NOTES

PERMITTING PRIVATE INITIATION OF CRIMINAL CONTEMPT PROCEEDINGS

In some states, those who violate court orders can be punished by privately initiated proceedings for criminal contempt.[1] Other jurisdictions forbid such an arrangement.[2] The Supreme Court has instructed the federal courts to appoint only "disinterested" private prosecutors when exercising their inherent authority to punish contempt.[3] Of course, the question of who can bring a criminal contempt proceeding affects a wide range of interests — a range just as broad as that protected by court orders in the first place. Any victor in a civil lawsuit may someday undertake a contempt proceeding to preserve that victory: so with the multinational corporation seeking to protect its patents, so with the parent attempting to enforce her custody arrangement. The doctrine of contempt assumes that civil proceedings will be sufficient to enforce a court order; criminal contempt is distinguished from its civil counterpart in that it punishes noncompliance rather than merely encouraging compliance. In practice, however, civil contempt can adequately discourage only ongoing violations of a court order. To jail a contemnor for what he did last Tuesday, criminal contempt is required.[4] And so it matters a great deal whether the beneficiary of a civil protective order can initiate criminal contempt proceedings, or whether she is limited to civil contempt: episodes of physical abuse are always in the past when the court learns of them.

Last year, the Supreme Court discussed the question of who could initiate proceedings for criminal contempt, but ultimately dismissed the case on which that discussion had been based. *Robertson v. United States ex rel. Watson*[5] began when John Robertson beat his ex-girlfriend, Wykenna Watson.[6] Robertson was charged with aggravated assault, and Watson procured a civil protective order.[7] While

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[1] *See, e.g.*, ALASKA R. CIV. P. 90(b); N.Y. FAM. CT. ACT § 846 (McKinney 2010); Gordon v. State, 960 So. 2d 31 (Fla. Dist. Ct. App. 2007); Gay v. Gay, 485 S.E.2d 187 (Ga. 1997).

[2] *See, e.g.*, Dep't of Soc. Servs. *ex rel.* Montero v. Montero, 758 P.2d 690, 693 (Haw. Ct. App. 1988); Rogowicz v. O'Connell, 786 A.2d 841, 845 (N.H. 2001).

[3] *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804 (1987).

[4] *See* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631–32 (1988) (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911)).

[5] 130 S. Ct. 2184 (2010). This Note would have been a far greater challenge — if indeed it would have been possible at all — without the benefit of the excellent briefs submitted in the *Robertson* case.

[6] *Id.* at 2185 (Roberts, C.J., dissenting).

[7] Brief for Petitioner at 2–3, *Robertson*, 130 S. Ct. 2184 (No. 08-6261), 2010 WL 360209, at *2–3; *see also Robertson*, 130 S. Ct. at 2185 (Roberts, C.J., dissenting).

the order was in place and the criminal charges were pending, Robertson attacked Watson for a second time.[8] Then, when Robertson negotiated his plea of guilty arising out of the first assault, the U.S. Attorney (who enforces both local and federal criminal laws in the District of Columbia) agreed not to pursue any charges concerning the second incident.[9] Watson filed a motion to hold Robertson in contempt for violating the protective order with the second attack.[10] After Robertson was found guilty of three counts of contempt and sentenced to one and one-half years in prison,[11] he sought to have his contempt convictions vacated on the grounds that they had been brought either in violation of his plea agreement with the U.S. Attorney or else in derogation of the government's allegedly exclusive power to undertake a prosecution.[12] However, Robertson waived the argument that Watson's role in his prosecution violated his due process rights. Instead he argued merely that her prosecution was either under the authority of the United States, in which case it was barred by his plea agreement, or else under Watson's own private authority, in which case it was constitutionally barred by the requirement that all criminal prosecutions be brought under public authority.[13] But although the question of whether a private interested party could constitutionally wield that public authority was not before the Court, the Justices discussed it all the same — and four dissented from the dismissal of the case in an opinion suggesting that they were open to the idea of a due process right to disinterested public prosecution.[14]

This Note will argue that such a right, if it in fact exists, is not violated when private parties initiate criminal contempt proceedings, so long as there is sufficient public oversight of the prosecution. Any apparent tension between the requirements of due process and one's ability to have a court order enforced through criminal contempt is, upon close examination and given the actual procedures employed in the various states, illusory. The Note first discusses the jurisprudence of contempt, including state and federal limitations on the private enforcement of court orders, in Part I. Part II describes the emergence of the civil protective order, with particular attention to the District of Columbia, which has been a leader in its development, and addresses

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[8] *Robertson*, 130 S. Ct. at 2185 (Roberts, C.J., dissenting).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See id.* at 2185–86.

[13] *See id.* at 2186.

[14] *Id.* at 2187. Justice Sotomayor wrote a very brief separate dissent, joined by Justice Kennedy, to emphasize that "the narrow holding [that the Chief Justice] proposes does not address civil contempt proceedings or consider more generally the legitimacy of existing regimes for the enforcement of restraining orders." *Id.* at 2191 (Sotomayor, J., dissenting).

the practical importance of a private enforcement mechanism for civil protective orders. Part III lays out the possible constitutional objections to such an enforcement mechanism. Part IV argues that, in nearly all cases, privately initiated contempt proceedings are constitutionally unproblematic.

The question of whether a private party may initiate a criminal contempt proceeding has broad implications. Because that issue often arises in the context of family law and domestic violence cases, it is especially central to the vindication of the rights protected by court order in such cases. Yet it bears remembering that the answer to the question of whether someone can constitutionally initiate proceedings to hold her abuser in criminal contempt for the violation of an order proscribing such abuse will also determine the extent of the rights enjoyed by a large class of corporate and individual plaintiffs.

