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# The False Claims Act and the English Eradication of Qui Tam Legislation

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# THE FALSE CLAIMS ACT AND THE ENGLISH ERADICATION OF *QUI TAM* LEGISLATION

J. RANDY BECK\*

*Congress amended the False Claims Act in 1986 to encourage qui tam enforcement of the statute, which penalizes submission of false claims to the federal government. A qui tam statute authorizes a private citizen "informer" to file suit on behalf of the government for collection of a statutory forfeiture. A successful informer receives a share of the recovery. Qui tam enforcement came from England, where it served for centuries as the principal means of enforcing a wide range of statutes. England moved away from qui tam enforcement in the 1800s and abolished it altogether in 1951. In this Article, Professor Beck considers the recurring problems that beset English qui tam enforcement, the widespread contempt for informers, and the reasons for Parliament's eventual eradication of such legislation. He concludes that qui tam statutes contain an inherent conflict of interest because they afford informers a pecuniary interest that often conflicts with public interests at stake in the litigation. Professor Beck argues that this conflict explains the problems with English qui tam statutes and analogous problems under the False Claims Act. He recommends modifying the Act to preserve the benefits of qui tam enforcement while increasing the role of disinterested public prosecutors in enforcement.*

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\* Assistant Professor, University of Georgia School of Law. B.A., 1985, Baker University; J.D., 1988, Southern Methodist University. I would like to express my appreciation for the many helpful suggestions received from Dan T. Coenen, Anne Proffitt Dupre, Mark L. Movsesian, Richard A. Nagareda, Judith R.T. O'Kelley, Erwin C. Surrency, Alan Watson, Michael Wells, and the participants in the Southeastern Association of American Law Schools Young Scholars' Workshop. Elizabeth A. Brooks provided valuable research assistance. My interest in *qui tam* litigation began in private practice, where I participated in the defense of several clients sued under the False Claims Act. Among other cases, I was one of the attorneys for the defendant in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). While I also worked for a short time at the Department of Justice, my responsibilities there were not connected with the False Claims Act.

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“What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds?”

—North Dakota Senator William Langer<sup>1</sup>

## INTRODUCTION

Since 1986, the federal government has been conducting an extensive experiment with a curious method of statutory enforcement. In that year, Congress amended the federal government’s principal anti-fraud statute—the False Claims Act (FCA)<sup>2</sup>—to encourage an archaic form of litigation known as a “*qui tam*” suit.<sup>3</sup> A *qui tam* statute permits a private citizen to bring an action on behalf of the government for recovery of a statutory penalty. The person who pursues the action—the “informer” or “relator”—receives a portion of any amount recovered on the government’s behalf.<sup>4</sup> Thus, *qui tam* statutes privatize government litigation,<sup>5</sup> permitting the private informer to sue for the government on a contingent-fee basis.

Substantial federal reliance on *qui tam* enforcement is a new phenomenon in this country. While *qui tam* statutes have been on the books since the first Congress<sup>6</sup> and the FCA has contained a *qui tam* provision since the Civil War,<sup>7</sup> these pre-1986 statutes generated

1. 89 CONG. REC. 7606 (1943) (statement of Sen. Langer).

2. See False Claims Act of 1986, Pub. L. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3733 (1994)).

3. The name “*qui tam*” comes from a longer Latin phrase, “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*,” which means “[w]ho sues on behalf of the King as well as for himself.” BLACK’S LAW DICTIONARY 1251 (6th ed. 1990) (translating from Latin) (internal quotation marks omitted). Further discussion appears *infra* at text accompanying notes 41-42.

4. See, e.g., *infra* note 52 and accompanying text.

5. Former Attorney General Edwin Meese III, for instance, has called the amended False Claims Act “an excellent example of privatization in the public interest.” Letter from Edwin Meese III to Taxpayers Against Fraud (Aug. 15, 1996) (visited Feb. 1, 2000) <<http://www.taf.org/taf/docs/meese.html>>.

6. See *infra* note 54 and accompanying text (discussing *qui tam* statutes enacted by early Congresses).

7. See *infra* notes 59-65 and accompanying text (discussing the enactment of the

relatively little litigation.<sup>8</sup> By contrast, the generous bounty offered to informers under the 1986 legislation<sup>9</sup> has resulted in an increased number of *qui tam* filings. The Department of Justice reports that as of September 1999, 2959 *qui tam* actions had been filed since the FCA amendments took effect.<sup>10</sup> The rate of filings has increased over time; in fact, more than 50% of those 2959 cases had been filed since the beginning of fiscal year 1997.<sup>11</sup> Expanding use of the FCA *qui tam* mechanism makes it increasingly significant to recipients of federal funds because any document created to support a funding request potentially could be deemed a “claim” or “record” subject to the

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False Claims Act).

8. See Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 249, 281 (1989) (“On this side of the Atlantic, *qui tam* never really gained a secure foothold, particularly at the federal level.”). A search for the term “*qui tam*” on November 15, 1999 in Westlaw’s ALLFEDS-OLD database generated only 166 hits. Another 142 hits were obtained by running the same search in the ALLFEDS database with a date restriction of “before 1987.” Of the combined total of 308 hits, some were duplicative, involving multiple opinions in the same case. Other opinions identified in these searches did not arise from federal *qui tam* actions. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (referencing *qui tam* litigation in discussing an Article III standing issue). While there may have been pre-1986 federal *qui tam* suits that did not generate reported opinions or opinions that did not use the term “*qui tam*,” the result of these searches still suggests a relatively small number of pre-1986 federal *qui tam* actions compared to the thousands of cases filed under the 1986 FCA amendments. See *infra* notes 10–11 and accompanying text.

9. The successful informer’s bounty can grow quite large under the amended FCA. The recovery in an FCA action includes treble damages, plus a fine of \$5000 to \$10,000 for each claim or business record violating the statute. See 31 U.S.C. § 3729(a) (1994). The informer is normally entitled to between 15% and 25% of the proceeds if the Justice Department intervenes in the suit, and between 25% and 30% if the Justice Department chooses not to intervene. See *id.* § 3730(d)(1)–(2). The largest settlement paid to date in a *qui tam* action is a \$325 million settlement by SmithKline Beecham Clinical Laboratories, Inc., in 1997 that resulted in a \$52 million bounty for the informers. See Margaret Cronin Fisk, *The Whistleblower Juggernaut: More and More Lawyers Belly Up to the Qui Tam Bar*, NAT’L L.J., Aug. 9, 1999, at A1. In addition to a percentage of the proceeds, a successful informer is entitled to recover costs, expenses, and attorneys’ fees. See 31 U.S.C. § 3730(d)(1)–(2).

10. See E-mail from Craig Wiener, Department of Justice, to Randy Beck (Feb. 15, 2000) (on file with author) [hereinafter Wiener E-mail].

11. See *id.* While the rate of filings has generally trended upwards, in both fiscal 1989 and fiscal 1997, the number of filings “spiked” to levels that were not matched in the two succeeding fiscal years. See, e.g., *id.* (reporting that 532 cases were filed in fiscal 1997, compared to 471 cases in fiscal 1998 and 483 cases in fiscal 1999). In the early years following the 1986 amendments, the defense industry was the principal target of *qui tam* litigation; recent figures, however, show that the Department of Health and Human Services was the client agency in the largest proportion of the cases filed, suggesting that *qui tam* informers have now turned their primary attention to health care providers. See John T. Boese, *When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law*, 43 ST. LOUIS U. L.J. 53, 54 (1999); Wiener E-mail, *supra* note 10.

statute.<sup>12</sup>

Apart from its practical significance for recipients of federal funding, *qui tam* litigation has generated substantial scholarly interest.<sup>13</sup> Private prosecution of government claims seems difficult to reconcile with Article II's command that "[t]he executive Power shall be vested in [the] President of the United States"<sup>14</sup> and with the basic principles of Article III standing.<sup>15</sup> By exercising prosecutorial powers, the informer appears to execute the laws without presidential appointment or supervision.<sup>16</sup> Moreover, the *qui tam* informer suffers

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12. See 31 U.S.C. § 3729(a)(1)–(2) (creating liability for presenting a "false or fraudulent claim for payment" or making a "false record or statement" to get such a claim paid); *id.* § 3729(c) (defining "claim"). But see *id.* § 3729(e) (excluding application of the statute to "claims, records, or statements made under the Internal Revenue Code of 1986").

13. See, e.g., Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 132–36 (1999) (arguing that states should be deemed to have waived sovereign immunity with respect to *qui tam* actions under the FCA); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2243–45 (1999) (discussing the relevance of *qui tam* provisions such as those in the FCA to debates about Article III standing requirements).

14. U.S. CONST. art. II, § 1, cl. 1.

15. Interpreting Article III, the Supreme Court has held that "the irreducible constitutional minimum of standing" requires the plaintiff to establish: (1) an actual injury; (2) caused by the conduct challenged in the litigation; and (3) redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). Additionally, the plaintiff's injury must be "particularized," such that it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. Thus, the Court has declined to permit litigation of a mere "generalized grievance" shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *United States v. Richardson*, 418 U.S. 166, 176–80 (1974)); accord *Lujan*, 504 U.S. at 573–74 ("[A] plaintiff [who] rais[es] only a generally available grievance about government . . . and seek[s] relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."); *Richardson*, 418 U.S. at 176–80 (holding that the "generalized grievance" bar precluded a suit by a taxpayer challenging the government's failure to publish expenditures by the CIA). Because the informer in a *qui tam* action sues based upon an injury to the public, rather than an injury that the informer suffers individually, *qui tam* standing seems potentially inconsistent with the particularized injury requirement expressed by the Supreme Court. The *Lujan* Court, however, distinguished *qui tam* suits in dicta, suggesting that provision of a bounty affords a litigant "a concrete private interest in the outcome" of the litigation. *Lujan*, 504 U.S. at 573. If a statutory bounty satisfies Article III, then the particularized injury requirement may not constitute part of "the irreducible constitutional minimum of standing." *Id.* at 560.

16. The Constitution assigns to the President the responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The Supreme Court has identified the pursuit of enforcement litigation as an aspect of the President's constitutional responsibility to execute the laws. See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (*per curiam*) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to

no traditional "injury in fact" before instituting an action: the FCA authorizes the informer to sue on the government's behalf without regard to whether the informer has been harmed personally by the defendant's conduct.<sup>17</sup> Consequently, commentators have debated whether the FCA violates the separation-of-powers doctrine, the Appointments Clause, and/or the Article III "case or controversy" requirement.<sup>18</sup> Others have focused on questions of policy or statutory interpretation raised by the amended statute.<sup>19</sup>

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"take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); *see also* Morrison v. Olson, 487 U.S. 654, 691-93 (1988) (holding that the Attorney General's power to remove an independent counsel for "good cause" did not unconstitutionally burden the President's ability to ensure faithful execution of the laws).

17. *See* 31 U.S.C. § 3729(a) (establishing liability for the submission of false claims to the government); *id.* § 3730(b)(1) (authorizing persons to bring civil actions in the name of the government for violations of *id.* § 3729(a)); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748-49 (9th Cir. 1993) (holding that a *qui tam* plaintiff need not suffer an injury to assert a claim and that the statute assigns the government's claim to the informer).

18. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989); Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y, Winter 1997, at 89; James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993); Frank A. Edgar, Jr., Comment, "Missing the Analytical Boat": *The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319 (1990); Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 GEO. WASH. L. REV. 609 (1994); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990); Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997); John P. Robertson, Comment, *The False Claims Act*, 26 ARIZ. ST. L.J. 899 (1994).

19. *See* Boese, *supra* note 11, *passim*; Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869 (1997); Elletta Sangrey Callahan, *Double Dippers or Bureaucracy Busters? False Claims Act Suits by Government Employees*, 49 WASH. U. J. URB. & CONTEMP. L. 97 (1996); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273 (1992); Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 UMKC L. REV. 30 (1996); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, LAW & CONTEMP. PROBS., Autumn 1997, at 167; Patrick W. Hanifin, *Qui Tam Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 556 (1991); James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35 (1991); Major John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. REV. 31 (1990); Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement*, 16 VA. ENVTL. L.J. 577 (1997); Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455 (1998); Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the Federal False Claims Act*, 24 OHIO N.U. L. REV. 163 (1998); John R. Munich & Elizabeth W. Lane, *When Neglect Becomes Fraud: Quality of Care and False Claims*, 43 ST. LOUIS U. L.J. 27 (1999); Marc S. Raspanti & David M. Laigaie, *Current*

The debate over the constitutionality of *qui tam* legislation has also worked its way into the federal courts. A panel of the Fifth Circuit, in an opinion vacated pending en banc review, recently declared the FCA *qui tam* provisions unconstitutional on separation-of-powers grounds.<sup>20</sup> The majority of federal appellate courts,

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*Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23 (1998); Adam G. Snyder, *The False Claims Act Applied to Health Care Institutions: Gearing Up for Corporate Compliance*, 1 DEPAUL J. HEALTH CARE L. 1 (1996); Kent D. Strader, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed in False Claims Act Cases?*, 62 U. CIN. L. REV. 713 (1993); Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 PUB. CONT. L.J. 669 (1998); Major David Wallace, *Government Employees as Qui Tam Relators*, ARMY LAW., Aug. 1996, at 14; Harvinder S. Anand, Note, *Competing Relators and Competing Objectives Under the False Claims Act: Barring Subsequent Claims Should Look Beyond the Plain Language of Section 3730(b)(5)*, 28 PUB. CONT. L.J. 89 (1998); Edmund C. Baird, III, Note, *The Use of Qui Tam Actions to Enforce Federal Grazing Permits*, 72 WASH. U. L.Q. 1407 (1994); Troy D. Chandler, Comment, *Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act*, 35 HOUS. L. REV. 541 (1998); Lisa Estrada, Casenote, *An Assessment of Qui Tam Suits by Corporate Counsel Under the False Claims Act: United States ex rel. Doe v. X Corp.*, 7 GEO. MASON L. REV. 163 (1998); Susan G. Fentin, Note, *The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255 (1995); Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 MINN. L. REV. 1357 (1998); Christopher C. Frieden, Comment, *Protecting the Government's Interest: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041 (1998); Kaz Kikkawa, Note, *Medicare Fraud and Abuse and Qui Tam: The Dynamic Duo or the Odd Couple?*, 8 HEALTH MATRIX 83 (1998); Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409 (1993); Mary DuBois Krohn, Comment, *The False Claims Act and Managed Care: Blowing the Whistle on Underutilization*, 28 CUMB. L. REV. 443 (1997); Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497 (1995); Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors: A New Application of the False Claims Act*, 22 B.C. ENVIL. AFF. L. REV. 623 (1995); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061 (1991); Carolyn J. Paschke, Note, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, Its History and Its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163 (1994-1995); Christopher P. Perzan, Note, *Research and Relators: The False Claims Act and Scientific Misconduct*, 70 WASH. U. L.Q. 639 (1992); Lisa Michelle Phelps, Note, *Calling off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003 (1998); Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935 (1993); Kara Nicole Schmidt, Note, *Privatizing Environmental Enforcement: The Bounty Incentives of the False Claims Act*, 9 GEO. INT'L ENVIL. L. REV. 663 (1997); Virginia C. Theis, Note, *Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 PUB. CONT. L.J. 225 (1999).

20. See *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 531, *reh'g en banc granted*,



however, have upheld the statute as it applies to private defendants.<sup>21</sup> In litigation involving governmental defendants, the circuits have divided over another significant constitutional question raised by the legislation: whether the Eleventh Amendment precludes *qui tam* litigation against a state.<sup>22</sup> The Supreme Court granted certiorari on this issue in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>23</sup> one day after issuing a recent trio of state sovereign immunity decisions.<sup>24</sup> Shortly before oral argument in *Vermont*

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196 F.3d 561 (5th Cir. 1999); *see also infra* note 21 (discussing *Riley*).

21. *See United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 288 n.12 (5th Cir. 1999) (noting that *qui tam* plaintiffs have Article III standing); *United States ex rel. Berge v. Board of Trustees*, 104 F.3d 1453, 1457–58 (4th Cir. 1997) (declining, on the basis of other circuit decisions, to hold that a *qui tam* plaintiff does not have standing); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1040–42 (6th Cir. 1994) (holding that the *qui tam* provisions do not violate the principle of separation of powers or the Appointments Clause of the Constitution); *Kelly*, 9 F.3d at 747–60 (rejecting separation-of-powers, Appointments Clause, Article III, and due process challenges to the *qui tam* provisions of the False Claims Act); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1153–55 (2d Cir. 1993) (concluding that the *qui tam* provisions do not conflict with Article III).

In *Riley*, the U.S. District Court for Southern Texas found that a *qui tam* informer lacks standing under Article III. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261, 1268–69 (S.D. Tex. 1997) (mem.), *rev'd*, 196 F.3d at 531, *reh'g en banc granted*, 196 F.3d at 561. On appeal, however, a majority of the Fifth Circuit panel concluded that *Foulds* had conclusively rejected the Article III challenge to the statute. *See Riley*, 196 F.3d at 523 (upholding the plaintiff's standing in bringing a *qui tam* claim). A different majority affirmed the district court's holding on the alternative ground that the statute violated separation-of-powers principles. *See id.* at 531.

22. *See Harvey Berkman, A Federalism Question Percolates: May Whistleblowers Sue States?*, NAT'L L.J., May 17, 1999, at A9. The Eleventh Amendment does not bar the United States from bringing an action against a state. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 138–41 (1965). Three circuits have concluded that a *qui tam* action under the FCA qualifies as a suit by the United States and, therefore, that the Eleventh Amendment does not forbid the litigation. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 201–03 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999); *United States ex rel. Zissler v. Regents*, 154 F.2d 870, 872–73 (8th Cir. 1998); *United States ex rel. Rodgers v. Arkansas*, 154 F.2d 865, 868 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *Berge*, 104 F.3d at 1458–59; *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48–50 (4th Cir. 1992). The Fifth Circuit has disagreed, however, holding that the Eleventh Amendment precludes a *qui tam* action against an unconsenting state defendant. *See Foulds*, 171 F.3d at 294. The D.C. Circuit has avoided the Eleventh Amendment issue by construing the FCA as inapplicable to the states. *See United States ex rel. Long v. SCS Bus. & Technical Inst.*, 173 F.3d 870, 886 (D.C. Cir. 1999) (explaining that even though the Eleventh Amendment issue was in some respects jurisdictional, the court could reach the statutory question before the Eleventh Amendment question if requested to do so by a state), *supplemented by* 173 F.3d 890 (D.C. Cir. 1999).

23. 119 S. Ct. 2391 (1999).

24. On June 23, 1999, the Court released three significant opinions restricting Congress's power to authorize lawsuits against the states by private parties. *See Alden v. Maine*, 119 S. Ct. 2240, 2254–66 (1999) (holding that constitutional structure implicitly

Agency, the Supreme Court requested additional briefing on the issue of Article III standing.<sup>25</sup> The FCA *qui tam* provisions thus appear poised to contribute to the developing body of case law defining the contours of the Eleventh Amendment<sup>26</sup> and to generate a significant

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allows states to invoke sovereign immunity against federal claims in state court, even though the Eleventh Amendment only applies in federal court); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226–31 (1999) (holding that a state does not constructively waive its Eleventh Amendment immunity by engaging in commercial activities regulated by the Lanham Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2205–11 (1999) (holding that a federal statute authorizing patent infringement suits against states could not be justified as an exercise of congressional power under Section 5 of the Fourteenth Amendment and, therefore, did not abrogate the states' Eleventh Amendment immunity). The next day, the Court granted certiorari in *Vermont Agency*, which raises two issues: (1) the statutory question of whether the FCA applies to states; and (2) the constitutional issue of whether the Eleventh Amendment bars a *qui tam* action. 162 F.3d at 201–08.

25. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 120 S. Ct. 523, 523 (1999) (mem.) (requesting briefs on the question: “Does a private citizen have standing under Article III to litigate claims of fraud upon the government?”); Charles Tiefer, *Surprise Order in Qui Tam Case May Foretell a Scalia Surprise*, LEGAL TIMES (Wash., D.C.), Nov. 29, 1999, at 52.

26. The following language from *Alden v. Maine* may telegraph the Court's intentions regarding the Eleventh Amendment issue in *Vermont Agency*:

In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government. A suit which is commenced and prosecuted against a State in the name of the United States by [the Executive Branch entrusted with a constitutional duty to faithfully execute the laws] . . . differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

*Alden*, 119 S. Ct. at 2267 (citations omitted). By emphasizing the constitutional and political accountability of executive branch officials and distinguishing “a broad delegation to private persons to sue nonconsenting States,” the Court may be suggesting that a state's implicit consent to suits by the federal government would not extend to a *qui tam* action prosecuted by a private informer in the name of the United States. *Id.* *Qui tam* informers are neither chosen by nor subject to the direction of the President, who bears the constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. Moreover, if an informer pursues an action against a state without the Justice Department's approval, no federal official takes “political responsibility for each suit prosecuted against a State.” *Alden*, 119 S. Ct. at 2267; see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) (holding that consent to suit “by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select” and expressing doubt that the federal government could delegate to an Indian tribe its exemption from state sovereign immunity). Barring *qui tam* actions against the states would be consistent with the expansive view of state sovereign immunity exhibited in recent cases. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267–88 (1997); *Seminole Tribe v. Florida*, 517 U.S.

opinion on Article III "case or controversy" requirements.

This Article approaches the FCA *qui tam* provisions from the perspective of English legal history—a perspective that Congress arguably should have explored in considering the 1986 legislation. The analysis begins with the observation that *qui tam* enforcement did not originate in our legal system, but is rather a "transplant"<sup>27</sup> from England. In considering the wisdom of *qui tam* enforcement, then, it would seem prudent to investigate how such statutes operated in the English legal system from which they are borrowed. In particular, one might expect Congress to study the decision of England's Parliament in 1951 to abandon *qui tam* legislation in favor of public enforcement of penal statutes.<sup>28</sup> After all, one surely should be cautious when "transplanting" a species that has been deliberately eradicated from its native soil.

This Article examines the English experience with *qui tam* statutes, including Parliament's ultimate repudiation of such legislation, in an effort to derive lessons for *qui tam* enforcement under the FCA. Part I draws upon Blackstone's *Commentaries* to describe the distinctive features of *qui tam* legislation. Part II summarizes the relevant history of the FCA *qui tam* provisions, focusing in particular on the reasons for the 1986 congressional decision to encourage *qui tam* enforcement of the statute.

Part III considers the English history of *qui tam* enforcement. The investigation shows that, for centuries, *qui tam* legislation produced significant and recurring problems in England, such as widespread extortion of secret settlements and fraudulent or malicious prosecution of innocent defendants.<sup>29</sup> As a result, common informers became one of the most vilified groups in England and were repeated targets of mob violence.<sup>30</sup> With the development of alternative means of statutory enforcement, Parliament moved away

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44, 54–73 (1996).

27. Alan Watson uses the term "transplant" to describe the ubiquitous habit of borrowing legal rules and practices from other countries. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 19 (University of Ga. Press 1993) (1974).

28. See Common Informers Act, 14 & 15 Geo. 6, ch. 39 (1951) (Eng.).

29. See *infra* notes 213–47, 322–28, 373–74 and accompanying text.

30. See *infra* notes 196–206, 320 and accompanying text. Charles Dickens captured the popular antipathy toward informers in *The Pickwick Papers*. CHARLES DICKENS, *THE PICKWICK PAPERS* (Signet Classic 1964) (1837). In that story, Pickwick and his traveling companions are mistaken for informers and are physically assaulted by their cab driver, only narrowly escaping further indignities at the hands of a mob. See *id.* at 30–31 ("[T]here is no saying what acts of personal aggression [the crowd] might have committed had not the affray been unexpectedly terminated . . .").

from *qui tam* legislation in the nineteenth century, finally opting in 1951 to abolish all remaining English *qui tam* statutes.<sup>31</sup>

Part IV argues that the difficulties plaguing *qui tam* enforcement in England and analogous problems observed under the FCA arise from a conflict of interest inherent in the structure of a *qui tam* statute. The informer sues on behalf of the public and theoretically represents the public interest. The statute, however, offers the informer a personal financial stake in the outcome of the litigation. When these personal and public interests collide, informers tend to pursue pecuniary gain at the expense of the common good.<sup>32</sup> The consequence of the informer's bounty is to eliminate the exercise of disinterested prosecutorial discretion—an important protection for both the public and the individual—and to transform law enforcement into a business pursued for the private enrichment of profit-motivated bounty hunters.<sup>33</sup>

Part V advocates a modification to the FCA that would preserve certain benefits of *qui tam* enforcement and ameliorate the informer's conflict of interest. An informer still would be permitted to file a fraud action on behalf of the government and receive a bounty if the suit resulted in a recovery. As under current law, the Department of Justice would have the option of intervening and pursuing the action filed by the informer. If the Justice Department chose not to intervene, however, the FCA claims would be dismissed. This statutory reform would preserve the primary advantage of *qui tam* enforcement in this context—providing a financial incentive for the disclosure of fraudulent conduct—and would create a record to aid in congressional oversight of Justice Department refusals to prosecute. At the same time, many of the consequences of the informer's conflict of interest would be mitigated, and a disinterested exercise of prosecutorial discretion would be incorporated into the FCA enforcement process.

## I. BLACKSTONE'S *COMMENTARIES* AND THE NATURE OF *QUI TAM* LEGISLATION

Sir William Blackstone's *Commentaries on the Laws of England* provide a convenient starting point for our inquiry into *qui tam* legislation.<sup>34</sup> By the time Blackstone's *Commentaries* were published,

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31. See *infra* notes 329–78 and accompanying text.

32. See *infra* notes 411–509 and accompanying text.

33. See *infra* notes 387–94, 429–88 and accompanying text.

34. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*; see also

*qui tam* enforcement had been in common use for centuries.<sup>35</sup> The *Commentaries* therefore offer a mature explication of the nature of *qui tam* enforcement in England in the period preceding the American Revolution.

Surprisingly, Blackstone addressed *qui tam* actions in the course of discussing the law of contracts. To a modern reader, the discussion may seem out of place. After all, *qui tam* actions enforce legislative mandates, the antithesis of contractual obligations assumed by consensual agreement. In Blackstone's view, however, these seeming opposites converged. It was from the fundamental *social contract*, he argued, that the obligation to obey a penal statute derived.<sup>36</sup> The person who violated a penal statute was "bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires."<sup>37</sup>

Blackstone identified three categories of litigants who might bring an action under the terms of a particular English penal statute. In one group were those aggrieved by the defendant's statutory violation—the victims of the misconduct. It was not uncommon for English statutes to give a cause of action to persons injured by the defendant,<sup>38</sup> a method of enforcement still prevalent today. Blackstone also identified the King as a potential litigant under a penal statute, presumably meaning that public officials could pursue a recovery on the King's behalf.<sup>39</sup> This category of litigant also mirrors modern practice, which frequently permits government officials to enforce statutory requirements.

The focus of this Article is the remaining category of litigants mentioned by Blackstone, which is less familiar to modern law.

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WILLIAM S. HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 22 (Archon Books 1966) (1928) (calling Blackstone's *Commentaries* "the best history of English law as a whole which had yet appeared").

35. The *Commentaries* were published between 1765 and 1769. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1395 (1997); Robert J. Cottrol, *Structure, Participation, Citizenship, and Right: Lessons from Akhil Amar's Second and Fourteenth Amendments*, 87 GEO. L.J. 2307, 2313 n.29 (1999) (book review). *Qui tam* statutes came into common use during the fourteenth and fifteenth centuries. See *infra* notes 129–70 and accompanying text.

36. See 3 BLACKSTONE, *supra* note 34, at \*161.

37. *Id.*

38. See *id.* at \*161; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 85–86 (1972) (noting that some English statutes permitted suit by an aggrieved party).

39. See 3 BLACKSTONE, *supra* note 34, at \*162; see also 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 4–13 (1938) (discussing officials who represented the King in various courts).

Under many English penal statutes, a claim could be prosecuted by “any of the king’s subjects” who would bring the action.<sup>40</sup> Statutes frequently permitted a person to sue for a penalty even if the person had not been injured by the conduct giving rise to the forfeiture. Blackstone explained this type of statute as follows:

[M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person “*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*”<sup>41</sup>

Translating the Latin, an informer in a *qui tam* action is one “ [w]ho sues on behalf of the King as well as for himself.”<sup>42</sup>

At least two important implications flow from the proposition that the *qui tam* informer sues “on behalf of the King.” First, the informer serves as the advocate for public interests that would otherwise be advanced by public officials. If the informer succeeds in a *qui tam* action, a portion of the recovery usually goes to the public treasury or to the fulfillment of some public purpose.<sup>43</sup> Second, by pursuing a *qui tam* action, the informer forecloses a subsequent action by government prosecutors alleging the same statutory violation. Except in cases of collusion, “the verdict passed upon the defendant in the [*qui tam*] suit is a bar to all others, and conclusive even to the king himself.”<sup>44</sup> Thus, the *qui tam* informer stands in the shoes of a government attorney. The informer is a self-appointed prosecutor, statutorily empowered to enforce the social contract in place of public officials.

Blackstone revisited *qui tam* actions in the context of criminal proceedings. A criminal prosecution could be commenced by “information,” a procedure available to both the King and a *qui tam* informer.<sup>45</sup> Thus, a *qui tam* action could be either civil or criminal,

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40. 3 BLACKSTONE, *supra* note 34, at \*161; *see, e.g.*, Statute of York, 12 Edw. 2, ch. 6 (1318) (Eng.) (permitting action for forfeiture by “he that will sue for it”).

41. 3 BLACKSTONE, *supra* note 34, at \*161.

42. BLACK’S LAW DICTIONARY 1251 (6th ed. 1990) (internal quotation marks omitted).

43. *See* 3 BLACKSTONE, *supra* note 34, at \*161–62.

44. *Id.* at \*162.

45. Blackstone discussed criminal *qui tam* actions in the following passage:

often at the informer's election.<sup>46</sup> English penal statutes typically offered the informer a variety of procedural means for collecting a statutory forfeiture, including a criminal information or an "action of debt"—a form of action often used in civil contract cases.<sup>47</sup>

Blackstone's discussion suggests the following criteria by which to identify a *qui tam* statute:

(1) The statute defines an offense against the sovereign or proscribes conduct contrary to the interests of the public;<sup>48</sup>

(2) A penalty or forfeiture is imposed for violation of the statute;<sup>49</sup>

(3) The statute permits a civil or criminal enforcement action pursued by a private party;<sup>50</sup>

(4) The private informer need not be aggrieved and may initiate

Informations are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam* actions, (the nature of which was explained in a former book) . . . only carried on by a criminal instead of a civil process . . .

4 BLACKSTONE, *supra* note 34, at \*308.

46. See Note, *supra* note 38, at 88–89 (discussing the fact that an informer could bring a criminal information or, alternatively, could choose a civil action).

47. See, e.g., 29 Geo. 2, ch. 23, § 12 (1756) (Eng.) (providing that an informer could sue for a penalty in a manner authorized under any law of excise or "by action of debt, bill, plaint or information"); 28 Hen. 8, ch. 5 (1536) (Eng.) (stating that an informer may seek recovery "by action of debt, information or otherwise"). Likewise, early *qui tam* statutes in the United States typically permitted the informer to elect between civil and criminal proceedings. See *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341–42 (1805) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information . . .").

48. See 3 BLACKSTONE, *supra* note 34, at \*161–62 (noting that an action could be brought by the King or by an informer on behalf of the King). The proscribed conduct may or may not have had an adverse impact on private interests of particular citizens.

49. See *id.* (discussing forfeiture). Typically, the penalty consisted of a monetary fine. However, in some *qui tam* statutes, the defendant forfeited specified property, such as goods offered for sale in violation of statutory requirements. See, e.g., Statute of York, 12 Edw. 2, ch. 6 (1318) (Eng.) (providing for forfeiture of wine or "victuals" illegally sold by certain local officials).

50. See 3 BLACKSTONE, *supra* note 34, at \*161–62 (discussing popular actions); 4 *id.* at \*305 (discussing *qui tam* actions pursued through criminal rather than civil processes). This authorization of private citizen enforcement distinguishes *qui tam* statutes from the vast majority of modern criminal legislation. Few American jurisdictions continue to allow a private citizen to bring a criminal prosecution without the consent of a public prosecutor. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529 (1994) (noting that "Alabama, Montana, and Ohio allow private prosecutors to participate without the consent or supervision of the district attorney").

the action in the absence of any distinct, personal injury arising from the challenged conduct;<sup>51</sup>

(5) A successful informer is entitled to a private benefit consisting of part or all of the penalty exacted from the defendant;<sup>52</sup> and

(6) The outcome of the private informer's enforcement action is binding on the government.<sup>53</sup>

While many types of legislation exhibit some of these characteristics, the combination of all these features serves to distinguish a *qui tam* statute from other models of statutory enforcement.

## II. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT

*Qui tam* enforcement has never been as widespread in this country as it once was in England. Early American Congresses continued the English practice by enacting a few *qui tam* statutes.<sup>54</sup>

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51. See 3 BLACKSTONE, *supra* note 34, at \*161 (noting that forfeiture action is given "to any such person or persons as will sue for the same," or, in other words, "given to the people in general"). Of course, the informer may be presumed to share in whatever injury has been inflicted on the public at large. In this country's federal courts, however, outside the context of *qui tam* statutes Article III generally is held to require a "particularized" injury to the plaintiff, distinct from any injury suffered by the public as a whole. See *supra* note 15 (discussing standing requirements). Nevertheless, all of the appellate courts that have addressed the issue have concluded that a *qui tam* statute satisfies the requirements of Article III despite the informer's lack of any particularized injury. See *supra* note 21 and cases cited therein. This feature distinguishes a *qui tam* statute from a private-attorney-general or citizen-suit provision. A citizen-suit provision cannot confer standing unless the private litigant herself satisfies Article III standing requirements. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (involving a case in which the government presumably would have had standing to sue for civil penalties, but a private environmental organization suing under a citizen-suit provision was held to lack standing to pursue the penalties because it did not satisfy the redressability requirement of Article III).

52. See 3 BLACKSTONE, *supra* note 34, at \*161-62 (discussing an informer's entitlement to a share of any forfeiture). Certain statutes provide for the successful private prosecutor to keep the entire statutory penalty. See, e.g., 1 Geo. 2, ch. 13, §§ 8, 17 (1714) (Eng.). Such statutes clearly provide for "popular actions" as explained by Blackstone, but arguably do not satisfy his technical definition of a *qui tam* action because the plaintiff does not share the recovery with the sovereign or anyone else. See 3 BLACKSTONE, *supra* note 34, at \*161. These statutes nevertheless raise many of the same issues as statutes that provide for division of the forfeiture and, therefore, will be treated as *qui tam* statutes in this Article.

