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Private prosecution: a useful constitutional safeguard or potentially dangerous historical anomaly?

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Introduction

In the light of recent English cases concerning the right of individuals to bring private prosecutions, this article argues that this right[1] should be removed or circumscribed more closely. In particular, we advocate three reforms here if the power to launch private prosecutions is to remain. First, we assert that there is a general need for an initial pre-trial hearing to act as a filtering mechanism in relation to private prosecutions. Second, we maintain that legislation should fix the Crown Prosecution Service (CPS) duty in relation to private prosecutions in a clear, specific manner, and should apply both at the initial filter stage and throughout any subsequent proceedings which began as an attempted private prosecution. Third, we argue that there should be clear sanctions where a defendant has been subjected to a malicious private prosecution or to behaviour by a private prosecutor or their agents which breaches the normal requirements of the laws of criminal procedure and evidence.

[1] Although it might be queried whether "right" is the correct label; "residual ability" might be more accurate, as we shall see. If it is a right, it is a limited one, and might more accurately be described as a right to commence criminal proceedings for most offences.

Our aim is to advance significantly the theory and analysis in an under-explored but important area of law.[2] We will examine two contemporary cases in particular. In the first, *R. (on the application of Gujra) (FC) v CPS*,[3] the Supreme Court determined that it is lawful for the CPS to take over and discontinue private prosecutions unless the evidence is "more likely to result in a conviction than not to do so"[4]; that is, unless there is a "realistic prospect" of a conviction. However, *Gujra* is also important because it was the first time that the Supreme Court considered the merits of the right to bring a private prosecution: Lord Wilson stated that there is "much to be said"[5] in favour of Lord Mance's view that this right is a valuable "safeguard against wrongful refusal or failure by public prosecuting authorities to institute proceedings".[6] Lord Wilson endorsed that.[7] We will argue that the counter-arguments are at least equally strong, especially since there are other ways of challenging a refusal to prosecute. Furthermore, we will argue that the majority of the Supreme Court took the wrong approach in *Gujra* when deciding that it is appropriate for the CPS to use "a simple 'better than evens' or 'is a conviction more likely than not?' test".[8]

The second contemporary case was decided in the Crown Court, where a defendant was convicted of conspiracy to defraud after a private prosecution mounted against him by the Federation Against Copyright Theft (FACT).[9] We will argue that this second case is significant

[2] The Law Reform Commission of Canada observed in 1986 that there has been very little written about private prosecutions (Law Reform Commission of Canada, *Working Paper No 52: Private Prosecutions* (1986), p.2). This is still true today.
[3] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52; [2013] Crim. L.R. 337.
[4] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [1] per Lord Wilson; [2013] Crim. L.R. 337.
[5] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [29]; [2013] Crim. L.R. 337.
[6] *Jones v Whalley* [2006] UKHL 41 at [43]; [2007] Crim. L.R. 74.
[7] *Jones v Whalley* [2006] UKHL 41 at [29]; [2007] Crim. L.R. 74.
[8] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [126], per Lady Hale; [2013] Crim. L.R. 337, arguing in the minority against the adoption of such a test.
[9] Vickerman Indictment No. T2009 7188, unreported Newcastle Upon Tyne Crown Court 2012.

in providing a clear illustration of the dangers of private prosecutions: specifically, it raises serious concerns about the potential abuse of state power and resources by private organisations.

It is necessary briefly to define our scope at the outset. A private prosecution is "a prosecution started by a private individual, or entity who/which is not acting on behalf of the police or other prosecuting authority".[10] Although the CPS brings most prosecutions in England and Wales,[11] there is still a power to initiate a private prosecution, subject to certain controls.[12] Many would be surprised to learn that they may number in the thousands per year: indeed, Lord Thomas CJ recently observed:

"there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions."[13]

Private prosecutions and theories about criminal justice

This article is not seeking to provide a comprehensive analysis of theoretical models through which the power to initiate a private prosecution can be examined. Such theories do, however, form a framework to understand the issues raised by this power more effectively. Whether

[10] CPS website, "Private Prosecutions", http://www.cps.gov.uk/legal/p_to_r/private_prosecutions [Accessed 10 June 2019].
[11] The CPS was created by s.1 of the Prosecution of Offences Act 1985. Prior to this Act, individual police forces prosecuted most offences.
[12] Prosecution of Offences Act 1985 s.6(1).
[13] *R. (on the application of Virgin Media Ltd) v Zinga (Munaf Ahmed)* [2014] EWCA Crim 52; [2014] 1 W.L.R. 2228 at [10]. The Private Prosecutors' Association is among those arguing that further growth in private prosecutions is likely due to budget restraints on enforcement agencies and the police: see Private Prosecutors' Association, "About Us", http://private-prosecutions.com/about/ [Accessed 10 June 2019].

there is justification for the existence of private prosecution in its current form must be considered with reference to the function of criminal punishment. This is an area where there is, predictably, disagreement, since criminal punishment can serve more than one purpose. As one commentator summarises the possibilities, punishment may be a deterrent, "but when deterrence fails, a court may impose punishment to incapacitate the offender, to rehabilitate the offender, or to exist as an end in itself".[14] It might be thought that it is not significant who conducts the prosecution if the goal is deterrence, incapacitation, rehabilitation and/or an end in itself (just deserts). However, as we shall show below when considering arguments for and against private prosecutions, this matter is not so straightforward.

Who is the victim?

When considering the appropriate nature of the prosecution system, it is helpful to consider both the history of views about the nature of crime and contemporary models of criminal process. First, crime can be viewed as a harm against the individual or against the State. Historically, the former view dominated; "hence crimes were prosecuted in much the same way as suits in tort were litigated: individuals squared off in a state-provided forum".[15] The State simply provided a mechanism by which a criminal could be made to pay restitution and the victim could obtain "private vengeance".[16] Gradually, the second view gained prominence. This change in theoretical understanding of crime has practical consequences: "[i]f crime is viewed as harm principally against the victim, then the state has no (or only a minor) role in

[14] M. O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 659, 663.
[15] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 664. However, O'Neill acknowledges that "crimes could be seen as offenses against the organization of the Church [and God] as well".
[16] Sir J. Fitzjames Stephen, *A History of the Criminal Law of England* (London: MacMillan, 1883), p.245.

seeking remediation".[17] On the other hand, if crime is viewed as a harm principally against the State, then it follows that the individual should have little or no role in initiating and conducting prosecution. O'Neill speculates that the change contributed to a decline in private prosecutions,[18] yet they appear to have had a resurgence recently. Is this resurgence simply an ad hoc response to retrenchment in terms of police and CPS activity or is it possible to view it more positively through the lens of a victims' rights model of criminal justice?