I. THE JURISPRUDENCE OF CRIMINAL CONTEMPT

The power to issue punishments for contempt of court is an ancient one, bound up in the very notion of the authority of the courts.[15] A court that issues an order must be — and, in American law, always has been — able to compel obedience and to punish disobedience.[16] That theoretical distinction between compulsion and punishment underlies the doctrinal distinction between civil and criminal contempt, which has been maintained by the Supreme Court for more than a century. The Court first drew that line in 1904, declaring that criminal contempts were "prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders," whereas civil contempts were instituted to preserve and "enforce the rights and administer the remedies" that courts have announced.[17] Although this first attempt at line-drawing cast the distinction in terms of the different purposes of the two forms of contempt, the Court has clarified that effect rather than purpose in fact distinguishes the two.[18] In practice, this distinction has meant that a fixed term of imprisonment for a past violation can be imposed only in a criminal proceeding, while a civil proceeding can result in a contemnor's being sentenced to coercive imprisonment until he complies with an order. The doctrinal paradigm, then, is criminal contempt to punish public affronts and civil contempt to enforce private rights. The defendant

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[15] *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795 & n.7 (1987).

[16] Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65 (1924) ("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law.").

[17] Bessette v. W.B. Conkey Co., 194 U.S. 324, 328 (1904) (quoting *In re* Nevitt, 117 F. 448, 458 (8th Cir. 1902)).

[18] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

who shouts obscenities at the court and is imprisoned for the offense is the paradigmatic criminal contemnor; the defendant who refuses to pay damages owed and is imprisoned until he pays up is the paradigmatic civil contemnor.

Although the Supreme Court has consistently distinguished criminal and civil contempts, it has been anything but clear regarding the nature of criminal contempt. The Court believes it to be both "a crime in the ordinary sense"[19] and yet also "an offense *sui generis*."[20] The Court has tended to emphasize the former view when declaring that alleged contemnors are entitled to some of the same due process rights as ordinary criminal defendants.[21] So those accused of criminal contempt must, like ordinary criminal defendants, be proven guilty beyond a reasonable doubt[22] in a proceeding where they are afforded the presumption of innocence and privileged not to incriminate themselves,[23] as well as given notice of the charges against them and provided with the assistance of counsel.[24] If charged with a nonpetty offense, criminal contempt defendants have the right to a jury trial,[25] and all criminal contempt defendants are protected against double jeopardy.[26]

However, alleged contemnors are not entitled to all of the usual criminal procedures — and this perhaps is the sense in which criminal contempt is "an offense *sui generis*." Those accused of criminal contempt in federal court have no right to a grand jury indictment.[27] If a contempt is committed in open court, a judge may summarily punish the contemnor without "a hearing, counsel, [or] the opportunity to call witnesses."[28] Most importantly for the purposes of this discussion, criminal contempt proceedings may be initiated on the court's own motion — no executive involvement is required at all.[29]

In 1987, one particular procedural protection came before the Court: the right to a disinterested prosecutor. It was not even clear whether ordinary criminal defendants enjoyed such a right — much less whether, if such a right existed for ordinary criminal defendants,

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19 Bloom v. Illinois, 391 U.S. 194, 201 (1968).

20 Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966).

21 *See* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 119–20 (1992) (discussing the Court's "analogy of criminal contempt to ordinary crimes," *id.* at 119).

22 Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 632 (1988).

23 *Gompers*, 221 U.S. at 444.

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

25 Bloom v. Illinois, 391 U.S. 194, 201–02 (1968).

26 United States v. Dixon, 509 U.S. 688, 696 (1993).

27 Green v. United States, 356 U.S. 165, 187 (1958).

28 Pounders v. Watson, 521 U.S. 982, 988 (1997) (per curiam) (citing *In re* Oliver, 333 U.S. 257, 275 (1948)).

29 *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 800–01 (1987).

this feature was one of the ways in which criminal contempt was "*sui generis*" or "a crime in the ordinary sense." *Young v. United States ex rel. Vuitton et Fils S.A.*[30] involved a federal court order protecting the intellectual property of Louis Vuitton. The manufacturer of luxury leather goods sued several producers of counterfeits, then entered into a settlement agreement that included a permanent injunction against renewed counterfeiting by the defendants.[31] When Louis Vuitton found that the defendants were again counterfeiting its products, it prevailed upon the court to appoint the company's attorneys to investigate the alleged contempt.[32] These private attorneys were given broad prosecutorial discretion, which they employed to obtain wiretap warrants and ultimately to prove indirect contempt.[33]

A divided Supreme Court held that the Louis Vuitton attorneys should never have been appointed in the first place because a "prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide . . . assurance" that she "will be guided solely by [her] sense of public responsibility for the attainment of justice."[34] Indeed, "such an attorney is required by the very standards of the profession to serve two masters"[35] — the court that appointed her and the private client who pays her bills. The Court grounded its ruling in its supervisory authority over the federal courts rather than in any constitutional concern, holding that "[a] private attorney appointed to prosecute a criminal contempt . . . certainly should be as disinterested as a public prosecutor who undertakes such a prosecution."[36] Of particular concern to the Court was the breadth of public authority that could be wielded by a private attorney appointed to prosecute contempt.[37] As the discussion below makes clear, that concern is not justified in the context of most privately initiated proceedings for criminal contempt.

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[30] 481 U.S. 787.
[31] *Id.* at 790–91.
[32] *Id.* at 791–92.
[33] *See id.* at 792.
[34] *Id.* at 814.
[35] *Id.*
[36] *Id.* at 804.
[37] *Id.* at 807 ("A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, . . . which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.").

II. CIVIL PROTECTIVE ORDERS AS A MEANS OF PREVENTING DOMESTIC VIOLENCE

The criminal justice system has historically had little interest in addressing the problem of domestic violence.[38] Household disputes, even when violent, were generally thought of as matters of chiefly private concern — if they were thought of at all. Legal in many states until the late nineteenth century,[39] domestic abuse was then officially prohibited but effectively tolerated.[40] Since society long turned a blind eye to abuses within the home, it is hardly surprising that public institutions followed suit, sometimes even memorializing their distaste for intervention in the form of explicit policy.[41]

The procedural protections that society cherishes have also kept domestic batterers beyond the reach of the law. Even after some police departments and prosecutorial offices overcame their reluctance to intervene in domestic disputes, evidentiary difficulties and resource constraints hobbled efforts to hold batterers to public account.[42]

In the 1960s, advocates began to focus attention on domestic crimes, arguing that new policies and perhaps new legal remedies were required to fight these long-ignored wrongs. One such remedy was the civil protective order (CPO), first enacted by Congress for the District of Columbia in 1970.[43] A victim of abuse can obtain a protective order that dictates precise details of her abuser's behavior: how close he may come, whether he may contact her by any means, how any contact will proceed. To violate this order would place the abuser in contempt of court. He could then be punished for the contempt, even if

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[38] *See, e.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661–65 (summarizing the evolution of domestic violence law from the country's founding through the 1970s).