53. See 3 BLACKSTONE, *supra* note 34, at \*162 (noting that the result in a *qui tam* suit "is a bar to all others, and [is] conclusive even to the king himself").

54. The first federal *qui tam* provision appeared in a statute providing for collection of duties. See Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (repealed 1790). Informers could sue for a penalty if government officials failed to publish "a fair table of the rates of fees, and duties demandable by law." *Id.* at 45; see also Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (repealed 1799) (enacting a later statute on the same subject). Another



Most of these passed out of existence long ago, and only a smattering of *qui tam* provisions still linger in the United States Code. For instance, an informer may sue to enforce penalties imposed by Title 25, concerning relations with Indians and Indian tribes.<sup>55</sup> A *qui*

early federal *qui tam* provision, also directed at public officials, punished fraud or neglect of duty by marshals participating in the first census. See Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (obsolete); Act of July 5, 1790, ch. 25, 1 Stat. 129 (obsolete).

As under English law, most early congressional *qui tam* statutes regulated economic affairs. See, e.g., Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (governing registration of ships); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 131, 133 (imposing penalties for employing a seaman without a written contract and for harboring a seaman who should be on board ship); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (concerning unlicensed trade with Indians); Act of Feb. 25, 1791, ch. 10, §§ 8-9, 1 Stat. 191, 195-96 (expired) (prohibiting the Bank of the United States from trading in "goods, wares, merchandise, or commodities" and restricting loans to foreign and domestic governments); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (enforcing duties on "distilled spirits"); Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (governing trade with Indian tribes).

Perhaps the most interesting *qui tam* statute of the nation's infancy was a 1794 enactment directed at slave trade with foreign nations. See Act of Mar. 22, 1794, ch. 11, 1 Stat. 347. The Act made it illegal for any person to prepare a ship in the United States or to sail from any U.S. port for the purpose of carrying on "trade or traffic in slaves" with a foreign country or for carrying persons between foreign countries to be sold as slaves. *Id.* § 1, 1 Stat. at 349. Any person violating these prohibitions was subject to a forfeiture of \$2000, half payable to any informer who would sue for it. See *id.* § 2, 1 Stat. at 349. Another provision imposed a forfeiture of \$200 for each person transported for the purpose of selling the person as a slave. See *id.* § 4, 1 Stat. at 349. This statute was the subject of a Supreme Court decision in which Chief Justice Marshall held that a *qui tam* action was barred by the statute of limitations. See *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341-42 (1805) (holding that because *qui tam* forfeiture could be recovered by either civil action of debt or criminal information, the statute of limitations applicable to criminal informations applied to a *qui tam* suit pursued as an action of debt).

Another *qui tam* statute that deserves special mention prohibited certain forms of theft or embezzlement "within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas." Act of April 30, 1790, ch. 36, § 16, 1 Stat. 112, 116. A person convicted under the statute was to be fined and "publicly whipped, not exceeding thirty-nine stripes." *Id.*

For further discussion of the history of *qui tam* enforcement in this country, see Caminker, *supra* note 18, at 341-42 & n.3; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296-303 (1989); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 174-75 (1992); Robert W. Fischer, Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. REV. 778, 778-79 (1973); Note, *supra* note 38, at 91-101; Dan D. Pitzer, Comment, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 424-36 (1972).

55. See 25 U.S.C. § 201 (1994). Title 25 also contains a *qui tam* provision covering certain contracts with Indians and Indian tribes. See *id.* § 81. A panel of the Eighth Circuit rejected a *qui tam* case under § 81 on the ground that the plaintiff lacked standing. See *Schmit v. International Fin. Management Co.*, 980 F.2d 498, 498 (8th Cir. 1992) (*per curiam*). Because it is unlikely that the court intended in a three paragraph *per curiam* opinion to declare the highly debatable proposition that *qui tam* informers must comply

*tam* action also may be filed when a person falsely marks an item to suggest patent protection or to imply consent of a patentee.<sup>56</sup> Likewise, a *qui tam* action will lie against someone who takes property from a shipwreck off the Florida coast and transports it to a foreign port.<sup>57</sup> Despite the availability of *qui tam* actions under these statutory provisions, only the False Claims Act has generated a large number of federal *qui tam* cases.<sup>58</sup>

#### A. *Enactment of the False Claims Act*

Congress enacted the FCA in 1863, midway through the Civil War, in response to frauds perpetrated in connection with Union military procurement.<sup>59</sup> The War and Treasury Departments had urgently requested legislation to facilitate prevention and punishment of procurement fraud.<sup>60</sup> According to Senator Howard, the chief spokesman for the legislation in the Senate, the country had been “full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war.”<sup>61</sup> The Army had received small arms that inspection revealed to be useless and artillery shells filled with sawdust rather than explosives.<sup>62</sup>

The original FCA prohibited various acts designed to fraudulently obtain money from the government. Among other penalties, the legislation imposed a forfeiture of \$2000 for each

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with normal rules of Article III standing, the more likely explanation for the decision is that the court simply did not realize it was dealing with a *qui tam* statute. A district court subsequently compounded the Eighth Circuit’s error, however, extending the reasoning of *Schmit* to actions under § 201, as well as those under § 81. See *In re United States ex rel. Hall*, 825 F. Supp. 1422, 1425–27 (D. Minn. 1993), *aff’d on other grounds*, 27 F.3d 572 (8th Cir. 1994). But see *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (identifying 25 U.S.C. § 201 as a statute permitting suit by common informer with no interest in the controversy except that given by statute).

56. See 35 U.S.C. § 292 (1994).

57. See 46 U.S.C. app. § 723 (1994). Another statute may provide for *qui tam* forfeiture of a vessel fitted out to conduct hostilities against a nation friendly to the United States. See 18 U.S.C. § 962 (1994) (providing that any such vessel and related property “shall be forfeited, one half to the use of the informer and the other half to the use of the United States”).

58. See *supra* note 10 and accompanying text.

59. See Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696, 696–99 (1863) (current version at 31 U.S.C. §§ 3729–3733 (1994)).

60. See CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863).

61. *Id.* at 952 (statement of Sen. Howard). For example, one court noted that “[o]ne enterpriser bought defective rifles from the government for \$17,486 and immediately resold them to a different quartermaster for \$109,912.” *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 236 n.14 (3d Cir. 1942) (citing MATTHEW JOSEPHSON, THE ROBBER BARONS 61 (1934)), *rev’d*, 317 U.S. 537 (1943).

62. See CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Sen. Howard).

violation plus double the government's actual damages.<sup>63</sup> Individuals could pursue this remedy through a *qui tam* action, and the informer was entitled to half the total recovery. The provision for *qui tam* enforcement was designed to encourage participants in fraudulent schemes to bring the wrongdoing to light.<sup>64</sup> Of course, one did not need to participate in a violation of the Act to sue as an informer.<sup>65</sup>

### B. World War II and the Near Abolition of the FCA Qui Tam Provisions

The False Claims Act's *qui tam* provisions remained in force until World War II, when abuses by informers led to their restriction and near-repeal. *United States ex rel. Marcus v. Hess*<sup>66</sup> triggered the statutory retrenchment. The defendants in that case were contractors who were indicted and pleaded *nolo contendere* to a bid-rigging conspiracy.<sup>67</sup> Realizing that the government had already made a case for him, a quick-thinking *qui tam* informer purportedly copied the allegations of the government's indictment into an FCA complaint and ultimately obtained a judgment for \$315,000.<sup>68</sup>

On appeal, the Third Circuit concluded that because the United States was not a party to the public works contracts in question, the defendants had not submitted any claim " 'against the United States Government[] or a department or officer thereof,' " as required by the FCA.<sup>69</sup> The court observed that "[*q*]ui tam actions have always

63. See Act of Mar. 2, 1863, § 3, 12 Stat. at 698 (current version at 31 U.S.C. § 3729(a) (1994)).

64. Senator Howard explained the purpose of the *qui tam* provision as follows: The effect of [the *qui tam* provision] is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. . . . In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863) (statement of Sen. Howard).

65. Senator Howard even anticipated that a federal district attorney might be an informer "and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages." *Id.*

66. 317 U.S. 537 (1943).

67. See *id.* at 539 & n.1, 545. The public works projects at issue in the case were managed by local officials, but funded by the federal Public Works Administration. See *id.* at 539.

68. See *id.* at 540, 545.

69. *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 237 (3d Cir. 1942) (quoting 18 U.S.C.A. § 80 (current version at 18 U.S.C. § 287 (1994))) (omission in original), *rev'd*, 317 U.S. 537 (1943).

been regarded with disfavor.”<sup>70</sup> Accordingly, the court suggested that a statute providing for *qui tam* enforcement be strictly construed, requiring the informer to satisfy the precise statutory requirements.<sup>71</sup>

The Supreme Court reversed the Third Circuit decision, concluding that courts should not construe substantive provisions of a statute narrowly simply because they disapprove of one of the statutory enforcement mechanisms.<sup>72</sup> The Supreme Court’s decision in *Hess* rested on deference to congressional authority, and its endorsement of *qui tam* enforcement was tepid at best.<sup>73</sup> The Court noted that Congress had the power to choose *qui tam* litigation as a means of preventing fraud upon the government;<sup>74</sup> thus, the Court reasoned that “to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours.”<sup>75</sup> The Court summarily rejected the government’s policy arguments against *qui tam* enforcement with the observation that they were “addressed to the wrong forum.”<sup>76</sup>

The Justice Department had anticipated the Supreme Court’s

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70. *Id.* at 235.

71. *See id.* Later the same year, Judge Learned Hand presided over a Second Circuit panel that narrowly construed the FCA on grounds similar to those offered by the Third Circuit in *Hess*. According to the Second Circuit, the FCA “is not only penal, but drastically penal. . . . Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy.” *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (*per curiam*) (citations omitted).

72. *See Hess*, 317 U.S. at 540–41.

73. The Court pointed out, however, that *qui tam* statutes “have been frequently permitted by legislative action,” and the Court noted that such statutes “have not been without defense by the courts.” *Id.* In support of the former point, the Court cited its decision in *Marvin v. Trout*, 199 U.S. 212, 225 (1905), which recognized the long history of *qui tam* enforcement in England and the early adoption of *qui tam* legislation in this country. *See Hess*, 317 U.S. at 541 n.4. With respect to the latter observation, the Supreme Court noted an FCA case wherein a court opined that *qui tam* enforcement provided an effective means of deterring frauds upon the Treasury. *See id.* at 541 n.5 (citing *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)). At the same time, however, the Supreme Court recognized judicial support for the more disparaging view of *qui tam* legislation reflected in the Third Circuit’s *Hess* opinion. *See id.* (citing *Taft v. Stephens Lith. & Eng. Co.*, 38 F. 28 (C.C.E.D. Mo. 1889)).

74. *See Hess*, 317 U.S. at 542.

75. *Id.*

76. *Id.* at 547. The government argued that

effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government’s investigations; and finally that conditions have changed since the Act was passed in 1863.

*Id.* at 546–47.

advice to address its concerns to federal legislators. Following the Third Circuit decision in *Hess*, Attorney General Francis Biddle sent a letter to Congress complaining that informers in recent FCA cases had not provided new information to the government. Instead, *qui tam* suits had become “ ‘mere parasitical actions, occasionally brought only after law-enforcement officers [had] investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.’ ”<sup>77</sup> In response to the Attorney General’s letter, both Houses of Congress voted to repeal the FCA *qui tam* provisions. The repeal bills, however, passed during different congressional sessions. The Senate voted to repeal the *qui tam* provisions at the end of the 77th Congress with only minimal discussion and without recorded opposition.<sup>78</sup> Early in the 78th Congress, the House of Representatives passed a materially identical bill in similar fashion.<sup>79</sup>

When the House bill from the 78th Congress reached the Senate Judiciary Committee, it ran into strong opposition from Senator William Langer of North Dakota.<sup>80</sup> In this more contentious environment, the Judiciary Committee stepped back from the outright elimination of *qui tam* suits endorsed the previous year and sought instead to restrict their usage.<sup>81</sup> In support of the proposed

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77. S. REP. NO. 77-1708, at 2 (1942) (Sup. Docs. No. Y 1.1/2:Serial 10659) (quoting an Aug. 28, 1942, letter from Attorney General Francis Biddle).

78. See S. 2754, 77th Cong., 88 CONG. REC. 9138 (1942) (passed by Senate).

79. See H.R. 1203, 78th Cong., 89 CONG. REC. 2800-01 (1943) (passed by House).

80. Senator Langer might be described as a colorful politician. When the first *qui tam* repeal bill was considered in 1942, Langer had only recently survived a drawn-out proceeding in which the Senate debated whether to allow him to take his seat. See *Powell v. McCormack*, 395 U.S. 486, 554-59 (1969) (Douglas, J., concurring). The chief concerns related to Langer’s removal from office as North Dakota governor by the state supreme court. See *id.* at 554 (Douglas, J., concurring). The removal litigation followed Langer’s indictment for “conspiring to interfere with the enforcement of federal law by illegally soliciting political contributions from federal employees.” *Id.* (Douglas, J., concurring). Langer did not take his removal from office lying down: “When it became clear that the court would order his ouster, he signed a Declaration of Independence, invoked martial law, and called out the National Guard. Nonetheless, when his own officers refused to recognize him as the legal head of state, he left office in July 1934.” *Id.* (Douglas, J., concurring). Langer was re-elected Governor in 1937 and then elected to the Senate in 1940, leading to the controversy over whether he should be seated. See *id.* at 554-55 (Douglas, J., concurring). Other allegations against Langer included misappropriation of public funds, interference with the judicial process through bribery and jury tampering, and professional misconduct as an attorney. See *id.* at 555 & nn. 16-18 (Douglas, J., concurring). A Senate committee, by a vote of 13 to 3, recommended that Langer not be seated, but the full Senate voted to seat Langer by a margin of 52 to 30. See *id.* at 555, 559 (Douglas, J., concurring).

81. Under the legislation proposed by the Senate Judiciary Committee, a *qui tam* plaintiff first would have to disclose his evidence to the Attorney General and request action by the Justice Department. Only if the Attorney General declined the suit or failed

reforms, a majority of the Committee emphasized that the government had been given adequate resources to enforce the law, so that *qui tam* enforcement authority was no longer needed.<sup>82</sup> Senator Langer's minority report, on the other hand, argued that the Justice Department had not been sufficiently aggressive in prosecuting war frauds.<sup>83</sup> Langer's vociferous opposition apparently deterred the majority from seeking wholesale eradication of the *qui tam* provisions.<sup>84</sup> With American troops in combat around the globe, it was not politically prudent to appear solicitous of the interests of defense contractors, some of whom, according to Langer, were "endanger[ing] the lives of our soldier boys."<sup>85</sup>

The debate on the Senate floor largely mirrored the positions taken in the Judiciary Committee. Chairman Van Nuys served as the principal spokesman for the bill, and his remarks foreshadowed themes that would be sounded in England eight years later in connection with Parliament's decision to abandon *qui tam* enforcement.<sup>86</sup> Van Nuys argued that the *qui tam* provisions originally served a useful purpose, but had become unnecessary given the resources of the Department of Justice and the Federal Bureau of

to act within six months could the informer file an action. See S. REP. NO. 78-291, pt. 1, at 2 (1943) (Sup. Docs. No. Y 1.1/2:Serial 10756).

82. According to the majority of the Senate Judiciary Committee:

[The *qui tam* mechanism of the FCA] was enacted during Civil War time, to meet a situation then existing, which does not now exist. At that time the office of the Attorney General was not staffed sufficiently to handle the many matters which arose and was not possessed of investigative facilities now at the disposal of that office. Now adequate facilities in respect to handling such matters exist and through the Federal Bureau of Investigation and many other investigative agencies of the Government, adequate investigations of frauds against the United States are being made.

*Id.*

83. According to Senator Langer:

The records show that in all the lawsuits brought against corporations their employees or officers and against other individuals who have cheated or defrauded the Government not a single individual has been sent to jail. This is so despite the fact that some persons have come in and pleaded guilty.

*Id.* pt. 2, at 1 (minority views).

84. See 89 CONG. REC. 7572 (1943) (statement of Sen. Van Nuys) (explaining the Committee's decision not to seek outright abolition of the *qui tam* provisions).

85. S. REP. NO. 78-291, pt. 2, at 1 (minority views) ("Some have endangered the lives of our soldier boys by the furnishing of materials such as wire not up to specifications, and . . . they have defrauded the Government in war contracts or W. P. A. contracts, and in every other way that human ingenuity could devise."). In scheduling floor debate, Senator Taft noted that the bill seemed "highly controversial" and that he had received many letters opposing it. 89 CONG. REC. 7347 (1943) (statement of Sen. Taft).

86. See *infra* notes 352-78 and accompanying text (discussing parliamentary debate over the Common Informers Act).

Investigation.<sup>87</sup> Moreover, the FCA had become a source of “racketeering” reminiscent of Al Capone in the days of Prohibition, as “racketeers and blackmailers” filed *qui tam* actions in order to negotiate nuisance settlements.<sup>88</sup> Senator Langer, on the other hand, argued that defense contractors made Al Capone look like “a gentleman, . . . a statesman, a scholar, and a patriot” because the contractors defrauded the government and endangered American troops.<sup>89</sup> Additionally, Senator Langer expressed skepticism about the Justice Department’s willingness to enforce the statute vigorously.<sup>90</sup> In any event, he argued, additional help enforcing the statute could not hurt.<sup>91</sup>

The final legislation enacted by Congress in 1943 reflected a compromise between the positions of those advocating abolition of the *qui tam* provisions and those arguing for their full retention.<sup>92</sup> The FCA ultimately retained the common informer, but in a considerably restricted role. The informer could file an FCA action, but had to provide the supporting evidence to the Justice Department, which had sixty days in which to intervene and take exclusive control of the suit.<sup>93</sup> Moreover, the legislation deprived the courts of jurisdiction over any *qui tam* action based upon information or evidence already possessed by the government at the time the suit was commenced.<sup>94</sup> Significantly, the informer was denied the assurance of a fixed minimum recovery.<sup>95</sup> If the government prosecuted the suit, the court could award the informer “fair and

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87. See 89 CONG. REC. 7571 (1943) (statement of Sen. Van Nuys).

88. *Id.* at 7571 (statement of Sen. Van Nuys), 7608 (statement of Sen. Van Nuys); see also *id.* at 7439 (statement of Sen. Van Nuys) (reporting that racketeers were “springing up like mushrooms all over the United States, . . . taking advantage of this antiquated statute”).

89. *Id.* at 7579 (statement of Sen. Langer).

90. See *id.* at 10,697 (statement of Sen. Langer) (“I ask any Senator to name one case from 1863 until 1942, in which the Attorney General of the United States tried to enforce the statute. From the day the statute went on the statute books to the present, the Attorneys General, whether Democrats or Republicans, fought it.”). For other expressions of skepticism about the Justice Department’s willingness to aggressively enforce the statute, see *id.* at 7575 (statement of Sen. Murray), and *id.* at 7614 (statement of Sen. Wheeler).

91. See *id.* at 7606 (statement of Sen. Langer).

92. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943) (codified as amended at 31 U.S.C. § 3730 (1994)).

93. See *id.* § 3491(C), 57 Stat. at 608 (codified as amended at 31 U.S.C. § 3730(b)). The informer could regain control of the action if the Justice Department failed to carry on the litigation with due diligence over a period of six months. See *id.*

94. See *id.*

95. See *id.* § 3491(E).

reasonable compensation” not to exceed 10% of the proceeds.<sup>96</sup> If the informer conducted the action, however, the legislation provided that the informer’s award could not exceed 25% of the recovery.<sup>97</sup>

### C. *The 1986 Revival of the FCA Qui Tam Provisions*

In the early 1980s, the Department of Defense experienced a series of scandals involving excessive prices paid for items procured from defense contractors. This was the era of the \$435 hammer, the \$640 toilet seat cover, and the \$7622 coffee maker.<sup>98</sup> Although these particular incidents may have had more to do with an inefficient procurement system than with fraud, high-profile exposés by the national media helped to generate pressure for Congress to amend the False Claims Act.<sup>99</sup>

Congress significantly altered the FCA in 1986.<sup>100</sup> Several of the changes applied to FCA actions generally, regardless of who sued for the government. The penalty was increased to a minimum of \$5000

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96. See *id.* § 3491(E)(1).

97. See *id.* § 3491(E)(2).

98. See, e.g., James Gerstenzang, *Admiral Removed over High-Priced Ashtrays*, L.A. TIMES, May 31, 1985, at 1, available in 1985 WL 2069170; *Weinberger Demands New Effort to Cut Costs*, N.Y. TIMES, July 28, 1983, at A17.

99. See *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong. 295 (1986) (Sup. Docs. No. Y 4.J89/1:99/48) [hereinafter *House Hearings*] (statement of Rep. Stark) (drawing a connection between Civil War frauds leading to the original enactment of the FCA and “absurd, sweetheart deals for coffeemakers, toilet seats, and other excessive costs” chronicled in the 1980s); *False Claims Reform Act: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong. 15 (1985) (Sup. Docs. No. Y 4.J89/2:s.hrg99-452) [hereinafter *Senate Hearings*] (statement of Sen. DeConcini) (“Over the past several years it seems like we have been treated to monthly scandals as we pick up the newspaper with our morning coffee.”); S. REP. NO. 99-345, at 13 (1986) (Sup. Docs. No. Y 1.1/2:Serial 13676), reprinted in 1986 U.S.C.C.A.N. 5266, 5278 (“Evidence of rampant fraud in Government programs since [1980] has renewed the effort to legislate a more effective statute.”); 132 CONG. REC. 10,862 (1986) (statement of Sen. McClure) (introducing into the congressional record, Paul Craig Roberts, Editorial, *Open-Ended Assault on Liberties*, WALL ST. J., Apr. 22, 1986, at A28, which described bills to amend the FCA as “legislative responses to sensational reports of defense contractors billing the Pentagon for \$600 toilet seats and \$100 screwdrivers”). The Justice Department had been criticized for alleged laxity in its handling of white-collar criminal prosecutions. In September 1985, Attorney General Edwin Meese III responded with a package of proposals intended to fight defense fraud, adding momentum to the drive for revision of the FCA. See Howard Kurtz, *Meese Unveils Plan to Fight Defense Fraud*, WASH. POST, Sept. 17, 1985, at A3.

100. See False Claims Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–3733 (1994)). The 1986 FCA amendments also prompted the enactment of parallel *qui tam* legislation at the state level. See, e.g., CAL. GOV’T CODE §§ 12650–12655 (West 1992 & Supp. 1998); FLA. STAT. ANN. §§ 68.081–092 (West Supp. 1997).



and a maximum of \$10,000 for each violation, plus treble the government's actual damages.<sup>101</sup> Congress also eliminated any requirement of specific intent to defraud the government, imposing liability based upon "reckless disregard of the truth or falsity" of information provided to the government by the defendant.<sup>102</sup>

Despite the Justice Department's reservations,<sup>103</sup> Congress also made several changes to the statute for the purpose of encouraging *qui tam* litigation. Under the amended statute, the informer is guaranteed costs, expenses, and attorneys' fees as well as 15% to 25% of the proceeds of the litigation when the Justice Department intervenes, and 25% to 30% if the Justice Department does not.<sup>104</sup> Even if the Justice Department does intervene, the informer can continue as a party.<sup>105</sup> The fact that the government already possessed the information underlying the *qui tam* suit is no longer a jurisdictional bar unless the information had been "public[ly] disclos[ed]" and the informer fails to prove that she was "an original source of the information."<sup>106</sup>

Supporters of the 1986 FCA amendments offered three primary justifications for increased reliance on *qui tam* enforcement: (1) the need to provide incentives for disclosure of fraudulent conduct; (2) the Justice Department's unwillingness to aggressively prosecute

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101. See 31 U.S.C. § 3729(a).

102. *Id.* § 3729(b).

103. The Justice Department took the position that changes to the *qui tam* provisions were unnecessary and that the proposed amendments could create problems in government prosecution of fraud cases. Nevertheless, because the Justice Department wanted other changes to the FCA, it did not object to the *qui tam* amendments in the context of the overall bill. See *House Hearings, supra* note 99, at 135-41 (statement of Richard K. Willard, Assistant Attorney General, Civil Division); *Senate Hearings, supra* note 99, at 26 (testimony of Jay Stephens, Deputy Associate Attorney General); S. REP. NO. 99-345, at 36, 1986 U.S.C.C.A.N. at 5301 (letter dated Dec. 11, 1985, from Phillip D. Brady, Acting Assistant Attorney General, to Sen. Thurmond, Chairman, Committee on the Judiciary).

104. See 31 U.S.C. § 3730(d)(1)-(2). The statute permits a lower award when the suit is based primarily on publicly disclosed information, when the informer plans and initiates the conduct giving rise to the claim, or when the informer is convicted of a criminal offense arising from her role in the violation. See *id.* § 3730(d)(1), (3).

105. See *id.* § 3730(c)(1).

106. *Id.* § 3730(e)(4). It is not entirely clear how Congress intended the changes in rules regarding the jurisdictional bar in § 3730(e)(4) to relate to § 3730(d)(1), which reduces the informer's award when the suit is based primarily on publicly disclosed information. The Tenth Circuit has reconciled these provisions by construing the jurisdictional bar of § 3730(e)(4) to apply when the government has not intervened in a *qui tam* action and the award modifier in § 3730(d)(1) to apply when the government does proceed with the action. See *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 553 n.3 (10th Cir. 1992).

fraud cases; and (3) the limited enforcement resources available to the federal government.<sup>107</sup> With respect to the first of these justifications, many legislators and other advocates of *qui tam* litigation viewed the informer's bounty as a means of encouraging whistleblowers.<sup>108</sup> Government investigators in some cases can uncover fraud by their own efforts, but in other circumstances, they need inside information to detect and punish fraudulent schemes. The difficulty in obtaining inside information is that a person who sees or participates in fraudulent activity may have little to gain, and much to lose, from exposing the illegal conduct.<sup>109</sup> Congress believed the large rewards made available to informers under the amended FCA would encourage those with knowledge of fraud to undertake the risks of disclosure.<sup>110</sup>

The remaining two justifications for encouraging *qui tam* enforcement flowed from Congress's perception that the Justice Department failed to adequately enforce the False Claims Act. Several participants in the legislative deliberations claimed that, even when presented with evidence of illegal conduct, the Justice Department did not aggressively investigate and prosecute those who

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107. See William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1821-25 (1996) (discussing the benefits of *qui tam* actions); *infra* notes 108-18 and accompanying text (discussing the justifications for *qui tam* actions).

108. See *House Hearings*, *supra* note 99, at 325 (testimony of Sen. Grassley) ("In short, S. 1562 would shift the incentives for individuals to come forward by allowing them more involvement in the litigation process as well as increased portions of damage awards."); *Senate Hearings*, *supra* note 99, at 29 (testimony of Jay Stephens, Deputy Associate Attorney General) (stating that through the incentive of personal recovery, *qui tam* enforcement encourages individuals with information to bring that information to the appropriate authorities, thereby assisting in the prosecution of fraud); *id.* at 102 (testimony of John Phillips, Co-Director, Center for Law in the Public Interest) ("What this law will do, is create inducements and encouragement to the very people seeing the fraud going on day in and day out in these defense establishments. It will help the Justice Department ferret out the information."); 132 CONG. REC. 22,339 (1986) (statement of Rep. Berman) ("These provisions improve the incentives for citizens with knowledge of fraudulent claims against the Federal Government to go public with the information, and afford such whistleblowers protection against retaliation by their employers.").

109. According to the Senate committee responsible for the FCA legislation, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. REP. NO. 99-345, at 4 (1986) (Sup. Docs. No. Y 1.1/2:Serial 13676), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

110. See H.R. REP. NO. 99-660, at 23 (1986) (Sup. Docs. No. Y 1.1/2:Serial 13702). The 1986 FCA amendments also sought to reduce the risks of disclosure by creating statutory protection against job-related retaliation for whistleblowing activities. See 31 U.S.C. § 3730(h).

were defrauding the public.<sup>111</sup> This alleged prosecutorial timidity was explained in two ways, one sinister and the other benign. The sinister explanation was that the Justice Department failed to act as a result of “political” considerations.<sup>112</sup> Indeed, some thought the Justice Department to be “on the side of the defense contractors.”<sup>113</sup> In this view, *qui tam* enforcement was justified as a corrective measure for the Justice Department’s unwillingness to enforce the law.<sup>114</sup>

The benign explanation for the Justice Department’s failure to prosecute more fraud claims was the need to ration enforcement resources. In the midst of the Gramm-Rudman budget pinch,<sup>115</sup> some supporters of the FCA amendments argued that the Justice

111. See, e.g., *House Hearings, supra* note 99, at 174 (statement of Rep. Berman) (noting that because of institutional and practical constraints, the Justice Department is unable to bring cases for every act of fraud and that “*qui tam* offers a real potential . . . to provide that prodding, that nudging, that will get the Justice Department into some of these areas”); *id.* at 177–79 (statement of Rep. Hertel) (citing recover per conviction statistics and noting “an apparent failure of legal deterrence”); *id.* at 296–98 (statement of Sens. Cohen, Roth, and Levin); *id.* at 326 (statement of Sen. Grassley) (stating that “[p]essimism about the likelihood of disclosures leading to results is not surprising” when one considers that more than 2000 fraud investigations were completed in 1984, “[y]et the Justice Department successfully prosecuted in that same year just 181 cases, including only one against one of the top 100 defense contractors”); *id.* at 325 (statement of Sen. Grassley); H.R. REP. NO. 99-660, at 22–23 (“[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action.”).

112. 132 CONG. REC. 22,340 (1986) (statement of Rep. Bedell) (“[I]n many cases, the authorities will not prosecute for political reasons. . . . [T]he Justice Department has neither the political will nor the resources to always enforce all of the laws.”).

113. *Senate Hearings, supra* note 99, at 27 (statement of Sen. Metzenbaum) (“[T]he American people have lost confidence in their Government’s willingness and ability to act effectively against defense contractors. Day after day, they read about cases that are washed under the rug, wiped out. . . . [T]hey believe the Government is not on their side . . .”).

114. See, e.g., *House Hearings, supra* note 99, at 179 (statement of Rep. Hertel) (“It could be a very effective anti-waste weapon allowing individuals to proceed where the government has not.”); *id.* at 330–31 (statement of Rep. Bedell) (“[W]e need some type of a guarantee, so that if there are problems and . . . the Justice Department refuses to do anything about them, there should be some opportunity for the people of our country to see that something is done. That is really the purpose of this legislation.”); *Senate Hearings, supra* note 99, at 112 (statement of Sen. Grassley) (“Private citizen involvement in uncovering fraud against Government would be a desirable discipline on the enforcement process.”).

115. See *House Hearings, supra* note 99, at 417 (testimony of John Phillips, Co-Director, Center for Law in the Public Interest) (noting that the Justice Department is “the first to say we need larger budgets, but [required budget cuts are] going to confront their staffs as well”); S. REP. NO. 99-345, at 7 (1986) (Sup. Docs. No. Y 1.1/2:Serial 13676), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272 (“[W]ith current budgetary constraints, it is unlikely that the Government’s corps of individuals assigned to anti-fraud enforcement will substantially increase.”).

Department simply did not have the means to investigate and prosecute many of the fraud allegations brought to its attention.<sup>116</sup> The Department necessarily allocated resources to high-priority cases and, therefore, could not pursue other claims involving problems of proof or fewer dollars.<sup>117</sup> Thus, the third justification for increasing *qui tam* enforcement was that private litigants and their attorneys would supplement government enforcement resources. Increased *qui tam* enforcement was touted as “an opportunity without adding one more person to the Federal payroll of enlisting support of thousands of people in ferreting out fraud against the Government.”<sup>118</sup>

In deciding to expand *qui tam* enforcement of the FCA, Congress’s debate over the 1986 amendments focused on the scandals of the moment without acknowledging the deeper concerns raised by *qui tam* statutes. Congress paid little or no attention to the English experience drawn from centuries of *qui tam* enforcement. Part III analyzes this English history and finds that there are significant concerns about *qui tam* enforcement that recur inevitably over time.

### III. THE ENGLISH EXPERIENCE WITH QUI TAM ENFORCEMENT

The English have an extensive history of *qui tam* enforcement spanning hundreds of years. Prior to the advent of modern law

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116. See *House Hearings*, *supra* note 99, at 95 (statement of Rep. Berman) (“Whether as a result of lack of resources, or worse, the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud.”); *id.* at 324–25 (statement of Sen. Grassley) (“[T]he Government needs help—lots of help—to adequately protect the Treasury against growing and increasingly sophisticated fraud.”); *id.* at 416–17 (testimony of John Phillips, Co-Director, Center for Law in the Public Interest) (noting the lack of government resources to investigate fraud); *Senate Hearings*, *supra* note 99, at 22 (statement of Sen. Grassley) (noting that although the government operates with enormous resources, private citizen involvement is necessary for proper enforcement of anti-fraud statutes); S. REP. NO. 99-345, at 7, 1986 U.S.C.C.A.N. at 5272 (“In addition to detection, investigative and litigative problems which permit fraud to go unaddressed, perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies.”).

117. See S. REP. NO. 99-345, at 7, 1986 U.S.C.C.A.N. at 5272 (“Taking into consideration the vast amounts of Federal dollars devoted to various complex and highly regulated assistance and procurement programs, Federal auditors, investigators, and attorneys are forced to make ‘screening’ decisions based on resource factors.”); see also *House Hearings*, *supra* note 99, at 157 (testimony of Richard K. Willard, Assistant Attorney General, Civil Division) (“We endeavor to target [our] resources as best we can on the cases that involve the largest amount of money . . . . As a result, there are some smaller cases that simply can’t be pursued profitably because if we go after the small cases it means leaving the bigger case unworked.”).

118. *House Hearings*, *supra* note 99, at 417 (testimony of John Phillips, Co-Director, Center for Law in the Public Interest); see also *id.* at 325 (statement of Sen. Grassley) (“The False Claims Act does not create any new Federal enforcement bureaucracy.”).

enforcement and the development of the regulatory state, England relied heavily upon *qui tam* informers to perform many tasks that today are the work of police officers, prosecutors, and administrative officials.<sup>119</sup> Nevertheless, Parliament abandoned *qui tam* enforcement midway through the twentieth century, and the legislative debates make clear that Parliament considered the abolition of *qui tam* legislation a positive legal reform.<sup>120</sup> While Congress in 1986 moved to supplement public enforcement with *qui tam* enforcement of the False Claims Act,<sup>121</sup> the movement in England was in precisely the opposite direction: toward purely public implementation of penal statutes.<sup>122</sup>

What did Parliament know that Congress did not? Consideration of the long English experience with *qui tam* legislation and the recurring problems that this form of law enforcement created is instructive in answering that question. This Part will review the history of *qui tam* litigation in England to show why Parliament came to consider elimination of *qui tam* enforcement—and its replacement with a regime of exclusively public enforcement—as an important and progressive modification of its legal system.