Models of criminal justice

In 1964, Herbert Packer published an influential article outlining two models of criminal justice, the Crime Control Model and the Due Process Model. Although these models are useful because they can serve as normative guides and allow trends in criminal justice to be highlighted,[19] they have been the subject of convincing criticism and are not the only possible models of criminal justice.[20] Both models assume that the State, rather than the individual, controls the investigation and prosecution of crime. Packer claimed that the models capture "the spectrum of choices that is at least in theory open in fixing the shape of the criminal process",[21] yet neither takes account of the existence of private prosecutions. Nor do they recognise that individuals may play other roles in the criminal justice process, as is evidenced by the surprisingly high percentage of convictions for sexual grooming of a child which result from evidence provided by "vigilante paedophile hunters"[22] who may have initiated the

[17] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 659, 663.
[18] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 670.
[19] See K. Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671.
[20] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 674.
[21] H. Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 2.
[22] 44 per cent of trials for such offences in 2016, according to a Freedom of Information Act request from the BBC, http://www.bbc.co.uk/news/uk-england-41203273 [Accessed 10 June 2019].

conduct which led to the offence. The Crime Control model resembles an assembly line, focussing upon efficiency in the criminal process.[23] For this purpose, efficiency means "the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known".[24] In contrast, the Due Process model "looks very much like an obstacle course"[25] where reliability is not sacrificed to efficiency and the aim is "… at least as much to protect the factually innocent as it is to convict the factually guilty".[26] Under this model, the notion of equality demands a "public obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him".[27] Kent Roach has pointed out that "[a]lthough Packer's models have had remarkable durability, they are a product of the time and place in which they were conceived".[28] One problem is that they assume that the criminal justice system inevitably involves the State asserting its power against the individual through the use of punishment. In response, Roach has proposed two new, additional models of criminal justice:

"a punitive model of victims' rights which relies upon the criminal sanction and punishment, and a non-punitive model of victims' rights which stresses crime prevention and restorative justice."[29]

[23] Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 10.
[24] Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 10.
[25] Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 13.
[26] Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 15.
[27] Packer, "Two Models of the Criminal Justice Process" (1964) 113 University of Pennsylvania Law Review 1, 19.
[28] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 682.
[29] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 699.

Like Packer, he does not believe that any legal system will perfectly reflect any one model.[30]

The punitive model of victims' rights outlined by Roach pits the rights of victims and potential victims against the accused's due process rights,[31] and clearly views crime as a harm at least partially perpetrated against the individual, as opposed to the State. Hence victims and their representatives play a much more active role than under the Crime Control and Due Process models, jump-starting legal change, paying much less deference to authority figures and subjecting them to critical scrutiny.[32] It might seem that private prosecution fits within this punitive model of victims' rights as part of a wider attempt to take victims' rights seriously. However, this is not the case, since Roach asserts that

"[i]n a punitive victims' rights approach … [victims] can only make representations to legislators, judges, and administrators who retain the ultimate power to impose punishment."[33]

Hence it excludes both private prosecutions and vigilante evidence-production.

According to Roach, the non-punitive model of victims' rights is different in that it focuses on the prevention of crime and restorative justice.[34] Under this model, crime prevention can occur through methods such as private policing or neighbourhood watch schemes and legitimate non-punitive responses to crime can include "avoidance, shaming, apologies, and informal

[30] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 713.
[31] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 700.
[32] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 701.
[33] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 710.
[34] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 706–707.

restitution".[35] This model not only aims to reduce suffering of both victims and offenders,[36] but posits that the key players in the justice system should be "the victim, the offender, and their families and supporters- not police, prosecutors, defense lawyers or judges who may appropriate their dispute".[37]

Roach's additional models of criminal justice are useful since they capture a wider range of options or values, but there are yet more: for instance, Andrew Ashworth and Mike Redmayne advocate a rights perspective, stating that respect for rights is "an objective to be obtained whilst the criminal justice system pursues retributive justice"[38] and drawing partially upon the European Convention on Human Rights for their normative framework.[39] Another framework in contrast focuses upon protecting and enhancing freedom, since that is the point of the criminal justice system.[40]

It is clearly feasible for victims and their representatives to do more than make representations to legal officials when seeking punishment, since private parties can, and do sometimes, act as prosecutors. Nevertheless, none of the above models of criminal justice requires the existence of private prosecutions as an element of justice.[41] Rather, they may divert resources which would otherwise be available to ensure justice for all. As we shall demonstrate below, there is no justification for the role of private prosecution in its current form.

[35] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 707.
[36] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 707.
[37] Roach, "Four Models of the Criminal Process" (1999) 89 Journal of Criminal Law and Criminology 671, 710.
[38] A. Ashworth and M. Redmayne, *The Criminal Process*, 4th edn (Oxford: Oxford University Press, 2010), p.48.
[39] Ashworth and Redmayne, *The Criminal Process* (2010), p.48.
[40] A. Sanders, R. Young and M. Burton, *Criminal Justice*, 4th edn (Oxford: Oxford University Press, 2010), p.48.
[41] Indeed, Ashworth and Redmayne conclude that as a matter of principle "there are no convincing arguments for accepting that victims or victims' families have a right to influence any of the key decisions in the criminal process" (Ashworth and Redmayne, *The Criminal Process* (2010), p.53).

The contemporary use of the power to initiate a private prosecution

In order to understand the scale and nature of the problems arising from private prosecutions, it is first necessary to understand how the power to initiate them is currently utilised. The creation of police forces and State prosecutors has led to it being rare for ordinary members of the public to bring private prosecutions.[42] However, this does not mean that the ability to instigate a private prosecution is insignificant from a practical perspective. First, organisations attempt to use private prosecutions to protect or promote their interests or goals; for instance, in relation to intellectual property. Bodies such as the British Phonographic Industry and FACT often prosecute.[43] FACT describes itself as being at "the forefront of the fight against intellectual property crime in the UK and internationally, specialising in protecting both physical and digital content"[44] and regularly instigates private prosecutions for offences such as conspiracy to defraud. Such organisations are in some ways acting similarly to the "associations for the prosecution of felons" which proliferated in the eighteenth and nineteenth centuries, before the creation of modern-style police forces.[45] It is unclear how many private prosecutions FACT instigates each year, since there are no official statistics on this matter. However, it is worth noting that FACT "represents and protects the intellectual property rights of a wide range of global brands and businesses",[46] and that one of them, Sky UK Ltd, claimed in 2014 that FACT had recently mounted prosecuted over 1,500 successful prosecutions on