[39] *Id.* at 1661–62 (citing Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (stating that in "[f]amily broils and dissentions . . . let the husband be permitted to exercise the right of moderate chastisement . . . and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned")); *see also* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996).

[40] *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) ("Throughout the 1970s and early 1980s, officers believed and were taught that domestic violence was a private matter, ill suited to public intervention.").

[41] *See* Siegel, *supra* note 39, at 2122–23.

[42] *See, e.g.*, Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998) ("It is unrealistic to expect district attorneys to prosecute contempt actions arising from alleged violations of civil court orders. District attorneys already have a heavy case load . . . ." (footnote omitted) (citing State *ex rel.* O'Brien v. Moreland, 778 S.W.2d 400, 406 (Mo. Ct. App. 1989))).

[43] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 131, 84 Stat. 473, 545–48 (codified as amended at D.C. CODE §§ 16-1001 to -1006 (LexisNexis 2001 & Supp. 2009)); Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 38 (2008).

the underlying conduct was not criminal or, if criminal, would not ordinarily have been prosecuted.

On a petition by the Corporation Counsel, as the District of Columbia Attorney General was known at the time, the court could enter a civil protective order lasting up to a year when an "intrafamily offense" had been "committed or threatened."[44] The order could, for example, require a batterer "to refrain from the conduct committed or threatened and to keep the peace toward the family member."[45] And, so that CPOs would effectively deter the abuse they proscribed, the statute specified that their violation would "be punishable as contempt,"[46] just like any other court order. After the District of Columbia gained home rule in 1973,[47] the City Council repeatedly strengthened the protections provided by civil protective orders, especially victims' rights to pursue judicial remedies against their abusers.

In 1982, the Council of the District of Columbia authorized victims of domestic violence to seek CPOs on their own initiative,[48] after which the Superior Court revised its rules regarding the enforcement of those orders.[49] Under the new rules, a private party could herself prosecute a criminal contempt action for violation of a civil protective order. The Superior Court reasoned:

> It would have been quite illogical for the Council to attempt to correct a problem in its effort to control domestic violence by granting petitioners a private right to obtain civil protection orders without also intending to permit the same petitioners to enforce the provisions of those orders privately by utilization of the only enforcement mechanism contained in the statute.[50]

Although the legal protections against domestic violence underwent a different evolution in every state, all fifty states now have civil protective orders. When CPO violations occur, every state provides for their enforcement, whether by the court's exercise of its inherent authority to punish contempt or through a motion brought by either a public official or a private party.

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[44] § 131, 84 Stat. at 547 (codified as amended at D.C. CODE § 16-1005).

[45] *Id.* (codified as amended at D.C. CODE § 16-1005(c)(1)).

[46] *Id.* § 131, 84 Stat. at 548 (codified as amended at D.C. CODE § 16-1005(f)).

[47] *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[48] Proceedings Regarding Intrafamily Offenses Amendment Act of 1982, 29 D.C. Reg. 3131, 3133 (July 23, 1982) (codified as amended at D.C. CODE § 16-1003(a) (LexisNexis 2001 & Supp. 2009)).

[49] D.C. SUPER. CT. INTRAFAMILY R. 7(c), 12(c)(2), (4) (1993) (repealed 2000) (allowing motions for contempt, giving "[b]oth parties . . . the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion" for contempt, *id.* 12(c)(4), and allowing the court to seek representation for the petitioner); *see id.* 9(a) (discussing representation of petitioners).

[50] Castellanos v. Novoa, 117 Daily Wash. L. Rptr. 1189, 1194 (D.C. Super. Ct. 1989).

The prospect of contempt is almost the entire point of the system of civil protective orders. A person gets such an order so that, when it is violated, the violation can be punished through the comparatively efficient contempt process rather than the slower, more heavily procedural process of ordinary prosecution. (The creation of a private criminal code, tailored to the needs of the victim and the proclivities of the abuser, is also a considerable benefit.) It is a jerry-built system to be sure, but it is currently the best legal tool in the fight against domestic violence. The civil protective order puts much-needed control in the hands of victims of abuse — but the very fact that it does so places it in tension with traditional commitments to defendants' rights. This tension is especially acute when the beneficiary of a protective order is permitted to initiate proceedings regarding that order's violation.

Yet there are many reasons a private right to initiate action is a desirable feature of an enforcement system. Police response and public prosecution of CPO violations are often unreliable.[51] Some police forces still do not place a priority on responding to allegations of domestic violence.[52] When the police do respond, they often refuse to make an arrest.[53] And when the police do make an arrest, the district attorneys are often reluctant to press charges for protective order violations.[54]

This reluctance to enforce CPOs is a side effect of their primary function: to establish a private criminal code to govern a formerly intimate relationship. A CPO raises the floor of prohibited conduct to a point that would be absurd outside the context of an abusive relationship. Violations may not involve physical contact or obvious physical violence. It is understandable that police, prosecutors, and juries would all be reluctant to imprison someone for ambiguous conduct, but that reluctance can have tragic side effects.

Even when the institutional will is there, police and prosecutors lack the resources to address the high volume of CPO violations.[55] Moreover, while criminal prosecution is a valuable tool in the battle against domestic violence, contempt is procedurally faster.[56] The CPO system was created to provide a speedy response to abuse.[57] Because

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[51] *See* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 223–24 (1993) (summarizing results of a survey conducted with domestic violence victims).

[52] *Id.* at 224.

[53] *Id.*

[54] *Id.* at 228–30.