#### A. Roman and Anglo-Saxon Antecedents

English *qui tam* statutes had historical antecedents in Roman and Anglo-Saxon law. Roman criminal law relied on a system of prosecution by private citizens, known as *delatores*.<sup>123</sup> Beginning no later than the *Lex Pedia*, which retroactively made criminals of Caesar's assassins, it became common for Roman criminal statutes to offer a portion of the defendant's property as a reward for a successful prosecution.<sup>124</sup>

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119. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3(b), at 569 (1985); see also Pitzer, *supra* note 54, at 417 ("In England the *qui tam* doctrine was initially instituted as a legal adjunct to supplement England's insufficient legal machinery in order to bring more offenses to the cognizance of the courts.")

120. See *infra* notes 348–78 and accompanying text.

121. See *supra* notes 99–118 and accompanying text.

122. See *infra* notes 348–78 and accompanying text.

123. See O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 100 (1995).

124. See 10 THE CAMBRIDGE ANCIENT HISTORY 402 n.19 (2d ed. 1996). Such statutes qualify as *qui tam* legislation because they define an offense against the public and permit an uninjured private party to sue for a share of a statutory forfeiture. See *supra* notes 48–53 and accompanying text.

Pecuniary rewards were provided, for instance, under the laws prohibiting treason, see 10 THE CAMBRIDGE ANCIENT HISTORY, *supra*, at 212–13, and adultery, see *id.* at 891–92. Criminal prosecutions brought by private-citizen *delatores* exerted significant influence over Roman politics and often were initiated for political purposes. Cato, for

An example of private *qui tam* enforcement can also be found in Anglo-Saxon England.<sup>125</sup> In 695 A.D., Wihtred, King of Kent, issued a law prohibiting labor on the Sabbath, which included the following *qui tam* enforcement provision: “If a freeman works during the forbidden time [between sunset on Saturday evening and sunset on Sunday evening], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising from] the labour.”<sup>126</sup> This Anglo-Saxon provision foreshadowed subsequent developments in English law, as the backlash against obnoxious conduct of informers enforcing the Sunday closing laws 1250 years later helped generate the political consensus for England’s elimination of *qui tam* legislation.<sup>127</sup>

### B. *Qui Tam Statutes in Medieval England*

The English experiment with *qui tam* enforcement began in earnest 250 years after the Norman Conquest.<sup>128</sup> Legislation important to the national sovereign was not always a high priority to local officials; in fact, enforcement of national law was particularly difficult when such national legislation undermined local officials’ interests. Faced with limited public enforcement resources and the difficulty of implementing national policies over numerous, geographically separated, local jurisdictions, Parliament began during the fourteenth century to turn increasingly to *qui tam* enforcement as the most practical means to police compliance with regulatory requirements.

The 1318 Statute of York,<sup>129</sup> an early English *qui tam* provision,

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instance, was acquitted 44 times and also brought charges against his political opponents. See 8 THE CAMBRIDGE ANCIENT HISTORY 178–82, 453–54 (2d ed. 1989). *Delatores* appear in the historian Tacitus’s accounts “as an almost unmitigated pest.” ROBINSON, *supra* note 123, at 100; see, e.g., 2 TACITUS, THE HISTORIES bk. 4, § 44, at 85 (Clifford H. Moore trans., 1962) (“[T]he informers’ abilities, wrath, and power, which they used to evil ends, were what men feared.”). Dissatisfaction with the institution of financially interested private prosecutions apparently led to legal reform. By the time of Justinian’s *Digest*, persons could be barred from bringing criminal prosecutions “because of their unsavory method of making money, such as those who have lodged two actions against two accused.” DIG. 48.2.8 (Macer, De Publicis Judiciis 2).

125. See T.F.T. PLUCKNETT, EDWARD I AND CRIMINAL LAW 31–32 (1960). Professor Plucknett identified a *qui tam* enforcement provision adopted prior to the consolidation of authority in a single English monarch. See *id.*

126. THE LAWS OF THE EARLIEST ENGLISH KINGS 3, 27 (F.L. Attenborough ed. & trans., 1963). “Healsfang” was a fine paid to avoid punishment. 6 THE OXFORD ENGLISH DICTIONARY 1050 (2d ed. 1989) (defined under “halsfang”/“healsfang”).

127. See *infra* notes 345, 350–52, 375 and accompanying text.

128. See *infra* notes 129–69 and accompanying text.

129. 12 Edw. 2, ch. 6 (1318) (Eng.).

demonstrates the potential for conflict between national policies and local interests. The legislation related to the "assizes of wine and victuals," which required uniform prices for certain consumer goods, set by reference to established criteria.<sup>130</sup> Parliament was concerned that enthusiasm for enforcing the price restrictions could wane if local officials were themselves selling the regulated commodities. The Statute of York addressed this problem by providing that "no Officer in City or in Borough, that by Reason of his Office ought to keep Assises of Wines and Victuals" could sell the regulated items, "and if any do, and be thereof convict[ed], the Merchandize whereof he is convict[ed] shall be forfeit[ed] to the King."<sup>131</sup>

This prohibition on sale of regulated commodities by regulatory officials could have its intended effect only if the threat of forfeiture was supported by a realistic likelihood of enforcement. The King, of course, could not be in all places at all times. Nor did he have an extensive network of paid royal officials whose loyalty to the interests of the Crown could be assumed.<sup>132</sup> The question, therefore, was how to assure that city and borough officers would take seriously the threat of forfeiture posed by the statute. Parliament's solution was to permit *qui tam* enforcement of the penalty: "[T]he third Part [of the forfeited merchandise] shall be delivered to the Party that sued the Offender, as the King's Gift. And in such Case he that will sue [for a thing so forfeited,] shall be received."<sup>133</sup> While the King retained authority to "assign his Justices to execute" the statute "when and where it pleaseth him,"<sup>134</sup> the default method of enforcement was to induce the cooperation of local citizens to act as the King's agents.

Similar concerns about local underenforcement of national regulations explain a 1331 *qui tam* statute<sup>135</sup> that was intended to enforce a provision of the 1328 Statute of Northampton regulating the length of fairs.<sup>136</sup> An important avenue of commerce in fourteenth century England, a fair could be conducted only "in virtue of a royal grant, or by long and immemorial usage and prescription which presupposes such a grant."<sup>137</sup> The Statute of Northampton required a

130. See 1 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND* 293-94 (12th ed. 1959) (discussing assizes of bread and ale, under which prices were set by reference to prices of wheat, barley, and oats).

131. 12 Edw. 2, ch. 6.

132. See 4 HOLDSWORTH, *supra* note 39, at 355.

133. 12 Edw. 2, ch. 6 (footnote omitted).

134. *Id.*

135. See 5 Edw. 3, ch. 5 (1331) (Eng.).

136. 2 Edw. 3, ch. 15 (1328) (Eng.).

137. 1 LIPSON, *supra* note 130, at 226; see *id.* at 221 ("For many centuries [fairs and

lord to keep a fair open “for the Time that they ought to hold it, and no longer,” consistent with a royal charter or established usage.<sup>138</sup> A lord holding a fair open past the specified closing time risked a fine, and a merchant ignoring the deadline could be “grievously punished.”<sup>139</sup>

Of course, the economic incentive for merchants was to continue selling their wares as long as customers lingered. Likewise, the lord conducting the fair had little incentive to enforce the closing time, particularly if he collected tolls based on total sales.<sup>140</sup> Once again, the challenge was implementing royal policy, which here required strict adherence to the authorized closing time. In 1331, Parliament adopted a *qui tam* provision that put teeth into the Statute of Northampton, at least as it applied to merchants:

[I]f it be found, that any merchant from henceforth sell any Ware or Merchandize at the said fairs after the said time, such merchant shall forfeit to our Lord the King the double Value of that which [is sold;] and every man that will sue for our Lord the King, shall be received, and [also have] the Fourth Part of that which shall be lost at his Suit.<sup>141</sup>

By offering the statutory reward of a quarter of any recovery, Parliament deputized those on site at each fair to act as the King’s eyes and ears and to initiate enforcement actions against merchants who ignored the published deadline.<sup>142</sup> Thus, merchants faced a realistic economic threat if they failed to observe the statutory requirements. Any sale after the fair’s official close could become a net loss; indeed, the larger the sale, the more the merchant stood to

markets] were the chief centres of traffic and the main channels of commercial intercourse.”).

138. 2 Edw. 3, ch. 15.

139. *Id.* The statute indicates that at least some fairs were held “for yielding certain ferm for the same to the King.” *Id.* It appears, then, that the King received revenue in exchange for the privilege of conducting a fair he chartered.

140. See 1 LIPSON, *supra* note 130, at 246.

141. 5 Edw. 3, ch. 5 (1331) (Eng.) (alteration in original) (citations omitted). This *qui tam* statute was the most enduring of them all. It was adopted in 1331 and stayed on the books until Parliament abandoned *qui tam* enforcement in 1951.

142. This statute was discussed during the House of Commons debate over the Common Informers Act of 1951. The sponsor of the Common Informers Bill commented:

Thus it can be seen how, in those days, in the absence of police, civil servants or officials of local authorities, such as inspectors, and so on, of whom it cannot be said that there is any dearth today, it was not only useful but necessary to provide what we might call this amateur machinery, and also to rely upon incentives to a public conscience less developed than it is, in some respects, today.

483 PARL. DEB., H.C. (5th ser.) 2082 (1951) (statement of Mr. Heald).



forfeit, with the customer potentially acting as the informer.<sup>143</sup>

A much more ambitious regulatory undertaking is reflected in two Statutes of Labourers, enacted in 1349<sup>144</sup> and 1350.<sup>145</sup> The 1349 legislation was adopted to address economic effects of a labor shortage caused by the plague. Exhibiting the bias of the wealthy, Parliament saw rising wages as a sign of economic opportunism by the working classes<sup>146</sup> and enlisted common informers to police a system of wide-ranging wage and price controls.<sup>147</sup> Under these laws, if a worker requested or a master agreed to wages exceeding levels that prevailed three years before the statute's enactment, and no aggrieved party brought suit, an informer could commence an action and keep the entire penalty.<sup>148</sup> Likewise, a food merchant who charged unreasonable prices forfeited double the amount received to the aggrieved party or to anyone else who chose to pursue the issue.<sup>149</sup> These controls also allowed informers to seek forfeitures from a town mayor or bailiff who failed to enforce the price regulations issued by Parliament.<sup>150</sup>

Over the next 150 years, what began as a trickle of *qui tam* statutes gradually became a flood. The bulk of these enactments regulated economic activities in a wide array of industries.<sup>151</sup> One

143. Four years later, Parliament again turned to common informers to enforce economic regulations with the passage of the Statute of Money, which regulated counterfeiting and other currency offenses. The statute imposed forfeitures for prohibited exports of silver, for bringing "false Money or Counterfeit sterling" into the country, for using a form of currency known as "black money," and for melting down certain English coins. 9 Edw. 3, ch. 2-4 (1335) (Eng.). All of the forfeitures were enforceable by common informers, who were entitled to a quarter of whatever was recovered for the King. *Id.* ch. 5. "Black money" was a type of coin "issued as silver but containing a high alloy of base metal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 227 (3d ed. 1976). For a subsequent statute using *qui tam* provisions to enforce regulations relating to counterfeiting and unlawful use of coins by gold and silver workers, see 17 Edw. 4, ch. 1 (1477) (Eng.) (establishing the informer's share at one-third of any forfeiture).

144. Statute of Labourers, 23 Edw. 3 (1349) (Eng.).

145. Statute of Labourers, 25 Edw. 3 (1350) (Eng.).

146. See Statute of Labourers, 23 Edw. 3, pmbl. ("Because a great Part of the People, . . . died of the Pestilence, many seeing the Necessity of Masters, and great Scarcity of Servants, will not serve unless they may receive excessive Wages, and some [are] rather willing to beg in Idleness, than by Labour to get their Living . . .").

147. See *id.* ch. 3, 6. Besides the wage and price controls, the statute also required labor by able-bodied men and women and made it illegal to give anything to a beggar who could work. See *id.* ch. 1, 7.

148. See *id.* ch. 3.

149. See *id.* ch. 6.

150. See *id.* The 1350 Statute of Labourers sought to prevent disregard of the prior year's enactment, see 25 Edw. 3, pmbl., and again provided for *qui tam* suits to police excessive wages, see *id.* ch. 5.

151. Of particular interest is a 1455 statute addressing an oversupply of lawyers in the

finds *qui tam* provisions, for instance, in a 1381 statute regulating the price of wine,<sup>152</sup> a 1416 statute<sup>153</sup> prohibiting “patenmakers” from using the timber “aspe” in making “patens” or “clogs,”<sup>154</sup> and a 1423 statute providing for forfeiture of defectively tanned leather and prohibiting cordwainers from acting as tanners.<sup>155</sup> Numerous other *qui tam* statutes touched upon a wide variety of British commercial activities.<sup>156</sup>

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city of Norwich and the counties of Norfolk and Suffolk. *See* 34 Hen. 6, ch. 7 (1455) (Eng.). Previously only six to eight attorneys practiced in the King’s courts in the region, and, as a result, there had been “great tranquility.” *Id.* The number of attorneys had since grown to 80 or more, and most of the lawyers were undereducated in the law. *See id.* These underemployed and unqualified attorneys had taken to haunting public gathering places such as fairs and markets, “exhorting, procuring, moving and inciting the people to attempt untrue and foreign suits for small trespasses, little offences, and small sums of debt.” *Id.* As a result, there had been “many suits more of evil will and malice, than of truth of the thing, to the manifold vexations and no little damage of the inhabitants of the said city and counties.” *Id.* Consequently, the statute limited the number of “common attornies” in the region to 14 (six in each county and two in the city) to be selected and admitted by the justices of the King’s courts. *Id.* Any person who presumed to act as an attorney without proper admission was subject to a *qui tam* prosecution for a forfeiture of 20£. *See id.*

152. *See* 5 Rich. 2, ch. 4 (1381) (Eng.).

153. *See* 4 Hen. 5, ch. 3 (1416) (Eng.). The stated purpose of the statute was “so that the [arrow makers] through the realm shall sell their arrows at a more easy and reasonable price from henceforth than they were wont.” *Id.* The concern, apparently, was that pattenmakers would create too much demand for asp and drive up the price paid by arrow makers, then known as fletchers. A subsequent statute relaxed the regulation and permitted pattenmakers to use asp that could not be used for arrow shafts. *See* 4 Edw. 4, ch. 9 (1464) (Eng.).

154. “Clogs” and “pattens” are wooden-soled shoes. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 425, 1657 (3d ed. 1976).

155. *See* 2 Hen. 6, ch. 7 (1423) (Eng.).

156. *See, e.g.,* 22 Edw. 4, ch. 8 (1482) (Eng.) (channeling trade with Scotland through the towns of Berwick and Carlisle); 22 Edw. 4, ch. 5 (1482) (Eng.) (prohibiting the fulling of hats, caps, and bonnets in a “fulling mill”); 22 Edw. 4, ch. 4 (1482) (Eng.) (restricting the price of bows); 22 Edw. 4, ch. 3 (1482) (Eng.) (restricting silk imports for four years); 12 Edw. 4, ch. 7 (1472) (Eng.) (prohibiting mills, dams, and other structures that impeded navigation); 7 Edw. 4, ch. 3 (1467) (Eng.) (prohibiting the export of woolen yarn and cloth that had not been shrunk properly to make it thicker); 4 Edw. 4, ch. 4 (1464) (Eng.) (prohibiting any but cloth and yarn makers from purchasing unshorn wool from specified counties); 4 Edw. 4, ch. 3 (1464) (Eng.) (prohibiting certain wool shipments from Newcastle); 3 Edw. 4, ch. 4, §§ 4–5 (1463) (Eng.) (authorizing “masters and wardens . . . of every craft and mystery” to seize a merchant’s wares on the ground that they were “not pure, lawful, and able . . . and duly wrought and made, as they ought to be”); 3 Edw. 4, ch. 4, § 1 (1463) (Eng.) (permitting *qui tam* seizure of various imported wares, such as saddles, tennis balls, and playing cards); 3 Edw. 4, ch. 3 (1463) (Eng.) (restricting silk imports for a five-year period); 3 Edw. 4, ch. 2 (1463) (Eng.) (prohibiting grain imports if market prices became depressed); 3 Edw. 4, ch. 1 (1463) (Eng.) (restricting wool exports and prohibiting use of foreign vessels to transport merchandise if domestic ships were available); 34 Hen. 6, ch. 5 (1455) (Eng.) (restricting silk imports); 34 Hen. 6, ch. 4 (1455) (Eng.) (limiting beer and ale production); 28 Hen. 6, ch. 1 (1449) (Eng.) (permitting seizure of goods from

In addition to the many statutes regulating economic affairs, a few *qui tam* statutes enforced non-economic, social regulations.<sup>157</sup> Other statutes, such as the 1318 Statute of York, discussed previously,<sup>158</sup> employed *qui tam* suits to police the conduct of public officials and to ensure the integrity of governmental processes. Another early *qui tam* statute directed at public officials is the 1350 Statute of Cloths,<sup>159</sup> which governed the conduct of "the King's aulneger and his deputies," officials responsible for enforcing regulations concerning cloth sold by English merchants.<sup>160</sup> The 1350 statute required the aulneger to measure wares sold as "whole cloth."<sup>161</sup> Merchandise that did not satisfy statutory requirements was forfeited to the King.<sup>162</sup> An aulneger convicted of failing to do his office "well and lawfully" was subject to "prison of one year, and ransomed at the King's will, and put out of his office for ever."<sup>163</sup> The statute also contained a *qui tam* provision permitting a "buyer of such cloth, or other that will sue" to prove that the aulneger "hath done any fraud or deceit in his office," with the informer entitled to one-half of the statutory forfeiture.<sup>164</sup>

The use of *qui tam* provisions to regulate the performance of public functions became increasingly common in the fourteenth and fifteenth centuries. In 1360, Parliament permitted informers to sue

"Brabant, Holland, and Zealand" in retaliation for an ordinance barring English wool imports); 23 Hen. 6, ch. 3 (1444) (Eng.) (prohibiting export of woolen threads, called "thrums"); 8 Hen. 6, ch. 17 (1429) (Eng.) (requiring export of certain goods through Calais to enable the King to collect customs); 8 Hen. 5, ch. 3 (1420) (Eng.) (restricting items which could be gilded with silver); 3 Hen. 5, ch. 1 (1415) (Eng.) (prohibiting use of certain coins).

157. See, e.g., 7 Hen. 4, ch. 14 (1405) (Eng.) (restricting the granting of liveries). Another statute sought to keep commoners in their place by permitting wealthy landowners to seize swans in the possession of those with incomes below specified levels. See 22 Edw. 4, ch. 6 (1482) (Eng.). A 1477 statute permitted *qui tam* suits against those playing the games of "closs, kailes, half-bowl, hand in and hand out, and queckboard," or permitting those games to be played on their property. 17 Edw. 4, ch. 3 (1477) (Eng.).

158. See *supra* notes 129-34 and accompanying text.

159. 25 Edw. 3, ch. 1 (1350) (Eng.).

160. *Id.*

161. *Id.*

162. See *id.*

163. *Id.*

164. *Id.* The aulneger held office at some peril, since the statute also made him answerable for the conduct of his deputies. See *id.* A subsequent statute provided a *qui tam* remedy against aulnegers when cloth had been "plaited and tacked together." 11 Hen. 4, ch. 6 (1409) (Eng.). Another law permitted suit if an aulneger sealed cloth that did not meet statutory requirements, refused to seal cloth that did, charged more than the statutory fees, or refused to exhibit his commission. See 4 Edw. 4, ch. 1, § 5 (1464) (Eng.). Still another statute provided a *qui tam* remedy for sealing cloth from Norfolk, Suffolk, or Essex that failed to comply with certain regulations. See 8 Edw. 4, ch. 1 (1468) (Eng.).

jurors who accepted bribes.<sup>165</sup> Shortly thereafter, another law authorized *qui tam* suits if a person responsible for procuring and arranging for carriage of provisions for the King's household accepted a bribe.<sup>166</sup> A 1391 statute permitted suits against mayors, sheriffs, and bailiffs who failed to implement a rule concerning measurement of grain.<sup>167</sup> A 1442 statute prohibited customs officials and other public employees from engaging in businesses related to their public duties.<sup>168</sup> The value of *qui tam* suits as a check on public officials had become so well accepted by 1444 that Parliament adopted no fewer than five such statutes in that single year.<sup>169</sup>

### C. *Qui Tam Reform in the Early Tudor Period*

The conclusion of the War of the Roses in the late fifteenth century brought to the throne the first Tudor monarch.<sup>170</sup> At this stage, concerns began to develop over the burgeoning system of *qui*

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165. See 34 Edw. 3, ch. 8 (1360) (Eng.).

166. See 36 Edw. 3, ch. 3 (1362) (Eng.). A subsequent statute suggests why a merchant might pay to avoid doing business with the King's purveyors. That enactment regulated purveyor abuses such as demanding a nine bushel quarter of grain (the legal standard was eight bushels) and requiring merchants to transport grain without compensation. See 1 Hen. 5, ch. 10 (1413) (Eng.). The 1413 statute can be read to permit suit only by an aggrieved party, but *qui tam* enforcement was clearly authorized when the statute was reenacted 20 years later. See 11 Hen. 6, ch. 8 (1433) (Eng.).

167. See 15 Rich. 2, ch. 4 (Eng.) (1391) (defining a "quarter" of grain as eight bushels rather than nine and requiring punishment of those who traded in "quarters" of nine bushels); see also 11 Hen. 6, ch. 8 (1433) (Eng.) (reaffirming the earlier statute).

168. See 20 Hen. 6, ch. 5 (1442) (Eng.).

169. The 1444 statutes enforced a one-year term limit for sheriffs, see 23 Hen. 6, ch. 8 (1444) (Eng.), governed the procedure for levying wages for knights of a shire, see *id.* ch. 11, addressed fraud and irregularities in parliamentary elections, see *id.* ch. 15, governed inquests by "escheators," see *id.* ch. 17, and protected wine importers from levies or other disturbances by public officials. See *id.* ch. 18. Another statute the same year prohibited the agent of a lord from taking goods against a merchant's will. See *id.* ch. 14. Other *qui tam* statutes permitting suit against public officials followed. See 17 Edw. 4, ch. 2 (1477) (Eng.) (limiting the jurisdiction of the "court of pipowder" conducted in connection with a fair and permitting a suit if an official exercised jurisdiction over a case not arising at the fair or failed to require plaintiff or attorney to swear that the act complained of occurred at fair); 17 Edw. 4, ch. 1 (1477) (Eng.) (permitting suit against officials who inappropriately marked silver products); 34 Hen. 6, ch. 6 (1455) (Eng.) (permitting suit against court officials who failed to afford protections to an abbot who had been the victim of an onslaught of lawsuits); 34 Hen. 6, ch. 3 (1455) (Eng.) (making Exchequer officials liable for misconduct, including the charging of "great and excessive gifts, fees and rewards, for execution of their offices"); 28 Hen. 6, ch. 5 (1449) (Eng.) (permitting suit against customs officials who made unlawful "distresses, arrests, charges, and impositions"); 27 Hen. 6, ch. 3 (1448) (Eng.) (targeting customs officials who permitted foreign merchants to carry gold or silver—rather than English goods—out of the country).

170. See GEORGE MACAULAY TREVILYAN, A SHORTENED HISTORY OF ENGLAND 182–84 (1942).

*tam* enforcement.

## 1. Reform Legislation Under Henry VII

Early in Henry VII's reign, it had become apparent that *qui tam* enforcement of penal statutes had created serious problems, yet Parliament gave no sign that it had become disillusioned with *qui tam* enforcement in general.<sup>171</sup> Indeed, a 1487 reform statute began with a recitation of the benefits of these "popular" actions, which could be "much profitable . . . to the King" when pursued properly.<sup>172</sup> The difficulty, however, arose from collusion between defendants and informers, which had frustrated enforcement of penal statutes.<sup>173</sup> Because the outcome in a *qui tam* suit was binding on the government, persons subject to penal statutes had learned how to turn the system of private prosecution to their advantage. A potential *qui tam* defendant could effectively immunize himself from prosecution with the assistance of a friendly informer. The informer would bring an action alleging violation of the statute and either take the case to judgment or execute a release, presumably recovering little or nothing from the defendant. The judgment or release in the collusive action would then bar good faith attempts to enforce the statute.<sup>174</sup>

To counter such actions, the reform legislation rendered ineffective any release given by a commoner.<sup>175</sup> If a defendant pled a recovery in a prior action as a bar to a good faith suit, the plaintiff was entitled to allege "that the said recovery . . . was had by [collusion]."<sup>176</sup> A person found guilty of colluding with a *qui tam* informer was subject to two years' imprisonment.<sup>177</sup>

## 2. The Injustices of Empson and Dudley

Rampant oppression infested the Court of Exchequer during Henry VII's reign, instigated by two acquisitive Exchequer officials, Sir Richard Empson and Edmund Dudley.<sup>178</sup> These two officials, according to a seventeenth century historian, "turned Law and Justice

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171. See 4 Hen. 7, ch. 20 (1487) (Eng.).

172. *Id.*

173. See *id.*

174. See *id.*

175. See *id.*

176. *Id.*

177. See *id.*

178. See SIR RICHARD BAKER, A CHRONICLE OF THE KINGS OF ENGLAND 247 (London, printed for H. Sawbridge 1684). For background on the Court of Exchequer, see 1 HOLDSWORTH, *supra* note 39, at 231-46.

into Rapine."<sup>179</sup> Among other tactics, they extorted fines by leaving defendants in prison without trial, conducted summary non-jury proceedings in their private homes, and punished juries that reached what they considered to be the "wrong" verdict. Their abuses centered around enforcement of penal statutes, in which they were aided and abetted by a number of *qui tam* informers, also known as "promoters." One observer reported that Empson and Dudley "considered not whether [a penal statute] was obsolete, or in use; and had ever a rabble of Promoters and leading Jurors at their command, so as they could have any thing found, either for fact or valuation."<sup>180</sup> Upon assuming the throne, one of Henry VIII's first official acts was to imprison Empson, Dudley, and the common informers who had assisted them. Empson and Dudley were both beheaded later for high treason, and the informers all died in prison.<sup>181</sup>

Perhaps as a result of the abuses of Empson and Dudley, Parliament enacted a minor *qui tam* reform during the reign of Henry VIII.<sup>182</sup> The statute of limitations for a *qui tam* action was reduced temporarily to one year.<sup>183</sup> This contrasted with the three-year statute of limitations that applied to actions brought by the King.<sup>184</sup>

#### D. *Qui Tam Reforms Under Elizabeth I and James I*

Notwithstanding the problem of collusive litigation and reports of corrupt informers, *qui tam* legislation thrived throughout the Tudor period.<sup>185</sup> As these statutes became even more commonplace,

179. BAKER, *supra* note 178, at 247.

180. *Id.*

181. *See id.* at 254.

182. *See* JOHN G. BELLAMY, CRIMINAL LAW AND SOCIETY IN LATE MEDIEVAL AND TUDOR ENGLAND 105-06 (1984).

183. *See* 1 Hen. 8, ch. 4 (1509) (Eng.).

184. *See id.*

185. *See infra* notes 189-91 and accompanying text. A statute enacted under Edward VI deserves special mention as the most draconian of all English *qui tam* statutes. The Vagabonds Act, 1 Edw. 6, ch. 3 (1547) (Eng.), which was drafted by a university professor, was aimed at preventing "idleness and vagabondry," identified as "the mother and root of all thefts, robberies, and all evil acts, and other mischiefs." *Id.*; *see* 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 140 (1957). An informer could bring charges against a "runagate servant, or any other" for living "idly and loiteringly." 1 Edw. 6, ch. 3. If convicted, the defendant was subject to branding, beating, and bondage. *See id.* (directing that the defendant be branded with a "mark of V" and allowing the informer to "take the said slave and give him bread, water or small drink, and refuse meat, and cause him to work, by beating, chaining or otherwise, in such work and labour as he shall put him unto, be it never so vile"). A slave who ran away again was subject to further branding and was consigned to slavery for the rest of his life. *See id.* The statute was partially repealed two years after its enactment. *See* 3 & 4 Edw. 6, ch. 16 (1549) (Eng.).

a class of professional informers arose, making their living by pursuing *qui tam* litigation throughout the country. This proliferation of professional informers gave rise to a host of abuses in the process of *qui tam* enforcement. The government initially responded through ad hoc intervention by the Privy Council.<sup>186</sup> Nevertheless, the need for a systemic overhaul eventually became apparent, leading Parliament to adopt several significant reform statutes.<sup>187</sup>

### 1. Professional Informers as “Viperous Vermin”

Reliance upon *qui tam* legislation was perhaps a matter of necessity given the shortage of police, prosecutors, and other regulatory officials in Tudor England.<sup>188</sup> If the laws were to be enforced, someone had to bring violations to the attention of the courts. Without the inducement of the statutory reward, there could be no assurance that enough enforcement actions would be filed to produce the desired deterrent effect.

As in the medieval period, *qui tam* statutes in Tudor England often sought to control the activity of participants in the marketplace and to police the conduct of market regulators.<sup>189</sup> During the reign of Henry VIII, *qui tam* statutes were also used to regulate the clergy and the Church. One statute employed informers to enforce limitations on the jurisdiction of the ecclesiastical courts, restricting their authority to summon persons residing in different dioceses.<sup>190</sup> This

186. See *infra* notes 224–33, 240–47 and accompanying text.

187. See *infra* notes 260–82 and accompanying text.

188. See *supra* note 119; *infra* notes 370–71 and accompanying text.

189. For instance, the Apprentices Act of 1536 operated as an early antitrust statute by prohibiting a master or craft guild from requiring an oath that barred an apprentice from opening a competing shop when the apprenticeship ended. See 28 Hen. 8, ch. 5 (1536) (Eng.). In effect, the statute prohibited a particular type of contract in restraint of trade. See *id.* An earlier statute also addressed misuse of the economic power to confer apprenticeships, limiting fees that apprentices could be charged by masters and guilds. See 22 Hen. 8, ch. 4 (1530) (Eng.); see also 31 Eliz., ch. 12, § 2 (1588) (Eng.) (regulating the sale of horses at markets and fairs and imposing forfeitures on public officials, parties, and witnesses to such transactions); 4 & 5 Phil. & M., ch. 5, § 34 (1557) (Eng.) (regulating the manufacture of woolen cloths); 2 & 3 Phil. & M., ch. 7, § 6 (1555) (Eng.) (regulating the sale of horses at markets and fairs); 5 & 6 Edw. 6, ch. 6, § 51 (1552) (Eng.) (regulating the manufacture of woolen cloths); 33 Hen. 8, ch. 27 (1541) (Eng.) (prohibiting oaths by any person connected with a hospital, college, deanery, or corporation promising to be bound by a rule permitting a minority vote to frustrate a grant, gift, lease, or election by the institution); 28 Hen. 8, ch. 14 (1536) (Eng.) (regulating the prices of wines); 19 Hen. 7, ch. 8 (1503) (Eng.) (prohibiting local officials from levying a custom called “scavage” or “shewage” on merchants).

190. See 23 Hen. 8, ch. 9, § 3 (1531) (Eng.). Use of *qui tam* legislation to control the judicial system was also reflected in a statute prohibiting “maintenance” of litigation. See 32 Hen. 8, ch. 9, § 3 (1540) (Eng.). “Maintenance” is “[a]n officious intermeddling in a

statute was among several enacted during Henry VIII's reign that dealt with "clerical jurisdiction and offenses committed by the clergy."<sup>191</sup>

With numerous *qui tam* statutes on the books, each promising a reward for a successful private prosecution, it was inevitable that some would be lured to set aside other labors and take up careers in law enforcement. Professor Elton traces the activities of George Whelplay, a London haberdasher who turned to a career as a common informer in 1538.<sup>192</sup> Elton concludes that Whelplay "must have employed something like a small detective agency; it is out of the question that he should have personally rushed about the country in the necessary fashion, on the off chance of getting evidence for a breach of the law."<sup>193</sup>

Professional informers like Whelplay provided the backbone of enforcement for English penal statutes, making up for the absence of a large corps of public investigators and prosecutors.<sup>194</sup> The extent of the activity of common informers is suggested by Professor Davies' enlightening study examining 675 selected cases from the reign of Elizabeth I in which violations of the apprenticeship statutes were alleged. Professor Davies found that approximately three-quarters of these cases were brought by professional informers.<sup>195</sup>

Such professional informers quickly developed an unsavory reputation. They were described variously as "varlets,"<sup>196</sup> "lewde"<sup>197</sup>

lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." BLACK'S LAW DICTIONARY 954 (6th ed. 1990) (citation omitted); see also 1 Jam., ch. 5 (1604) (Eng.) (limiting the extent to which "court barons" could profit from the imposition of fines).

191. BELLAMY, *supra* note 182, at 101.

192. See G.R. Elton, *Informing for Profit: A Sidelight on Tudor Methods of Law-Enforcement*, 11 CAMBRIDGE HIST. J. 149, 150 (1954).

193. *Id.* at 157; see also M.J. Ingram, *Communities and Courts: Law and Disorder in Early-Seventeenth-Century Wiltshire*, in CRIME IN ENGLAND 1550-1800, at 110, 122-23 (J.S. Cockburn ed., 1977) ("[C]ommon informers . . . were often organized in syndicates backed by substantial Londoners."). Court records refer to associates who worked with Whelplay. See Elton, *supra* note 192, at 162 & n.42 (noting that Whelplay was assisted by Ellis Brooke and John Dower).

194. See MARGARET GAY DAVIES, *THE ENFORCEMENT OF ENGLISH APPRENTICESHIP: A STUDY IN APPLIED MERCANTILISM 1563-1642*, at 18-19 (1956); Elton, *supra* note 192, at 149-50.

195. See DAVIES, *supra* note 194, at 18-19. I am indebted to Professor Davies's informative study for alerting me to a number of the sources cited in this portion of the Article.