[42] As stated by Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] A.C. 435 at 498; [1977] 3 W.L.R. 300.
[43] R. Crozier, "Criminal Prosecutions – An Underused Remedy" [April 2012] Intellectual Property Magazine 31.
[44] FACT, "About FACT", http://www.fact-uk.org.uk/about/ [Accessed 10 June 2019].
[45] On these historical associations, see J. Langbein, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: the Appearance of Solicitors" [1999] CLJ 314, 342–347.
[46] FACT, "Our customers", https://www.fact-uk.org.uk/about-us/our-customers/ [Accessed 10 June 2019].

their behalf alone.[47]

These figures suggest that FACT is a prolific prosecutor.[48] It must be remembered that not all criminal prosecutions result in convictions, and that there must therefore have been many more private prosecutions commenced in relation to Sky programming than the number of convictions. Again, it must be remembered that FACT has conducted private prosecutions on behalf of many organisations, not just those relating to televised sport. Moreover, various other companies have also instigated numerous private prosecutions in recent years: for instance, a company named Media Protection Services brought dozens of private prosecutions on behalf of the Football Association Premier League between 2005 and 2011,[49] and the UK Film Distributors' Association (FDA) launched the Film Content Protection Agency in 2016 to take over anti-film piracy work previously undertaken by FACT.[50] Perhaps most importantly of all, it must be acknowledged that private prosecutions are brought by a wide range of organisations, including charitable and public interest bodies[51] as well as commercial ones, and that the threat of private prosecution itself may have a significant deterrent function.[52] For instance, 696 defendants were convicted in 2017 as a result of prosecutions brought by the Royal Society for

[47] British Sky Broadcasting Ltd (now trading as Sky UK Ltd), "Fighting Fraud", http://business.sky.com/CustomerZone/FightingFraud/ [Accessed 10 June 2019].
[48] In 2016, the Motion Picture Association withdrew its funding of FACT, reportedly reducing FACT's total budget by 50 per cent (see T. Grater, "FACT Faces uncertain future following MPA funding pull", http://www.screendaily.com/news/fact-faces-uncertain-future-following-mpa-funding-pull/5104276.article [Accessed 10 June 2019]). However, this has not necessarily reduced its activity in terms of private prosecution, with its focus reportedly shifting to "games, music and leisure" and "smaller audiovisual producers" (A. Orlowski, "Copyright crimefighters FACT change tack after Hollywood calls The Terminator", *The Register*, 9 November 2016).
[49] See C. Binham, "Premier League Prosecutions in Doubt", *The Financial Times*, 16 August 2012; these prosecutions are now undertaken in partnership with FACT.
[50] FDA, "Film Content Protection Agency", http://www.launchingfilms.com/filmcontentprotection-agency/howfcpaworks [Accessed 10 June 2019].
[51] See L. Leigh, "Private Prosecutions and Diversionary Justice" [2007] Crim. L.R. 289, 293–294.
[52] As we shall see, there are also significant issues in relation to the investigation and process of private prosecutions.

the Prevention of Cruelty to Animals (RSPCA).[53] Concern has also recently been raised about the use of private prosecutions by companies working for rail operators: regarding the offence of boarding a train without a valid ticket, John Spencer has argued that honest travellers are privately prosecuted but dishonest travellers are not, since the latter pay civil penalty fares but the former protest.[54]

The second mode of use of private prosecutions is by ordinary members of the public, as distinct from organisations. Some law firms and private investigators now encourage individuals and corporations to bring private prosecutions as a means of obtaining redress when police are allegedly not interested[55]: indeed, there are now at least two English law firms that specialise in private prosecutions,[56] and the launch of the Private Prosecutors' Association in 2017 would appear to indicate further growth, or intention to support growth.[57] This kind of encouragement has the potential to increase significantly the number of private prosecutions brought by ordinary members of the public. Those providing such encouragement do not necessarily highlight the risks or disadvantages of bringing a private prosecution, or the relative

[53] RSPCA, Prosecutions Annual Report 2017, p.32. The RSPCA made changes to its private prosecution strategy as a result of a 2013 report it commissioned (see "RSPCA Response to the Wooler Review", https://www.rspca.org.uk/webContent/staticImages/Downloads/RSPCAResponseToWoolerReview.pdf [Accessed 10 June 2019]. However, concerns about its role as a private prosecutor (House of Commons Environment, Food and Rural Affairs Committee, *Animal Welfare in England: Domestic Pets* (London: TSO, 2016), HC Paper No. 117, p.30) led to the Government putting the RSPCA on "probation" for the following two years (see C. Hope, "Ministers put RSPCA on 'probation' for two years over prosecution policy" *The Telegraph*, 12 February 2017). More recently, the RSPCA sought new powers to search private property to help it seize animals in distress (see BBC, "RSPCA seeking new powers to seize 'suffering' animals", http://www.bbc.co.uk/news/uk-politics-40542246 [Accessed 10 June 2019]. If granted, these new powers could lead to even more private prosecutions by this organisation.

[54] J.R. Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 4.

[55] Leigh, "Private Prosecutions and Diversionary Justice" [2007] Crim. L.R. 294

[56] See Edmonds, Marshall, McMahon, http://www.emmlegal.com/ [Accessed 10 June 2019] and the Private Prosecution Service, "About PPS", http://privateprosecutionservice.co.uk/about-private-prosecution-service-solicitors-barristers [Accessed 10 June 2019].

[57] See Private Prosecutors' Association, http://private-prosecutions.com [Accessed 10 June 2019].

merits of any other options available to those seeking redress for an injustice.[58]

Even if there should be no increase in the number of private prosecutions initiated by ordinary members of the public, the ability to initiate such proceedings would matter from a practical perspective simply because of its use by commercial and other organisations. There are again no official statistics on the proportion of private prosecutions brought by ordinary members of the public, as opposed to commercial or other organisations; in fact, there are no official statistics at all on the prevalence of private prosecutions in England and Wales.[59] However, figures from 1980 show that under 3 per cent of private prosecutions were brought by individuals, and about 9 per cent by retailers.[60] From the available evidence, it seems likely that most private prosecutions are still instigated by organisations; for example, because they are more likely than individuals are to have the resources to conduct the necessary private investigations and legal proceedings.[61]

Arguments in favour of retaining private prosecution

Safeguard

[58] See, e.g. Wilsons Solicitors, "Private Prosecutions", http://www.lawoffice.co.uk/privpros.aspx [Accessed 10 June 2019].