[55] *See* Wilson v. Wilson, 984 S.W.2d 898, 903 (Tenn. 1998).

[56] David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1199 (1995).

[57] *See* Green v. Green, 642 A.2d 1275, 1279 (D.C. 1994) (noting that statutory procedures are designed "to expedite the application and, if necessary, the enforcement of CPOs").

any delay in the enforcement of a CPO can lead to tragic results, rapid response is critical. Indeed, faced with such violations, courts have recognized that speed is necessary to prevent potentially fatal escalation.[58] A private contempt enforcement action is ordinarily concluded within a month after it is commenced; criminal misdemeanor prosecutions for contempt violations can take up to twelve months.[59]

III. CONSTITUTIONAL AND OTHER CONCERNS WITH PRIVATE PROSECUTIONS

There are clear advantages — both practical and symbolic — to allowing the beneficiaries of court orders to initiate criminal contempt proceedings when those orders are violated. But if "initiation" begins to approximate "prosecution," then a host of concerns may appear. A private, independent right of action for criminal contempt would challenge the basic assumption that prosecution is a function of the sovereign. A truly private prosecution could be difficult to reconcile with the requirements of constitutional due process. Separation of powers issues might arise. The ethical requirements of a prosecutor might prove incompatible with those of a private advocate. And, finally, taking the enforcement of civil protective orders out of public hands might signal that the rights protected by such orders are not truly matters of public concern. This Part will review each potential basis of concern.

A. Sovereign Power

There is a foundational constitutional assumption that only the government can prosecute a crime. The Supreme Court has explained that the "purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant."[60] In this way, the Court signaled the intricate relationship between private interest and public concern: although a private individual cannot initiate a prosecution for attempted murder, murder is a public wrong primarily because each person has a right to life.

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[58] *See, e.g.*, Snyder v. Snyder, 629 A.2d 977, 981 (Pa. Super. Ct. 1993) ("The emergency nature of the judicial process [in contempt actions] . . . requires that this Court act swiftly to prevent continued abuse and deal with contempt situations in an expeditious manner lest the violation giving rise to the contempt become a criminal action for homicide." (quoting Eichenlaub v. Eichenlaub, 490 A.2d 918, 922 (Pa. Super. Ct. 1985))).

[59] *See* Zlotnick, *supra* note 56, at 1209 n.248 (citing Paul Duggan, *Fighting Backlog, D.C. Prosecutors Dismiss Almost 1,000 Cases*, WASH. POST, June 13, 1993, at B3).

[60] Standefer v. United States, 447 U.S. 10, 25 (1980) (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc)).

But must prosecution necessarily be public? The Constitution refers to "crimes,"[61] "offence[s],"[62] and "criminal prosecutions,"[63] though without defining those terms. Instead, their meaning must be derived in part from the common law traditions in which they are rooted.[64] As Blackstone explained, glossing John Locke, when an individual enters civil society his "right of punishing crimes against the law of nature . . . is transferred . . . to the sovereign power."[65] In the English common law tradition, crimes were therefore thought to be "a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity," while civil wrongs were merely "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals."[66] The criminal law "secure[s] to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole."[67]

When the time came to enforce the criminal law, the King was "in all cases the proper prosecutor for every public offence."[68] Although English law provided for private criminal prosecution, the King had the final say: the Attorney General of England (who undertook public prosecutions only "in cases of special importance to the Crown") was empowered to file a writ of *nolle prosequi*, ordering the dismissal of any private prosecution.[69] "[H]is decisions in such matters were treated by the courts as entirely within his discretion."[70]

American criminal law largely abandoned the English tradition of private prosecution but maintained the principle that a crime is an of-

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61 U.S. CONST. art. III, § 2, cl. 3.

62 *Id.* amend. V.

63 *Id.* amend. VI.

64 *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (examining the historical background of the Confrontation Clause); Schick v. United States, 195 U.S. 65, 69 (1904) ("The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." (quoting Smith v. Alabama, 124 U.S. 465, 478 (1888)) (internal quotation marks omitted)).

65 4 WILLIAM BLACKSTONE, COMMENTARIES *7–8; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 1, 137 (Ian Shapiro ed., 2003) ("[E]very man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature, in prosecution of his own private judgment.").

66 4 BLACKSTONE, *supra* note 65, at *5.

67 *Id.* at *7.

68 *Id.* at *2.

69 Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1242, 1242 (Joshua Dressler ed., 2d ed. 2002).

70 *Id.*

fense against the public good.[71] In federal court, from the very beginning, Congress gave to U.S. Attorneys the authority to "prosecute in [each] district all delinquents for crimes and offences, cognizable under the authority of the United States."[72] For the most part, the colonies and early states also put prosecutorial authority in the hands of public officials.[73]

Questions of sovereign power were central to the *Robertson* case, which turned on the question of whether Watson was exercising public or private power when she initiated criminal contempt proceedings, and the issue was therefore among the chief concerns of the Justices. Chief Justice Roberts, writing in dissent, would have addressed the "important threshold issue" of whether Watson could bring criminal contempt charges on her own authority and would have held that "[t]he answer to that question is no."[74] Citing (among others) Blackstone and Locke,[75] the Chief Justice emphasized that "[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another."[76]

However, concerns over sovereign power need not bar private prosecution, so long as the private prosecutor is understood to be acting on behalf of the sovereign government. The issue of whose power Watson was exercising arose in *Robertson* because Watson brought criminal contempt proceedings to punish the defendant for actions for which the U.S. Attorney had promised not to seek punishment. Without the plea bargain, concerns about sovereign power would not have kept Watson from bringing a contempt action on behalf of the United States.

B. Due Process

The Supreme Court's criminal procedure jurisprudence presupposes that the government is the party adverse to the criminal defendant. The right to counsel, for example, attaches at "the point at which 'the

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[71] *See* Brief for Petitioner, *supra* note 7, at 20 ("A crime is an act or omission punishable as an offense against the state. . . . [I]n case of a crime, the state is deemed the injured party and punishes the wrong-doer . . . in its own name." (quoting 1 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW § 4 (Chi., Callaghan & Co. 1897) (alterations in original) (footnote omitted) (internal quotation marks omitted))); *see also id.* ("Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service [of] the State." (quoting 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 10 (Phila., Kay & Bro. 1896) (alteration in original) (internal quotation marks omitted))).