196. WILLIAM HARRISON, *THE DESCRIPTION OF ENGLAND 175* (Georges Edelen ed., Cornell Univ. Press 1968) (1587). Harrison lamented the daily abuse of the poor "by sundry varlets that go about the country as promoters or brokers between the pettifoggers of the law and the common people, only to kindle and espy coals of contention whereby



and "evil."<sup>198</sup> One highly placed critic of informers was Sir Edward Coke.<sup>199</sup> In his *Institutes of the Laws of England*, Coke listed "the vexatious informer" as one among several "viperous Vermin" preying upon the Church and the Commonwealth.<sup>200</sup> Indeed, informers harassed and impoverished citizens, particularly those in the lower classes, "for malice or private ends, [but] never for love of Justice."<sup>201</sup>

Coke's attitude toward informers was similar to that expressed in an opinion of the Court of Star Chamber. Sir John Stafford had initiated an action as a common informer, perhaps lured by the potential for easy money. Stafford "was greatly blamed by the court that [despite] being so worthy a gentleman, . . . he would stoop to so base an office as to be an informer, who albeit they be necessary in every well-governed state, yet for the most part they are of the meaner and worst [sort]."<sup>202</sup>

The antipathy toward informers was even stronger among the lower and middle classes, who suffered most from the informers' activities. Indeed, common informers were occasional targets of mob violence. In 1566, informers triggered riots in the vicinity of the Westminster courts.<sup>203</sup> Queen Elizabeth issued a proclamation noting that "great routs and companies" had "assembled themselves together against such as be informers upon penal laws and statutes, commonly called promoters."<sup>204</sup> The angry citizens "made great outcries" against the informers and beat them severely.<sup>205</sup> The proclamation threatened imprisonment for anyone participating in

the one side may reap commodity and the other spend and be put to travail." *Id.*

197. 22 ACTS OF THE PRIVY COUNCIL OF ENGLAND 1591-92, at 404, 404-05 (John Roche Dasent, L.B., ed., Mackie & Co. 1901) (entry dated Apr. 25, 1592) [hereinafter PRIVY COUNCIL 1591-92]; DAVIES, *supra* note 194, at 63.

198. DAVIES, *supra* note 194, at 50 (internal quotation omitted).

199. Coke served as Solicitor General and Attorney General under Elizabeth I, as Chief Justice of the Court of Common Pleas, as a Member of Parliament, and on the Court of King's Bench under James I. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 242-45 (5th ed. 1956).

200. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND \*194.

201. *Id.* Informers were, according to Coke, "*turbidum hominum genus*"—a wild or disordered class of men. *Id.* at \*191.

202. See WILLIAM BRADFORD WILLCOX, GLOUCESTERSHIRE: A STUDY IN LOCAL GOVERNMENT 1590-1640, at 57 (1940) (quoting JOHN HAWARDE, LES REPORTES DEL CASES IN CAMERA STELLATA 1593 TO 1609, at 331-32 (William P. Baildon ed., London, private printing for Alfred Morrison, esq. 1894)); see also DAVIES, *supra* note 194, at 63 n.1 (quoting same).

203. See Proclamation Protecting Informers (Nov. 11, 1566), reprinted in 2 TUDOR ROYAL PROCLAMATIONS 288 (Paul L. Hughes & James F. Larkin, c.s.v., eds., 1969).

204. *Id.*

205. *Id.*

such riots, along with further punishment “by whipping, standing upon the pillory or otherwise” as ordered by the Court of Star Chamber.<sup>206</sup>

## 2. Problems Arising from *Qui Tam* Enforcement

The disdain for common informers in Tudor England arose from their motives and methods. Informers were widely perceived as self-interested at best and malevolent at worst.<sup>207</sup> The charge of self-interest was a natural inference from the bounty provision of a *qui tam* statute. The Privy Council<sup>208</sup> in 1552 created a “Committee of Ten” to encourage those informers who acted from love of country and a desire to see the laws enforced.<sup>209</sup> The Committee’s instructions criticized informers who acted “parteleye for their owne singular gayne, parteleye for malice, corrupcion and other devillishe affection.”<sup>210</sup>

These motives impacted informers’ methods of law enforcement. Because anyone could be an informer, the profession did not always attract the most scrupulous citizens. Most informers tended to act in ways that would improve their bottom line, often at the expense of competing considerations such as the relative culpability of the defendant, the fairness of the proceedings, or the broader interests of the public.<sup>211</sup> Some of the informers’ objectionable methods are discussed in the subsections that follow.<sup>212</sup>

206. *Id.*; see also WILLIAM CAMDEN, THE HISTORY OF THE MOST RENOWNED AND VICTORIOUS PRINCESS ELIZABETH, LATE QUEEN OF ENGLAND 87 (London, 4th ed. printed for R. Bentley at the Post Office in Covent Garden 1688) (“About this time was restrained by wholesome Severity the Insolency of certain bad people, which here and there offered violence, beat, and openly in the Streets cried out against, those Informers whome the vulgar sort calleth *Promoters*.”).

207. See, e.g., COKE, *supra* note 200, at \*194 (complaining that informers enforced the law “for malice or private ends, and never for love of justice”).

208. The Privy Council was a body of royal advisors that exercised both executive and judicial functions. See generally 1 HOLDSWORTH, *supra* note 39, at 477–525 (discussing the history and responsibilities of the Privy Council).

209. See M.W. Beresford, *The Common Informer, The Penal Statutes and Economic Regulation*, 10 ECON. HIST. REV. 221, 223–25 (2d ser. 1957–1958).

210. *Id.* at 225 (internal quotation marks and citation omitted).

211. See, e.g., THE BOOK OF PENALTIES; OR, SUMMARY OF THE PECUNIARY PENALTIES INFLICTED BY THE LAWS OF ENGLAND, ON THE COMMERCIAL, MANUFACTURING, TRADING, AND PROFESSIONAL CLASSES, IN THEIR SEVERAL OCCUPATIONS AND BUSINESSES at vi (London, Effingham Wilson, Royal Exchange 1834) (characterizing informers as “mostly needy pettifoggers, . . . who pursue their vocation not for justice, but for gain” and noting that they did not care “whether they receive[d] a penalty for the infraction of a law or an equivalent bribe . . . their purpose not being to give impartial efficiency to the laws, but to fill their pockets”).

212. See *infra* notes 213–47 and accompanying text.

### a. Unlicensed Compositions

Just as today, it was common in Tudor England for parties to an action under an English penal statute to conclude that a settlement—then called a “composition”—would advance the interests of all involved. A *qui tam* informer could seek a license from the court to “compound” (i.e. negotiate a settlement) with the defendant for a lesser fine than that called for by the statute.<sup>213</sup> A composition benefited both parties by avoiding the expenses of litigation and the risk of an adverse verdict.

Despite the availability of licenses for compositions, it became common for informers to enter into unlicensed compositions with present or prospective defendants.<sup>214</sup> In the case of a licensed composition, the court ensured that the government received its portion of the proceeds.<sup>215</sup> In contrast, an unlicensed composition permitted the informer to keep the entire recovery without giving the government a share.<sup>216</sup> Thus, it was in the economic self-interest of an unscrupulous and financially motivated informer to settle a case without bringing the settlement to the court’s attention.

The economic forces pressing informers and defendants toward unlicensed compositions are easy to envision. Suppose that a penal statute imposed a fine of 10£ for a particular offense, half going to the informer and half to the Crown. Suppose further that an informer obtained persuasive evidence of a statutory violation, so that the defendant would likely lose 10£ if he defended the action. In such circumstances, the defendant might well be willing to pay the informer 7£ to drop the prosecution. The defendant would save 3£ and the costs of litigation. Likewise, the informer could pocket the entire 7£, putting him in a better position than if he pursued the action to judgment and received half of the statutory forfeiture.<sup>217</sup> In an unlicensed composition, the informer and the defendant split the government’s share of the statutory penalty. This arrangement

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213. See DAVIES, *supra* note 194, at 51. To “compose” and to “compound” are synonyms, both referring to the act of bringing disparate elements together into a unified whole. Compare 3 THE OXFORD ENGLISH DICTIONARY 591–92 (2d ed. 1989) (defining “compose”), with *id.* at 627–29 (defining “compound”).

214. See *infra* notes 219–23 and accompanying text.

215. See Elton, *supra* note 192, at 152 (noting that Exchequer barons took half of the forfeited sum for the King).

216. See 4 HOLDSWORTH, *supra* note 39, at 356 (“Threats to sue were easy means of levying blackmail.”).

217. Of course, the defendant in an unlicensed composition risked a subsequent prosecution by another informer or public officials. Thus, such secret settlements were more likely when the chances of a further prosecution were small.

benefited everyone except the government, which was usually none the wiser. The chances that the government would find out about the collusion were diminished further if the informer never filed an action in the first place. Thus, a palpable incentive existed for informers to threaten suits against merchants and other potential defendants and then compound prior to commencing a prosecution. This collection of payments in return for a promise not to prosecute was, in essence, a form of blackmail or extortion.<sup>218</sup>

The practice of negotiating unlicensed compositions appears to have been common. In 1574, an investigation by the Court of the Exchequer resulted in the imprisonment of nine informers for unlicensed compositions.<sup>219</sup> Professor Davies' investigation of *qui tam* prosecutions under the apprenticeship statutes revealed that in cases filed by professional informers, court records were "inconclusive" four-fifths of the time, likely because many cases were resolved informally.<sup>220</sup> The fact that professional informers continued filing apprenticeship actions—despite the large number of cases that resulted in no judgment or reported composition—suggests that informers were receiving compensation directly from the defendants.<sup>221</sup> Moreover, the four-fifths figure refers to cases actually filed with the court.<sup>222</sup> Other cases likely were never filed because the informer and the potential defendant reached a secret settlement before the initial pleading.<sup>223</sup>

#### b. Fraudulent and Malicious Accusations

A common criticism of informers was that they pursued fraudulent or malicious prosecutions.<sup>224</sup> An unprincipled informer

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218. The Model Penal Code defines a crime of "compounding," which is committed if a person "accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to such an offense." MODEL PENAL CODE § 242.5 (1985). This provision "carries forward a modern version of the traditional offense of compounding" and has the purpose of reaching "obstruction of justice bordering on extortion." *Id.* Explanatory Note for §§ 242.1–8, at 180, 182; see also SEYMOUR F. HARRIS, PRINCIPLES OF THE CRIMINAL LAW 93–94 (1877) (describing the crime of compounding informations upon penal statutes). For a discussion of the law of extortion and blackmail, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.12 (2d ed. 1986).

219. See DAVIES, *supra* note 194, at 43, 67.

220. See *id.* at 59.

221. See *id.*

222. See *id.*

223. See *supra* notes 217–18 and accompanying text.

224. For instance, in a letter to the Bishop of Exeter, the Privy Council authorized continued imprisonment of an informer named Andrew Holmer for "false informacions"

who hit a dry spell on meritorious cases might be tempted to pursue false or unfounded accusations in hopes of misleading the court or intimidating the defendant into a settlement. For instance, in October 1619, the Privy Council considered a letter from justices of the peace of Wiltshire County complaining of "intollerable abuses and wrongs" committed by common informers, causing "trade and comerce betweene that county and other neighbour counties [to be] almost quite overthrowne."<sup>225</sup> According to the justices, informers had driven defendants to compound even though the defendants had been lawfully licensed by the court.<sup>226</sup> The letter named William Hackett as the informer "most notorious for extortion and other misdemeanors."<sup>227</sup> The Privy Council appointed a committee, including Sir Edward Coke, to conduct hearings into alleged abuses by Hackett and others.<sup>228</sup> The committee was later expanded and ordered to examine a number of other misbehaving informers.<sup>229</sup>

On another occasion, the Privy Council intervened to order the arrest of a common informer named Richard Ayre upon a petition from "the woollbuyers of Hallifax."<sup>230</sup> Ayre was accused of filing informations against several petitioners for violation of a particular penal statute, even though the petitioners' actions were specifically exempted by the statutory language.<sup>231</sup> Ayre would "not joyne any issue" with the petitioners, "but insiste[d] upon nycities in pleadings to overtake them that way," causing great expense to the defendants.<sup>232</sup> Consequently, the Council ordered Ayre committed to

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until he acknowledged his fault and give bond for good behavior. PRIVY COUNCIL 1591-92, *supra* note 197, at 404, 404-05 (entry dated Apr. 25, 1592). Holmer had allegedly prosecuted "clamorous complaintes" against a certain innocent vicar. *Id.* The Council concluded that the prosecutions resulted from "splene and malice and without any juste cause given by" the defendant. *Id.*

225. 37 ACTS OF THE PRIVY COUNCIL OF ENGLAND 1619-21, at 42, 42 (His Majesty's Stationery Office 1930) (entry dated Oct. 20, 1619) [hereinafter PRIVY COUNCIL 1619-21].

226. *See id.*

227. *Id.*

228. A warrant was issued for Hackett's arrest, *see id.* at 63, 63 (entry dated Nov. 17, 1619), and Hackett was temporarily imprisoned, *see id.* at 85, 85 (entry dated Dec. 6, 1619); DAVIES, *supra* note 194, at 71-72. The ultimate outcome of his case, however, is uncertain. *See* DAVIES, *supra* note 194, at 72.

229. *See* PRIVY COUNCIL 1619-21, *supra* note 225, at 128, 128-29 (entry dated Feb. 11, 1620). Another case concerned a common informer who filed a "multiplicite of informacions" in the Court of the Exchequer against wool buyers in Cornwall. *See id.* at 227, 227 (entry dated June 23, 1620). The Council ordered the withdrawal of pending informations against the Cornwall merchants, who were not covered by the *qui tam* statute, and the rejection of any such information filed in the future. *See id.* at 228.

230. *Id.* at 63, 65 (entry dated Nov. 17, 1619).

231. *See id.* at 65.

232. *Id.*

prison until he withdrew all actions against the wool buyers.<sup>233</sup>

c. Selection of Inconvenient Venues

One method employed by common informers to encourage favorable settlements of *qui tam* litigation was to file the case in a location that made defense impossible or inconvenient. Coke relates that a favorite tactic of informers was to file all cases at Westminster, regardless of the nature of the offense or the place where it was committed, resulting in excessive burdens on defendants.<sup>234</sup> As noted by Professor Davies: “An accused country craftsman or farmer, faced with the prospect of an expensive and time-consuming journey to London and an indefinite wait there for trial, would have been likely to submit promptly.”<sup>235</sup> Even if the informer did not file the action in London, he might try to deprive the defendant of any “home court advantage” by filing in a county where the parties and witnesses were not known to the potential jurors.<sup>236</sup>

d. Selection of Inappropriate Defendants

A further defect in the system of *qui tam* enforcement related to selection of targets for prosecution. Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest.<sup>237</sup> A *qui tam* statute eliminates any incentive for a benevolent exercise of prosecutorial discretion. The common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good.<sup>238</sup> In Tudor England, for example, Parliament had allowed the accumulation of numerous outdated penal statutes that

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233. *See id.* The Council also instructed him not to execute any judgment previously obtained. *See id.*

234. *See COKE, supra* note 200, at \*192 (“[C]ommon informers, and many times the kings attorney drew all informations for any offence, in any place within the realm of England against any penall law to some of the kings courts at Westminster, to the intolerable charge, vexation, and trouble of the subject . . .”).

235. DAVIES, *supra* note 194, at 27.

236. *See COKE, supra* note 200, at \*192.

237. *See infra* notes 387–92 and accompanying text.

238. It is difficult to imagine a public prosecutor, for instance, taking the course attributed to informer William Hackett and others, who filed so many actions against persons transporting commodities into Wiltshire County that commerce with neighboring counties was “almost quite overthrowne.” PRIVY COUNCIL 1619–21, *supra* note 225, at 42, 42 (entry dated Oct. 20, 1619).

no longer served their original purposes.<sup>239</sup> By enforcing outdated statutes or targeting technical violations, informers on occasion interfered both with individual liberty and with important avenues of commerce.

One example of informers creating economic hardship through their selection of prosecution targets appears in a Privy Council record from 1620.<sup>240</sup> The Council had received a letter from justices of the peace in Kent recounting the economic distress of farmers caused by “the cheapnes and want of vent of corne.”<sup>241</sup> An overabundance of grain in Kent apparently had resulted in depressed prices, a complaint the Council also had heard from other regions of the country.<sup>242</sup> In reply, the Council alerted the justices to a related problem caused by informers—“disturbance given by informers in carrying corne from port to porte within the kingdome for the supplie of such partes where corne is most scarce.”<sup>243</sup> A public prosecutor could exercise discretion to relax enforcement of statutes directed at grain shippers until the economic crisis passed. The informers, however, lacked any incentive to take into consideration these distributional problems in the English grain markets and had effectively halted shipment of grain from region to region simply by wielding the threat of a *qui tam* suit.

Another example of a common informer’s disinclination to consider the public good appears in a letter from the Privy Council to the Lord Treasurer.<sup>244</sup> The letter concerned a complaint by East Indies merchants about an information filed in the Court of Exchequer under a statute for the “garblinge,” or sifting of spices.<sup>245</sup> The merchants argued that the necessities of their trade made it difficult to comply with the literal terms of the statute, but that they did comply with its intent.<sup>246</sup> Perhaps because the spice trade was

239. See COKE, *supra* note 200, at \*191 (“Many penall laws obsolete, and in time grown apparently impossible, or inconvenient to be performed, remained as snares, whereupon the relator, informer or promooter did vex and entangle the subject . . .”).

240. See PRIVY COUNCIL 1619–21, *supra* note 225, at 114, 114 (entry dated Jan. 28, 1620).

241. *Id.*

242. *See id.*

243. *Id.*

244. See 34 ACTS OF THE PRIVY COUNCIL OF ENGLAND 1615–16, at 512, 512 (His Majesty’s Stationery Office 1925) (entry dated Apr. 20, 1616) [hereinafter PRIVY COUNCIL 1615–16].

245. See 1 Jam., ch. 19 (1604) (Eng.), *repealed by* 6 Anne, ch. 16 (1707) (Eng.); PRIVY COUNCIL 1615–16, *supra* note 244, at 512, 512 (entry dated Apr. 30, 1616).

246. See PRIVY COUNCIL 1615–16, *supra* note 244, at 512 (entry dated Apr. 30, 1616). According to the merchants, the manner of their business and the sheer volume of spices

important to the national economy, the Council endorsed the merchants' position, ordering a stay of the informer's case in the Exchequer and punishment of the informer for his presumptuousness.<sup>247</sup>

### 3. Governmental Responses to Abusive *Qui Tam* Enforcement

As observed in the previous subsection, the Privy Council responded to *qui tam* abuses through ad hoc intervention in judicial proceedings.<sup>248</sup> In addition, royal officials sought to counteract the problem of unlicensed compositions by awarding patents that granted particular individuals special enforcement authority under designated penal statutes.<sup>249</sup> These patents created problems of their own, however, because they granted monopolies to favorites of the Crown and because they continued to treat law enforcement as a profit-making enterprise.<sup>250</sup> Parliament eventually responded with a series of measures designed to restrict common informers and a related statute controlling issuance of royal patents.

#### a. Royal Patents

Unlicensed compositions worked to the detriment of the royal treasury because the Crown received no part of the settlements.<sup>251</sup> As the unreliability of informers became more apparent, the Crown increasingly resorted to issuing patents or commissions for enforcement of penal statutes. A royal patent might authorize the patentee to prosecute violations of the law in return for a share of the proceeds, to compound with violators, or even to sell dispensations that relieved the purchaser of the obligation to comply with statutory requirements.<sup>252</sup> Professor Holdsworth notes that, over time, such commissions "were sought for and issued in wider and wider terms."<sup>253</sup> Like common informers, royal patentees enforced the law

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they brought into the country "inforceth them to speedie sales and retornes, whereby they may haply fall in dainger of the literall sense of the lawe, howsoever they may with all carefullnes indeavour to performe the intendment and purporte of the same." *Id.*

247. *See id.*

248. *See supra* notes 224–33, 240–47 and accompanying text.

249. *See* 4 HOLDSWORTH, *supra* note 39, at 357.

250. *See id.* at 357–58; *infra* notes 251–59 and accompanying text.

251. *See supra* notes 215–16 and accompanying text; *infra* note 254.

252. *See* 4 HOLDSWORTH, *supra* note 39, at 357 ("Persons were not only empowered to sue for penalties and allowed to keep the proceeds; they were also allowed to compound with offenders, and even to dispense (doubtless for a pecuniary consideration) with the observance of the statutes.")

253. *Id.*



for the sake of personal enrichment, but they could, in theory, be trusted more than common informers because they faced the loss of their patents if they fell out of royal favor. Moreover, the patentee could be required to pay for the patent at the time of issuance, ensuring that the Crown received a return from the enforcement of penal statutes.<sup>254</sup>

Royal patents, however, were greatly criticized in Parliament,<sup>255</sup> particularly when they permitted patentees to confer dispensations authorizing disregard of legislative enactments. These "dispensing patents" allowed a citizen to bargain with a patentee for the right to violate the law.<sup>256</sup> A dispensing patent was condemned "by all the Judges of England" in the *Case of Penal Statutes*.<sup>257</sup> The judges held that "[w]hen a Statute is made by Parliament for the good of the Commonwealth, the King cannot give the penalty, benefit, and dispensation of such act to any subject; Or give power to any subject to dispense with it."<sup>258</sup> In deference to this decision, the Crown

254. See DAVIES, *supra* note 194, at 32 ("[T]he pleasant jingle of ready money passing from the patentee to the Crown replaced the uncertainties of dependence on informers' honesty."). These justifications seemed to underlie a Privy Council letter written in 1620 in defense of the grant of a compounding patent. The patent was issued "to draw some reasonable benefite to his Majestie by composition for such penalties," because "every common informer . . . did prosecute them for his owne advantage without regard of his Majesty's profit." PRIVY COUNCIL 1619-21, *supra* note 225, at 275, 275 (entry dated Aug. 16, 1620).

255. Holdsworth explains the opposition to royal patents and commissions as follows:

It was one thing to supplement the activity of the common informer by delegating persons to look into the infringements of statutes, and to sue for penalties on behalf of the crown. It was quite another to confer upon them these further prerogative rights; and matters were made worse when the Council interfered on behalf of the grantee to prevent any one else from suing for the penalty. The abuse was growing so rampant that Parliament, Coke tells us, ceased to give the forfeiture from the breaches of statutes to the crown, and gave them instead "to the relief of the poor and other charitable uses[] which cannot be granted or employed otherwise."

4 HOLDSWORTH, *supra* note 39, at 357-58 (quoting *The Case of Penal Statutes*, 7 Coke's Reports 37a (1604)) (omission in original).

256. See WILLIAM HYDE PRICE, *THE ENGLISH PATENTS OF MONOPOLY 12* (1906). A Privy Council record from 1623 concerns a patent to compound with Irish farmers who drew plows "by the tailles of horses." 39 ACTS OF THE PRIVY COUNCIL OF ENGLAND 1623-25, at 152, 152 (His Majesty's Stationery Service 1933) (entry dated Dec. 8, 1623) [hereinafter PRIVY COUNCIL 1623-25]. The patentees had deliberately set the fines low, "seeking rather to nourish then abolish that uncivle custome." *Id.*

257. *The Case of Penal Statutes*, 7 Coke's Reports 36b (1604).

258. *Id.* According to Coke,

[W]hen a Statute is made *pro bono publico*, and the King (as the head of the Commonwealth, and the fountain of Justice and Mercy) is trusted by the whole Realm with it, this confidence and truth is so inseparably joyned and annexed to the person of the King in so high a point of Sovereignty, that he cannot transferr

stopped issuing dispensing patents, but it ignored any broader implications of the case and continued to issue patents permitting the holder to compound with offenders in the name of the King.<sup>259</sup>

b. Legislative Reform of the Enforcement of Penal Statutes

Legislative efforts at *qui tam* reform took many decades to reach fruition. Legislative reform proposals were introduced and rejected in the period 1543–1547.<sup>260</sup> Between 1566 and 1571, Parliament first rejected reform legislation offered by royal officials, and the Queen then vetoed a bill passed by Parliament.<sup>261</sup> Queen Elizabeth I and Parliament finally reached agreement in 1576 with passage of the first of several significant *qui tam* reform statutes enacted during her reign and that of King James I.

The 1576 statute dealt with the mounting problem of unlicensed compositions by subjecting offenders to corporal punishment.<sup>262</sup> The act prohibited compounding for an alleged violation of a penal statute until after the defendant answered the suit, and it precluded any composition without consent of the court.<sup>263</sup> An informer convicted of violating the act, in addition to paying a fine, had to stand in the pillory for two hours and was disqualified from acting as an informer in future litigation.<sup>264</sup> The statute also sought to discourage meritless *qui tam* cases by requiring the informer to pay costs and damages if the case was discontinued by the informer or resulted in a verdict for the defense.<sup>265</sup> Moreover, the act required the informer to sue in

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the fame to the disposition or power of any private person, or to any private use: for it was committed to the King by all his Subjects for the good of the Commonwealth.

*Id.*

259. See DAVIES, *supra* note 194, at 31–33; PRICE, *supra* note 256, at 12; *supra* note 254 and accompanying text (discussing Privy Council letter of 1620 defending a compounding patent). Interestingly, royal proclamations recognized that patents and monopolies were frequently abused and harmful to the public good. See, e.g., Proclamation Concerning Monopolies (Nov. 28, 1601), *reprinted in* PRICE, *supra* note 256, at app. J; Proclamation Suspending Monopolies (May 7, 1603), *reprinted in* PRICE, *supra* note 256, at app. L. Nevertheless, it proved easier to condemn “abuses” of the system than to abandon the practice altogether.

260. See Beresford, *supra* note 209, at 225.

261. See G.R. ELTON, THE PARLIAMENT OF ENGLAND 1559–1581, at 73, 103 (1986); FREDERIC A. YOUNGS, JR., THE PROCLAMATIONS OF THE TUDOR QUEENS 137–38 (1976).

262. See An Act to Redress Disorders in Common Informers, 18 Eliz., ch. 5, § 4 (1576) (Eng.).

263. See *id.* § 3.

264. See *id.* § 4.

265. See *id.* § 3. A separate fee typically was charged for each significant service rendered by a clerk, bailiff, or sheriff, so court costs could mount quickly in a case that

person or through an attorney; informers were forbidden to employ deputies.<sup>266</sup>

A second reform statute, enacted in 1587, took a limited step toward correcting the problem of suits brought in London against out-of-town defendants.<sup>267</sup> The statute recited that subjects living in remote areas had been "maliciously troubled" by penal actions filed in the various London courts, and were consequently forced to attend and make bail "to their great trouble and undoings."<sup>268</sup> However, the statute merely provided that if an offense wasailable or was such that a court might grant leave to appear through an attorney, the defendant was permitted to make his initial appearance through an attorney without bail.<sup>269</sup>

In 1589, Parliament passed a third statute providing that informers could file an action under a penal statute only in the county where the offence was committed or the relevant contract was formed.<sup>270</sup> The defendant could defend on the ground that the offense was not committed in the county alleged,<sup>271</sup> and the act also provided a one-year statute of limitations for most actions brought by common informers.<sup>272</sup> Any person who previously had been ordered not to pursue a *qui tam* action because of a misdemeanor was disqualified from bringing further penal actions except in cases where the plaintiff was personally aggrieved.<sup>273</sup>

Notwithstanding the adoption of these three reform statutes during the reign of Queen Elizabeth I, Parliament continued to grumble about the conduct of informers.<sup>274</sup> King James I addressed this and other grievances relating to the administration of justice in a 1621 proclamation.<sup>275</sup> While sympathizing with Parliament's

went to trial. See DAVIES, *supra* note 194, at 55-57. The 1576 act also addressed the issuance of process in *qui tam* cases and provided that a jury could not be compelled to appear at Westminster for an offense committed more than thirty miles away. See 18 Eliz., ch. 5, § 2.

266. See 18 Eliz., ch. 5, § 1.

267. See An Act for the Continuance and Perfecting of Divers Statutes, 29 Eliz., ch. 5 (1587) (Eng.).

268. *Id.* § 21.

269. See *id.*

270. See An Act Concerning Informers, 31 Eliz., ch. 5 (1589) (Eng.).

271. See *id.* § 2.

272. See *id.* § 5. In addition, the legislation perpetuated prior statutes for "reformation of disorders" by common informers. *Id.* § 1, cl. 2.

273. See *id.* § 1, cl. 3.

274. See A Proclamation Declaring His Majesties Grace to His Subjects, Touching Matters Complained of, as Publique Greevances (July 10, 1621), reprinted in 1 STUART ROYAL PROCLAMATIONS 512-13 (James F. Larkin, c.s.v., & Paul L. Hughes eds., 1973).

275. See *id.* (acknowledging "the complaint of His Commons, of the great damage and

grievances concerning informers' vexatious conduct, the proclamation stopped short of offering concrete legal reforms. It stated only that the King had given "provident and good Directions" to his courts, "accompanied with his strictest Charge and Commandment for due observance of the same."<sup>276</sup>

Two years later, Parliament adopted a pair of statutes that went much further. The Statute of Monopolies prohibited most royal monopolies and patents, including those authorizing the holder to dispense with the requirements of a penal statute or to compound with violators.<sup>277</sup> A second statute noted that commoners had been "grievously charged, troubled, vexed, molested, and disturbed" by informers, who forced them to answer charges in the Westminster courts "or else to compound with them for the same."<sup>278</sup> Responding to the apparent failure of the Elizabethan legislation to drive informers out of London, the act provided that penal actions could be prosecuted only in a court with jurisdiction over the county where the offense was committed. Actions pursued in the courts at Westminster were ineffective.<sup>279</sup> Moreover, the informer had to swear that the offense was not committed in any county other than the one alleged in the pleadings and that it had occurred less than one year before the action was filed.<sup>280</sup> If the informer failed to prove that the offense was committed in the county alleged, the defendant was to be found not guilty.<sup>281</sup> The same Parliament also repealed a large number of obsolete penal statutes that had been used by informers to ensnare the unsuspecting.<sup>282</sup>

### E. *Qui Tam Enforcement into the Nineteenth Century*

Parliament adopted only a few *qui tam* statutes in the seventeenth century, but much *qui tam* legislation remained in force. Common informers were able to continue their operations, although without the access to the London courts that they had enjoyed previously. *Qui tam* legislation, however, experienced a resurgence in

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disquiet of His honest and good Subjects, proceeding from the troublesome and restless spirits, and dispositions of Informers, and such as have vexed them by Informations, and Supplicavits, in his Majesties Courtes at Westminster").

276. *Id.*

277. 21 Jam., ch. 3 (1623) (Eng.).

278. 21 Jam., ch. 4, § 1 (1623) (Eng.).

279. *See id.*

280. *See id.* § 3.

281. *See id.* § 2. The statute also permitted the defendant "to plead the general issue" while at the same time introducing "special matter" in evidence. *Id.* § 4.

282. *See* 21 Jam., ch. 28, § 11 (1623) (Eng.); COKE, *supra* note 200, at \*192.

the eighteenth and early nineteenth centuries as Parliament adopted a number of new statutes enforceable by common informers. This Section will briefly overview *qui tam* legislation enacted from the seventeenth to the early nineteenth centuries. More detailed attention will then be focused on two legal contexts in which extensive documentation of informers' activities has survived: laws restricting religious dissenters and laws aimed at controlling liquor sales. *Qui tam* enforcement of religious duties came to play a particularly significant role in subsequent debates over *qui tam* legislation in England.

### 1. Abatement and Resurgence in *Qui Tam* Legislation

Common informers continued to experience official disfavor following the reign of James I. In 1635, Charles I issued a proclamation accusing informers of extorting secret settlements, notwithstanding the Elizabethan legislation directed at unlicensed compositions.<sup>283</sup> The proclamation sought to ensure that all *qui tam* informations would be a matter of public record so that royal officials could collect the King's money.<sup>284</sup> The proclamation also sought to afford relief to low-income defendants by providing for mitigation of forfeitures imposed on those who could demonstrate poverty.<sup>285</sup> Parliament enacted fewer *qui tam* statutes in the seventeenth century than in previous centuries.<sup>286</sup> Informers continued to operate under the existing legislation, however, as well as under new statutes that targeted religious dissenters.<sup>287</sup> Having been barred from the London courts for most offenses, informers shifted the locus of their activities to the courts of the outlying counties.<sup>288</sup>

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283. See A Proclamation for Prevention of Abuses of Informers, Clerkes, and Others in Their Prosecutions upon the Lawes, and Statutes of this Realme (Sept. 6, 1635), reprinted in 2 STUART ROYAL PROCLAMATIONS 472-80 (James F. Larkin, c.s.v., ed., 1983).

284. See *id.*

285. See *id.*

286. See Gerald Hurst, *The Common Informer*, 147 CONTEMP. REV. 189, 189 (1935) ("Coke's influence caused a marked decline in the statutory recognition and encouragement of common informers."). The seventeenth century nevertheless saw a few *qui tam* statutes enacted. See, e.g., 8 & 9 Will. 3, ch. 8 (1695-96) (Eng.) (regulating the collection of silver plate and the production of silver coin); Bank of England Act, 1694, 5 & 6 W. & M., ch. 20, § 27 (Eng.) (prohibiting the governor and the company of the Bank of England from trading in goods, wares, or merchandise).

287. See *infra* notes 294-315 (discussing enforcement of laws regulating religious belief and practice).

288. See THOMAS GARDEN BARNES, SOMERSET 1625-1640: A COUNTY'S GOVERNMENT DURING THE "PERSONAL RULE" 54-56 (1961) (discussing the role of common informers in Somerset quarter sessions); Ingram, *supra* note 193, at 124-25

*Qui tam* legislation again came into favor in the eighteenth and early nineteenth centuries.<sup>289</sup> The *qui tam* statutes in this period resembled those of earlier centuries in their focus on economic regulation,<sup>290</sup> but also included laws designed to promote public safety and to protect the environment.<sup>291</sup> As in earlier periods, a variety of *qui tam* provisions enforced statutory duties of public officials.<sup>292</sup> An

(noting that informers continued to practice in Wiltshire County after the 1623 Act, although their activities were diminished).

289. Hurst suggested that “[t]he tide turned again in favour of the common informer in the reign of George III.” Hurst, *supra* note 286, at 190. Some *qui tam* legislation, however, had been enacted during the reign of George II. See, e.g., Linen (Trade Marks) Act, 1743, 17 Geo. 2, ch. 30 (Eng.); Gold and Silver Thread Act, 1741, 15 Geo. 2, ch. 20 (Eng.); Plate (Offences) Act, 1738, 12 Geo. 2, ch. 26 (Eng.).