[59] See https://www.whatdotheyknow.com/request/24132/response/68828/attach/html/2/First%20response.doc.html [Accessed 10 June 2019].

[60] D. Hay, "Controlling the English Prosecutor" (1983) 21 Osgoode Hall Law Journal 165, 180–181, referring to K. Lidstone, R. Hogg and F. Sutcliffe, *Prosecutions by Private Individuals and Non-Police Agencies* (London: HMSO, 1980), Royal Commission on Criminal Procedure, Research Study No. 10, pp.15–33. These statistics predate the creation of the CPS. The downgrading of low-value shoplifting to a summary offence by the Anti-Social Behaviour, Crime and Policing Act 2014 may have reduced police enthusiasm for prosecuting shoplifters and so lead to a corresponding resurgence of store-led prosecutions.

[61] Crowdfunding of private prosecutions is a recent trend. It can be utilised by either organisations or individuals: see M. Berridge, "This week Britain's first crowdfunded prosecution was conducted in the Old Bailey", https://www.kingsleynapley.co.uk/insights/blogs/regulatory-blog/crowdfunding-private-prosecutions-charities-taking-action-when-the-authorities-do-not [Accessed 10 June 2019].

Although we believe that major reform is necessary in relation to private prosecution, there are arguments in favour of its retention that cannot simply be dismissed out of hand, the primary one being that it serves as a safeguard against "capricious, corrupt or biased failure or refusal of … authorities to prosecute offenders."[62] One concern here[63] is that the authorities may be reluctant or even unwilling to prosecute members of "the establishment", such as politicians or police officers.[64]

Bookmaker's approach

Another concern, raised by the Police Federation, is that the CPS only pursue the "most certain of cases", perhaps because of performance targets.[65] Lady Hale echoed this concern about a "so-called 'bookmaker's approach'" to prosecution in her dissenting speech in *Gujra*[66] suggesting that private prosecution is important as a safeguard for protecting victims of crime, particularly "those who have traditionally had such difficulty in getting their voices heard or, if heard, believed".[67] Her position here seems to reflect some kind of punitive victims' rights model of criminal justice, but she clearly believes that it is necessary for victims to have more rights than are permissible under Roach's punitive model described above. Her view is that "apparently credible complaints have not been taken further because of so-called 'lack of evidence'"[68] and that such cases "are likely to involve a violation of the victim's rights under

[62] *Gouriet, v Union of Post Office Workers* [1978] A.C. 435; [1977] 3 W.L.R. 300, per Lord Diplock.
[63] G. Williams, "The Power to Prosecute" [1955] Crim. L.R. 596, 599.
[64] See, e.g. R. Camber, "MPs WILL be privately prosecuted over expenses scandal 'if CPS drops the ball' thanks to donations from Mail readers" The Daily Mail 26 September 2009 and the crowdfunded "#BrexitJustice" prosecution of Boris Johnson for misconduct in a public office, which passed the threshold test on 29 May 2019 but which was quashed by the High Court on 7 June 2019. For examples of private prosecution being brought against police officers, see "Police officers in court as man brings private prosecution" *The Telegraph*, 15 August 2012, and N. Syson, "Amateur Lawyer Cop Rap" The Sun 24 April 2017.
[65] House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London: TSO, 2009), HC 186, p.17.
[66] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [126]; [2013] Crim. L.R. 337.
[67] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [124]; [2013] Crim. L.R. 337.
[68] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [130]; [2013] Crim. L.R. 337.

Article 8 or, in extreme cases, Article 3 of the European Convention on Human Rights".[69]Accordingly, Lady Hale believes that an effective right to bring private prosecutions is necessary for the State to fulfil its "positive obligation to provide an effective deterrent [to private parties interfering with an individual's human rights], in the shape of the criminal law".[70]

This view does not reflect the position of the European Court of Human Rights, which has held that the "threshold evidential test" used by the CPS does not violate any rights of the victims of crimes.[71] The Court found that the CPS evidential test is not arbitrary, since (inter alia) it is a single standard which applies to all (public) prosecutions, is not an unduly high threshold and applies to all offences regardless of the identity of the alleged offender.[72] But the same cannot be said of private prosecutions, where there is no consistently applied single threshold (unless the CPS take over the prosecution),[73] and where the only prosecutions which take place at all for some offences are private. Whilst it is true that the State has a positive obligation to provide an effective deterrent, our opinion is that the possibility of challenging a CPS decision not to prosecute deals with the human rights concerns outlined by Lady Hale and has the advantage of being open to all victims, not just those who can afford to commence a prosecution (we

[69] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [133]; [2013] Crim. L.R. 337. She cites allegations of sexual offences as one such example; however, recent scandals indicate that, in at least some cases, public prosecutions for sex offences are taking place even when exculpatory evidence exists. The cure for such failures lies not in letting the public "have a go", but rather in tightening compliance with rules of evidence.
[70] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [33]; [2013] Crim. L.R. 337.
[71] *Da Silva v United Kingdom* (5878/08) (2016) 63 E.H.R.R. 12; 40 B.H.R.C. 159 at [266]–[276].
[72] *Da Silva v United Kingdom* (5878/08) (2016) 63 E.H.R.R. 12; 40 B.H.R.C. 159 at [268].
[73] The voluntary Code of Practice planned by the newly formed Private Prosecutors' Association may introduce more consistency between private prosecutors, since one of the key objectives of the Association is to "Enable those involved in bringing private prosecutions to identify, endorse and share best practice" (http://private-prosecutions.com/about [Accessed 10 June 2019]). However, it is important to note that there is no requirement for private prosecutors to join the Association and that it will have no sanctions. Further, their draft Code is a statement of current law and some good practice principles, rather than an attempt at reform.

consider this point in more detail below[74]). Furthermore, as we shall explain, there are also powerful human rights arguments against private prosecution.

Politics

A third concern here is that the CPS may not prosecute certain individuals for political reasons: for example, as in the cases of Babar Ahmad and Syed Talha Ahsan,[75] because the US wants to extradite them. Little weight should be attached to this concern; the number of relevant cases is unlikely to be high, and it is doubtful that self-selected private individuals are best placed to determine what is in the public interest here.