[72] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

[73] *See* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 108 (1930).

[74] Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184, 2185 (Roberts, C.J., dissenting).

[75] *Id.* at 2186–87 (citing 1 BLACKSTONE, *supra* note 65, at *268; JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 88, at 43–44 (J.W. Gough ed., 1946)).

[76] *Id.* at 2188.

government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society.'"[77] The defendant's rights to receive disclosure of evidence favorable to him and not to be confronted by testimony that is known to be false apparently assume that the prosecutor will be a public actor charged with fulfilling public obligations,[78] as does the prohibition on prosecutions grounded in arbitrary classifications.[79] All of these defendants' rights spring from the Due Process Clause, which of course limits governmental authority only.[80]

There is a real tension between the tenor of these principles and the practicalities of a system that would allow for true private prosecution. At a theoretical level, it is difficult to imagine how one could interpret the Fourteenth Amendment to guarantee defendants the same rights in a private prosecution as they would have in a public one. Perhaps the Court could declare that private prosecutors are a constitutional hybrid: state actors for some purposes (such as obligations under *Brady v. Maryland*[81]) but not for others (such as liability under 42 U.S.C. § 1983). And at a practical level, even the prosecutorial obligations that seem theoretically necessary may prove difficult to implement. A prosecution that did not afford a defendant his *Brady* rights to exonerating information would be hard to accept, but a private prosecution that fully honored those rights is hard to imagine. Would the victim of abuse be required to sign an affidavit revealing any gaps in her memory of the event or any role she may have played in instigating it? If not, what could *Brady* mean in that context?

Although the question was not strictly in the case, the interaction between constitutional criminal due process and privately initiated contempt proceedings arose in *Robertson*. Chief Justice Roberts suggested at oral argument that one could "think it's a violation of due process for an interested party to be able to criminally prosecute someone . . . at their discretion."[82] In his dissent, the Chief Justice asked whether a private prosecutor could interview a defendant without giv-

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[77] Rothgery v. Gillespie Cnty., 128 S. Ct. 2578, 2583 (2008) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

[78] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[79] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[80] Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974) (noting "the essential dichotomy" in the Due Process Clause "between deprivation by the State, subject to scrutiny under its provisions, and private conduct . . . against which [it] offers no shield").

[81] 373 U.S. 83.

[82] Transcript of Oral Argument at 45, Robertson v. United States *ex rel.* Watson, 130 S. Ct. 2184 (2010) (No. 08-6261), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-6261.pdf.

ing the *Miranda* warnings or withhold exculpatory evidence.[83] He also criticized the conclusion by the D.C. Court of Appeals that criminal contempt was a "special situation" that allowed for private prosecution,[84] emphasizing that the lower court erroneously relied on a dissent by Justice Blackmun in *United States v. Dixon*.[85]

The confusion surrounding the due process question posed a significant obstacle to the Justices' consideration of the question properly before the Court. Justice Breyer noted at argument that "it's very hard for me to focus on . . . the issue that you want me to decide . . . without thinking about the one you don't. . . . [B]efore I can answer that question, I would like to know whether the government could appoint the private person."[86] Justice Sotomayor said that she was not "sure . . . how we can avoid" answering the question of whether a private individual could undertake the prosecution at all, even as a representative of the government.[87]

C. Separation of Powers

Executive control of the prosecutorial machinery is a fundamental aspect of the separation of powers. There is no *federal* separation of powers issue with state decisions to allow private prosecution (nor with such an arrangement in the District of Columbia), and therefore no occasion for the Supreme Court to upset current state practices on separation of powers grounds. However, there may be concern at the *state* constitutional level. All states have the same three branches as the national government, with roughly the same division of powers among them, and many states interpret their state constitutions to embody the same structural principles as those contained in the U.S. Constitution. What is more, some states have adopted the Supreme Court's decision in *Young*, which rested on the Court's supervisory authority rather than its powers of constitutional interpretation. If the Supreme Court constitutionalizes the *Young* principle, state courts are likely to follow suit. At oral argument in *Robertson*, Justice Scalia offered his opinion that *Young*'s disinterestedness principle had not gone far enough, and that in any event and aside from the *Young* exception, "the power to prosecute belongs to the executive."[88]

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[83] *Robertson*, 130 S. Ct. at 2187–88 (Roberts, C.J., dissenting).

[84] *Id.* at 2188 (quoting *In re* Robertson, 940 A.2d 1050, 1057 (D.C. 2008) (internal quotation mark omitted)).

[85] 509 U.S. 688 (1993); *see also id.* at 742 (Blackmun, J., concurring in the judgment in part and dissenting in part).

[86] Transcript of Oral Argument, *supra* note 82, at 37–38; *see also id.* at 38 ("[H]ow do I begin to answer these questions bound together in my mind in some partial way?").

[87] *Id.* at 42.

[88] *Id.* at 40.

D. Nonconstitutional Concerns

Professional ethics and public symbolism, though not determinative of the constitutional issue, are also potential sources of concern with privately initiated criminal contempt proceedings. Suppose that an abused person's attorney (perhaps a private attorney appointed by the court to represent the victim) is designated to prosecute. In that case, there is an inevitable conflict between the public obligations of prosecutors and the duty of private attorneys to be zealous advocates. The Supreme Court has said that prosecutors are "servant[s] of the law,"[89] appointed to serve the public interest.[90] Rules of prosecutorial ethics echo this line: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[91] A private attorney, by contrast, has an "obligation zealously to protect and pursue a client's legitimate interests."[92]

This system presents a danger both to the attorney, who may be put in the position of having to violate one ethical code in order to obey another, and also to the defendant, who may be prosecuted out of personal motives or a desire to gain private leverage. This latter concern is common both to cases in which the abused person herself prosecutes and to those in which her lawyer does, and it is precisely the concern that underlies broadly applicable arguments in favor of executive control over prosecutorial decisions.

