuses inherent in the questioned method of trial deprives him of the fundamental fairness required by the due process clause.

IV. ETHICAL CONSIDERATIONS

Throughout the history of judicial review of private prosecution in North Carolina the ethical question of the propriety of private prosecution has been overlooked.[45] Though related to and often commingled with the conflict-in-roles consideraitons previously discussed, ethical decisions dealing with prosecutors have been less confined to the substantive structures of the past. The North Carolina State Bar has imposed a high moral obligation on the solicitor to seek justice at the expense of being denied convictions.[46] Moreover, both the Council of the North Carolina State Bar and the General Assembly have attempted to segregate the public solicitor from all private influences.[47] This philosophy has been followed to the extent of declaring it unethical for an attorney who shares office space or expenses with any judge, assistant judge, solicitor, assistant solicitor, or substitute solicitor to practice law in a criminal court of such officer[48] or for any attorney who is or has been such an officer to accept professional employment in any case growing out of any matter connected with his office during his incumbency.[49] These strict ethical standards result from the realization by the Council of the frailty of all men and of the adverse effect on public opinion of such associations regardless of whether actual prejudice in the courtroom results.[50] However, because of inconsistent opinions in

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[44]See text accompanying notes 4-9 *supra*.

[45]*See* cases cited note 2 *supra*.

[46]NCSB CANONS OF ETHICS No. 5.

[47]NCSB CANONS OF ETHICS Nos. 5, B, B-1, C. The need for citation to Ethics Opinions which restrict the solicitors private practice of law has been alleviated by the abolishment of such practice by statute. N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[48]NCSB CANONS OF ETHICS No. B-1; *see, e.g.*, NCSB COUNCIL, ETHICS OPINIONS, No. 675 (1969); *id.* No. 623 (1968); *id.* No. 606 (1968); *id.* No. 588 (1967).

[49]NCSB CANONS OF ETHICS No. C; *see, e.g.* NCSB COUNCIL, ETHICS OPINIONS, No. 689 (1969); *id.* No. 665 (1969); *id.* No. 628 (1968); *id.* No. 555 (1967).

[50]Such a practice on the part of a court officer in accepting such employment would

areas tantamount to private prosecution, such as where a city attorney criminally prosecutes a city employee, the Council's ethical stand on the issue is less than clear.[51] These inconsistencies are evidenced by the cumulative impact of the opinions which reveal that while the Council acknowledges that private prosecutors are proper it prohibits solicitors from accepting private fees.[52] It remains anomalous that the Council expects "clean hands" of the solicitor but accepts privately financed prosecution.[53]

V. CONCLUSION

Because of the inherent discrepancies in roles in both the philosophical and practical application, the possible ethical compromises, and the questionable constitutional legitimacy, the private prosecution should be abolished.[54] In the event a party can demonstrate that a particular prosecution is inadequate in a certain situation, the North Carolina General Statutes provide adequate means of alleviating the problem by the appointment of a temporary assistant to the public prosecution. This system avoids the prejudices resulting from private prosecution and results in the appointment of attorneys who prosecute in the state's interest and only for compensation by the state.

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> have the appearance of evil whether or not evil grows out of the practice and the solicitors . . . should not permit themselves to become next friends through the influence of attorneys practicing in their courts.
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> It is human frailty to return favors and consciously or unconsciously favors received often times influence one's conduct . . . .

NCSB COUNCIL, ETHICS OPINIONS, No. 454 (1964).

[51]*See* NCSB COUNCIL, ETHICS OPINIONS, No. 595 (1967); *id.* No. 254 (1959); *id.* No. 234 (1958); *id.* No. 142 (1954); *id.* No. 103 (1953).

[52]NCSB COUNCIL, ETHICS OPINIONS, No. 470 (1965); *id.* No. 250 (1958).

[53]Of notable significance is the fact that although the Council has issued in excess of 735 decisions, only seven have mentioned private prosecution. In addition, the Council has neither justified its confirmation of the practice nor addressed itself squarely to the issue.

[54]In *Best*, the North Carolina Supreme Court accurately pointed out that the legislature has provided for the appointment of a full-time solicitor to prosecute in the name of the state and to be compensated by the state, and for the appointment of temporary assistants when the dockets are crowded. However, the court concluded that since the statute did not specifically prohibit private prosecution, the practice was allowable. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972). However, it could be argued that since the statute established the office of public solicitor, restricted his compensation and loyalties, and provided for the appointment of assistants by a disinterested court in case of emergencies, the legislature intended to exclude the intrusion of private interests.