290. See, e.g., Seal Fishery Act, 1875, 38 & 39 Vict., ch. 18 (Eng.) (providing for regulation of seal fishing in specified areas); Hosiery Manufacture (Wages) Act, 1874, 37 & 38 Vict., ch. 48, § 3 (Eng.) (prohibiting employers in the hosiery manufacture trade from deducting charges from artificers’ wages and from neglecting to pay wages in the coin of the realm); Larceny Act, 1861, 24 & 25 Vict., ch. 96, § 102 (Eng.) (prohibiting the advertisement of a reward for return of lost or stolen property that suggests no questions will be asked); North American Fisheries Act, 1819, 59 Geo. 3, ch. 38 (Eng.) (prohibiting American and other foreign fishermen from taking, drying, or curing fish near certain English territories in North America); Apothecaries Act, 1815, 55 Geo. 3, ch. 194, § 25 (Eng.) (regulating the licensing and practice of apothecaries and their assistants); Gold and Silver Thread Act, 1788, 28 Geo. 3, ch. 7 (Eng.) (regulating the use of metals inferior to silver in manufacture of threads, lace, and similar ornamental apparel); Plate Assay (Sheffield and Birmingham) Act, 1772, 13 Geo. 3, ch. 52, §§ 4, 13, 15, 19, 23 (Eng.) (regulating the marking and quality of Sheffield and Birmingham silver and the conduct of assayers); White Herring Fisheries Act, 1771, 11 Geo. 3, ch. 31, §§ 11, 13 (Eng.) (prohibiting charges and other hindrance of fishermen wanting to use certain ports and shorelands); 5 Geo. 3, ch. 49 (1765) (Eng.) (regulating the issuance of bank notes); 29 Geo. 2, ch. 23, §§ 12, 17 (1756) (Eng.) (regulating Scottish fisheries and providing for customs officers to act as *qui tam* informers); Disorderly Houses Act, 1751, 25 Geo. 2, ch. 36 (Eng.) (enacting a penalty for maintaining a “disorderly house,” i.e., an unlicensed place for “publick dancing, music, or other publick entertainment of the like kind”); Linen (Trade Marks) Act, 1744, 18 Geo. 2, ch. 24 (Eng.) (establishing penalties for improper marking of linens); Universities (Wine Licenses) Act, 1743, 17 Geo. 2, ch. 40 (Eng.) (prohibiting unlicensed wine sales at universities); Linen (Trade Marks) Act, 1743, 17 Geo. 2, ch. 30 (Eng.) (enacting penalties for linen bearing counterfeit stamps); Gold and Silver Thread Act, 1741, 15 Geo. 2, ch. 20 (Eng.) (regulating the manufacture of gold and silver wire and thread); Plate (Offences) Act, 1738, 12 Geo. 2, ch. 26 (Eng.) (regulating the quality and marking of gold and silver products); Plate Assay Act, 1700, 12 & 13 Will. 3, ch. 4 (Eng.) (regulating goldsmiths, silversmiths, and assayers of gold and silver).

291. See Lighting and Watching Act, 1833, 3 & 4 Will. 4, ch. 90, § 50 (Eng.) (establishing a penalty for the pollution of waterways by gasworks); Fires Prevention Act, 1785, 25 Geo. 3, ch. 77 (Eng.) (prohibiting the boiling or distillation of more than ten gallons of tar, turpentine, or oil within a specified distance of a building).

292. See, e.g., Municipal Corporations Act, 1882, 45 & 46 Vict., ch. 50, § 159 (Eng.) (penalizing clerks of a burrough court if a clerk or a clerk’s partner is employed or interested in prosecution of an offender); Summary Jurisdiction Act, 1848, 11 & 12 Vict., ch. 43, § 30 (Eng.) (penalizing clerks of peace for charging higher than established fees); Commissioners Clauses Act, 1847, 10 & 11 Vict., ch. 16, § 15 (Eng.) (permitting suit

important innovation in this area was the use of common informers to enforce statutory disqualifications that prevented certain categories of individuals from serving in the House of Commons.<sup>293</sup>

## 2. *Qui Tam* Enforcement of Religious Duties

Because religious disputes were also political disputes in this era of English history, religious matters were subject to public regulation.<sup>294</sup> Starting in the sixteenth century, Parliament turned to common informers to enforce penalties directed against various categories of religious non-conformists. For instance, an Elizabethan statute imposed penalties for saying or hearing a Catholic mass, refusing to attend Anglican services, or even employing a schoolmaster who refused to attend Anglican services.<sup>295</sup> All of these prohibitions were enforceable by *qui tam* actions.

Parliament continued to enact *qui tam* statutes relating to religious belief and practice in the seventeenth and eighteenth centuries. Much of the legislation targeted Catholics,<sup>296</sup> although

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against commissioners who act while incapacitated, not duly qualified, or without subscribing required declaration); Juries Act, 1825, 6 Geo. 4, ch. 50, § 46 (Eng.) (specifying the duties of court clerks and sheriffs in connection with the summoning and service of jurors); Levy of Fines Act, 1822, 3 Geo. 4, ch. 46, § 10 (Eng.) (penalizing public officials for failure to comply with statutory duties connected with levying of fines); Sale of Offices Act, 1809, 49 Geo. 3, ch. 126, § 6 (Eng.) (prohibiting advertisements relating to the sale of offices); Land Tax Commissioners Act, 1798, 38 Geo. 3, ch. 48 (Eng.) (prohibiting non-residents of a city or town from acting as its land tax commissioner).

293. See, e.g., House of Commons Disqualification Act, 1821, 1 & 2 Geo. 4, ch. 44 (1821) (Eng.) (disqualifying certain Irish officials from sitting in the House of Commons); House of Commons (Clergy Disqualification) Act, 1801, 41 Geo. 3, ch. 63 (Eng.) (disqualifying clergy of the Church of Scotland from sitting in the House of Commons); House of Commons (Disqualifications) Act, 1801, 41 Geo. 3, ch. 52 (Eng.) (declaring which persons would be disqualified from a seat in the House of Commons of the United Kingdom following union with Ireland); House of Commons (Disqualification) Act, 1782, 22 Geo. 3, ch. 45 (Eng.) (disqualifying persons who held public service contracts or commissions from sitting in the House of Commons); House of Commons Disqualification Act, 1742, 15 Geo. 2, ch. 22 (Eng.) (listing office holders who could not sit in the House of Commons).

294. See *infra* notes 296–315 and accompanying text.

295. See 23 Eliz., ch. 1, §§ 4–6, 11 (1581) (Eng.); see also 35 Eliz., ch. 1, §§ 8–10 (1593) (Eng.) (establishing a penalty for maintaining a non-relative who refuses to attend Anglican services). Another statute from Elizabeth I's reign prohibited various forms of simony, the sale of ecclesiastical positions, by the clergy. See 31 Eliz., ch. 6 (1589) (Eng.).

296. One statute adopted in the reign of James I permitted *qui tam* prosecution of any Catholic who entered a house occupied by the King or the heir apparent, see 3 Jam., ch. 5, § 2 (1605) (Eng.), who remained living within ten miles of London (except those who worked there or had no alternative residence), see *id.* §§ 2–3, who practiced law, medicine, or held certain court or military offices, see *id.* § 6, who married in a non-Anglican ceremony or failed to have a child baptized by an Anglican minister or was buried somewhere other than an Anglican church or church-yard, see *id.* § 10, or against anyone

some *qui tam* statutes also affected Protestant dissenters. For instance, the statute of Elizabeth's reign that required attendance at Anglican services could ensnare Catholics and dissenting Protestants alike.<sup>297</sup> Parliament also permitted a *qui tam* action against anyone administering the sacrament of the Lord's Supper who had not "been made priest by episcopal ordination" in the form and manner prescribed by the *Book of Common Prayer*.<sup>298</sup> Some observers have suggested that Parliament's provision for *qui tam* enforcement of statutes like this one, at a time when *qui tam* legislation was generally out of favor resulted from a distrust of the Crown's commitment to religious uniformity.<sup>299</sup>

One *qui tam* statute that caused great distress among dissenting Protestants was the 1670 Act to Prevent and Suppress Seditious Conventicles.<sup>300</sup> The statute imposed a fine on anyone attending a religious assembly conducted "in other manner than according to the liturgy and practice of the church of *England*."<sup>301</sup> More significant penalties applied to preaching or teaching at such an assembly or permitting such a meeting to occur in one's home. The act permitted summary conviction before a justice of the peace, with a jury trial only available upon appeal if the fine imposed exceeded ten shillings.<sup>302</sup> Moreover, the fines prescribed by the statute could be "levied by distress and sale of the offender's goods and chattels."<sup>303</sup> The informer's hand was strengthened by a provision permitting *qui tam* prosecution of any justice of the peace, constable, or other official who failed to carry out duties imposed by the statute.<sup>304</sup>

Informers enforcing this statute engaged in high-handed tactics

who sent their children overseas to prevent their education in England, *see id.* § 11, or who printed or imported Catholic literature, *see id.* § 15. Other statutes enforced by *qui tam* informers required public officials and others to receive Communion in Anglican churches, swear oaths and sign declarations acknowledging the King's temporal and spiritual authority, and reject particular Catholic doctrines such as transubstantiation. *See* 30 Car. 2, ch. 1, §§ 2-3, 6, 9 (1677) (Eng.); 25 Car. 2, ch. 2, §§ 1-2, 4 (1672) (Eng.); *see also* 3 Jam., ch. 4, § 3 (1605) (Eng.) (requiring all former Catholics who joined the Anglican church to take Lord's Supper at an Anglican Church at least once a year).

297. *See* 23 Eliz., ch. 1, §§ 4, 8 (1581) (Eng.). The 1662 Act of Uniformity also reached both Catholics and Protestants. 14 Car. 2, ch. 4 (1662) (Eng.).

298. 14 Car. 2, ch. 4, § 10.

299. *See, e.g.*, 483 PARL. DEB., H.C. (5th ser.) 2092 (1951) (statement of Mr. Hollis) ("[D]uring the reigns of the last two Stuart Kings, Parliament had very little confidence in the will of the Executive to enforce the law that it had seen fit to pass.").

300. 22 Car. 2, ch. 1 (1670) (Eng.).

301. *Id.* § 1.

302. *See id.* §§ 3, 6.

303. *Id.* § 2, cl. 2; *see id.* § 3.

304. *See id.* § 10.



that further tarnished the reputation of their profession. In the 1670s and 1680s, objectors churned out a host of pamphlets that castigated informers for enforcing the statute against peaceable Quakers and Puritans.<sup>305</sup> A particularly caustic diatribe appeared in London in

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305. For instance, a 1682 tract described the activities of certain informers who had recently "been Levying Distresses upon several Protestant-Dissenters, and in the Management of it, behaved themselves with that Fury and unparallel degree of Violence and Arbitrary Force, that it fills our Hearts with Sadness, and our Thoughts with no less Terrour then Amazement." *THE DEVOURING INFORMERS OF BRISTOL &C.: BEING AN ADDITIONAL ACCOUNT OF SOME LATE PROCEEDINGS OF THOSE RAVENOUS BEASTS OF PREY, AGAINST DISSENTING PROTESTANTS* 1 (London, no publisher 1682). Informers allegedly had received warrants to seize certain defendants' property by virtue of clandestine convictions obtained in a tavern. The informers generally took twice as much property as was needed to satisfy the statutory penalty and insisted on breaking open furniture to look for cash, even if sufficient property was in plain view. *See id.* at 3. Other tracts also sought to highlight the conduct of informers in enforcing penal statutes directed at religious belief and conduct. *See A JUST COMPLAINT OF THE OPPRESSED, BECAUSE CONVICTED, FINED & DISTRAINED EXCESSIVELY, UNSUMMOND & UNHEARD IN THEIR OWN DEFENCE; UPON THE CLAINDESTINE EVIDENCE OF CONCEILED INFORMERS, IN THEIR PROSECUTION OF THE PEACEABLE PEOPLE CALLED QUAKERS FOR THEIR RELIGIOUS MEETINGS* 2, 4-5 (n.p., no publisher, n.d.) (discussing Quakers convicted without being heard in their own defense, excesses in the process of levying on property, and alleged perjury by informers); *AN ELEGY UPON MARSH'S ONE OF THE TWO PUBLICK SWORN INFORMERS AGAINST PROTESTANT RELIGIOUS MEETINGS IN THE CITY OF LONDON, WHO LATELY DYED VERY MISERABLY IN THE PRISON OF THE COUNTER* (n.p., no publisher 1675) (containing a poem concerning the death of an informer which is viewed as a sign of God's righteous judgment); *HENRY CARE, A PERFECT GUIDE FOR PROTESTANT DISSENTERS, IN CASE OF PROSECUTION UPON ANY OF THE PENAL STATUTES MADE AGAINST THEM* (London, printed for R. Baldwin 1682) (describing the persecution of Protestant dissenters by "ignorant and greedy Informers"); *GEORGE FIDGE, THE ENGLISH GUZMAN: OR, CAPTAIN HILTONS MEMOIRS, WITH SEVERAL OTHER OF THE GRAND INFORMERS* (London, printed for R. Oswel 1683) (accusing two informers of being Catholics); *JOSEPH HARRISON, THE LAMENTABLE CRY OF OPPRESSION OR, THE CASE OF THE POOR, SUFFERING & PERSECUTED PEOPLE CALLED QUAKERS IN AND ABOUT FAKENHAM IN NORFOLK* 12-13, 18 (n.p., no publisher 1679) (giving accounts of fines levied on the property of various Quakers); *PHILAGATHUS, THE INFORMER'S DOOM: OR, AN AMAZING AND SEASONABLE LETTER FROM UTOPIA, DIRECTED TO THE MAN IN THE MOON* 42-53 (London, printed for John Dunton at the Black Raven 1683) (describing an imaginary trial of an informer by Judge Conscience); *WILLIAM POOLEY, PART OF THE SUFFERINGS OF LEICESTERSHIRE & NORTH-HAMPTONSHIRE, BY INFORMERS AND PRIESTS* 3-5 (London, no publisher 1683) (accusing informers, inter alia, of perjury, levying on a weaver's loom even though working tools were exempt, and levying on more property than needed to satisfy the fine); *THE INFORMERS LOOKING-GLASS, IN WHICH HE MAY SEE HIMSELF WHILE HE IS MALICIOUSLY PROSECUTING DISSENTING PROTESTANTS* (n.p., no publisher 1682) (stating that an informer "will declare that he hath no prejudice against you, and with the same Tongue he will swear your Goods from you, or your person into Prison, if he can"). Of course, some publications defended the activities of informers. *See, e.g., A VIEW OF THE PENAL LAWS CONCERNING TRADE AND TRAFICK, ALPHABETICALLY DISPOSED UNDER PROPER HEADS* 2-3, 5-6 (London, printed by the Assigns of Richard and Edward Atkins Esq. for John Walthoe 1697) (arguing that informers are necessary to law enforcement and subject to legal constraints, that informers

1675, under the title, *The Character of an Informer, Wherein His Mischeivous Nature, and Leud Practises Are Detected*.<sup>306</sup> The informer was called “[a] mischeivous *Vermin*, bred out of the Corruption of the Body Politique; that feeds (like Toads) only on Poysons, and sucks the peccant Humours so long (like a Horse-leach) till he burst with Venome.”<sup>307</sup> The anonymous author portrayed the informer as a hypocrite, pretending concern for the public interest, but in fact pursuing only his own private gain:

[I]f ever he say any *Prayers*, they are only that Men may daily encrease their Crimes, and Act more unlawful things; that his *Gains* may rise proportionably. For though like a Cunning Archer, he seem to make the Publique Service the Mark of his aim, yet he squints aside at his *own* Ends, which are the true Butt [i.e., target] all the Arrows of his Prosecutions are shot at . . . .<sup>308</sup>

Moreover, the author noted the irony in employing irreligious informers in the purported service of the Church: “For as he takes Wages to Fight against God, so he lays it out again in the Service of the Devil, Consuming in Bawdy houses, what he gets by Surprizing Meeting-houses . . . .”<sup>309</sup>

do not prosecute those who act reasonably and lawfully, and that those who criticize informers are either ignorant or motivated by self-interest). The materials cited in this footnote are on file with the author.

306. THE CHARACTER OF AN INFORMER, WHEREIN HIS MISCHIEVOUS NATURE, AND LEUD PRACTISES ARE DETECTED (London, printed for T.P. 1675) [hereinafter THE CHARACTER OF AN INFORMER] (on file with author); see also THE INFORMERS ANSWER TO THE LATE CHARACTER, VINDICATING THEMSELVES FROM THE SCANDALOUS TRUTHS OF THAT UNLUCKLY PAMPHLET (London, printed for T.C. 1675) (on file with author) (purporting to respond to *The Character of an Informer*, but in fact supporting its charges).

307. THE CHARACTER OF AN INFORMER, *supra* note 306, at 1.

308. *Id.* at 3. In addition to the charge of self-interest, the author accused informers of lying to the courts. See *id.* at 4 (“He values an *Oath* no more than a Gamester, and swallows *Perjuries* as fast and as easily as a Juggler does Pins and Daggers.”). The charge of perjury by informers is also made in THE INFORMERS LECTURE TO HIS SONS, INSTRUCTING THEM IN THE MYSTERIES OF THAT RELIGION 1 (London, printed for Joseph Collier on London Bridge 1682) (on file with author).

309. THE CHARACTER OF AN INFORMER, *supra* note 306, at 5. One popular strategy of the anti-informer tracts is illustrated by a printed sermon of George Fox, a Quaker leader. See G. FOX THE ELDER, THE DEVIL WAS AND IS THE OLD INFORMER AGAINST THE RIGHTEOUS (London, printed by John Bringhurst at the Sign of the Book in Grace Church Street 1682) (on file with author). Fox observed that “[h]e that is an *Informer*, is a Persecutor, and Spoiler, and a Destroyer; and the DEVIL is the Head of all Informers, Persecutors and Destroyers of the RIGHTEOUS.” *Id.* at 1. The identification of the Devil as an informer rested in part upon the New Testament passage describing Satan as “the Accuser of the Brethren.” *Revelations* 12:10. Having identified the Devil as the father of all informers, Fox presented a detailed exposition of the fate that befell those

Eventually, Parliament ended the practice of using informers to persecute non-Anglican denominations. Nevertheless, in the area of Sabbath observance, informers continued to enforce religious obligations well into the twentieth century.<sup>310</sup> The Sunday Observance Act of 1780, which played a significant role in the repeal of English *qui tam* statutes, provided:

[A]ny house, room, or other place, which shall be opened or used for publick entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called *Sunday*, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place . . . .<sup>311</sup>

The keeper of such a "disorderly house" was subject to *qui tam* prosecution for a forfeiture of 200£.<sup>312</sup> Lesser penalties applied to the person managing or conducting the entertainment and any person

who informed against the people of God in the course of various persecutions recorded in Scripture, concluding with a warning of certain judgment:

[T]herefore let all Murderers, Informers, and Sons of Belial, take heed, who seek the Destruction of the Righteous, in that they bring Destruction upon themselves, as you may see all along in the Scriptures, what was the End of such, whether they were high or low, Priest, Professor or Prophane, the Righteous God spared none . . . .

FOX, *supra*, at 12.

Other tracts pursuing a similar strategy include EDWARD BOURNE, A LOOKING-GLASS DISCOVERING TO ALL PEOPLE WHAT IMAGE THEY BEAR (n.p., no publisher 1671); OWEN STOCKTON, A REBUKE TO THE INFORMERS: WITH A PLEA FOR THE MINISTERS OF THE GOSPEL, CALLED NONCONFORMISTS, AND THEIR MEETINGS (London, no publisher 1675); CHARLES HARRISS, A SCRIPTURAL CHRONICLE OF SATANS INCENDIARIES, VIZ. HARD-HEARTED PERSECUTORS, AND MALICIOUS INFORMERS (London, no publisher 1670); MARGARET LYNAM, THE CONTROVERSIE OF THE LORD AGAINST THE PRIESTS OF THE NATIONS AND TEACHERS OF THE PEOPLE, WHO ARE IN THE WAY OF CAIN AND BALAAM, IN SIN, PRIDE AND COVETOUSNESS, YET LEANING UPON THE LORD, AND HAVE A PROFESSION OF RELIGION, A FORM OF WORSHIP, BUT DENY THE POWER OF GOD (London, no publisher 1676); GEORGE WHITEHEAD, JUDGMENT FIXED UPON THE ACCUSER OF OUR BRETHERN, AND THE REAL CHRISTIAN-QUAKER VINDICATED FROM THE PERSECUTING OUTRAGE OF APOSTATE INFORMERS; CHIEFLY FROM W. ROGERS, F. BUGG, T. CRISP, JOHN PENNYMAN AND JEFFERY BULLOCK, THEIR MALICIOUS, CONFUSED AND UNJUST OPPOSITION AND IMPUTATION OF APOSTACY, IMPOSITION, PEPEY, &C. IN THEIR ABUSIVE-BOOKS AND PAMPHLETS HEREIN SPECIFIED (London, printed by Andrew Sowle at the Crooked Bille in Holloway Lane near Shoreditch 1682); *see also* EDWARD PEARSE, THE CONFORMIST'S FOURTH PLEA FOR THE NONCONFORMISTS (London, printed by J.D. for Jonathan Robinson 1683) (describing the terrible judgments suffered by contemporary informers and setting forth a letter from a penitent informer). All sources listed in this footnote are on file with the author.

310. *See infra* note 374 (discussing the activities of a twentieth century informer enforcing England's Sunday observance statute).

311. 21 Geo. 3, ch. 49, § 1 (1781) (Eng.).

312. *See id.*

collecting money or tickets.<sup>313</sup> The statute also authorized *qui tam* suits against advertisers of prohibited entertainments.<sup>314</sup> Informers continued to enforce this statute until 1951.<sup>315</sup>

### 3. *Qui Tam* Regulation of Spirituous Liquors

Another enlightening case study of problems arising from *qui tam* enforcement relates to an eighteenth century statute designed to address excessive consumption of alcohol.<sup>316</sup> In 1736, Parliament constructed a regulatory regime requiring retailers of alcoholic beverages—those selling alcohol in quantities less than two gallons—to obtain expensive licenses and to pay duties on their stock.<sup>317</sup> The legislation was targeted at eliminating street vendors and other minor retailers who sold liquor from wheelbarrows, sheds, and comparable locations.<sup>318</sup> A person convicted of selling spirituous liquors in an unlicensed establishment was subject to a penalty of 10£, with half payable to the *qui tam* informer.<sup>319</sup>

The commoners of London repeatedly rioted to protest the statute and its implementation. London newspapers from 1737 to 1738 contain numerous stories of altercations and spontaneous demonstrations triggered by informers and constables who enforced the legislation.<sup>320</sup> Outrage was directed both at Parliament's attempt

313. *See id.*

314. *See id.* § 3.

315. *See infra* notes 350–52 and accompanying text (discussing the abolition of *qui tam* statutes and the concerns over the Sunday Observance Act).

316. The statute recited the following reasons for the legislation:

[T]he drinking of spirituous liquors or strong waters is become very common, especially amongst the people of lower and inferior rank, the constant and excessive use whereof tends greatly to the destruction of their healths, rendering them unfit for useful labour and business, debauching their morals, and inciting them to perpetrate all manner of vices . . . .

9 Geo. 2, ch. 23, § 1 (1736) (Eng.).

317. *See id.* Licenses were only available “to such persons . . . who shall keep publick victualling-houses, inns, coffee-houses, ale-houses, or brandy-shops, and use or exercise no other trade whatsoever.” *Id.* § 10.

318. *See id.* § 13 (stating that it would be unlawful to sell liquor “about the streets, highways, or fields, in any wheelbarrow or basket, or upon the water in any ship, boat, or vessel, or . . . on any bulk or bulks, stall or stalls, or in any shed or sheds”).

319. *See id.*

320. On one occasion, an informer was attacked on the way to the magistrate. When the unlucky informer arrived at court, “he was ready to expire; being terribly beat, cut and bruised, all over Mire,” so that he seemed “one entire lump of Dirt.” COMMON-SENSE: OR, ENGLISHMAN’S J., Nov. 19, 1739, at 2. The magistrate read the Riot Act and summoned soldiers to conduct the informer and his co-informer into court, while the mob threatened to destroy the magistrate’s home. *See id.* A similar account reports the death of a female informer. *See* LONDON EVENING-POST, Jan. 3–5, 1738, at 1 (“[T]he Populace used her with such Severity, by beating, kicking, and cramming Dirt into her Mouth, that

to curb a popular vice and at the methods used by those enforcing the statute.<sup>321</sup> Accounts from the *London Evening-Post* and other journals suggest that common informers engaged in unconscionable

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we hear she is since dead of her Wounds; even her own Sex expos'd her to great Indecencies."'). On a different occasion, a crowd of over 1000 assembled and threatened to kill two female informers and the magistrate, and to pull down the magistrate's house. See LONDON EVENING-POST, Jan. 21-24, 1738, at 2. Comparable disturbances occurred with frequency. See, e.g., COMMON-SENSE: OR, ENGLISHMAN'S J., Aug. 26, 1738, at 2 (recounting a celebration in which a female informer was burned in effigy); LONDON EVENING-POST, May 20-23, 1738, at 1-2 (describing a riot against an informer arrested for extorting money to stifle a prosecution); LONDON EVENING-POST, May 18-20, 1738, at 1-2 (detailing an assault upon constables and informers by a mob); LONDON EVENING-POST, Mar. 4-7, 1738, at 1 (noting "the many notorious Riots upon Informers"); LONDON EVENING-POST, Feb. 25-28, 1738, at 2 (reporting that "an Informer, and a Constable, who were carrying a Person to Gaol convicted of retailing Spirituous Liquors, were set upon by the Mob in Southwark, and so rudely treated that they are in great Danger of their Lives"); LONDON EVENING-POST, Feb. 23-25, 1738, at 2 (recounting that "two Informers were so severely pelted by the Populace near Golden Square, that [it is] thought they can hardly recover"); LONDON EVENING-POST, Feb. 18-21, 1738, at 2 (reporting that one informer had his clothes torn off and was dragged several times through a horse pond while another was seated on an ass and led down the street while being beaten and pelted); LONDON EVENING-POST, Feb. 14-16, 1738, at 2 (reporting that two persons who were committed to prison for selling gin were "rescued out of the Hands of the Constable" when they cried out, "Informers!"); LONDON EVENING-POST, Feb. 4-7, 1738, at 2 (reporting that two informers were "disciplin'd" by a mob, then "carried half dead to the Round-House, all other Houses, both Publick and Private refusing to give them Sanctuary"); LONDON EVENING-POST, Feb. 2-4, 1738, at 2 (detailing disturbances on the Island of Guernsey following the passage of a law restricting the retail sale of spirituous liquors); LONDON EVENING-POST, Jan. 7-10, 1738, at 2 (recounting a story that an informer hid from the mob in a house and that the ringleader encouraged the mob to pull the house down). See generally J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 134-35 (1986) (discussing mob violence against informers enforcing the alcohol statute). A well-known informer was arrested for walking about in women's clothing, presumably hoping to disguise himself from the populace. See COMMON-SENSE: OR, ENGLISHMAN'S J., Oct. 28, 1738, at 2.

The statute against unlicensed retailing of spirituous liquors provided that someone who failed to pay the specified fine was to be imprisoned. See 9 Geo. 2, ch. 23, § 13. Some defendants chose prison rather than permitting informers to profit from their prosecutions. See, e.g., LONDON EVENING-POST, Feb. 4-7, 1738, at 2. A newspaper account reports that one convicted defendant was too poor to pay the fine, but was so well-beloved in her neighborhood that the neighbors raised money to keep her out of jail. See LONDON EVENING-POST, Feb. 28-Mar. 2, 1738, at 1.

321. The statute targeted a segment of society that most needed the income provided by liquor sales and that could least afford the penalties of the Act. As noted in one account:

We hear that one very vigilant Superior Officer of Excise in Southwark has been instrumental in convicting to the Number of 96 Persons for Offenses within the Statute of the late Act against retailing Spirituous Liquors in less Quantities than two Gallons; whereby, at 5£ Penalty for each Person, his Share will amount to 480£ a fine Sum rais'd out of the Ruin of several poor Families.

LONDON EVENING-POST, Jan. 3-5, 1738, at 1.

practices such as perjury, extortion, and entrapment.<sup>322</sup> Because it was easy to swear that a defendant sold liquor contrary to the statute, perjury was commonplace. The outcome of the prosecution might turn on the magistrate's determination of credibility. The following is representative of many reported accounts of perjury by informers:

Last Tuesday one Mary Felton, an Informer against Persons for selling Spirituous Liquors, was detected before Richard Farmer, Esq; one of his Majesty's Justices of the Peace, for falsely, maliciously, and spitefully swearing an Affidavit . . . wherein she unjustly accus'd one Mary the Wife of James Wallis, (as the Wife of one William Goudge) with having serv'd her with half a Pint of Geneva in the said Mr. Goudge's Shop, . . . and at the same Time brought two more Witnesses to prove her paying the said Money; but it appearing on Oaths of several creditable Persons that the said Mary Wallis had been ill for six Months past, and had not been out of Doors, and also . . . that she had not been in Mr. Goudge's House for upwards of six Months, and never did serve any Thing in the said Shop, besides several othere circumstantial Proofs that she was not the Person, Mr. Farmer committed her to Newgate, and the two Witnesses to New Prison.<sup>323</sup>

Perhaps even more common than accounts of perjury were reports that informers had engaged in extortion by soliciting payments to refrain from filing informations. For instance, in April 1738, it was reported that “[w]ithin these few Days the Right Hon. The Lord Mayor has committed several Persons to Gaol, for extorting Money from People to stifle Informations which they were going to lodge against them, for retailing Spirituous Liquors.”<sup>324</sup>

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322. See, e.g., LONDON EVENING-POST, Feb. 4-7, 1738, at 2 (noting that some informers appeared to have no qualms about perjuring themselves).

323. LONDON EVENING-POST, Jan. 31-Feb.2, 1738, at 2; see also COMMON-SENSE: OR, ENGLISHMAN'S J., Sept. 16, 1738, at 2 (stating that male and female informers were imprisoned and fined for “swearing against several innocent Persons for retailing Spirituous Liquors, when the Jury found them guilty without going out”); COMMON-SENSE: OR, ENGLISHMAN'S J., Sept. 9, 1738, at 2 (reporting that a charge by a female informer against Mrs. Sparks, a widow, was dismissed based on evidence that the “Charge was laid at a time when Mrs. Sparks was out of Town; that she kept no Publick-House, nor dealt in any way in Liquors”); LONDON EVENING-POST, Jan. 28-31, 1738, at 1 (recounting that informer Elizabeth Bromley was committed to Newgate after falsely claiming that Letitia Broadhurst had served her a glass of brandy); *id.* (“Yesterday Morning a Woman was committed to Newgate, and a Man to New-Prison, for Perjury, in swearing falsely against a Victualler in Wapping, that they bought Spirituous Liquors of him contrary to Act of Parliament.”).

324. LONDON EVENING-POST, Apr. 27-29, 1738, at 2; see also LONDON EVENING-POST, May 20-23, 1738, at 2 (reporting that “[l]ast Week Thomas Hudson, who had made

Interestingly, notwithstanding the repeated attempts to deal with unlicensed compositions in the sixteenth and seventeenth centuries, the practice apparently remained quite common in the eighteenth century.<sup>325</sup>

Newspaper accounts also describe informers engaging in "entrapment," perhaps not in the modern legal sense, but in the sense of encouraging persons to violate the law for the purpose of bringing a *qui tam* action. In many cases, it appears that informers based their actions upon service of alcoholic beverages that they themselves had ordered.<sup>326</sup> Because any customer might prove to be an informer, sellers of alcohol began looking for ways to service their customers without being seen. One method was for the customer to enter an empty room and give a pre-arranged signal. The customer would then put money into a drawer, which would slide into another room and slide out again with the requested beverage.<sup>327</sup> This practice

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himself obnoxious to the Populace by informing against several Retailers of Spirituous Liquors, was detected in receiving Money from a Victualler . . . to stifle an Information" and was subsequently convicted); COMMON-SENSE: OR, ENGLISHMAN'S J., May 13, 1738, at 2 ("Monday two noted Informers were committed to the New Gaol in Southwark, for extorting Money from several Persons under Pretence of stifling Informations lodg'd against them for retailing Spirituous Liquors contrary to Act of Parliament."); LONDON EVENING-POST, Apr. 27-29, 1738, at 2 (recounting the successful prosecution of an informer who extorted money in exchange for a promise not to prosecute); LONDON EVENING-POST, Feb. 28-Mar. 2, 1738, at 1-2 ("On Saturday last a Constable in Shoreditch was try'd at Hicks's-Hall, for extorting a Guinea from a Victualler of that Place, on Pretence of his retailing Spirituous Liquors . . ."); LONDON EVENING-POST, Feb. 2-4, 1738, at 2 ("On Monday last a Constable at Islington was committed to New Prison by Justice Poulson, for extorting a Guinea from Mr. Mills, under Colour of informing against him for selling Spirituous Liquors contrary to the late Act.").

325. For additional discussion of this problem, see Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts 1750-1850*, in *POLICING AND PROSECUTION IN BRITAIN 1750-1850*, at 356-59 & n.56 (Douglas Hay & Francis Snyder eds., 1989) (noting claims of perjury, extortion, and unlawful compounding by informers enforcing turnpike laws).

326. See, e.g., LONDON EVENING-POST, Feb. 9-11, 1738, at 2 ("[T]wo Men went to a Publick House . . . and call'd for a Bowl of Punch, which the Landlord upon great Importunity made, and they paid for it; but they prov'd to be two Informers, and one of them . . . gave an Information against the Landlord . . .").

One interesting account concerns a butcher who prosecuted one of his customers after persuading her to violate the statute:

[The] Butcher . . . came to the Widow Wallace's, . . . of whom the good Woman had bought Meat of four or five Years, and desir'd a Dram of Brandy, pretending to be indispos'd; the poor Widow, not suspecting the Butcher's being an Imposter, readily help'd him to one, who immediately after went and laid an Information against her, and she was forced to pay Ten Pounds, which she and her poor Family are in much want of.

COMMON-SENSE: OR, ENGLISHMAN'S J., Sept. 16, 1738, at 2.

327. See, e.g., GENTLEMAN'S MAG., Feb. 1738, at 106, 106.

made it impossible for the purchaser to testify as to who served alcohol in violation of the statute.<sup>328</sup>

### F. *The Abolition of Common Informer Actions in England*

Reliance on *qui tam* legislation declined dramatically with the development of alternate means of law enforcement. A decade after Parliament created a permanent police force for the city of London, it enacted legislation to restrict *qui tam* actions and remedy abuses arising from *qui tam* enforcement.<sup>329</sup> Halfway through the twentieth century, Parliament moved to eliminate the remaining English *qui tam* statutes, decisively preferring public enforcement of legislation designed to protect interests of the public as a whole.