It can also be argued that, whatever the practical advantages of private prosecution, the system has a bad symbolic effect. By relegating the prosecution of violations of civil protective orders to a second-tier enforcement system, states may send a signal that such violations are more trivial offenses than those prosecuted by the normal, public means.

IV. FOUR CONSTITUTIONAL ARGUMENTS FOR PRIVATELY INITIATED PROCEEDINGS

Some of the concerns raised in Part III are more easily resolved than others. If the beneficiary of a CPO is understood to wield delegated sovereign power rather than her own private authority, the first issue presents no bar to privately initiated prosecution. Federal separation of powers doctrine is not binding upon the states, and the nonconstitutional concerns are of course no constitutional obstacles. What follows, then, is a response to those who would posit a federal, constitutional due process right to public criminal prosecution — a right that

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89 Berger v. United States, 295 U.S. 78, 88 (1935).

90 *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980).

91 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010).

92 *Id.* at pmbl. 9.

the Supreme Court has never declared and on which this Note takes no position.

If there is a due process right to disinterested prosecution, and one concedes that private parties who initiate actions for criminal contempt are in fact prosecutors, then three chief arguments can be made in defense of the D.C. system and others like it. The first argument asserts that contempt is meaningfully different from other crimes and concludes that, although private prosecution for murder would be deeply problematic, no comparable issue is raised by private prosecutions for criminal contempt. The second claims that the dichotomy between civil contempt and its criminal counterpart is incoherent, or at the least unworthy of the doctrinal weight that it is made to bear. The third argument suggests that even if the Constitution cannot tolerate unfettered private authority to bring criminal prosecutions, fairly minimal restraints on that authority could save the self-interested private prosecutor.

All three of these arguments accept the claim that private individuals who initiate criminal contempt proceedings are in fact prosecutors. If, however, it is contended that some (though perhaps not all) privately initiated proceedings for criminal contempt are properly understood to be prosecutions undertaken by the court at the suggestion of a private party, then a fourth argument arises. This final argument does not depend upon settling the intricate issue of exactly what level of public involvement in a criminal prosecution is required by federal constitutional due process. Instead, it merely asserts that many "private prosecutions" for criminal contempt are misnamed: they are inquisitorial investigations by the court in the service of its inherent power to punish contempts.

A. Contempt Is Different

In many respects, contempt *is* different.[93] Existing to preserve the efficacy of the judiciary, it is attended by fewer procedural protections. Although criminal contempt is "a crime in the ordinary sense,"[94] it is not an ordinary crime in every sense. For one thing, defendants have no right to a grand jury indictment[95] — indeed, the court may bring criminal contempt charges on its own motion.[96] Despite the statutory

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[93] Professor Joan Meier has undertaken a thorough, theoretically grounded comparison of ordinary crimes and criminal contempt, and concludes that "it is apparent that contempt proceedings are, at root, different." Meier, *supra* note 21, at 127.

[94] Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[95] Green v. United States, 356 U.S. 165, 184 (1958).

[96] Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 800–01 (1987).

nature of federal crimes,[97] criminal contempt "may be punished in conformity to the prevailing usages at law."[98]

Thus, one argument in defense of the D.C. system claims that, even if the appointment of interested private prosecutors generally violates due process (which the Supreme Court emphatically has not held), contempt is different in that respect. Perhaps the power of the judiciary is sufficiently important to justify the cutting of a few procedural corners. Of course, the doctrine would not be so blunt. Rather, a court would say that private prosecution is often the only way to ensure that judicial orders are obeyed, and that judicial orders are different from statutory law in that they are individually tailored to particular circumstances. In some ways, the judge who issues the order exercises discretion comparable to that of the public prosecutor, who must determine whether a public purpose is served by punishing a given violation. In crafting an order, the judge determines that there is a public interest in a particular individual's behaving in a particular way. So what does it matter if no public prosecutor exercises a second layer of discretion when the order is violated? It is enough, this argument runs, that a judge saw fit to proscribe conduct that the defendant allegedly undertook.

But even if contempt is different, to argue from that difference to a system of private prosecutions for the violation of civil protective orders raises fairly significant problems. Start from the proposition that aggravated assault *is not* different. It is just an ordinary, run-of-the-mill crime, which must be prosecuted by public officials or not at all. Then imagine a person who has won a civil protective order that prohibits, among other things, actions that would amount to aggravated assault. She is assaulted. Now, because that order is in place, this person can prosecute her abuser for criminal contempt of a court order not to commit aggravated assault, though she remains unable to undertake a prosecution for the assault itself. Is this private action justified by the court's decision to prohibit the specific assault that occurred, when it would not be justified by the legislature's decision to prohibit all assaults? If so, the court possesses the power (which the legislature does not) to selectively confer a right to private prosecution — a power that would require an elaborate doctrinal grounding that currently does not exist.

Moreover, if a judge has the discretion to issue an order that justifies the empowerment of a private party to punish violations of that order, then the act of crafting an order would take on an even greater

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[97] *See* United States v. Lanier, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts . . . ." (citing United States v. Kozminski, 487 U.S. 931, 939 (1988); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820))).

[98] 18 U.S.C. § 402 (2006).

significance than it currently possesses. The knowledge that the judge's decision would confer upon a private party the right to prosecute might not affect the judge's behavior with regard to aggravated assault, but it might reduce her willingness to issue orders prohibiting subtler forms of psychological abuse. This potentially unintended consequence does not go to the coherence of the "contempt is different" argument, but it does suggest that the argument should be put forward with caution.

B. The Civil/Criminal Dichotomy Is Indeterminate

Although the distinction between civil and criminal contempts "is one of long standing" whose "principles have been settled at least in their broad outlines for many decades,"[99] it has proven somewhat troublesome to administer.[100] The Court has admitted that "in the codified laws of contempt . . . the 'civil' and 'criminal' labels of the law have become increasingly blurred."[101] Courts have difficulty classifying different instances of contempt.[102] Rather than providing defendants with reliable protections, "the distinction has become a major source of the confusion that is endemic to the contempt process."[103] If "[t]he distinction the Supreme Court has drawn between civil and criminal contempt is confusing, difficult to apply, and fails to address the most serious concerns engendered by the contempt process,"[104] then perhaps it is time to be rid of it — and, not incidentally, to allow victims to pursue determinate sentences for prior violations of civil protective orders.