Gap-filling

Tamlyn Edmonds, a barrister who specialises in private prosecutions, states that authorities may not prosecute offenders who deserve punishment due to prioritisation of resources by the police or the CPS "in these times of austerity".[76] Seen in this way, private prosecutions might seem to usefully "fill in the gaps" where the authorities have to focus elsewhere because a lack of resources forces them to prioritise their actions on other matters. However, the costs of bringing such prosecutions are potentially recoverable from central funds even if a prosecution does not result in a conviction.[77] Indeed, the relevant Practice Direction indicates that an order for costs

[74] On the human rights significance of the possibility of challenging a CPS decision, see too J. Rogers, "A Human Rights Perspective on the Evidential Test for Bringing Prosecutions" [2017] Crim. L.R. 678.
[75] See BBC, "Babar Ahmad and Abu Hamza among terror suspects to be sent to US", http://www.bbc.co.uk/news/uk-17662054 [Accessed 10 June 2019].
[76] T. Edmonds, "Private Prosecutions: An Individual's Right", http://thejusticegap.com/2012/06/private-prosecutions-an-individual%E2%80%99s-right [Accessed 30 November 2017]. This view is shared by the Private Prosecutors' Association.
[77] Prosecution of Offences Act 1985 s.17.

"should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause." [78]

Thus, the State often eventually bears the financial burden of private prosecutions, which may well be significantly higher than in comparable public prosecutions.[79] If, as the Private Prosecutors' Association asserts,[80] austerity has caused cuts in public prosecutions, why should some well-funded people and organisations be able to press ahead in their own interests and recoup costs from the public purse?

Expertise

A more convincing argument in favour of private prosecutions is that an alleged victim may be best placed to bring a case because they have knowledge or skill lacked by the authorities.[81] There are various situations where this may be the case. O'Neill cites cyber-crime as an illustration: "[t]he government does not, and cannot, maintain a monopoly over the specialized knowledge to detect and prosecute cyber-criminals"[82] since private industry's access to well-paid programming talent gives it the edge over the government[83]in terms of law enforcement here. Our view is that private industry could legitimately play a supportive role to the police

[78] *Practice Direction (Costs in Criminal Proceedings)* [2015] EWCA Crim 1568 at [2.61]. This approach "applies to proceedings in respect of an indictable offence or proceedings before the High Court in respect of a summary offence. Regulation 14(1) of the General Regulations extends it to certain committals for sentence from a Magistrates' Court".
[79] See M. Scott, "I don't Blame the Top QC for Bringing an Unsuccessful Private Prosecution but Should we Have to Pay for it?", http://barristerblogger.com/2016/03/10/dont-blame-top-qc-bringing-unsuccesful-private-prosecution-pay [Accessed 10 June 2019].
[80] Law Society Gazette, 10 May 2018.
[81] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 659, 740.
[82] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 659, 741–742.
[83] O'Neill, "Private Vengeance and the Public Good" (2010) 12 University of Pennsylvania Journal of Constitutional Law 659, 741.

and the CPS (for example, by providing evidence to these authorities), but that this does not necessarily mean that it is appropriate for the alleged victim to control the prosecution process.

Control

A final, linked, argument in favour of private prosecutions is that they are also beneficial because they enable individual victims to remain in control of proceedings[84] and vindicate "personal grievances".[85] As the Law Reform Commission of Canada has rightly stated:

"It may be unwise for society to ignore this elemental facet of human personality, since individuals, frustrated by the law, may seek to accommodate themselves by unlawful means".[86]

However, victims' rights are now incorporated into the criminal justice system in a fairer manner than vindication of grievances of the well-funded or popular.

Arguments against retaining private prosecution

Outdated

There is a compelling case against the retention of private prosecution in its current form. Critics of private prosecution may advance just as many calls to theory, logic, history, human rights and primal needs as its proponents. Some query whether such a right has a place in a modern era, where crime is often seen as an offence "against the good order of the state"[87]

[84] Edmonds, "Private Prosecutions: An Individual's Right", http://thejusticegap.com/2012/06/private-prosecutions-an-individual%E2%80%99s-right [Accessed 30 November 2017].
[85] Anonymous, "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction" (1955) 65 Yale Law Journal 209, 227.
[86] Law Reform Commission of Canada, *Working Paper No 52: Private Prosecutions* (1986), p.20.
[87] *Jones v Whalley* [2006] UKHL 41 at [16], per Lord Bingham; [2007] Crim. L.R. 74.

rather than the individual, and private prosecution can be "exercised in a way damaging to the public interest".[88] While it is true that

"[t]he right to bring a private prosecution was once considered to be a valuable constitutional safeguard…. [t]hat is however now an outdated view".[89]

Citizens who wish to challenge prosecutorial decisions may do so via judicial review in certain cases.[90] More importantly, recent developments have taken this further. In *Killick*, the Court of Appeal held that victims of crime have a right to review of a CPS decision not to prosecute or to discontinue a case, and that this is in addition to the availability of judicial review.[91] In response, the CPS issued a new scheme and supporting guidance (the Victims' Right to Review (VRR)), with effect from June 2013.[92] In addition, the EU Victims' Rights Directive came into effect in November 2015, including rights to support, information and involvement in criminal proceedings.[93] The sum effect of these developments is that only certain matters such as a

[88] *Jones v Whalley* [2006] UKHL 41 at [16], per Lord Bingham; [2007] Crim. L.R. 74.
[89] *Media Protection Services Ltd v Crawford* [2012] EWHC 2373 (Admin) at [25], per Burnton LJ; [2013] Crim. L.R. 155.
[90] See e.g. *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [37], per Lord Wilson; [2013] Crim. L.R. 337. On the limited significance of judicial review in this context, see Rogers, "A Human Rights Perspective on the Evidential Test for Bringing Prosecutions" [2017] Crim. L.R. 678, 686–687.
[91] *Killick (Christopher)* [2011] EWCA Crim 1608 at [49]; [2012] 1 Cr. App. R. 10.
[92] See CPS, "Victims' Right to Review Scheme", http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html [Accessed 10 June 2019]. This scheme has significantly reduced the prospect of being able to challenge a decision not to prosecute by way of judicial review. In *L v DPP* [2013] EWHC 1752 at [11]–[12]; (2013) 177 J.P. 502, the High Court stated: "First, no judicial review should be brought until the CPS has had an opportunity of conducting a further review under their Victim right of review procedure. In the ordinary case, if a challenge is to be brought before that right of review has been taken up, a court should not entertain it. Second, if there has been a review in accordance with this procedure, then, it seems to me, that the prospect of success will … be very small".
[93] The Directive gives Members States a degree of discretion to determine what is required in terms of the right of victims to participate in criminal proceedings. In England and Wales, victims can participate in the criminal justice system through the Victim Personal Statement, which a court should take into account prior to sentencing: see CPS, "Victim Personal Statement", https://www.cps.gov.uk/legal-guidance/victim-personal-statements [Accessed 10 June 2019]. However, there is less scope for victims to participate in public prosecutions prior to the sentencing stages, although they can appear as witnesses and the CPS "will consider any views expressed by the victim or victim's family" (see CPS, "Victims and Witnesses: Care and Treatment", https://www.cps.gov.uk/legal-guidance/victims-and-witnesses-care-and-treatment [Accessed 10 June 2019]).