#### 1. The Decline of English *Qui Tam* Enforcement

By the late nineteenth century, Parliament's enthusiasm for *qui tam* statutes had cooled significantly. Professor Radzinowicz notes that only twelve of the *qui tam* statutes repealed in 1951 had been enacted between 1825 and 1895.<sup>330</sup> Only one *qui tam* statute was adopted in the twentieth century—directed at police officers who interfered with voting for local offices<sup>331</sup>—and this was merely a recodification of a nineteenth century enactment.<sup>332</sup>

The decline of *qui tam* enforcement coincided with the development of modern police departments and the proliferation of public prosecutors. Indeed, it may be that the desire to eliminate common informers played a role in the development of professional

328. Parliament enacted a second statute on spirituous liquors in 1738 which addressed the problem of clandestine sales by retailers that "are not seen, but are hid behind some wainscot, curtain, partition, or are otherwise concealed." 11 Geo. 2, ch. 26, § 1 (1738) (Eng.). Parliament provided that in the event of such sales, the occupants of the house would be deemed the violators. *See id.* The statute also addressed the issue of violence against informers, making it a felony for five or more persons "in a tumultuous and riotous manner, [to] assemble themselves to rescue any offender" or to assault an informer. *Id.* § 2. Another provision permitted the removal of actions arising out of enforcement of the statute to the King's courts at Westminster. *See id.* § 3. This provision was perhaps designed to counter the use of the courts to intimidate informers. For instance, in the case in which a landlord was entrapped into providing a bowl of punch, the informers took the bowl with them to court as evidence of the offense. After paying his fine for serving spirituous liquors, the landlord accused the informers of stealing his bowl, whereupon they were committed to the county jail. *See* LONDON EVENING-POST, Feb. 9–11, 1738, at 2.

329. *See infra* notes 336–42 and accompanying text.

330. *See* 2 RADZINOWICZ, *supra* note 185, at 155 n.76.

331. *See id.*; The Representation of the People Act, 1949, 12 & 13 Geo. 6, ch. 58, § 87, reprinted in 8 HALSBURY'S STATUTES OF ENGLAND 573, 651–52 (2d ed. 1949).

332. *See* County and Borough Police Act, 1859, 22 & 23 Vict., ch. 32, § 3 (Eng.); 483 PARL. DEB., H.C. (5th ser.) 2085 (1951) (statement of Mr. Heald).



law enforcement institutions. Sir John Fielding, a magistrate who presided over an early police force in London,<sup>333</sup> believed that the rewards offered to informers had the perverse effect of discouraging public-spirited citizens from reporting evidence of crimes.<sup>334</sup> In describing the genesis of his "Bow Street Runners," he indicated that one of his responsibilities as magistrate was "by all Means [to] discourage common Informers, who are apt to [entrap] the Subject into Offences for the sake of the Penalty."<sup>335</sup>

Parliament first provided for a professional London police force in 1829.<sup>336</sup> A decade later, the Metropolitan Police Courts Act sought to restrict the activities of common informers.<sup>337</sup> Parliament found that non-aggrieved parties often filed informations for pecuniary gain, but later dropped the prosecutions or failed to produce sufficient evidence for conviction.<sup>338</sup> Awarding penalties to successful prosecutors was also found to encourage "corrupt [p]ractices" by

333. See STANLEY H. PALMER, *POLICE AND PROTEST IN ENGLAND AND IRELAND 1780-1850*, at 69, 72, 78-79 (1988) (attributing to Fielding the first English use of the French word "police" to refer to a body of men and discussing the history of Fielding's Bow Street police force). Fielding was the half-brother of novelist Henry Fielding, who preceded him as the Bow Street magistrate. See CLIVE EMSLEY, *THE ENGLISH POLICE: A POLITICAL AND SOCIAL HISTORY* 19 (2d ed. 1996).

334. Fielding explained his concern as follows:

The Legislature, by giving one half of the Penalty to the Informer, doubtless intended to facilitate the Execution of the Penal Laws; but it certainly has a contrary Effect; for those who make Informations before Magistrates from the mere Motive of the Reward, are of the disreputable Kind; and the Advantages annexed to Informers, have rendered the Office itself odious, and deterred many reputable Persons from redressing Injuries and Inconveniences they have laboured under, for Fear of the odious Imputation of an Informer.

SIR JOHN FIELDING, *EXTRACTS FROM SUCH OF THE PENAL LAWS, AS PARTICULARLY RELATE TO THE PEACE AND GOOD ORDER OF THIS METROPOLIS: WITH OBSERVATIONS FOR THE BETTER EXECUTION OF SOME, AND ON THE DEFECTS OF OTHERS* 43-44 (London, H. Woodfall & W. Strahan for T. Cadell 1769); see also *id.* at 44 ("But as Gain is the common idea of the Motive of all Informations, many . . . Persons [who bring informations out of good intentions] have been insulted for their good Offices to the Public.").

335. *Id.* at 4-5. Fielding also warned merchants of the danger of entrapment by informers: "[A]s there are many Persons who are wicked enough to tease a[nother] to lend them Cards, or to suffer them to Game in their Houses, merely that they may have an Opportunity to inform against the House for the Sake of the Reward, no [one] can be safe" from informers. *Id.* at 105-06; see 2 RADZINOWICZ, *supra* note 185, at 142 & n.23.

336. See 10 Geo. 4, ch. 44 (1829) (Eng.).

337. See 2 & 3 Vict., ch. 71 (1839) (Eng.).

338. See *id.* § 32 ("Informations are often laid for the mere Sake of Gain, or by Parties not truly aggrieved, and the Offences charged in such Informations are not further prosecuted, or it appears upon Prosecution that there was no sufficient Ground for making the Charge.").

common informers.<sup>339</sup> The new statute permitted the court to award up to 5£ to the defendant if the information was not prosecuted or was found to lack a sufficient basis.<sup>340</sup> Unauthorized compounding was subjected to fines of up to 10£.<sup>341</sup> Significantly, the magistrate also was authorized to reduce or eliminate an informer's reward as he saw fit.<sup>342</sup>

## 2. A First Attempt at Abolition

As the activities of police officers and public prosecutors continued to expand, sentiment started to develop in Parliament that informers were no longer a necessary component of law enforcement in England. The push for abolition of *qui tam* statutes began on November 6, 1934, when Sir Gerald Hurst, a member of the House of Commons, received permission to introduce a bill to abolish common informer actions.<sup>343</sup> Hurst realized that there was insufficient time to complete action on the bill in that session of Parliament, but he hoped to give the measure a head start in a future legislative session. In explaining the purpose of the bill, Hurst spent most of his time reciting the facts of cases pursued by common informers<sup>344</sup> and noted that informers had been most active under the Sunday observance statute.<sup>345</sup> Hurst decried the institution of *qui tam* enforcement as "legalised blackmail" and argued that "[t]he proper informer is someone who represents the public."<sup>346</sup> A few months later, Hurst published an article expounding his reasons for opposition to *qui tam*

339. *Id.* § 34.

340. *See id.* § 32.

341. *See id.* § 33.

342. *See id.* § 34.

343. *See* 293 PARL. DEB., H.C. (5th ser.) 843-46 (1934) (statement of Mr. Hurst).

344. For instance, Hurst strategically called the legislators' attention to a 1917 case in which an informer sued a Member of Parliament "to recover penalties amounting to £29,000 for having advertised Government bonds in his newspaper." *Id.* at 844 (statement of Mr. Hurst).

345. *See id.* at 845 (statement of Mr. Hurst) ("[A]n action was brought against the Brighton Aquarium for exhibiting fish on Sundays. It was pleaded . . . that this could not be deemed an entertainment as 17 bandsmen performed sacred music while the fish were fed. The Court held that it was an entertainment . . ."); *id.* (statement of Mr. Hurst) ("[T]he Leeds Sunday Society were sued by a common informer . . . [for] having organised a lecture by [a] French writer . . . . When the Court heard that he had told a story about an Englishman, an Irishman and a Scotchman, they at once concluded it was an entertainment and awarded the penalty."). *But see id.* (statement of Mr. Hurst) ("In 1869 a common informer sued for penalties under this Act with regard to some lectures upon 'Science as the handmaid of religion.' He sought to show that this was a public entertainment. The judges who heard the case held, 'We are not amused' and the informer lost . . .").

346. *Id.* at 845 (statement of Mr. Hurst).

legislation:

[I]t is wrong for a free country to allow an informer to seek redress for his own pecuniary advantage in respect of a public wrong in which he has no direct personal interest or concern. A wrong to the State should surely be atoned for by a penalty payable to the State alone.<sup>347</sup>

Hurst's proposal to abolish *qui tam* legislation was aided by the obnoxious practices of common informers, which eventually lead to the enactment of legislation eliminating *qui tam* enforcement.

### 3. The Common Informers Act of 1951

The occasion that caused Hurst's seeds of legal reform to sprout was the 100th anniversary of the Great Exhibition of 1851. His Majesty's Government began planning years in advance for a huge extravaganza to be called the "Festival of Britain, 1951." The event would have its serious side—"a national display illustrating the British contribution to civilisation, past, present and future, in the Arts, in science and technology, and in industrial design"<sup>348</sup>—but there would also be "amusements" of a less educational nature.<sup>349</sup>

As plans for the Festival solidified, the concern arose that if the Festival were open on Sundays, some informer might sue government organizers or private parties participating in the events.<sup>350</sup> The precise application of the eighteenth century Sunday Observance Act was unpredictable in the twentieth century, and Parliament did not want the Festival of Britain to become a test case. The Government therefore introduced a Sunday Openings Bill to exempt the Festival from the Sunday observance statutes and to specify the permissible scope of the Festival's Sunday exhibitions.<sup>351</sup> During the debate over

347. Hurst, *supra* note 286, at 189.

348. 445 PARL. DEB., H.C. (5th ser.) 691 (1947) (statement of The Lord President of the Council).

349. See Festival of Britain (Sunday Opening) Act, 14 & 15 Geo. 6, ch. 14 (1951) (Eng.). The "amusements" of concern to Parliament were defined to include any swings or roundabouts or other fairground amusements, but shall not be taken to include any puppet or marionette show, or . . . any children's pony-carriage drives, or any special illuminations, or any children's zoo, or any underground grotto or series of grottos or elevated tree walk if designed for visual or scenic effect, or any boating lake, or any miniature railway adapted wholly or mainly for children to ride in.

*Id.* § 3(b).

350. See 481 PARL. DEB., H.C. (5th ser.) 539-74 (1950) (debating a bill to permit the Festival to remain open on Sundays despite the Sunday Observance Act).

351. See *id.* at 539. Parliament concluded that the Festival should remain open on Sundays, but "without the amusements." See 14 & 15 Geo. 6, ch. 14, §1(b); see also *supra*

the Sunday Openings Bill, Members of Parliament (MPs) roundly decried the use of common informers for law enforcement purposes.<sup>352</sup>

The parliamentary dislike of informers quickly found new expression as Members of Parliament lined up in support of a bill introduced shortly before debate on the Sunday Opening Act. This bill, the Common Informers Act of 1951, became the primary legislative vehicle for abolition of England's remaining *qui tam* statutes.<sup>353</sup> Although the Common Informers Act was sponsored by one of the minority Conservatives, the record suggests universal support for this legal reform. In fact, the sponsor, Lionel Heald of Chertsey,<sup>354</sup> categorized the legislation as a matter "of public interest . . . upon which there is no party difference."<sup>355</sup> Attorney General Shawcross arranged for his own parliamentary drafters to assist in drawing up the bill and threw the Labour Government's support

note 349 (defining "amusements").

352. The Lord President of the Council, having described the Sunday observance laws as "incredibly obsolete and obscure," considered it "a further embarrassment" that "the main instrument of enforcement of the law is the common informer." 481 PARL. DEB., H.C. (5th ser.) 539 (1950) (statement of The Lord President of the Council). Another Member of Parliament (MP) found it "very wrong that the activities of the common informer should still be encouraged by some of the archaic legislation that is still on the Statute Book." *Id.* at 549 (statement of Mr. Butler). Still another commented that "[t]he common informer is odious, I think, to most Englishmen." *Id.* at 568 (statement of Mr. Hale). Another observed that "[h]ard things have been said about the common informer." *Id.* at 570 (statement of Capt. Waterhouse).

Although there was much talk of the need to modernize and clarify existing legislation, Parliament did not object in principle to laws restricting Sunday activities. While opting to open the Festival of Britain exhibits on Sundays, the majority of the House of Commons voted that Sunday proceedings should be conducted "without the amusements." 14 & 15 Geo. 6, ch. 14, § 1(b). Many Members of Parliament were offended that enforcement actions under the Sunday observance legislation should be pursued by prosecutors seeking private monetary gain; such a view was captured in the statement of one MP that "[n]othing is more detestable and reprehensible than the use of common informers for a reward to prosecute religious observances." 481 PARL. DEB., H.C. (5th ser.) 574 (1950) (statement of Mr. Lang).

353. See Common Informers Act, 14 & 15 Geo. 6, ch. 39 (1951) (Eng.); 480 PARL. DEB., H.C. (5th ser.) 2041 (1950). Technically, although Parliament decided to abolish all remaining English *qui tam* statutes in 1951, the Common Informers Act did not completely effectuate that decision. Parliament retained *qui tam* enforcement of the parliamentary disqualification statutes pending enactment of legislation to create an alternative method of enforcing such statutes. See House of Commons Disqualification Act, 1957, 5 & 6 Eliz. 2, ch. 20, § 7 & General Note (Eng.), reprinted in 24 HALSBURY'S STATUTES OF ENGLAND 425, 430-31 (3d ed. 1970) (providing for Privy Council review of disqualification petitions and explaining that "the old proceeding by way of common information is abolished" for disqualifications covered by the statute).

354. A short time later, Heald became Attorney General in the 1951 administration of Winston Churchill. See 2 RADZINOWICZ, *supra* note 185, at 140-41 n.15.

355. 483 PARL. DEB., H.C. (5th ser.) 2079 (1951) (statement of Mr. Heald).

squarely behind the measure.<sup>356</sup>

Debate over the *qui tam* abolition bill subjected the common informer to criticism that was even more forceful than that voiced during discussion over the Festival of Britain. Members of Parliament described the informer as an “unnatural creature of statute,”<sup>357</sup> “a parasite who is legally empowered to sue for money for which he has not worked,”<sup>358</sup> a “frightful beast,”<sup>359</sup> a “malodorous type.”<sup>360</sup> A Scottish MP suggested that the common informer represented an English intrusion into Scottish law<sup>361</sup> and that “any informer . . . is repugnant.”<sup>362</sup> Enforcement of the law by common informers was “a complete anachronism,”<sup>363</sup> “an odious instrument of the law,”<sup>364</sup> “a form of legalised blackmail,”<sup>365</sup> “thoroughly objectionable and obnoxious to modern ideas,”<sup>366</sup> “antiquated . . . shameful,”<sup>367</sup> “quite contemptible,” and “a discreditable business.”<sup>368</sup> After hearing some of the debate, one MP wondered why the common informer had not been abolished earlier, “when it is so obvious that he has been anathema and the object of strong language of condemnation by all right thinking [persons].”<sup>369</sup>

Several members were willing to grant that informers might have been necessary at an earlier time in English history. Attorney General Shawcross pointed out that law enforcement had not always been the chief function of his office, and that it was not until 1856 that all areas of the country had a police force.<sup>370</sup> Similarly, Mr. MacColl of Widnes explained that “[a]t one time the administrative machinery of the State was so incompetent to secure law enforcement that this field of activity had to be left in the hands of private enterprise.”<sup>371</sup>

356. See *id.* at 2106 (statement of Attorney General Shawcross); *id.* at 2079 (statement of Mr. Heald).

357. *Id.* at 2097 (statement of Mr. Hughes).

358. *Id.* (statement of Mr. Hughes).

359. *Id.* at 2110 (statement of Mr. Harris).

360. *Id.* at 2112 (statement of Mr. Turner-Samuels).

361. See *id.* at 2150 (statement of Mr. Ross) (stating that “before the Union of Parliaments we had no common informer procedure in Scotland”).

362. *Id.* at 2152 (statement of Mr. Ross).

363. *Id.* at 2091 (statement of Mr. Hollis).

364. *Id.* at 2094 (statement of Mr. Hylton-Foster).

365. *Id.* at 2100 (statement of Mr. Hughes).

366. *Id.* at 2133 (statement of Mr. Fletcher).

367. 171 PARL. DEB., H.L. (5th ser.) 1054–55 (1951) (statement of Viscount Simon).

368. *Id.* at 1056 (statement of The Lord Chancellor).

369. 483 PARL. DEB., H.C. (5th ser.) 2153 (1951) (statement of Mr. Houghton).

370. See *id.* at 2101–02 (statement of Attorney General Shawcross).

371. *Id.* at 2159 (statement of Mr. MacColl) (“As is the characteristic of private enterprise, it was necessary that there should be some incentive and the common informer

Expanding on his reference to informing as a form of “private enterprise,” MacColl teased the Conservatives for abandoning their commitment to free market principles.<sup>372</sup> Apart from polite concessions to history and MacColl’s jesting defense of informers, however, the MPs had nothing positive to say about *qui tam* law enforcement. Members repeatedly argued that *qui tam* enforcement led to “blackmail”<sup>373</sup>; despite reform efforts beginning in the sixteenth century under Elizabeth I, the problem of unlicensed compositions had apparently continued into the twentieth century.<sup>374</sup>

Much of the Parliamentary criticism of common informers focused on their motivations in pursuing penal actions. On the one hand, the informer was repeatedly accused of acting for reasons of greed or worse:

[T]his sort of action may be brought from various motives, none of which has any good purpose and all of which are indeed very bad. Proceedings of this kind may be brought out of spite, or purely for private gain or for even sheer egotism. . . . A person may in fact bring these proceedings purely and simply to do an ill-turn to a rival or competitor;

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had to be able to obtain substantial financial inducement to carry out the important social work of seeing that the law was maintained.”)

372. *Id.* at 2160 (statement of Mr. MacColl) (“I could not help feeling a certain sympathy for the common informer. He should have the attraction to the Conservative Party that his is a profession or trade which does not lend itself to monopoly.”); *see also id.* at 2162 (statement of Mr. MacColl) (“I cannot help feeling that on the benches opposite there are people who are working their way towards a new social philosophy.”); *id.* at 2161 (statement of Mr. MacColl) (by preventing informers from reaching compositions with potential defendants, “this Bill can only be regarded as an interference with the sanctity of contract”).

373. *E.g., id.* at 2081 (statement of Mr. Heald); *id.* at 2095 (statement of Mr. Hylton-Foster); *id.* at 2140 (statement of Mr. Pannell).

374. Two MPs, for instance, referred to a celebrated informer named Mr. Green, who worked to enforce the Sunday observance statutes. *See id.* at 2086 (statement of Mr. Heald); *id.* at 2140 (statement of Mr. Pannell). Perhaps to reflect his improving financial circumstances, Mr. Green changed his name to “the very much grander one,” *id.* at 2086 (statement of Mr. Heald), of “Mr. Houghton le Touzel,” *id.* at 2140 (statement of Mr. Pannell). Mr. Houghton le Touzel was a notorious informer who stated to the press “that he was not himself a Sabbatarian, that he was not interested in what people did on Sunday, but that he had had his attention drawn to the common informer procedure, and that it occurred to him that this promised quite a lucrative business if handled in the right way.” *Id.* at 2086 (statement of Mr. Heald).

Mr. Houghton le Touzel reportedly received thousands of pounds in annual payments from merchants, some as high as 300£ each, in exchange for promises not to file *qui tam* actions. *See id.* (statement of Mr. Heald). One member analogized this scheme to “the protection gangs which waged war in Chicago under Al Capone.” *Id.* at 2140 (statement of Mr. Pannell). Cases litigated by Mr. Green/Houghton le Touzel include *Houghton-le Touzel v. Mecca, Ltd.*, 2 K.B. 612 (1950), and *Green v. Kursaal (Southend-on-Sea) Estates, Ltd.*, 1 All E.R. 732 (K.B. 1937).

and, what makes it even worse, it may have as its lever nothing more or less than pure blackmail.<sup>375</sup>

On the other hand, the informer was berated for lacking public spiritedness, because he demanded a reward to perform the duty of every citizen.<sup>376</sup> Moreover, "he is unconcerned about the public interest, and he is actuated purely by mercenary motives and his own cupidity."<sup>377</sup> With a host of charges laid against him and no one willing to come to his defense, the common informer was expelled from English law without recorded dissent.<sup>378</sup>

#### IV. THE *QUI TAM* INFORMER'S CONFLICT OF INTEREST

After a long experiment with *qui tam* legislation, the English Parliament decisively and comprehensively rejected *qui tam* enforcement in favor of public enforcement of penal statutes. Parliament's decision is explicable by reference to the real-world problems that stemmed from *qui tam* litigation in that country—extortion of secret settlements,<sup>379</sup> fraudulent accusations,<sup>380</sup> unrestrained pursuit of defendants (often for minor offenses),<sup>381</sup> and the like. However, these problems also can be viewed as particular manifestations of a more fundamental flaw at the heart of a *qui tam* statute. By offering the successful informer a bounty, *qui tam* legislation provides a personal financial interest in the law enforcement process that often conflicts with other public interests at stake in the litigation. This conflict of interest causes informers to

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375. 483 PARL. DEB., H.C. (5th ser.) 2113–14 (1951) (statement of Mr. Turner-Samuels); see *id.* at 2152–53 (statement of Mr. Ross); *id.* at 2093 (statement of Mr. Hollis); 171 PARL. DEB., H.L. (5th ser.) 1050, 1056 (1951) (statement of The Lord Chancellor); *id.* at 1054 (statement of Viscount Simon). The Attorney General made reference in his remarks to "motives of private greed," and noted that this was "a phrase which the [R]ight [H]on. Member for Woodford (Mr. Churchill) adopted the other night from a judgment of Mr. Justice Rowlatt a few years ago." 483 PARL. DEB., H.C. (5th ser.) 2102 (1951) (statement of Attorney General Shawcross).

376. See 483 PARL. DEB., H.C. (5th ser.) 2087 (1951) (statement of Mr. Heald); *id.* at 2097 (statement of Mr. Hughes); 171 PARL. DEB., H.L. (5th ser.) 1052 (1951) (statement of Viscount Simon).

377. 483 PARL. DEB., H.C. (5th Ser.) 2099 (1951) (statement of Mr. Hughes).

378. The vote on the bill was not recorded. However, the unanimity of support is suggested by the absence of any stated opposition to the legislation. Indeed, upon the third reading of the bill, one member congratulated the sponsor of the legislation that "[t]here has been no kind of opposition in any quarter to what he has suggested." *Id.* at 1519 (statement of Mr. Hollis).

379. See, e.g., *supra* notes 213–23, 262–64, 283–84, 324–25, 373–74 and accompanying text.

380. See, e.g., *supra* notes 224–33, 308, 322–23 and accompanying text.

381. See, e.g., *supra* notes 237–47, 324–26, 335, 344 and accompanying text.

initiate, conduct, and terminate enforcement actions in ways that are harmful to the broader community.<sup>382</sup> A public prosecutor, by contrast, lacks a direct financial interest in the outcome of a case and is, therefore, more likely to take into consideration and to act upon a broader range of public interests than a *qui tam* informer.

#### A. *Public Interest and Private Gain in Qui Tam Enforcement*

In evaluating methods of statutory enforcement, consideration must be given to the goals of the law enforcement process. One obvious aim of any regulatory regime is to deter undesirable conduct. Related goals may include raising revenue or compensating the public for injuries caused by the wrongdoer. In enacting the False Claims Act, for instance, Congress sought to deter the submission of false claims to the government and to compensate the treasury for harms caused by schemes to defraud the public.<sup>383</sup>

If the goal is deterrence of illegal conduct, then *qui tam* enforcement offers an obvious advantage: private informers supplement the activities of public law enforcement personnel, thereby boosting the number of enforcement actions filed.<sup>384</sup> The larger number of enforcement actions means a greater chance that any particular offender will be apprehended, magnifying the deterrent impact of the statute. If the statute serves a compensatory function, *qui tam* enforcement likewise offers at least a potential for greater recoveries by the public as long as cases are brought to court and settled officially.<sup>385</sup>

But deterrence, or deterrence plus compensation, can never be the exclusive goals of a regulatory regime. Regulators must balance the pursuit of these objectives against competing goals that may be equally important to the public. For instance, the public also has an interest in minimizing the social costs created by a regulatory system. At some point, additional enforcement efforts or stiffer penalties impose costs on the public, on regulated individuals, or on third parties that threaten to outweigh any corresponding deterrence and compensation gains. A rational regulatory system seeks an optimal level of enforcement—one that adequately fulfills the statutory

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382. See *infra* notes 411–509 and accompanying text.

383. See *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 965 (9th Cir. 1995) (“We recognize that the FCA aims at achieving deterrence as well as restitution.”).

384. See Wiener E-mail, *supra* note 10 (presenting statistics on cases pursued by informers without Justice Department participation).

385. See *id.* (discussing recoveries in cases pursued by informers without Justice Department participation).



purposes while minimizing social costs.<sup>386</sup>

One important mechanism for achieving an optimal level of enforcement and avoiding unproductive social costs associated with a regulatory regime is prosecutorial discretion. Public prosecutors are expected to exercise judgment in balancing the various public interests at stake in the enforcement process.<sup>387</sup> A prosecutor may decide not to challenge conduct that falls within the terms of a statute if she thinks the public would not be well served by an enforcement action.<sup>388</sup> In deciding who to prosecute, she may consider the likelihood of a successful outcome in a particular case, the deterrent value of the prosecution, the blameworthiness of the particular defendant compared to other potential defendants, the extent to which the defendant's conduct implicates the policies underlying the statute, the effect of the prosecution on other interests of the public, and other similar matters.<sup>389</sup> Prosecutorial discretion permits a case-by-case balancing of competing public interests implicated by each potential enforcement action.<sup>390</sup> Additionally, it serves as a significant protection of liberty interests, operating as a buffer between the individual and the power of the state.<sup>391</sup> Prosecutorial discretion also

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386. See, e.g., Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1131 (1980) (noting that "an efficient enforcement policy will not deter all antitrust violations because the cost of deterring some of the violations will be greater than the harm averted"); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 760-61, 808-10 (1993) (contending that rational enforcement must be adjusted for social costs incurred to determine whether conduct is illegal).

387. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting that prosecutors have broad discretion in charging decisions).

388. See LAFAVE & ISRAEL, *supra* note 119, § 13.1(c), at 560 ("Even when it is clear that there exists evidence which is more than sufficient to show guilt beyond a reasonable doubt, the prosecutor might nonetheless decide not to charge a particular individual with a criminal offense.").

389. See, e.g., *Wayte*, 470 U.S. at 607 (discussing the fact that prosecutorial discretion is broad because it is difficult for courts to review "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan").

390. See LAFAVE & ISRAEL, *supra* note 119, § 13.2(a), at 562-63 (noting that discretion permits prosecutor to "individualize justice" and discussing considerations that influence prosecutorial decisions); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971) (noting that discretion "permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules").

391. See LAFAVE & ISRAEL, *supra* note 119, § 13.2(a), at 562 (noting that the decision not to prosecute can "relieve deserving defendants of even the stigma of prosecution"); Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (stating that without discretion in the law enforcement process to relax strict enforcement of legal rules, "[l]iving would be a sterile compliance with soul-killing rules

fosters public accountability in the decision-making process.<sup>392</sup>

Through provision of a bounty to a successful informer, a system of *qui tam* enforcement eliminates the personal and public protections afforded by prosecutorial discretion. A *qui tam* statute operates by appealing to the pecuniary interests of informers.<sup>393</sup> Thus, because a reward is given only for a successful prosecution and never for refraining from filing an action, the statute encourages the informer to ignore any consideration apart from whether a prosecution will result in a monetary recovery. To the extent the informer's personal financial interest conflicts with public interests affected by an enforcement action, the public interest typically will be sacrificed.<sup>394</sup>

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and taboos").

392. See Abrams, *supra* note 390, at 3 (noting that prosecutorial discretion is advantageous because "public attitudes change over time, and it is not always possible immediately to adapt the statutory law to these changes"). Although federal prosecutors are not directly accountable to the public, they are indirectly accountable to the extent that they are supervised by an elected President. See Caminker, *supra* note 18, at 368 (stating that "because prosecutors within the executive branch are accountable to the President and, through her, ultimately to the people, they are presumably less likely to enforce the law oppressively or overzealously").

393. See *supra* notes 4, 52, 63–64, 110 and accompanying text.

394. In injecting a personal financial interest into the process of public law enforcement, a *qui tam* statute departs from ethical principles that are vigorously enforced in other sectors of the legal system. Our legal institutions reflect the judgment that those representing the public generally should be "disinterested" in the sense that their material well-being will not be affected by the decisions they make. For instance, Congress has made it a crime punishable by up to five years in prison for a public employee to participate "personally and substantially" in a "judicial or other proceeding" in which the employee or a closely related person or entity has a financial interest. 18 U.S.C. §§ 208(a), 216(a)(2) (1994); see also 28 U.S.C. § 528 (1994) (permitting the Attorney General to promulgate rules disqualifying officers or employees of the Department of Justice from participating in investigations or prosecutions when they may have a conflict of interest). Similarly, an executive order from the Bush administration repeatedly emphasizes the theme that public service should not be pursued for private gain:

(a) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

(b) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

....

(g) Employees shall not use public office for private gain.

Exec. Order No. 12,674, § 101, 3 C.F.R. 215, 215 (1989), amended by Exec. Order No. 12,731, § 101, 3 C.F.R. 306, 307 (1990), reprinted as amended in 5 U.S.C. § 7301 (1994).

Moreover, the Due Process Clause of the Fifth Amendment is violated when an adjudicative official has a personal financial interest in the outcome of a proceeding. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–25 (1986) (holding under the Due Process Clause that an Alabama Supreme Court justice should not participate in a case when the decision would directly influence a lower court case in which the justice had a substantial financial interest); *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (upholding a lower

The Supreme Court recognized the potential for such a conflict between public and private goals in *Hughes Aircraft Co. v. United States ex rel. Schumer*.<sup>395</sup> The Court in that case declined to apply the 1986 FCA amendments retroactively.<sup>396</sup> Critical to its decision was the Act's expansion of *qui tam* enforcement, which the Court analogized to the creation of a new cause of action. Significantly, the Court noted that *qui tam* informers "are motivated primarily by prospects of monetary reward rather than the public good."<sup>397</sup> As a consequence, "a relator's interests and the Government's do not necessarily coincide."<sup>398</sup>

The conflict of interest inherent in a *qui tam* statute is analogous to the conflict identified by the Supreme Court in the case of *Young v. United States ex rel. Vuitton et Fils S.A.*<sup>399</sup> *Young* arose out of civil litigation charging the defendants with imitating the plaintiff's products. The underlying lawsuit settled, and the district court entered a consensual injunction. The plaintiff subsequently authorized a "sting" operation that uncovered evidence that the defendants were continuing to manufacture counterfeit goods in violation of the court order.<sup>400</sup> The district court appointed the plaintiff's attorneys to represent the United States in investigating and prosecuting the asserted contempt of court.<sup>401</sup> The Supreme

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court ruling that the Alabama State Board of Optometry was disqualified from participating in an administrative proceeding due to its pecuniary interest in the resolution of the matter); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that an Ohio statute permitting a mayor to act as judge and impose fines in criminal prohibition cases violated the Fourteenth Amendment due to the mayor's pecuniary interest in the fines collected). The Supreme Court, however, has given mixed signals with respect to whether due process ever requires a disinterested prosecutor. Compare *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) ("Prosecutors are also public officials; they too must serve the public interest. . . . A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."), with *Tumey*, 273 U.S. at 535 ("[A] State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers."). For additional discussion of this issue, see *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759-60 (9th Cir. 1993) (rejecting a due process challenge to FCA); *infra* note 405 (discussing case law interpreting due process to require a disinterested prosecutor).

395. 520 U.S. 939 (1997).

396. See *id.* at 941-42.

397. *Id.* at 949.

398. *Id.* at 949 n.5.

399. 481 U.S. 787 (1987).

400. See *id.* at 791.

401. See *id.* at 791-92.

Court reversed the defendants' contempt convictions on the ground that the prosecutors had a conflict of interest.<sup>402</sup> After explaining a prosecutor's duties as a public official and reviewing legal and ethical proscriptions designed to eliminate conflicting private interests, the Court concluded that a conflict of interest exists where attorneys for private parties are appointed to prosecute opposing litigants for contempt:

The Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not. A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.<sup>403</sup>

The Court explained a number of ways in which the appointed prosecutors might be tempted to use governmental powers for the pecuniary benefit of their private clients.<sup>404</sup> Consistent with the *Young* decision, a number of federal and state courts have ruled that an attorney may not represent the government in a case where either the attorney or a private client has a financial stake in the outcome.<sup>405</sup>

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402. *See id.* at 802–14.

403. *Id.* at 805.

404. *See id.* at 805–06. The basis for reversing the defendants' convictions in *Young* was the Supreme Court's supervisory power over lower federal courts. *See id.* at 808–09. The Court acknowledged that prosecutors are allowed to zealously seek convictions, *see id.* at 807 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980)), but indicated that a prosecutor who also represents an interested party suffers from an impermissible conflict of interest because “the ethics of the legal profession *require* that an interest other than the Government's be taken into account.” *Id.* at 807.

405. Some of these decisions are grounded on the Due Process Clause and others rely on extra-constitutional ethical considerations, as in *Young*. *See Polo Fashions, Inc. v. Stock Buyers Int'l Inc.*, 760 F.2d 698, 704 (6th Cir. 1985) (invoking supervisory power to reject a district court's appointment of attorneys for a private party to pursue criminal contempt proceedings); *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (holding that a criminal prosecution by private attorneys representing private interests violated due process); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that due process had been violated when a prosecutor also represented an assault victim in private litigation against the defendant); *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 350–53 (Cal. 1985) (holding that a city government could not hire a private attorney to prosecute a civil nuisance case on a contingent-fee basis); *People v. Zimmer*, 414 N.E.2d 705, 708 (N.Y. 1980) (holding that it

Just as the financial interests of the client in *Young* potentially conflicted with the government's interest "in dispassionate assessment of the propriety of criminal charges,"<sup>406</sup> the informer's financial interest under a *qui tam* statute undermines the comparable public interest in dispassionate assessment of whether and how to prosecute violations of a penal statute. Lord Coke described this conflict of interest in eloquent terms when he observed that informers act "for malice or private ends, [but] never for love of Justice."<sup>407</sup>

Coke may overstate the case in suggesting that informers "never" act "for love of Justice." No doubt there are informers actuated by high ethical standards and a sincere desire to see the public interest advanced.<sup>408</sup> But *qui tam* legislation by its nature appeals to the lowest common denominator. No screening process separates good informers from bad ones. For every informer who on principle sacrifices his own interests for the common good, another can be found whose principles are more accommodating. Even public prosecutors do not always act from the purest of motives. Public prosecutors sometimes act corruptly, egotistically, from partisan motives, or for purposes of career enhancement.<sup>409</sup> But a *qui tam*

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is fundamentally unfair to permit prosecution of a corporate manager by a district attorney who was counsel to and shareholder in the corporation).