Yet this line of argument may be too clever by half. Although commentators have suggested that the dichotomy between civil and criminal contempt is unintelligible and therefore untenable, the Court believes that it has "consistently applied" the doctrine over more than a century.[105] When the doctrine was raised at oral argument, no Justice questioned its viability.[106] Absent some extraordinary pressure, the dichotomy seems unlikely to collapse at this late date.

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99 Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631 (1988).

100 For an excellent discussion of this troubled dichotomy, see Meier, *supra* note 21, at 119–26.

101 *Hicks*, 485 U.S. at 631.

102 *See* Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 681–84 (1981); *see also* Hubbard v. Fleet Mortg. Co., 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) ("There is considerable confusion in the courts over the distinction between civil and criminal contempt . . . .").

103 Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993); *see also* Meier, *supra* note 21, at 121 ("The confusion between civil and criminal contempt has been widespread.").

104 Dudley, *supra* note 103, at 1098.

105 *Hicks*, 485 U.S. at 632.

106 *See* Transcript of Oral Argument, *supra* note 82, at 35–36.

And even if it did, something would have to replace it. No Court would allow the panoply of constitutional protections that attend on criminal prosecutions for contempt to perish along with the civil/criminal dichotomy. If anything, a doctrine that lacked such a categorical distinction might well expand due process protections into proceedings currently classed as civil,[107] rather than cutting them back in what are now thought of as criminal proceedings. Though it is great fun to see a dichotomy collapse,[108] this distinction is likely to stand for the foreseeable future.

C. Minimal Public Oversight Is Sufficient

So one is left with the prospect of a due process right for accused criminal contemnors that would prevent victims of abuse from effectively enforcing their civil protective orders. This doctrinal problem is, needless to say, a large one — though, as Justice Scalia put it at the *Robertson* oral argument, "[s]ome problems have no answers."[109] Yet before one accepts that this is such a problem, one ought to explore every possible solution. If unconstrained private prosecution is thought to be constitutionally intolerable, might some minimal governmental control be enough to save it? Two mechanisms suggest themselves as likely candidates: judicial oversight and executive authority to issue a *nolle prosequi*.

There was some confusion in the *Robertson* case about whether the District of Columbia's system of CPO enforcement gave beneficiaries of the orders a full private right of action.[110] The question is significant: If CPO beneficiaries have a private right of action, then they may trigger a contempt proceeding if they choose. If, however, the court retains some discretion to disallow private prosecutions, then the private action has a meaningful public constraint. It matters only slightly if, in practice, the court always chooses to prosecute contempts that are alleged by CPO beneficiaries. So long as there is some release valve, some mechanism by which a defendant has an opportunity to assert that the motion is based in personal animosity or a desire for illegitimate private gain — part of a blackmail threat, perhaps, to be withdrawn if the defendant complies with the beneficiary's wishes —

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[107] *See* Dudley, *supra* note 103, at 1098 (suggesting that "more extensive protections" be accorded when civil contempts trigger especially severe sanctions).

[108] Professor David Shapiro provides an especially enjoyable rendition of this trope. *See* David L. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465, 465 (1984) ("The very fact that people are asking whether the up-down distinction is still viable is plenty good evidence that it is not.").

[109] Transcript of Oral Argument, *supra* note 82, at 39.

[110] *Id.* at 46–48.

then the public official who oversees that valve will be charged with securing the due process rights of the alleged criminal contemnors.

And even if the judiciary exerted still less control over the process, the executive rather than the judiciary could perform the required monitoring function by retaining its traditional authority to issue a *nolle prosequi* — a binding decision that a certain alleged offense will not be prosecuted. In this scenario, the beneficiary of a CPO would retain a full private right of action rather than the mere ability to make a motion. However, that private right would be circumscribed by the executive's authority to overrule a victim's decision to prosecute. Presumably, the alleged contemnor would complain to the executive, which would have some process in place to address such complaints. Thus, at least formally, the prosecution would still be undertaken by the sovereign authority of the state and subject to state control. The *nolle prosequi* was an essential element of private prosecution at common law, and its survival could ensure that the larger practice also survives.

D. Is the Beneficiary of a Protective Order Truly a Prosecutor at All?

Courts have the inherent authority to investigate and punish contempts on their own motion. The Supreme Court has been entirely clear about this power.[111] Although criminal contempt proceedings are clearly prosecutions, it is not altogether obvious that input is needed from any "prosecutor." If, walking around one day, a judge saw an attack that violated a protective order she had issued, she could call a hearing and summon witnesses to testify. To hand down a sentence of more than six months' imprisonment, the judge would have to empanel a jury — and it is difficult to imagine a jury proceeding that did not feature a prosecutor — but there is no obvious reason why a prosecutor is required in nonjury proceedings for criminal contempt.

Of course, almost no indirect contempts are casually observed by judges. But the model offers one way to understand the motion for an order to show cause: the beneficiary of a protective order is merely alerting the judge to behavior that would otherwise have escaped her notice.[112] The point, again, is that if the judge had known about the conduct she could have looked into it without any prompting. The closer a state's procedure gets to this purely inquisitorial model, the

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[111] *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795 (1987) (noting that "the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function"); *id.* at 801 (reiterating that "a court has the authority to initiate a prosecution for criminal contempt").

[112] *See* Meier, *supra* note 21, at 128 ("[O]nly the private party is aware of his or her order's violation and can bring it to the court's attention.").

less any constitutional right to public or disinterested prosecution could plausibly prohibit private movants.