police failure to investigate fall outside the CPS review scheme, but in some circumstances these matters would be within the scope of judicial review and of human rights claims, such as where a violation of arts 2 or 3 of the ECHR can be alleged.[94] The world has moved on to such an extent that any need for private prosecutions must be at least very much diminished.[95]

Three other arguments flow from this point. First, the effect of the creation of the CPS on the criminal justice system must be acknowledged; the CPS was created to act in the public interest in this context, and hence the continued existence of, and diversion of funds to, private prosecutions may harm the public interest. Second, a dual role as victim-prosecutor may have undesirable results, which have been seen in recent cases discussed below. Third, those in favour of private prosecutions omit to mention their impact on the rights of defendants. We shall look at each of these arguments in turn.

CPS

The CPS is required to take the public interest into account in pursuing its role. Its decisions "have an enormous impact on everyone experiencing the criminal justice system, whether victims, witnesses or defendants." [96] The House of Commons Justice Committee has characterised the CPS as the gatekeeper of the criminal justice system:

[94] As discussed in detail by the Supreme Court in *D v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2019] A.C. 196.
[95] *R. (on the application of Hayes) v Crown Prosecution Service* [2018] EWHC 327; [2018] Crim. L.R. 500 underlines the point that the VRR scheme is of limited assistance where a private prosecution is taken over and the decision is taken to offer no evidence due to lack of a realistic prospect of conviction; proceedings cannot be reinstituted unless the double jeopardy rule is disapplied under the Criminal Justice Act 2003, and so redress under the VRR scheme is limited to an explanation and apology. However, we submit that all cases should be subject to the same criteria regarding realistic prospects of conviction.
[96] House of Commons Justice Committee, The Crown Prosecution Service: Gatekeeper of the Criminal Justice System (London: TSO, 2009), HC 186, para.1.

"The prosecutor is entrusted with determining on an evidential and public interest basis whether a person should be prosecuted and therefore whether he or she should go forward for a judgment before the courts".[97]

However, this overlooks the significance of private prosecutors, who often have an inbuilt conflict of interest. Private prosecutors also determine whether a person should be prosecuted, and do not necessarily even take the public interest into account when doing so.[98] Some Canadian judges have been particularly sceptical about the concept of private prosecution for the latter reason. As Farris J stated:

"[f]or individuals who are thinking only of themselves and not of society as a whole to have the right to institute and carry on criminal proceedings would destroy the whole fabric of the recognised fairness of our criminal prosecutions".[99]

In principle, private prosecutors must live up to the highest standards, as "Ministers of Justice". [100] In practice, important procedural safeguards may be missed in private prosecutions. There are some antiquated laws which are not enforced by public prosecution authorities on the grounds that doing so would not be in the public interest; they include plank-carrying and rug-shaking in the street, and writing on banknotes.[101] Nonetheless, there is little

[97] House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London: TSO, 2009), HC 186, para.2.
[98] The voluntary Code of Practice drafted by the newly formed Private Prosecutors' Association is a far weaker measure than the rules which bind the state authorities in relation to the conduct of prosecutions, and, as we previously stated, will have no sanctions.
[99] *Whiteford* [1947] 1 W.W.R. 903 at 906–907.
[100] *R. (on the application of Haigh) v City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin); [2017] 1 Costs L.R. 175 at [36].
[101] For illustrations, see Law Commission, "Legal Curiosities: Fact or Fable?", https://www.law-com.gov.uk/app/uploads/2015/03/Legal_Oddities.pdf [Accessed 10 June 2019].

to prevent private parties from enforcing them if they do not have a primary motive that is "so unrelated to the proceedings that it renders it a misuse or an abuse of the process"[102]; indeed, this is arguably what Mary Whitehouse famously did in cases such as *Lemon (Denis),*[103] where the defendant was convicted for an offence that was subsequently abolished: blasphemous libel. Similarly, there is little to prevent a private prosecution being brought for a serious offence when the CPS would be more likely to prosecute D for a less serious one; for example, the CPS takes the view that, where wounds are concerned, s.20 of the Offences Against the Person Act 1861 should only be charged where they are "really serious".[104] However, a private prosecution could be brought in relation to a small cut if the other requirements for a conviction are fulfilled, the private prosecutor is not primarily acting out of an improper motive and thereby using the legal process to try to accomplish a purpose for which it was not designed, and the CPS is not already pursuing proceedings in relation to the same set of facts.[105]

Private and public prosecutions can both be stopped for abuse of process where a trial will "offend the court's sense of justice and propriety"[106] or "undermine public confidence in the criminal justice system and bring it into disrepute".[107] However, the courts exercise the jurisdiction to stay proceedings "carefully and sparingly and only for very compelling reasons",[108] such as where D was entrapped or abducted contrary to extradition laws. The role

[102] *In re Serif Systems Ltd* [1997] CLY 1373, per Auld LJ, cited with approval in *R. (on the application of Dacre and another) v City of Westminster Magistrates' Court* [2008] EWHC 1667 at [28]; [2009] Crim. L.R. 100.
[103] *Lemon (Denis)* [1979] A.C. 617; [1979] Crim. L.R. 311. This offence was abolished by the Criminal Justice and Immigration Act 2008 s.79.
[104] CPS, "Offences Against the Person, Incorporating the Charging Standard", http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a15 [Accessed 10 June 2019].
[105] On a case of potentially concurrent prosecutions relating to the same set of facts, see *Tower Bridge Metropolitan Stipendiary Magistrate, Ex p Chaudhry* [1994] Q.B. 340; [1993] 3 W.L.R. 1154.
[106] *Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 A.C. 42 at 74; [1993] 3 W.L.R. 90, per Lord Lowry.
[107] *Latif* [1996] 1 W.L.R. 104, 112, per Lord Steyn; [1996] Crim. L.R. 414. They can also be stopped where D cannot receive a fair trial.
[108] *Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 A.C. 42; [1993] 3 W.L.R. 90.