The Ninth Circuit has rejected a due process challenge to the *qui tam* provisions of the FCA. See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759-60 (9th Cir. 1993); *supra* note 393. *Baca v. Padilla*, 190 P. 730 (N.M. 1920), is another interesting case in which the court prohibited a contingent fee criminal prosecution:

To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

*Id.* at 732.

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

407. COKE, *supra* note 200, at \*194. Likewise, this conflict was recognized during Parliament's debate on the Common Informers Act when an MP complained that an informer "is unconcerned about the public interest, and . . . actuated purely by mercenary motives and his own cupidity." 483 PARL. DEB., H.C. (5th ser.) 2099 (1951) (statement of Mr. Hughes). The anonymous author of *The Character of an Informer* pointed to the same conflict when he noted that an informer "seem[s] to make the Publique Service the Mark of his aim, yet he squints aside at his *own* Ends, which are the true [target] all the Arrows of his Prosecutions are shot at." THE CHARACTER OF AN INFORMER, *supra* note 306, at 3.

408. And even an informer who cares about no interest but his own may coincidentally promote the public good in pursuing private gain.

409. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (explaining that the system of broad prosecutorial discretion "carries with it the potential for both individual and institutional abuse"). Of course, if the government prosecutor wants to keep his job or advance in his career, it is important to maintain at least the appearance of working for

statute intentionally turns prosecutorial decision-making into a mercenary endeavor by purposefully inserting personal financial concerns into a process that we normally seek to keep free from such complicating influences.<sup>410</sup>

### B. Manifestations of the Informer's Conflict of Interest

A *qui tam* statute affords the informer a personal financial interest that will often conflict with public interests implicated by an enforcement action.<sup>411</sup> These conflicting interests explain many of the

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the public interest. This need to maintain appearances perhaps serves as a constraint on the behavior of public prosecutors and tends to minimize conduct with an obvious adverse impact on the public. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1338 (1993) ("American prosecutors are almost always elected public officials who have to defend their record and the way they use their discretion to the electorate." (footnote omitted)).

The opportunity for corrupt practices by public prosecutors, such as extortion of secret payments from defendants, may be minimized by the greater scrutiny such prosecutors endure, particularly those in the Justice Department. By the time an FCA case is referred to a Justice Department attorney, there are frequently several other government employees already involved in the matter who might notice suspicious behavior. See DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 32 (1980) ("Typically, civil litigation conducted by the Department of Justice is intimately related to the programs of other federal agencies—referred to as the 'client agencies.'"). In addition, the Justice Department has mechanisms in place to monitor the conduct of prosecutors, which tend to deter corruption. See, e.g., 2 DEPARTMENT OF JUSTICE MANUAL § 1-2.112 (1997) (describing the role of the Office of Professional Responsibility in investigating alleged misconduct of Justice Department employees). By contrast, *qui tam* enforcement is decentralized and the informer may be the only person other than the wrongdoer who knows of a statutory violation.

410. See *supra* notes 393–94, 399–404 and accompanying text.

411. Personal interests of the informer beyond the available bounty may also conflict with public interests at stake in the litigation. Cf. *supra* note 408 and accompanying text (describing the personal interests of public prosecutors). English *qui tam* informers, for instance, sometimes were accused of acting from "malice." See *supra* notes 201, 210, 216 and accompanying text. An informer who prosecutes a claim because of antipathy toward the defendant is unlikely to make prosecutorial decisions based on a disinterested evaluation of the public good. Similarly, the informers in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), filed 34 *qui tam* actions against competitors as part of a "war in the citrus industry." *Id.* at 1141. An informer attempting to harm competitors is unlikely to prosecute cases in a manner benefiting the public. Indeed, the Justice Department intervened and dismissed the *qui tam* claims presented in *Sequoia Orange*, believing the cases to be harmful to the industry. See *id.* at 1142. This case appears to be the only one in which the Justice Department has intervened for the purpose of dismissing a *qui tam* action.

Of course, it is quite possible that private causes of action could be brought for malicious purposes, such as harming a competitor. See David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits Under the Fair Housing Act*, 63 U. CHI. L. REV. 1607, 1630 (1996) ("According to Judge Posner, the existence of

problems that beset *qui tam* enforcement in England. The informers pursued the prosecution of statutory violations with a business mindset, rather than that of disinterested public servants. If the informer had evidence of statutory violations, he had no incentive to consider the public impact of the litigation, the culpability of the defendants, the fairness of a particular litigation strategy, or similar matters that might influence a public prosecutor. For those informers who were less than scrupulous, the goal of wealth maximization could be pursued even more effectively by extorting secret settlements or by claiming statutory violations that in fact did not occur. This Section will discuss particular ways in which informers seeking the largest possible bounty have undermined the public interest in English *qui tam* cases and in cases brought under the FCA.

### 1. Diverting the Public's Share of the *Qui Tam* Recovery

Perhaps the clearest conflict between the interests of the informer and the public concerns the allocation of moneys recovered from a defendant. When dividing a fixed pot of money paid by a defendant, every dollar that goes to the public necessarily will not go to the informer. Thus, the informer has a financial incentive to reduce the amount of money that the public receives. This aspect of the informer's conflict of interest manifested itself in England in the recurring extortion of secret settlements, i.e., unlicensed compositions.<sup>412</sup> Informers collected payments from statutory violators in exchange for forbearance to file a *qui tam* action or abandonment of a case already filed. The informer then pocketed the entire settlement, sharing none of it with the public.<sup>413</sup> This practice provided the principal basis for the charge of "blackmail" leveled at informers during the Parliamentary debate over the Common

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the abuse of process tort is proof that some meritorious lawsuits are filed for ulterior reasons—for example, to impose prohibitive litigation costs on a competitor . . ."). However, the impact of such cases is limited by the requirement that the plaintiff make a plausible showing of the damages it has suffered. Under the FCA, the plaintiff need not show any injury to itself, suing instead for treble damages based upon alleged injury to the government. See *supra* notes 17, 101 and accompanying text. This procedure makes it easier to raise the stakes in the litigation by claiming that the defendant should be liable for a large damage award. If the informer can make no plausible claim that the defendant injured the government, the FCA might still permit a suit for recovery of civil penalties. See *infra* notes 463, 475 and accompanying text (discussing large civil penalties imposed under FCA, even in the absence of damage to the government).

412. See, e.g., *supra* notes 213–23, 262–64, 283–84, 323–25, 373–74 and accompanying text.

413. See *supra* notes 214–23.

Informers Act of 1951.<sup>414</sup>

There are, of course, no published statistics on the incidence of blackmail stemming from the 1986 FCA amendments.<sup>415</sup> However, given the incentives for both informers and defendants to negotiate secret settlements and the recurrence of such conduct under English *qui tam* legislation, it would not be surprising to find that similar incidents have occurred under the American statute. Moreover, the FCA has demonstrably given rise to a related problem. Even if FCA informers have refrained from extortion, there is strong evidence that they have undermined the public interest by structuring FCA settlements to reduce the share recovered by the public.

The problem can be illustrated by the 1992 congressional testimony of a Justice Department witness. The witness testified that in FCA cases in which the government refused to intervene (“declined cases”), recoveries to the United States Treasury “[had] been negligible,” but that recoveries by informers and their attorneys in those same cases “[had] not been negligible.”<sup>416</sup> While the United States had received only \$225,000 from declined cases,<sup>417</sup> informers had entered into or requested approval of settlements providing for another \$6.1 million in payments to the relators and their attorneys—money that would not be shared with the government.<sup>418</sup> In other words, the evidence suggests that, between 1986 and 1992, proposed and final settlements in declined *qui tam* cases had been structured so that the vast majority of settlement proceeds were allocated to

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414. See *supra* notes 373, 375 and accompanying text; see also *supra* text accompanying note 346 (describing *qui tam* enforcement as “legalized blackmail”). It could be argued that such extortionate settlements undermine public financial interests, but nevertheless advance the public interest in deterrence by imposing a penalty on the defendant for unlawful conduct. Because such settlements are secret, however, they cannot deter anyone other than the particular wrongdoer in question. Moreover, it is likely that the extortionate settlement will be substantially less than the full penalty provided for by statute, weakening the deterrent impact. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 601 (4th ed. 1992) (“If blackmail were lawful, the public monopoly of enforcement would be undermined. An alternative, and only superficially inconsistent, possibility is that the blackmailer will subvert the statutory punishment scheme by accepting from the offender a payment less, often much less, than the specified fine for the offense.”).

415. Racketeering was one of the complaints that led to the restriction of FCA *qui tam* litigation in 1943. See *supra* note 88 and accompanying text.

416. *False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on Admin. Law and Governmental Relations of the House of Representatives Comm. on the Judiciary*, 102d Cong. 28 (1992) (Sup. Docs. No. Y 4.J89/1:102/49) [hereinafter *Gerson Testimony*] (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Department of Justice).

417. See *id.* at 26.

418. See *id.* at 28.



informers and their attorneys rather than the government.<sup>419</sup> This outcome, while perhaps not surprising, undercuts the FCA, which specifies that the government should receive between 70% and 75% of any sums recovered on FCA claims in declined cases.<sup>420</sup>

How do informers circumvent the statutory formula for division of proceeds? They negotiate to allocate settlement dollars to claims in which the government shares no interest.<sup>421</sup> As the Justice Department witness explained, “[t]his \$6.1 million [in ‘additional payments’] has been variously characterized in settlement agreements as ‘attorney’s fees’ or ‘wrongful termination settlements’ or payment for ‘emotional distress.’”<sup>422</sup> In essence, informers use the government’s fraud claims as bargaining chips to increase recoveries on personal causes of action.

The Justice Department believes this technique was employed in *United States ex rel. Killingsworth v. Northrop Corp.*,<sup>423</sup> a *qui tam* case in which the government chose not to intervene. The informer and

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419. Gerson’s testimony did not mention the amount paid to informers in statutory bounties. On the other hand, neither did he indicate whether any of the pending settlements provided for additional payments to the United States beyond the \$225,000 already recovered. Thus, the testimony does not permit a determination of the exact percentage of money allocated to informers and their attorneys in these proposed and final settlements. *See id.*

420. *See* 31 U.S.C. § 3730(d)(2) (1994). Relators may have shared a larger percentage of their recoveries with the government since 1992, but have still kept a relatively high percentage of the money paid by defendants in declined cases. According to Justice Department figures, the total dollar amount allocated to FCA claims in declined cases through September 1999 has been \$189 million. *See* Wiener E-mail, *supra* note 10. The informers’ bounty has not been calculated in all of these cases. *See id.* However, because the statutory minimum bounty is 25% in most declined cases, *see* 31 U.S.C. § 3730(d)(1)–(2), and the informer’s bounty has averaged 29% in the declined cases where a bounty has been calculated, *see* Wiener E-mail, *supra* note 10, it is reasonable to assume that if none of these recoveries is reversed on appeal, at least 25% of the \$189 million recovered in declined cases, or \$47.25 million, will eventually go to informers.

In addition, the Justice Department knows of another \$64.3 million that has gone to the informers in declined cases because it was characterized as something other than an FCA recovery. The actual figure is probably higher than \$64.3 million, because some of the settlement agreements are confidential, so the Justice Department lacks access to complete data. *See id.* Thus, of the \$253.3 million (\$189 million + \$64.3 million) that the Justice Department knows was recovered from defendants in declined cases, it appears likely that at least \$111.55 million (\$47.25 million + \$64.3 million), or 44%, will go to the informers and their attorneys, in addition to any payments that have been kept secret from the Justice Department. One published list of *qui tam* settlements shows a few settled cases in which the government received nothing at all and a number of others in which the amount allocated to the government seems suspiciously low. *See List of Qui Tam Settlements*, 2 No. 10 DOJ ALERT 16 (Prentice Hall, Oct. 1992).

421. *See* Kovacic, *supra* note 107, at 1833.

422. *Gerson Testimony*, *supra* note 416, at 28.

423. 25 F.3d 715 (9th Cir. 1994).

the defendant reached an agreement that the defendant would pay \$1 million to be shared by the informer with the government for an FCA fraud claim and \$3.2 million solely to the informer for a wrongful termination claim, including costs and attorney's fees.<sup>424</sup> The government objected, arguing that the settlement had been structured to reduce the amount recovered by the United States and that the defendant had failed to pursue a potentially meritorious statute of limitations defense applicable to the wrongful termination claim.<sup>425</sup> The parties then agreed to shift \$500,000 of the settlement amount from the wrongful termination cause of action to the FCA claim.<sup>426</sup>

An even clearer case of an informer trying to cut the government out of its rightful recovery is *United States v. Texas Instruments Corp.*<sup>427</sup> In that case, the informer and the defendant entered into a settlement for \$300,000, which was characterized as "legal fees" and paid to the relators' attorneys. The attorneys then gave \$124,500 of the supposed legal fees back to the informer. The district court found that the latter sum was simply a disguised recovery on the FCA claim and that the government was entitled to receive its share of that money.<sup>428</sup>

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424. *See id.* at 718.

425. *See id.*

426. *See id.* The Ninth Circuit ruled that the government was entitled to a hearing on "whether the proposed settlement fairly and reasonably allocates the settlement funds." *Id.* at 725. On remand, the district court approved the settlement over the government's objection and the Ninth Circuit affirmed on appeal. *See United States ex rel. Killingsworth v. Northrop Corp.*, No. 94-56599, 1995 WL 635100, at \*2 (9th Cir. Oct. 26, 1995) (unpublished disposition).

In *Searcy v. Philips Electronics North American Corp.*, 117 F.3d 154 (5th Cir. 1997), the Fifth Circuit provided additional protection to the United States, holding that the FCA does not permit voluntary dismissal of an FCA claim over the objection of the Justice Department. *See id.* at 155. The holding essentially gives the government a veto power over settlements reached in declined cases, unless perhaps a defendant could pay an informer not to prosecute an action that remained pending.

427. 104 F.3d 276 (9th Cir. 1997).

428. *See id.* at 277. The informer also may undermine the public interest in the settlement process by impeding the negotiation of non-monetary settlements. At times, a non-monetary settlement can provide greater value to the public than a cash settlement, while simultaneously reducing the cost to the defendant. *See James C. Freund, Bridging Troubled Waters: Negotiating Disputes*, in *THE CORPORATE LITIGATOR* 253, 261 (Francis J. Burke, Jr. & Michael L. Goldblatt eds., 1989) (noting that settlements can be premised on business arrangements between the parties because "the value to the recipient of goods and services is always substantially higher than the cost to the furnisher, an economic fact of life that can help to bridge large gaps"). Because the informer has a financial stake in any recovery, however, the informer's incentive is for every settlement to be expressed in dollars and cents, even when the public would be better served by more creative settlement options. As explained by a veteran prosecutor:

"We may want to settle with a hospital, knowing that they are providing all of the

The problem of unlicensed compositions in England and the efforts of FCA informers to reduce the settlement dollars recovered by the United States illustrate the inevitability of conflict between the interests of informers and the interests of the public in certain contexts. Empowering informers to represent the public promises to undermine the public good in situations where their interests diverge. Disagreement over the division of money paid by defendants is simply the most visible expression of the informer's conflict of interest. The discussion below suggests that the antagonism between the goals of informers and those of the public extends beyond the allocation of monetary recoveries to other matters that, while sometimes more subtle, are no less important to the welfare of the community.

## 2. Imposing Unproductive and Counterproductive Social Costs

In discussing the benefits of prosecutorial discretion, this Article suggested that the public interest requires a careful balancing of the goals of a statutory regime, such as deterrence and compensation, with other important goals, such as minimizing the costs of the enforcement process.<sup>429</sup> The disinterested public prosecutor presents a real advantage in this regard. In deciding whether to bring suit, the public prosecutor can engage in a case-by-case consideration of the regulatory benefits and the social costs of a particular enforcement action.<sup>430</sup>

One can illustrate this advantage of prosecutorial discretion by considering circumstances in which a prosecutor would advance the public interest by declining to file enforcement actions arguably authorized by the terms of a statute. At least three such

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community's charity care and understanding that a multimillion-dollar settlement will impair their ability to do that . . . . But I have a relator who knows the case is worth millions, and he doesn't want to settle."

Brian McCormick, *Law Opens Door to More Whistle-Blowing on Health Fraud*, AM. MED. NEWS, June 26, 1995, at 23, 23 (quoting James Sheehan, Chief of Civil Division, United States Attorney's Office, Eastern District of Pennsylvania). Under the statute, the informer cannot unilaterally block a Justice Department settlement, but he or she can force a court hearing to determine whether the settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B) (1994).

429. See *supra* notes 383-92 and accompanying text.

430. The Supreme Court made an analogous point in *Alden v. Maine*, 119 S. Ct. 2240 (1999), emphasizing the value of centralized decision-making in the pursuit of litigation against states. See *id.* at 2267. The Court explained that cases pursued by the United States government itself "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Id.*

circumstances come to mind. First, the public good would be promoted by declining to prosecute in cases in which prosecution would defeat the goals of the legislation. For example, because the False Claims Act is supposed to protect tax dollars,<sup>431</sup> enforcing the statute in a manner that causes a net loss to the treasury undermines the goals of the statute and harms the public.

Second, even when an enforcement action would not undermine statutory goals directly, the public would be harmed and societal resources wasted by enforcing an overly broad statute against conduct bearing little or no relation to the purposes behind the legislative scheme. The public has no reason to apply a legal rule when its regulatory policies are not implicated. To the contrary, the common good requires *not* enforcing a statute when doing so would create unproductive social costs. Thus, in the context of the FCA, enforcing the statute against conduct having only minimal potential impact on the public fisc undermines the public interest. Invoking the statute in this circumstance imposes unproductive social costs on members of the society in the enforcement process itself and in the efforts of regulated persons to avoid similar enforcement actions in the future—without advancing the public purposes behind the legislation.

Third, even if the potential defendant's conduct has a significant impact on the achievement of statutory goals, the public interest is harmed when a statute's enforcement produces social costs that exceed the regulatory benefits of enforcement. Applying the statute in particular contexts, for instance, might create economic dislocations with an excessive impact on innocent third parties. Alternately, the costs of satisfying the statute in particular circumstances might become so high that the public would be harmed by requiring regulated parties to conform fully to legal requirements. The cost of compliance is a particularly important issue under the FCA because of its close relationship to the government contracting process. Contractors facing greater costs from FCA enforcement will either demand larger payments for goods or services supplied to the government, or shift to more lucrative fields of economic endeavor, thereby reducing competition in the procurement market.<sup>432</sup>

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431. See *supra* note 383 and accompanying text.

432. Of course, the public may have little sympathy with respect to enforcement costs imposed on a company that cheats the government. But many costs of complying with the FCA, such as the cost of training employees or the cost of monitoring to prevent violations, will be higher for companies that try in good faith to satisfy their statutory duties. See, e.g., Katherine Simpson Allen, Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037, 1040 n.13 (1985)

In each of these three circumstances, then, and perhaps others as well, a prosecutor would advance the public interest by refraining from filing an enforcement actions notwithstanding statutory authorization to do so. Recognizing and acting upon the public interest in such circumstances requires evaluation of the policies behind a statutory prohibition and the costs imposed by the enforcement process. A *qui tam* informer, however, acts primarily for the sake of the statutory bounty. The informer is a single-minded automaton, programmed to seek out statutory violations and collect forfeitures. The issues relevant to an informer's pursuit of forfeitures are: (1) the likelihood that the informer could convince a court that the defendant violated a statute; and (2) the ability of the defendant to pay the resulting penalty. This focus on wealth maximization tends to exclude competing considerations. The financially motivated informer will be relatively insensitive both to the goals of a regulatory regime and to the social costs imposed by enforcement because neither directly impacts the collection of bounties. This insensitivity to regulatory goals and social costs is borne out in both the English history of *qui tam* enforcement and in modern experience under the FCA.

a. Fraudulent and Meritless Claims

One common complaint under the eighteenth century English statute regulating liquor sales was that informers prosecuted innocent defendants.<sup>433</sup> This problem illustrates in an extreme form the informer's insensitivity to the goals of a regulatory regime and the costs of enforcement. Parliament, of course, adopted the legislation to punish the unlicensed sale of alcohol, hoping to reduce conduct deemed socially harmful.<sup>434</sup> Enforcement of the statute against someone who had not actually sold alcohol imposed social costs on the defendant while doing little to advance the policy goals of the legislation.<sup>435</sup> But whether a prosecution furthered the public goal of punishing unlicensed liquor sales or whether it imposed unproductive social costs on the defendant were matters of indifference to a

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(noting that costs of compliance with EPA regulations are higher for honest waste haulers and that illegal dumpers enjoy large profit margins due to non-compliance).

433. See *supra* notes 322-23 and accompanying text.

434. See *supra* notes 317-19 and accompanying text.

435. To the extent there may be some positive deterrent impact from an erroneous conviction, the social costs of penalizing a defendant for an offense that was not in fact committed outweigh the deterrence advantage. See 4 BLACKSTONE, *supra* note 34, at \*358 ("[I]t is better that ten guilty persons escape than that one innocent suffer.").

bounty-seeking informer. If an informer was not particularly honest, and if he failed to detect enough statutory violations to meet his financial goals, he could earn additional bounties by convincing the courts that innocent persons had violated the statute.<sup>436</sup> The public interest in protecting law-abiding citizens against unfounded accusations was thus sacrificed in pursuit of the informer's personal financial interests.

A less egregious but related form of overreaching has arisen in enforcement of the FCA. A large proportion of *qui tam* cases filed under the FCA have been dismissed by the courts, but have nevertheless proven expensive to resolve. The bulk of the resulting social costs have been borne either by the government or by defendants. These social costs imposed by the informers' activities, therefore, have failed to deter bounty-seeking informers from bringing "lottery ticket" enforcement actions.

Statistics from the Department of Justice demonstrate that the courts have dismissed a high percentage of *qui tam* actions filed since the 1986 FCA amendments. As of September 1999, the Justice Department had learned the final outcome in 1600 *qui tam* cases.<sup>437</sup> Of these 1600 cases, the Justice Department categorized 1181, or 73.8%, as having been "[d]ismissed, no recovery." The other 419 cases, or 26.2%, have produced a settlement or judgment.<sup>438</sup> Based on this data, it appears that in *qui tam* cases that have reached a definitive conclusion, the courts have found more than seven out of ten defective, either as a substantive matter or as a result of procedural or jurisdictional deficiencies.<sup>439</sup>

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436. See *supra* notes 322–23 and accompanying text.

437. See Wiener E-mail, *supra* note 10 (combining figures for cases categorized as "[s]ettled or judgment" and "[d]ismissed, no recovery").

438. See *id.* The Justice Department characterizes 42 cases as "inactive" and another 71 cases as "unclear." *Id.* Even if we included these cases in our calculations, the figures would still show that, among *qui tam* cases that may have run their course, at least 68.9% (1181 of 1713) have been dismissed by the courts, and others have apparently been abandoned by the informers. Of the 1600 cases described in the text, the Justice Department indicates that it "[i]ntervened or otherwise pursued" 348 of them. *Id.* Out of those 348 cases, only 8, or 2.3%, are classified as "[d]ismissed, no recovery." *Id.* Thus, the Justice Department has done a much better job than informers generally of selecting meritorious *qui tam* cases to pursue.

439. During the Bush administration, the Justice Department pointed to the large number of meritless *qui tam* cases filed under the 1986 FCA amendments. In 1992, Assistant Attorney General Stuart Gerson testified before Congress that "[a]n uncomfortable number of the *qui tam* suits filed present no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." *Gerson Testimony*, *supra* note 416, at 24. Of the 332 *qui tam* complaints that had been

The pursuit of substantively or procedurally defective FCA claims is an objective manifestation of the informer's conflict of interest. Evidently, informers have concluded that these claims create sufficient potential for financial reward to warrant the required effort, even though seven out of ten cases result in no recovery. From the standpoint of the informer, this conclusion is probably rational. When there has been a recovery in a *qui tam* case, the average amount paid to the informer has been \$987,000, so there is a significant upside if a particular claim pays off.<sup>440</sup> An attorney will usually pursue a *qui tam* action on a contingent-fee basis, so the informer is insulated from most of the costs of prosecution. The attorney bears the prosecution costs, but can cover her losses by pursuing a large number of cases, some of which are likely to produce a payout.<sup>441</sup> Moreover, it may be rational for an informer to pursue a

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investigated by Gerson's office at the time of his testimony (many of which were presumably still active), about 150 (45%) had been dismissed by the courts or abandoned by the *qui tam* informers. See *id.* at 25. Former Attorney General William Barr likewise indicated in a 1992 speech to corporate counsels that a "high proportion" of *qui tam* cases lacked merit. William P. Barr, Remarks to the American Corporate Counsel Association (Oct. 29, 1992).

440. See Wiener E-mail, *supra* note 10.

441. Addressing the issue of claims against innocent defendants, Judge Richard Posner has recognized that a person in the position of a *qui tam* informer "is paid per offender convicted, regardless of the actual guilt or innocence of the accused" and, therefore, "can increase his 'catch,' and hence his income, by augmenting the supply of 'offenders' " with fabricated claims. POSNER, *supra* note 414, at 597. On the other hand, he has noted that "the private enforcer may be more sensitive to the costs of the unsuccessful prosecution" and, therefore, may "screen out the innocent more carefully than the public enforcer would, because resources devoted to prosecuting the innocent are likely to be less productive than those devoted to prosecuting the guilty." *Id.* at 598.

Nevertheless, the FCA data collected by the Justice Department suggests that informers as a class have engaged in only minimal "screening" to exclude non-meritorious claims, perhaps because many FCA informers do not have a large supply of potential claims to assert. A plausible FCA claim typically depends upon access to inside information, so an informer who wants a chance at the large bounties under the statute may have no alternative but to make the strongest possible claim from the information in his possession. Certain informers have been in a position to file multiple *qui tam* actions under the FCA. For instance, one retired employee of an Inspector General's office reportedly has pursued at least seven *qui tam* cases. See, e.g., United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 741 (9th Cir. 1995) (en banc) (noting that Harold R. Fine has pursued "several" *qui tam* actions); accord Wallace, *supra* note 19, at 19 (reporting that relator Fine filed seven *qui tam* complaints between 1992 and 1993). Perhaps such an informer, with unusual access to a large number of potential claims, would have the ability to "screen" *qui tam* cases and assert only the most meritorious. The typical private informer, however, does not have the public prosecutor's luxury of sifting through numerous possible cases to select only those presenting the best evidence of fraud.

The FCA has spurred the growth of a "*qui tam* bar" consisting of law firms that devote substantial resources to FCA litigation. See Fisk, *supra* note 9, at A1 (noting a

claim, even if it seems unlikely to yield a victory on the merits. For instance, the case could prove to have a nuisance value, causing the defendant to settle to avoid the higher costs of defending a fraud claim.<sup>442</sup>

While it makes economic sense from the informers' standpoint to file a large number of FCA cases in hopes of a few significant payouts, this course of action produces costs for defendants and the public. In an effort to obtain information on the costs of defending FCA cases, Professor Kovacic surveyed forty government contract and commercial firms.<sup>443</sup> The surveyed firms had been defendants in thirty-eight completed *qui tam* cases that had been pursued without Justice Department intervention. In defending these cases, the firms spent approximately \$53,403,000 in outside legal costs: "The total amount of [FCA] recoveries obtained in these matters was \$3,694,484. The average expenditure in outside legal fees by defendants in these cases was \$1,431,660, and the average [FCA] recovery was \$97,223."<sup>444</sup> These figures suggest that, at least in cases that the Justice Department declines, the social costs to defendants of *qui tam* enforcement are dwarfing the benefits accruing to the public.<sup>445</sup>

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Florida firm that has six attorneys and five investigators devoted exclusively to pursuing 70 active *qui tam* cases). Such a firm presumably rejects some cases offered by potential informers, but because the firm does not hold a monopoly on enforcement powers, a rejected informer may still be able to find another attorney willing to handle the case. Moreover, as suggested in the text, the profitability of a *qui tam* practice may depend on having several cases pending at once. Thus, even a firm with a significant *qui tam* practice might be willing to take some marginal cases and rely on the law of averages to protect the firm's bottom line. Certainly, no private firm will have a sufficient pool of potential cases so that it can be as selective as the Department of Justice in deciding how to allocate enforcement resources.

442. Even when the risks of an adverse judgment seem low, an FCA defendant must take into account the high penalties provided by the statute: treble the government's actual damages, plus a fine of \$5000 to \$10,000 for each invoice or other document that is deemed to constitute a "false or fraudulent claim" or a "false record or statement" supporting payment of such a claim. 31 U.S.C. § 3729(a) (1994).

443. See William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 224-25 (1998).

444. *Id.* at 226. The survey respondents estimated that even a relatively simple *qui tam* case, where the proceedings are short lived, typically produces out-of-pocket legal costs in the range of \$250,000 to \$500,000, not including other costs such as employee time. *See id.* at 225. Potentially, of course, the self-interest of the survey respondents could have influenced their estimates. *See id.* at 224-25.

445. The sizable legal fees expended in these cases need not be viewed as evidence that the cases had potential merit or that the defendants were trying to spend the informers into submission. In a large company, extensive legal fees can be incurred just in conducting a preliminary legal and factual investigation to determine the merits of a case. *See CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., REPORT AND PLAN* (1991), reprinted in 11 REV. LITIG. 203, 256 (1992)



The adverse effect of meritless *qui tam* claims on the public is aggravated by the ability of many defendants to recapture their defense costs under cost-reimbursement contracts. The Federal Acquisition Regulations permit a government contractor under a cost-reimbursement contract to recover up to 80% of the costs of successfully defending an FCA action.<sup>446</sup> Thus, it seems probable that the thirty-eight cases covered by Professor Kovacic's survey produced a significant net loss to the treasury.<sup>447</sup> But even in cases where such legal expenditures are not reimbursed directly by the public, they adversely affect government contracting by driving up procurement costs and discouraging firms from participating in the procurement market. An informer has no incentive to consider such costs, even though they may be significant to the public.<sup>448</sup>

Fruitless *qui tam* cases also adversely affect the public by

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(reporting that attorneys in a survey identified preliminary investigation of cases as the second highest source of litigation costs, with discovery activities as the highest). Moreover, when the case concerns a program employing hundreds of workers, an informer can impose heavy legal costs on the defendant with a simple request for production of documents, which must be gathered and reviewed by outside counsel. See LARRY S. KAPLAN, *COMPLEX FEDERAL LITIGATION: AN ATTORNEY'S GUIDE TO MANAGEMENT AND TRIAL* § 18.02, at 397-98 (1993) (discussing large costs of document production); WILLIAM SCHWARZER ET AL., *CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE* § 6-3 (2d ed. 1994) ("Overuse and misuse of document requests are common sources of complaints about the discovery process. Dragnet requests that would produce many more documents than are needed or relevant are easy to draft . . .").

446. See 48 C.F.R. § 31.205-47(b), (e) (1999) (stating that up to 80% of reasonable costs of defending FCA action brought "by a third party in the name of the United States" may be allowable costs under government contracts unless the actions resulted in a judgment or a settlement); Kovacic, *supra* note 443, at 226; Kovacic, *supra* note 107, at 1840-41; see also JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* 3-85 to -87 (1998) (noting that "the allowability of costs in defending *qui tam* actions" remains an open question). For additional information on *qui tam* actions, see generally QUI TAM: BEYOND GOVERNMENT CONTRACTS (PLI Litig. & Admin. Practice Course Handbook, Series No. H-456, 1993).

447. See Kovacic, *supra* note 443, at 226 ("The results of the survey suggest that the government frequently reimburses the defendant in an amount that substantially exceeds the [FCA] penalties obtained by a relator who proceeds with a case independently after the Justice Department has declined to participate.").

448. A fee-shifting provision might make the informer more sensitive to the costs of defending against an unsuccessful *qui tam* action. In a widely cited article, Professors Becker and Stigler have advocated a private market in law enforcement somewhat analogous to that created by a *qui tam* statute. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13-17 (1974). However, to deter "[c]apricious or arbitrary enforcement," their proposal includes "full compensation of persons acquitted of charges" paid for by the party bringing the charges. *Id.* at 15. The FCA contains a fee-shifting provision, but it has virtually no bite, because it applies only if a case is "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4) (1994).

consuming government investigative resources.<sup>449</sup> Indeed, the FCA mandates that the Justice Department investigate allegations of fraud contained in *qui tam* complaints.<sup>450</sup> In 1992 testimony before Congress, a Justice Department witness stated that Civil Division attorneys had spent approximately 20,000 hours investigating 150 *qui tam* cases that subsequently were dismissed or abandoned;<sup>451</sup> this total did not include time spent by other government investigators, such as employees of the Defense Contract Audit Agency and the Air Force Office of Special Investigations. One source of the problem is that a *qui tam* informer can file a wide-ranging complaint and let the government do the investigation. If the government finds evidence of fraud, the informer can claim a share of the recovery.<sup>452</sup> If not, the investigation has cost the informer little. The costs of a government investigation matter a great deal to the public, however, because tax dollars pay the salaries of law enforcement personnel.

#### b. Technical Violations

Judge Posner has noted that legal rules are often overinclusive “because of the inherent limitations of foresight and ambiguities of language.”<sup>453</sup> The legislature cannot anticipate or express with precision all of the circumstances that might warrant an exception to a rule of general application, so it paints with a broader brush than the public interest requires. Strict enforcement of an overinclusive rule, Posner argues, can impose heavy social costs.<sup>454</sup> This problem is often addressed through “discretionary nonenforcement” by public prosecutors.<sup>455</sup> Such benevolent exercises of prosecutorial discretion reduce the costs of overinclusion “without a corresponding increase in underinclusion (loopholes).”<sup>456</sup>

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449. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1146 (9th Cir. 1998) (approving the Justice Department’s dismissal of *qui tam* claims because “the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs”); Kovacic, *supra* note 107, at 1840.

450. See 31 U.S.C. § 3730(a)–(b); *United States ex rel. Pratt v. Alliant Techsystems, Inc.*, 50 F. Supp. 2d 942, 944 (C.D. Cal. 1999).

451. See *Gerson Testimony*, *supra* note 416, at 25–26.

452. See 31 U.S.C. § 3730(d)(1) (providing that the informer can “receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim”).