Although no state offers a perfect example, many suggest that the concept of a "private prosecutor" may be erroneous. Rather than providing for true prosecutions, these states allow beneficiaries of court orders to file ex parte motions requesting that the court issue an order to show cause why the alleged contemnor should not be punished. In Alaska, upon "a proper showing on ex parte motion supported by affidavits," a court must issue either an order to show cause or a bench warrant for the arrest of the accused party.[113] Such a motion can be made "by the aggrieved party whose right or remedy in an action has been defeated or prejudiced or who has suffered a loss or injury by the act constituting a contempt."[114] Then, when the alleged contemnor appears, "the court or judicial officer shall proceed to investigate the charge by examining the defendant and witnesses for or against the defendant."[115] As the rules describe it, this proceeding is almost inquisitorial: it is not clear that there is any prosecutor at all. And if the Alaska courts are truly "investigat[ing] the charge" in cases of indirect contempt, then it is not at all clear why the ex parte movant should occupy the same doctrinal space as a public prosecutor.

In New York, the beneficiary of a civil protective order may "originate proceedings"[116] by filing "an allegation that the respondent has failed to obey a lawful order of this court or an order of protection issued by a court of competent jurisdiction of another state."[117] When such an allegation is filed, "the court may cause a copy of the petition and summons to be issued requiring the respondent to show cause" why he should not be punished.[118] New York casts its rules in the permissive, and courts have confirmed that they possess the discretion to dismiss such petitions.[119]

Florida allows the beneficiary of a court order to move for an order to show cause why an alleged contemnor should not be held in indirect criminal contempt.[120] However, a court may also issue such an order on its own motion.[121] If the defendant pleads not guilty, then a hearing must be held to determine guilt or innocence; at that hearing the judge may proceed "without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that pur-

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113 ALASKA R. CIV. P. 90(b).
114 *Id.*
115 *Id.* 90(f).
116 N.Y. FAM. CT. ACT § 846(a) (McKinney 2010).
117 *Id.* § 846.
118 *Id.* § 846(b)(i).
119 *See* Barnes v. Barnes, 863 N.Y.S.2d 758, 759 (App. Div. 2008).
120 *See, e.g.*, Gordon v. State, 960 So. 2d 31, 32 (Fla. Dist. Ct. App. 2007).
121 FLA. R. CRIM. P. 3.840(a).

pose."[122] This "assistance" is optional and, even when the judge chooses to make an appointment, does not bestow all the powers of a prosecutor upon a private attorney.[123]

Many states proceed on roughly this model, with judges exercising substantial control. In Texas, for example, the private party may file an enforcement motion with the state district court including the specific provision of the order sought to be enforced; the time, place, and manner of the violator's alleged violation; and the request for relief sought.[124] In Pennsylvania, "[a] plaintiff may file a private criminal complaint against a defendant, alleging indirect criminal contempt for a noneconomic violation of any provision of an order or court-approved consent agreement issued under this chapter."[125] And in Georgia, the beneficiary of a court order can file an application for a contempt citation.[126]

Tennessee allows the attorney representing the beneficiary of a court order to move for criminal contempt, but not the beneficiary herself.[127] Although the Tennessee Supreme Court upheld this system partly on the grounds that "[t]he ethical rules governing the conduct of all attorneys in Tennessee should prevent a private attorney representing the beneficiary of a court order from becoming overzealous or from striking foul blows,"[128] it also noted the practical necessity of privately initiated prosecutions. The court wrote that if it were "to hold that due process precludes a litigant's private attorney from prosecuting contempt proceedings, many citizens would be deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced."[129] Moreover, any concern that a defendant's due process rights would be violated "is slight because it is the trial judge, not the private attorney, who actually decides whether a contempt action may proceed."[130]

To be clear, the constitutionality of privately initiated proceedings for criminal contempt does not depend on the strength of the argument that, in some jurisdictions, movants are not prosecutors. One could reject this assertion and still conclude that, because private prosecutors

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122 *Id.* 3.840(d).

123 *See Gordon*, 960 So. 2d at 37.

124 TEX. FAM. CODE ANN. § 157.002 (West 2008).

125 23 PA. CONS. STAT. ANN. § 6113.1(a) (West 2010).

126 *See* Gay v. Gay, 485 S.E.2d 187, 188 (Ga. 1997).

127 *See* TENN. R. CRIM. P. 42(b)(2) ("The judge shall give [notice of a criminal contempt proceeding] orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.").

128 Wilson v. Wilson, 984 S.W.2d 898, 904 (Tenn. 1998).

129 *Id.* at 903.

130 *Id.*

receive sufficient public oversight, private prosecutions are constitutionally permissible. One could also hold the position that there is no constitutional right to publicly overseen private prosecutions — the Supreme Court has never held to the contrary. What this Note argues is that, first, if the Fourteenth Amendment places limits on the unsupervised authority of private prosecutors, then relatively minimal public oversight is sufficient to satisfy constitutional due process. Second, in a subset of jurisdictions, it appears that it is the court rather than the movant that is exercising its authority to undertake proceedings for criminal contempt. In those states, the constitutional obligations that are placed upon prosecutors should be understood to be borne by the court that undertakes the contempt proceedings, and not the private party that asked it to do so. These are systems of public control, not public oversight. But even if no such systems exist — even if they are a figment of overeager construction — public oversight remains an adequate ground on which to conclude that privately initiated criminal contempt proceedings are constitutionally permissible.

V. CONCLUSION

The civil protective order was an important innovation in the fight against domestic violence, but its value depends upon its enforceability. Even where the public will to prosecute CPO violations is sufficient, public resources will never be. Only the person who benefits from a CPO has the information and the incentive to ensure that it is respected. But the means of enforcement must pass constitutional muster.

CPO proceedings often take place in special family and domestic violence courts, where procedural rules are loose and treatise writers nonexistent. Much of what happens there is unknown and difficult to uncover. However, the Supreme Court has taken an interest in those proceedings and may revisit them shortly. It would behoove advocates of effective CPO enforcement to amass a detailed record of the procedural protections that are provided to alleged contemnors in jurisdictions where their accusers can initiate prosecutions against them. As this Note has suggested, in the fine details of those protections lies the fate of the larger enforcement scheme.