of abuse of process in addressing private prosecutions which have been brought primarily for improper motives or which are being conducted in a way that is wholly inappropriate is significant. Nevertheless, its effect is limited[109]: a judge cannot suppress a prosecution merely because he regrets it[110] or considers it disproportionate or not in the public interest.[111] The Court of Appeal has indicated that bad faith, unlawfulness or executive misconduct would be among the grounds for abuse of process: thus, they include entrapment and abduction but go beyond these cases.[112] However, the Court acknowledged that the claim is generally only successful in very serious examples of malpractice and unlawfulness.[113]

The CPS was specifically created to "make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process"[114] for the purpose of "fairness".[115] Private prosecutions, without safeguards or support, might undermine that purpose and may be challenged on grounds of unfairness. For example, a powerful organisation could use the threat of private prosecution to intimidate a vulnerable individual, V, to transfer certain of his property rights to this organisation to try to reduce its likelihood of privately prosecuting him. The CPS is expected to maintain standards of objectivity, independence and legal expertise, the absence of which in some private

[109] See P. Hungerford-Welch, "Abuse of Process – Does It Really Protect The Suspect's Rights" [2017] Crim. L.R. 3, arguing that its effectiveness would be "increased by greater clarity on the weight to be afforded to the factors which determine whether something does or does not justify a stay on the ground of abuse of process, together with a reappraisal of the latitude given to the investigating and prosecuting authorities if they are guilty of misconduct".
[110] *Connelly v DPP* [1964] A.C. 1254 at 1304; [1964] 2 W.L.R. 1145.
[111] *W(P)* [2016] EWCA Crim 745 at [38]; [2016] Crim. L.R. 844.
[112] *Crawley* [2014] EWCA Crim 1028 at [21]; [2014] 2 Cr. App. R. 16.
[113] *Crawley* [2014] EWCA Crim 1028 at [22]; [2014] 2 Cr. App. R. 16.
[114] Sir C. Philips, Report of the Royal Commission on Criminal Procedure (London: HMSO, 1981), Cmnd. 8092-I, para.7.3.
[115] Philips, Report of the Royal Commission on Criminal Procedure (London: HMSO, 1981), Cmnd. 8092-I, para.7.3.

prosecutions may result in unfair trials for defendants or unrealistic expectations for victims.[116] Recent judicial comments have rightly favoured these aspects of the CPS mandate; for example, Lord Neuberger has observed in relation to decisions whether to discontinue private prosecutions:

"[a]n objective, expert, and experienced assessment of the prospects appears to me to be generally more reliable than the assessment of a person who will normally be (probably wholly) inexperienced in the criminal justice system, and (often, as in this case) involved, frequently as a victim, and therefore far from dispassionate".[117]

The point here is not that the CPS never makes mistakes and that it can never be inappropriately swayed by public opinion, pressure groups or investigation by outside bodies such as parliamentary select committees,[118] but that, in comparison to private prosecutors, its independence makes it more likely to be dispassionate and less likely to act out of self-interest. The palpable shift in focus and rhetoric of the criminal justice system towards the rights and needs of victims must not overshadow its aims: "the point of the criminal justice system is to identify who did the wrong thing and make that individual subject to a penalty".[119] As noted by Robin White, "[o]ne form of prosecutor independence in the public interest is independence from the victim".[120]

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[116] See P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill Law Journal 265, 293.
[117] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [69]; [2013] Crim. L.R. 337. See too R. Buxton, "The Private Prosecutor as a Minister of Justice" [2009] Crim. L.R. 427, 428.
[118] This is arguably what happened in the case of the first prosecution of female genital mutilation: see e.g. S. Laville, "First FGM Prosecution: How the Case Came to Court" *The Guardian*, 4 February 2015.
[119] R. White, giving evidence to the Committee, House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London: TSO, 2009), HC 186, para.80.
[120] White, giving evidence to the Committee, House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (London: TSO, 2009), HC 186, para.80.

Dual role

The victim focus that private prosecutions create is problematic. It would be naïve to think that those who bring private prosecutions are all aggrieved victims of crime; some seek to exploit the law or have other motives. Any expansion of private prosecution could

"unnecessarily widen the field of prosecution of Her Majesty's subjects to any obsessed, vindictive, unscrupulous, self- styled saviour. Her Majesty's subjects are entitled to freedom from unwarranted prosecution."[121]

The case examples which follow will demonstrate procedural unfairness, human rights breaches and/or double standards being applied, all of which call for reform. For the relatively small proportion of private prosecutions which do appear to be brought by ordinary members of the public seeking justice, other measures might be equally or more effective, and less expensive. Arguably, a better solution to victims feeling that they have not had justice is to provide greater resources to support them; do they necessarily feel better after court, especially if they lose? As noted above, the human rights era has introduced other channels of redress against the actions of police, government and many others, and protection of victims of crime has become far more central to criminal justice. In any case, to allow additional channels for some victims of crime (the wealthy, legally aware, privately funded or corporate) adds a steeper gradient to the playing field rather than truly assisting the vulnerable. It could be just as much a human rights violation for victims of crime as that which concerned Lady Hale in *Gujra*. In this case, her Ladyship stated that the possibility of private prosecutions is important for "the

[121] *Campbell v Sumida* (1964) 49 D.L.R. (2d) 263, 271, per Miller J.

protection of vulnerable people from all forms of neglect and abuse, whether physical or sexual",[122] since they have difficulty "in getting their voices heard".[123] However, there is little evidence of vulnerable individuals bringing successful private prosecutions in the modern era; rather, the vast majority seem to be brought by well-resourced, vocal organisations protecting their commercial interests. Further, without appropriate support, individual private prosecutors may equally be at risk of censure, retaliation or intimidation, as they were historically,[124] and the process may allow resentments to fester as much as resolve them.

Defendants' rights

Proponents of private prosecutions tend to neglect the impact of such prosecutions on the rights and reasonable expectations of suspects and defendants. Several of the arguments advanced in favour of private prosecutions share this deficit. For example, the "filling in the gaps" approach, which views private prosecutions as a remedy against State prioritisation of resources, creates wealth discrimination and does not solve the problem of lack of resources; where is the fairness to potential defendants in a system which effectively allows prosecution only by the wealthy (or the popular, if crowdfunded) for offences which will not be prosecuted by the State? It is true that the costs of private prosecutions are potentially recoverable from central funds, but those who do not have significant financial resources are unlikely to even be able to initiate such prosecutions. Furthermore, the vast majority of private prosecutions never come to the attention of the CPS[125] and so for those cases, a much weaker threshold is still the

[122] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [130]; [2013] Crim. L.R. 337.
[123] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [125]; [2013] Crim. L.R. 337.
[124] See D. Hay, "Controlling the English Prosecutor" (1983) 21 Osgoode Hall Law Journal 170.
[125] In June 2013, Oliver Heald, the solicitor general, reported that "since February 2011 the CPS has been referred 55 private prosecution cases" (Hansard, HC Deb, c3W (10 June 2013)). This is a tiny minority of cases, bearing in mind that the RSPCA alone convicted 2,893 defendants in 2011 and 2012 combined (see RSPCA, *RSPCA*

requirement for a private prosecution to be both initiated and pursued to either acquittal or conviction, unless and until the CPS hears about such cases and decides to take over and discontinue those which do not meet their compulsory tests.