453. POSNER, *supra* note 414, at 600.

454. See *id.*

455. See *id.*

456. *Id.* Some commonplace examples of law enforcement discretion include situations when “[t]he police overlook minor infractions of the traffic code” and when “building

Such discretionary nonenforcement is impossible under a *qui tam* statute, however, because prosecutorial discretion requires a government “monopoly” of enforcement powers.<sup>457</sup> In a system of *qui tam* enforcement, an overinclusive statute is likely to be applied to the outermost limits of its language. This overenforcement is a consequence of the informer’s conflict of interest. The Supreme Court recognized both the problem and its source in *Hughes Aircraft Co. v. United States ex rel. Schumer*.<sup>458</sup> Because *qui tam* informers “are motivated primarily by prospects of monetary reward rather than the public good,” they “are less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.”<sup>459</sup>

The seventeenth century English case in which East Indies merchants were sued under a statute regulating “garbling” of spices illustrates the problem of prosecution for “technical” violations of a regulatory command.<sup>460</sup> The Privy Council ordered a stay of the case after the merchants argued that they had satisfied the intent of the statute and would be excessively burdened by compliance with its literal terms.<sup>461</sup> This sort of argument may persuade a government prosecutor who wishes to advance the statutory policies while minimizing the costs imposed on the public. Conversely, the argument is unlikely to influence a *qui tam* informer zealously pursuing a bounty.<sup>462</sup>

The False Claims Act is a classic example of an overinclusive statute. There is no question that Congress painted with a broad brush. A defendant need not have a specific intent to defraud the government to fall within the statute’s reach; reckless submission of a false claim suffices to trigger treble damages and civil penalties under the Act.<sup>463</sup> Moreover, many cases have held that a defendant can be liable for FCA civil penalties even when the government has suffered

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inspectors ignore violations of building code provisions that, if enforced, would prevent the construction of new buildings in urban areas.” *Id.*

457. *See id.*

458. 520 U.S. 939 (1997).

459. *Id.* at 949.

460. *See supra* notes 243–46 and accompanying text.

461. *See* PRIVY COUNCIL 1615–16, *supra* note 244, at 512, 512 (entry dated Apr. 30, 1616); *supra* notes 246–47 and accompanying text.

462. Similarly, Lord Coke accused *qui tam* informers of enforcing obsolete statutes that remained on the statute books, but which no longer served their original purposes. *See* COKE, *supra* note 200, at \*191.

463. *See* 31 U.S.C. § 3729(b) (1994).

no damages, a rule that brings attempted—but unsuccessful—frauds within the scope of the statute.<sup>464</sup> A defendant can also be liable even if government officials knew about the circumstances that render the claim false, a principle that allows application of the statute when government employees play a role in the fraud.<sup>465</sup> While such broad rules of liability are explicable in terms of the statutory policies, the synergistic effect of rules like these is to make the FCA applicable to a broad range of conduct, some of which only tangentially relates to the statute's purpose of preventing and punishing schemes to defraud the United States Treasury.

The breadth of the FCA encourages *qui tam* informers to press claims alleging technical statutory violations with little relation to the statutory purposes. An example is offered by *United States ex rel. Hughes v. Cook*,<sup>466</sup> a case decided prior to the 1986 FCA amendments. The informer sued nine doctors, claiming they had violated the FCA in submitting claims for Medicaid reimbursement.<sup>467</sup> The plaintiff's sole argument was that the doctors had not filed their medical licenses with a state court in a timely fashion, allegedly making the licenses void under Mississippi law.<sup>468</sup> Of course, one can imagine a scheme to defraud Medicaid by submitting claims for services by unlicensed "doctors." But here the informer made no claim "against the qualifications, credentials, ability or integrity" of the defendants.<sup>469</sup> The district court granted summary judgment on the ground, *inter alia*, that the defendants had not "knowingly" defrauded the government,<sup>470</sup> a defense that would be harder to establish under the amended FCA, with its expanded definition of the term "knowing."<sup>471</sup>

The 1996 case *United States ex rel. Sanders v. East Alabama*

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464. See, e.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty.").

465. See *id.* ("That the relevant government officials know of the falsity is not in itself a defense.").

466. 498 F. Supp. 784 (S.D. Miss. 1980).

467. See *id.* at 785.

468. See *id.* at 785–86.

469. *Id.* at 785 (relating the informer's deposition testimony concerning one of the defendant doctors).

470. See *id.* at 786–88. The court also based its decision on the fact that the medical licenses were not void due to changes in the applicable state laws and that the informer lacked authority to challenge the licenses. See *id.* at 788–89. Because these arguments depended on the particulars of state law, they might be unavailable to other defendants facing comparable FCA claims.

471. 31 U.S.C. § 3729(b) (1994); see *supra* note 463 and accompanying text.

*Healthcare Authority*<sup>472</sup> illustrates a similarly “technical” claim under the amended FCA. There, the informer argued that the defendant hospital failed to satisfy Medicare and Medicaid regulations because it had improperly obtained a “Certificate of Necessity” from state administrators, and that reimbursement claims submitted by the hospital were therefore fraudulent.<sup>473</sup> Deeming it irrelevant that the government was not injured by the defendant’s conduct, the court concluded that a knowingly or recklessly false representation that the defendant satisfied state licensing requirements could bring a claim within the reach of the amended FCA.<sup>474</sup> Such an FCA claim seems far afield from the statute’s purpose of protecting the United States Treasury, especially in the absence of any injury to the government.<sup>475</sup> From the informer’s perspective, however, it makes little difference whether a particular case is a wise application of the False Claims Act.<sup>476</sup> Any reckless misstatement in a document submitted to the government might generate a bounty, whether or not the defendant meant to defraud the public.<sup>477</sup>

One consequence of the informer’s financial incentive to prosecute technical FCA violations is that those doing business with the government must pay attention to minute and relatively insignificant details of the federal government’s procurement process. Any failure to comply with the vast array of federal regulations

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472. 953 F. Supp. 1404 (M.D. Ala. 1996).

473. *See id.* at 1407. The court stated that the plaintiff’s claims were “based upon an improperly obtained Certificate of Need (‘CON’) which allowed East Alabama Healthcare Authority to operate and receive reimbursement for 106 additional beds at East Alabama Medical Center.” *Id.*

474. *See id.* at 1410–11. The court did not specify the precise licensing requirements at issue; however, unless the requirements related to the quality of medical services provided, it seems excessive to use the federal False Claims Act as an additional means to enforce state licensing rules.

475. *See supra* notes 59–61, 383 and accompanying text.

476. Even if the Government suffered little or no damage from a defendant’s conduct, the informer still may have a strong financial incentive to sue for civil penalties under the FCA. *See, e.g.,* *United States v. Halper*, 490 U.S. 435, 437–38, 452 (1989) (noting that prior to the 1986 amendments a defendant who submitted 65 false claims was liable for \$130,000 in civil penalties, even though he overbilled the government by only \$585 and the government’s actual damages were less than \$16,000). For instance, an informer asserting a defective licensing theory as in *Cook* or *Sanders* might be able to argue that thousands of separate Medicare or Medicaid claims were technically “false” because each was based on a false representation that the hospital or doctor was properly licensed. The FCA provides a minimum penalty of \$5000 and a maximum penalty of \$10,000 for each statutory violation. *See* 31 U.S.C. § 3729(a). Thus, even without any damages to the government, the potential liability of the hospital or doctor on such a claim could be enormous.

477. *See supra* notes 12, 102 and accompanying text.

governing procurement might be the basis of a *qui tam* complaint. Government contractors cannot count on the good sense of public officials to distinguish rules that matter in a particular context from rules that do not.<sup>478</sup> As Professor Kovacic argues, contractors are required to operate “strictly by the book.”<sup>479</sup> To avoid liability, strict compliance is “essential even though the outlay of resources to attain complete adherence to a specific regulatory command may significantly surpass the value that the government derives from having its suppliers follow that command scrupulously.”<sup>480</sup> Moreover, “[b]ecause the [FCA] treats grievous and trivial deviations from regulatory commands alike, firms must structure their compliance systems to obey all commands fully.”<sup>481</sup>

Courts have responded to the problem of overly technical *qui tam* claims through “judicially imposed” limitations on the scope of the statute.<sup>482</sup> For instance, in *United States ex rel. Lamers v. City of Green Bay*,<sup>483</sup> an informer alleged that the city had made false representations to the United States regarding a program to transport schoolchildren on the city’s federally funded public transit system. The informer argued that the city had lied in repeatedly claiming that the school routes were mere “extensions” of pre-existing routes, which the city believed at the time to be required by federal

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478. It could be argued that strict enforcement of government regulations by *qui tam* enforcers will create pressure to eliminate inefficient procurement rules. This would not, however, solve the problem of regulations that are only inefficient in particular settings. In other words, there may be many regulations that are useful some of the time, but that should be selectively relaxed in other circumstances. A public prosecutor can perform this function, which Judge Posner calls “discretionary nonenforcement,” POSNER, *supra* note 414, at 600, at little cost through judicious exercise of prosecutorial discretion, but a *qui tam* prosecutor has a financial incentive to insist on strict compliance with every applicable regulation.

479. Kovacic, *supra* note 443, at 233.

480. *Id.* at 219.

481. *Id.* at 223. Additionally, Professor Kovacic notes,

There may be numerous instances in which compliance with a nominal legal command, either in the form of a statute or a regulation, may undermine rather than enhance the public interest. *Qui tam* monitoring creates substantial hazards for contractors who fail to abide scrupulously by nominal regulatory commands, and it denies the government the ability to use prosecutorial discretion to mitigate costs of ill-conceived regulatory controls.

*Id.* at 223. Professor Kovacic suggests that the costs imposed by *qui tam* enforcement of the FCA tend to undermine recent government initiatives to introduce commercial practices into the procurement process and encourage commercial firms to enter the government contract market. See *id.* at 201–04.

482. See, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784–85 (4th Cir. 1999) (“Liability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed, requirement that the false statement or claim be material.”).

483. 168 F.3d 1013 (7th Cir. 1999).

regulations.<sup>484</sup> The Seventh Circuit rejected this claim on the ground that the city official in question was not lying, but “[a]t most . . . fudging.”<sup>485</sup> Moreover, “[e]ven if this was an outright lie,” the misstatement was not actionable because the city had misinterpreted the regulations and the statement was in fact immaterial to the funding decision.<sup>486</sup> The court also rejected a separate claim by the informer based on the city’s 1994 certification of compliance with program requirements. Even though federal regulators found violations of applicable regulations not long after these assurances were made, the Seventh Circuit reasoned that “minor technical violations” see normal “for a new bus program, and they do not give rise to an FCA claim.”<sup>487</sup>

Judicial limitations on FCA liability have the merit of weeding out at least some overly technical FCA allegations. The cost of this approach is a restriction in the scope of the statutory prohibition, a cost Congress arguably attempted to avoid when it drafted the statute broadly.<sup>488</sup> Judicially imposed restrictions on liability increase the government’s burden in establishing an FCA violation, binding not only *qui tam* informers, but the Justice Department as well. Moreover, the Seventh Circuit in *Lamers* appeared to struggle to articulate a principled basis for its decision. Though “materiality” is a familiar concept in the law, it is less clear how the court will develop

484. *See id.* at 1019.

485. *Id.*

486. *Id.* The Seventh Circuit’s materiality requirement was borrowed from the Fourth Circuit. *See id.* (citing *United States ex rel. Berge v. Board of Trustees*, 104 F.3d 1453, 1459 (4th Cir. 1997)); *see also Harrison*, 176 F.3d at 784–85 (noting the requirement of materiality in the Fourth Circuit). A materiality requirement was also recognized in *Tyger Construction Co. v. United States*, 28 Fed. Cl. 35, 55 (1993). *But cf. United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1190 (N.D. Cal. 1998) (assuming but not deciding whether the statute requires materiality).

487. *Lamers*, 168 F.3d at 1019; *see also Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999) (interpreting *Lamers* to hold that “technical violations of a federal regulation on which a claim is based do not make the claim ‘false’”). The alleged regulatory violations do seem relatively trivial. According to the *Lamers* court:

It is true that the City was having problems providing clear maps and uniformly applying its “any corner is a stop” policy, as the FTA found in its 1995 administrative decision. In addition, there was evidence that the new [school] routes caused public confusion and drivers waited longer than usual for passengers at school routes.

*Lamers*, 168 F.3d at 1019.

488. Perhaps the Seventh Circuit did what the Supreme Court said should not be done—partially “nullify” the FCA “because of dislike of the independent informer sections,” and in the process “exercise a veto power” that does not belong to the courts. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943); *see supra* note 75 and accompanying text.

its distinction between “minor technical” or “normal” regulatory violations and those that give rise to an FCA claim. And there seems very little promise in a rule making FCA liability turn on a judicially perceived distinction between “fudging” and “lying.” But a court presiding over a system of *qui tam* FCA enforcement must either restrict the scope of statutory liability in the manner of the Seventh Circuit in *Lamers* or permit informers to parlay minor regulatory defaults into treble-damage FCA claims.

### c. Economically Harmful Prosecutions

Informers’ insensitivity to the social costs of their prosecutions also explains the pursuit of economically harmful *qui tam* actions by English informers. William Hackett and his fellow informers, for instance, were criticized for aggressively pursuing cases against merchants in Wiltshire County causing the interruption of trade with surrounding counties.<sup>489</sup> Informers in 1620 interfered with the shipment of grain throughout England, causing grain surpluses in certain regions and shortages in others.<sup>490</sup> In contrast, public prosecutors are likely to refrain from filing prosecutions which could result in such adverse economic impacts. But the informers’ bounty motivates them to ignore public economic interests that would be affected by particular prosecutions.

## 3. Nurturing Unlawful Conduct

The interests of the public and those of informers also diverge radically with respect to the “supply” of prohibited conduct.<sup>491</sup> The public adopts a regulatory command because it wants the proscribed behavior to decrease. On the other hand, the informer makes a living from the illegal conduct, and, therefore, the informer’s interests are advanced by an increase in the number and severity of statutory violations.<sup>492</sup>

This aspect of the informer’s conflict of interest explains allegations of entrapment leveled against informers under English *qui tam* statutes.<sup>493</sup> In most instances, the public will be best served if statutory enforcement efforts are directed at violations that would

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489. See *supra* notes 225–28 and accompanying text.

490. See *supra* notes 240–43 and accompanying text.

491. See POSNER, *supra* note 414, at 597–98 (discussing private enforcers’ interest in increasing the “supply” of offenders).

492. See *id.*

493. See, e.g., *id.* at 597 (noting that a private enforcer can increase the supply of offenders through entrapment); *supra* notes 326, 335 and accompanying text.



take place regardless of official encouragement.<sup>494</sup> The informer may be able to collect bounties more efficiently by manufacturing statutory violations that otherwise would not occur. Thus, informers under the English statute on retail liquor sales sometimes persuaded persons to serve them alcohol for the purpose of bringing *qui tam* suits.<sup>495</sup>

This conflict between the interests of the public and the interests of bounty hunters also helps to explain a problem that arose under an English statute prohibiting farmers from drawing plows by their horses' tails.<sup>496</sup> Certain patentees had received a royal patent to compound with Irish farmers who violated the statute. According to the Privy Council, the patentees deliberately established a low fine, "seeking rather to nourish then abolish that uncivle custome."<sup>497</sup> The public interest was in reducing the number of farmers mistreating their horses. But the patentees were paid per infraction. Thus, to increase their profits under the royal patent, they sought to encourage violations of the statute, undercutting the deterrent purpose of the legislation.

Two features of the FCA reduce the likelihood that informers will engage in entrapment for the sake of bringing *qui tam* actions under the statute. First, the statute imposes liability on one who "causes" certain FCA violations.<sup>498</sup> Consequently, an informer who seeks to bring about a violation of the statute might wind up on the wrong side of the *qui tam* enforcement process. Second, the FCA permits the court to reduce the informer's bounty upon finding that the informer "planned and initiated" the violation of the statute, and it requires the informer's dismissal from the action without a bounty upon conviction of a criminal offense "arising from his or her role in the violation."<sup>499</sup> Thus, a court may deny some or all of the statutory reward to an informer who instigated an FCA violation.

Although an FCA informer might be dissuaded from

494. An exception might be an instance when a person frequently violates a statute without getting caught. In this circumstance, the public might benefit from official encouragement of a violation, which then could serve as the basis for a prosecution.

495. See, e.g., *supra* note 326 and accompanying text.

496. See *supra* note 256.

497. PRIVY COUNCIL 1623-25, *supra* note 256, at 152, 152 (entry dated Dec. 8, 1623).

498. See, e.g., 31 U.S.C. § 3729(a)(1) (1994) (establishing liability for one who "causes" presentation of a false claim); *id.* § 3729(a)(2) (establishing liability for one who "causes" a false record or statement to be made or used to get a false claim paid); *id.* § 3729(a)(4) (establishing liability for one who "causes" delivery to the government of less property than is reflected in a receipt); *id.* § 3729(a)(7) (establishing liability for one who "causes" a false statement or record to be made or used to avoid an obligation to the government).

499. *Id.* § 3730(d)(3).

precipitating a violation of the statute, the informer's conflict of interest can manifest itself by influencing the informer's conduct upon discovering a fraudulent scheme. In the Sixth Circuit case *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*,<sup>500</sup> the government intervened in a *qui tam* action and obtained a large settlement from the defendant. The appeal arose from an award of attorneys' fees to the informer, and the court remanded the case for review of several issues, including one based on the claim that the informer deliberately delayed filing his *qui tam* action for nearly three-and-one-half years after the informer's initial consultation with his attorneys.<sup>501</sup> The defendant argued that the delay in filing suit was a deliberate tactic by the informer to increase the government's damages so that his bounty would increase proportionately. The total dollar amount of false claims submitted as of 1987, when the informer first contacted his attorneys, was \$13.1 million.<sup>502</sup> By the time the informer actually filed suit, however, the damage to the government had more than tripled, to \$41.6 million, meaning that the informer's potential bounty had tripled as well.<sup>503</sup> The Sixth Circuit found the defendant's claim sufficiently credible that it remanded for a district court investigation of whether the informer "unnecessarily delay[ed] sending his legal counsel the documents necessary for them to begin assessing the merits of his claims" and whether the attorneys chose to file the case "at the latest possible moment."<sup>504</sup>

The Sixth Circuit's suspicion of an intentional delay in filing suit only arose because of the financial stake offered to the informer under the statute. A public prosecutor who obtained solid evidence of a continuing fraud upon the treasury would be expected to file suit quickly to staunch the hemorrhaging of public funds. The informer, however, is paid based on the amount of fraud he proves. Thus, assuming no competing informers are on the horizon, it is in the informer's financial interest for the government to be damaged to the greatest extent possible before the scheme is brought to light.

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500. 41 F.3d 1032 (6th Cir. 1994).

501. *See id.* at 1043-44. The attorneys representing the informer conceded that they first met with their client in mid-1987. *See id.* at 1043. At that time, they allegedly received no documentation and did not even know the informer's real name. *See id.* The informer supposedly provided documentation to support his claims in July 1989. The law firm then conducted its own investigation and filed suit in November 1990. *See id.* The informer's explanation of the delay was that he feared a "powerful and ruthless" Israeli general involved in the fraud. *Id.* at 1037.

502. *See id.* at 1038.

503. *See id.* at 1038-39.

504. *Id.* at 1044.

#### 4. *Qui Tam* Actions by Government Employees

A number of courts have permitted *qui tam* actions by employees of the government, even when the information underlying the fraud claim was acquired on the job.<sup>505</sup> In such cases, the government informer has essentially the same financial incentives as a private informer. Thus, like a private citizen, the government informer has an incentive to pursue technical FCA claims, where the social costs of enforcement outweigh the benefits to the public. Likewise, the government employee has an incentive to look the other way when he discovers fraudulent conduct, so as to increase his potential recovery in a subsequent FCA action. The government informer faces an additional layer of potentially conflicting interests, however, beyond those present for a private relator. Pursuit of the largest possible recovery in a *qui tam* action may conflict not only with the informer's role as a representative of the public in the litigation, but also with duties owed to the public as a result of the employment relationship.<sup>506</sup>

The conflict of interest becomes most acute when a *qui tam* action is pursued by an employee whose job description includes the detection and prevention of fraud upon the government. In this circumstance, it is quite likely that the financial incentives created by the FCA will lead to malfeasance on the job. For instance, the informer may conceal fraudulent conduct of contractors until he has

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505. See *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1494 (11th Cir. 1991) (holding that the False Claims Act does not prohibit a government employee from filing a *qui tam* action based upon information acquired while working for the government); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1417 (9th Cir. 1991) (allowing a suit by an Assistant District Counsel for the Army Corps of Engineers based upon information gathered during his period of employment); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 72 (E.D. Pa. 1991) (permitting a suit by the commissioner of local housing authority that administered federal funds based on information obtained in that position); *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1159 (S.D. Fla. 1990) (allowing a suit by a Special Agent of the Office of Inspector General of the Department of Health and Human Services upon information obtained in government employment); *Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 919 (E.D. Va. 1989) (allowing suit by Agency for International Development employee based on information acquired during his employment). See generally BOESE, *supra* note 446, at 4-20 to -27 (discussing *qui tam* provisions and their application to government employees).

506. See Hanifin, *supra* note 19, at 608-15 (noting various conflicts between the interests of informers and the job responsibilities of a government employee, including an informer's interest in permitting fraud to continue to increase the size of the potential recovery); Wallace, *supra* note 19, at 21 (noting a conflict of interest, especially if a government employee stays on job after filing a *qui tam* action); Theis, *supra* note 19, at 244-45 (noting the conflict of interest for a government employee informer and the possible effect on job performance).

had time to initiate a *qui tam* case. Even if the informer is scrupulous in performing all job responsibilities, the public arguably is forced to pay twice for the same services.<sup>507</sup> One significant function of the *qui tam* bounty is to compensate the informer for disclosing evidence of fraudulent conduct.<sup>508</sup> In the case of a government fraud investigator, however, the public has already paid for that disclosure through the employee's salary. Perhaps for these reasons, two federal appellate courts, on different theories, have barred *qui tam* claims pursued by government employees responsible for protecting the public from fraud.<sup>509</sup>

## V. A SUGGESTED STATUTORY REFORM

The analysis to this point has suggested that *qui tam* statutes, including the FCA, create an inherent conflict of interest. The informer is expected to represent the public in litigation, but is given a personal financial interest in the outcome of each case that conflicts with various public values affected by the enforcement process.<sup>510</sup> The bounty provision motivates the informer to maximize his financial recovery, even if the litigation is harmful to the community. As a result, statutes like the FCA remove the societal and individual protections afforded by dispassionate exercise of prosecutorial discretion.<sup>511</sup> The informer's conflict of interest under the FCA has manifested itself most plainly in "declined" cases, where the informer conducts the litigation on the government's behalf without the participation of the Department of Justice.<sup>512</sup> The question is how the conflict of interest should be addressed.

One way to address the informer's conflict of interest is to follow

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507. See Hanifin, *supra* note 19, at 614-15 (noting the double payment problem); Theis, *supra* note 19, at 244-45 (discussing the effect of *qui tam* suits on the conduct of investigations by government employees).

508. See *supra* notes 108-10 and accompanying text.

509. Both courts found that the government employee was not an "original source" of the information forming the basis for the suit under 31 U.S.C. § 3730(e)(4) (1994). In *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), the First Circuit held that a quality assurance specialist for the Defense Contract Administrative Service did not have "independent knowledge" of information acquired during his employment. *Id.* at 20. In *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995) (en banc), the Ninth Circuit reached the same result on the theory that an auditor within the Department of Energy Office of Inspector General was compelled to report fraud to his superiors as part of his job and, therefore, had not disclosed the information "voluntarily." *Id.* at 741.

510. See *supra* notes 393-410 and accompanying text.

511. See *supra* notes 429-90 and accompanying text.

512. See, e.g., *supra* notes 416-20 and accompanying text (discussing the allocation of settlement proceeds in declined cases).

the approach of the English Parliament.<sup>513</sup> Congress simply could eliminate the *qui tam* provisions of the False Claims Act, along with the other *qui tam* provisions scattered throughout the United States Code.<sup>514</sup> Following the English lead in eradicating this English legal transplant would be consistent with the principle—vigorously maintained in other contexts—that governmental powers should not be exercised for the sake of private gain.<sup>515</sup> On the other hand, the *qui tam* provisions of the FCA probably have served a valuable purpose in prompting disclosures of fraudulent conduct. Since 1986, the government has recovered \$2.698 billion in *qui tam* cases that the Justice Department entered or “otherwise pursued,” of which \$409.8 million was allocated to the informers.<sup>516</sup> Some of the approximately \$2.29 billion net recovery by the Treasury in these cases doubtless would have been recovered without a *qui tam* enforcement mechanism, but it is also likely that the statutory bounty induced disclosures of fraudulent conduct that otherwise would have remained hidden. Therefore, it is worth considering whether a modification of the statute could preserve the principal advantages of *qui tam* litigation while addressing the consequences of the informer’s conflict of interest.

Many of the more serious abuses of *qui tam* litigation could be eliminated by introducing a disinterested exercise of prosecutorial discretion into the enforcement process.<sup>517</sup> This could be accomplished by modest tinkering with the statute to eliminate the informer’s right to pursue declined cases.<sup>518</sup> Currently, the FCA

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513. See *supra* notes 348–78 and accompanying text (discussing Parliament’s abolition of *qui tam* legislation).

514. See *supra* notes 54–57 and accompanying text (discussing other federal *qui tam* statutes).

515. See *supra* note 394, 399–405 and accompanying text.

516. See Wiener E-mail, *supra* note 10.

517. One circuit court has held that the government can intervene in an FCA case and dismiss the action over the objection of the relator. See *United States ex rel. Sequoia Orange Co. v. Strathmore Packing House Co.*, 151 F.3d 1139 (9th Cir. 1998). If so, then the FCA permits the Justice Department to exercise a sort of affirmative prosecutorial discretion by intervening to shield particular defendants. The Justice Department apparently has exercised this power on only one occasion, in *Sequoia Orange Co.*; the Justice Department’s behavior is, of course, not at all surprising given the political risks of appearing to “protect” those who are accused of “defrauding the government.” Even if a power of occasional intervention for the purpose of dismissal is consistent with the FCA, it leaves unchecked the informer’s conflict of interest in the vast majority of declined cases. Such a power is no substitute for a systemic incorporation of prosecutorial discretion into the FCA enforcement scheme.

518. Eliminating prosecution of declined cases quite possibly would produce a net financial benefit to the United States Treasury and, in any event, would entail no major sacrifice by the public. The recoveries since 1986 in *qui tam* cases pursued by the Justice

requires the informer to file the *qui tam* action under seal and serve the complaint, along with a written disclosure of the informer's evidence, on the Department of Justice.<sup>519</sup> The Justice Department then conducts an investigation and decides whether to intervene to assume control of the litigation.<sup>520</sup> If the Justice Department elects not to intervene, the current statute permits the informer to continue litigating the declined case without the Justice Department's participation.<sup>521</sup> Under the proposed reform, the statute would mandate dismissal without prejudice of cases over which the Justice Department elected not to assume control.<sup>522</sup> FCA claims, then, would be litigated only with the approval and participation of career public servants lacking a financial interest in the litigation process.<sup>523</sup>

Such a modification of the statute would address many of the

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Department have been \$2.698 billion, but the total for FCA recoveries in declined cases has been only \$189 million, which should be further discounted to reflect the 25% or more that must be paid out in bounties. See Wiener E-mail, *supra* note 10; see also *supra* note 420 (discussing recoveries in declined cases). The much larger recoveries in cases pursued by the Justice Department suggest that the department has done a good job of selecting *qui tam* cases with a high probability of success. See Fisch, *supra* note 19, at 197 (concluding that "the Justice Department is an effective judge of quality" and citing an average recovery of \$8 million in cases pursued by the DOJ versus a \$30,000 average recovery in declined cases).

While recoveries in declined cases have been relatively small, a high percentage of those cases has been dismissed without any recovery. See Wiener E-mail, *supra* note 10 (stating that 1173 out of 1661 declined cases (70.6%) were "[d]ismissed, no recovery," that 40 cases were "[i]nactive," and that the status of 67 cases was "[u]nclear"); *supra* notes 437-38 and accompanying text. Because a cost-reimbursement contract requires the public to reimburse a portion of the legal costs incurred in successfully defending an FCA action, public payments to contractors for defense of declined cases probably have exceeded the public's recovery in cases involving such contracts. See *supra* notes 446-47 and accompanying text (discussing recovery of *qui tam* defense costs under federal regulations).

519. See 31 U.S.C. § 3730(b)(2) (1994).

520. See *id.* § 3730(b)(4).

521. See *id.* § 3730(c)(3).

522. Essentially the same statutory modification was advocated in a recent interview by John T. Boese, who has written a practitioner's guide on *qui tam* actions and has defended a large number of clients sued under the FCA. See BOESE, *supra* note 446; Peter Aronson, *Critics Gripe at Suits, Claiming U.S. Is Cheated Out of Billions*, NAT'L L.J., Aug. 9, 1999, at A1 (stating that Boese has indicated that the "law should be changed so that if the government decides not to intervene, the case is dismissed").

523. If the government later attempted to sue the defendant on grounds previously alleged in a dismissed *qui tam* action, the informer's right to a bounty could be preserved statutorily. A personal claim by the informer, such as a claim for wrongful termination, could be permitted to continue notwithstanding the dismissal of FCA claims. Personal claims are not pursued on behalf of the public and, thus, do not create a conflict of interest. If the informer was still employed by the defendant and the Justice Department chose not to intervene, the court could be authorized to maintain the file of the case under seal to protect the informer against adverse repercussions in the workplace.

problems observed in *qui tam* enforcement in England and in this country. With respect to the initiation of litigation, no FCA claim would be pursued unless a government official concluded that the prosecution would advance the public interest. The Justice Department could decline prosecutions where the social costs of enforcement seemed to outweigh any benefits to the public. For instance, overly technical claims based on minor violations of regulatory requirements probably would not be pursued. Speculative claims without substantial evidentiary support would be less likely to go forward, particularly in cases involving cost-reimbursement contracts under which the government might have to pay a portion of the defense costs. Participation of the Justice Department would also protect the interests of the public in the settlement process because informers and defendants could not allocate settlement proceeds to personal claims of the informer unless government prosecutors agreed to the allocation.<sup>524</sup>

The proposed modification of the False Claims Act would preserve the primary benefits of *qui tam* enforcement in this context and would satisfy to a large extent the congressional concerns that underlay the expansion of *qui tam* enforcement in 1986. The principal advantage of *qui tam* litigation has been the creation of incentives to disclose fraudulent conduct.<sup>525</sup> Under the proposed modification to the statute, these financial incentives would remain. The informer could file a case under seal and, if the Justice Department elected to intervene, the informer would be entitled to share in the proceeds.

The proposed statutory modification could also address Congress's other reasons for passing the FCA amendments. One stated congressional justification for the 1986 FCA amendments was the concern that the Justice Department was unwilling to pursue fraud claims aggressively.<sup>526</sup> To some extent, such conflicts between the executive and legislative branches are a natural byproduct of a system of separated powers. Having a disinterested prosecutor evaluate the merits of a case before extensive defense costs are

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524. The modification would not eliminate all potential for blackmail. An informer still might seek a payment from a potential defendant in exchange for the informer's silence. However, the incentives for extortionate conduct would be reduced to the level that exists in the case of a purely public enforcement process.

525. See *supra* notes 108-10 and accompanying text (discussing Congress's desire to encourage whistleblowers).

526. See *supra* notes 111-14 and accompanying text (discussing congressional distrust of the Justice Department's willingness to pursue FCA claims).

incurred is advantageous from the standpoint of individual liberty even if legislators are frustrated by perceived executive inaction. To the extent Congress had a legitimate concern about underenforcement of the False Claims Act, the proposed statutory modification would permit more effective congressional oversight of the enforcement process. Each time the Justice Department refused to prosecute a *qui tam* case, a documentary record would be created of the informer's allegations and the supporting evidence. Congress could hold periodic oversight hearings forcing the executive branch to justify refusals to prosecute particular *qui tam* cases when the evidence of fraud seemed compelling. The threat of adverse publicity and congressional control over agency budgets should be sufficient tools to promote vigorous enforcement of the FCA.

The other congressional concern motivating the 1986 FCA amendments—a lack of government enforcement resources—should be less of a problem under the FCA than in other statutory contexts.<sup>527</sup> Congress has the ability to appropriate funds for additional prosecutors and investigators. If a significant pool of meritorious but unprosecuted FCA cases exists, additional damage and penalty awards should more than cover the salaries and expenses of new enforcement personnel. The inability to cover these costs would cast serious doubt on any claim that the statute was being underenforced.

In any event, the proposed statutory modification could permit private supplementation of government resources. While the Department of Justice would have control over FCA litigation, informers and their attorneys still would be permitted to participate. The Department of Justice could rely on the informers' attorneys as adjunct prosecutors, having them take depositions, answer discovery, or perform appropriate investigative tasks.<sup>528</sup>

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527. See *supra* notes 115–18 and accompanying text (discussing congressional concern over limitations on FCA enforcement resources).

528. Assuming that Congress chooses not to make significant changes to the *qui tam* provisions of the FCA, it might still adopt minor statutory changes—some of them recommended by those who commented on this Article—to address particular manifestations of the informer's conflict of interest. For instance, the informer's incentive to reduce the public's recovery by allocating settlement dollars to personal claims could be countered by codifying the holding of *Searcy v. Philips Electronics North American Corp.*, 117 F.3d 154 (5th Cir. 1997). There, the court held that voluntary dismissal of an FCA claim over the Justice Department's objection was impermissible, arguably giving the Department something akin to a veto over settlements in declined cases. See *id.* at 160. The informer's incentive to delay filing a *qui tam* suit could be addressed by fixing the bounty at the time the fraud was discovered or, perhaps, by adopting a shorter statute of limitations for *qui tam* cases. Government employees could be disqualified from pursuing



## CONCLUSION

The essential underlying problem with *qui tam* statutes is apparent in the longer Latin phrase that gives rise to the name. The informer sues "on behalf of the King as well as for himself."<sup>529</sup> But the interests of the "King"—or the public in our system of government—are not coextensive with those of a financially motivated private informer. This conflict is the lesson of the English history of *qui tam* enforcement, as well as the more recent experience under the *qui tam* provisions of the False Claims Act. If we are not to follow the example of the English Parliament in abolishing *qui tam* legislation, we would be wise to modify the False Claims Act to incorporate a systematic exercise of prosecutorial discretion by the Department of Justice. In this manner, we can preserve the primary advantages of *qui tam* litigation while protecting the public and individual defendants from the most harmful consequences of the informer's conflict of interest.

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*qui tam* actions through a minor modification of the statute.

529. See *supra* notes 3, 41–42 and accompanying text.