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Refashioning Old Tools for Modern Society

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Peter Ormerod, *Privacy Qui Tams*, 98 **Notre Dame L. Rev.** __ (forthcoming 2023), available at SSRN.

Qui tam actions have a long history as a valuable litigation structure to vindicate collective harms. A qui tam action obviates the need for class actions while providing a mechanism for private enforcement. The qui tam plaintiff is a private individual—often called a relator—who files suit to redress a societal wrong. The government has a limited period to intervene and take over the litigation. If it does not act, the individual steps into the government's shoes and serves as a regulator.

Although the procedure traces to thirteenth-century England, modern qui tam statutes authorizing this private enforcement variant are exceedingly rare. Peter Ormerod hopes to revitalize their use to enforce privacy rights in *Privacy Qui Tams*. Ormerod posits qui tam as "a novel enforcement structure with deep roots and great promise." He builds a careful and compelling argument to live up to that claim. Discussing substantive and procedural law, without giving either component short shrift, is no small feat, yet Ormerod manages the challenge artfully.

The Article begins with a theoretical and doctrinal primer on privacy law. Ormerod summarizes scholarly taxonomies of "information capitalism" to highlight the ineffectiveness of the new wave of privacy laws. These laws lack a clear ideological foundation and create unintended enforcement barriers. The rapid expansion of surveillance infrastructures precipitates the need for a new approach to privacy law before the United States becomes entrenched in the "status quo."

The law has not responded to the shift from an industrial to an informational political economy. The law cannot respond to new technologies that do not fit its archaic structures, which were designed to stop industrial, rather than digital, threats. "[E]ven privacy laws that hint at superior substantive provisions are threatened by an inability to enforce them effectively." He specifies how challenges to public and private enforcement have left privacy law impotent, citing three factors: (1) enforcement agencies are severely understaffed and underfunded; (2) industry players have too great an influence on the politics of privacy; and (3) when public enforcers do act, the remedies they seek are too meager to compensate or deter.

To illustrate his point, Ormerod examines the Federal Trade Commission. The Commission has adopted a "meek and unimaginative regulatory strategy" to privacy concerns. In 2021, the Supreme Court exacerbated the problem in *AMG Capital Management v. FTC*, holding the FTC lacks the statutory authority to obtain equitable monetary remedies. While Ormerod concedes other agencies have authority to impose monetary penalties, such "penalties pale in comparison to the businesses' profit-generating capacity."

The Article then explains the shortcomings of class-action private enforcement. Federal laws such as the Fair Credit Reporting Act and the Telephone Consumer Protection Act authorize private rights of action, allowing individuals to vindicate their rights and the rights of others. But "over the past thirty years, the Supreme Court has sharply limited individual plaintiffs' ability to vindicate legal rights conferred on them by Congress." Forced arbitration agreements, narrow constructions of Article III standing, and restrictive interpretations of FRCP 23's class certification requirements have crippled private enforcement.

Given this state of "ineffective public enforcement and infeasible private enforcement," Ormerod's deceptively simple solution would authorize private citizens to bring privacy qui tam suits. It is in this proposal section that the article

exceeds expectations. Privacy is not merely an “individual, fundamental right” but a “common pool” of “related interests,” and hence an appropriate subject for qui tam actions. In this theoretical framework, privacy is vital to “social functioning” and essential for a functioning liberal democracy. Qui tams offer the natural solution to the enforcement problem.

Ormerod offers concrete details about privacy qui tams. He proposes statutory language allowing an individual to sue for civil penalties to protect collective privacy rights in state and federal court. Any legislation must negate standing concerns by “studiously avoid[ing] any suggestion that the relator’s compensation is intended to remedy a personalized injury or that the relator represents other aggrieved parties.” The government can intervene and take over litigation within 60 days, but the relator would receive a modest percentage of any recovery. If the government opts against intervening, the relator continues with her suit and receives a higher percentage of any disgorged profits, along with fees and costs.

From there, Ormerod addresses likely criticisms. He acknowledges some may view his proposal as too “exotic and unprecedented” for the judiciary. Congress may be wary of contributing to potential litigiousness. There will be industry opposition and the “inevitable regulatory capture” that occurs in our neoliberal society. But in confronting such challenges, Ormerod persuades. He walks through the counterarguments in full and responds without over-promising. His proposal becomes a modest, moderate strategy with viable potential to make a difference.

As a staunch advocate of private enforcement, I approached this piece with doubt. On questions of private and public enforcement, my gut reaction is to reform and strengthen class action procedures. Regarding privacy claims, however, Ormerod convinced me that qui tam actions are worthy of close consideration.

In one of my favorite quotes, Representative John Dingell stated, “I’ll let you write the substance…you let me write the procedure, and I’ll screw you every time.” Ormerod left me wondering if this quote needs revision—“If you let me write the procedure, I’ll get to vindicate substantive rights.”

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