The lack of filter mechanisms for private prosecutions raises serious concerns about defendants' rights. It must be remembered that allegations can have serious consequences, and that prosecutions are a particularly serious form of allegation, since they carry the threat of criminal punishment and may involve distressing and invasive investigations[126]; for example, in 2014, an action which began as a private prosecution of a vulnerable woman diagnosed with bipolar disorder, Eleanor de Freitas, led to her suicide days before her trial was about to start.[127] Private prosecutions are not necessarily the last resort of those cheated of justice: they may be malicious or not based on a reasonable suspicion that D has committed a criminal offence. The accused have human rights too, and private prosecutions may arguably constitute a violation of at least some of them, at the investigatory stage or after initiation of a prosecution. The Supreme Court has held that:

"It is difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights" [128]

Prosecutions Department Annual Report 2012, p.3). The draft Code published by the Private Prosecutors' Association in January 2019 would not introduce any duty to inform the CPS of the initiation of a private prosecution; our response to the consultation will argue that this is a missed opportunity.

[126] See e.g. the speech of Lady Hale in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] A.C. 366 at [87], a case concerning the tort of malicious prosecution.

[127] See S. Laville, "Call for Prosecutors to Answer for trial of Alleged Rape Victim who Killed Herself" *The Guardian*, 6 November 2014. The CPS could also be blamed for not discontinuing this case, but this does not undermine our argument that there is a compelling case against the retention of private prosecution in its current form; this argument is not dependent upon the assumption that the CPS is flawless.

[128] *SXH v Crown Prosecution Service* [2017] UKSC 30 at [33]; [2017] Crim. L.R. 712.

and that "[i]f the criminalisation does not amount to an unjustifiable interference with respect for an activity protected by Article 8, no more does a decision to prosecute for that conduct".[129] However, the Supreme Court here was commenting on the *initiation* of *public* prosecutions where tests based on evidence and the public interest have been met; the Court did not hear arguments on whether the continuation of a flawed prosecution raised issues with arts 8 or 6. We submit that a private prosecution which is brought without reasonable grounds for suspicion, or which is continued when a public prosecutor would have discontinued it, or when the offence concerned is rarely prosecuted except privately, would have led to rather different comments from the Court. Further, the State has a positive obligation to "take reasonable and appropriate measures to secure the … rights [of the individual]",[130] and it is arguable that this requires it to take reasonable and appropriate measures to control all prosecutions: for example, because pre-trial detentions may interfere with both art.5, the right to liberty, and art.8.[131] The lack of equality of arms and resources where the private prosecutor is a well-funded organisation using public and private investigators risks an unfair trial, which would be an infringement of art.6 of the European Convention on Human Rights.[132]

In relation to art.6, it is also important to bear in mind that private prosecutions regularly follow private investigations, which will be conducted or at least controlled by the private prosecutor rather than the police and which, unlike police investigations, may be unregulated by the rules provided by the Code of Practice issued under Pt II of the Criminal Procedure and

[129] *SXH v Crown Prosecution Service* [2017] UKSC 30 at [32]; [2017] Crim. L.R. 712.
[130] *López-Ostra v Spain* [1994] ECHR 46 at 51.
[131] *SXH v Crown Prosecution Service* [2017] UKSC 30 at [44], per Lord Kerr; [2017] Crim. L.R. 712, in the minority on this point.
[132] We will explore this particular aspect of recent cases in a subsequent publication.

Investigations Act 1996. Amongst other things, this Code requires police officers to record and retain all information and material which is obtained in the course of a criminal investigation and which may be relevant to the investigation and to "pursue all reasonable lines of inquiry, whether these point towards or away from the suspect".[133] It is clear that it is applicable to at least certain private investigations, since s.67(9) of the Police and Criminal Evidence Act 1984 (PACE) stipulates that those "who are charged with the duty of investigating offences or charging offenders" must also "have regard to any relevant provision" of it. Case law has treated this as including a store detective and an RSPCA Inspector,[134] as well as various officers of state agencies.[135] In *Joy v Federation Against Copyright Theft*, Clarke J held that the duty to investigate criminal offences could be any type of legal duty.[136] However, this means the Code of Practice does not apply to all private investigations, since there will be cases where the private investigator was not under any type of legal duty to investigate; for example, an alleged victim or a vigilante paedophile-hunter.[137] This is significant because this lack of a requirement for some private investigators to comply with this Code of Practice undermines the scheme of disclosure in criminal trials, mentioned below, which is dependent upon matters such as the recording and retention of all relevant information. Similar concerns arise in relation to every other aspect of a private investigation, including compliance with PACE requirements for interviews with suspects and witnesses, witness statements, the adverse

[133] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf [Accessed 10 June 2019].
[134] *Bayliss* (1994) 98 Cr. App. R. 235; [1994] Crim. L.R. 687 and *RSPCA v Eager* [1995] Crim. L.R. 59 respectively.
[135] E.g. those of the Serious Fraud Office (*Director of Serious Fraud Office, ex parte Saunders* [1988] Crim. L.R. 837; [1989] C.O.D. 176).
[136] *Joy v Federation Against Copyright Theft* [1993] Crim. L.R. 588, *Independent*, 16 February 1993, discussed with approval by the Court of Appeal in *Bayliss* (1994) 98 Cr. App. R. 235; [1994] Crim. L.R. 687. In *Joy*, the court stated that s.67(9) would apply to an individual who was employed by FACT to investigate criminal offences.
[137] This is a particularly important point, since many of the arguments in favour of retaining private prosecutions presume that it is individual victims who prosecute.

inference rules, the right to legal advice, and also to actions which may be undertaken such as surveillance and covert activities.

Well-funded organisations prosecuting individuals

As we have argued elsewhere,[138] private prosecutions of individuals by powerful organisations have led to questionable convictions. The defendant in *Vickerman*[139] was sentenced to four years' imprisonment for conspiracy to defraud. FACT prosecuted him for running a website which provided links to material located elsewhere on the internet. Much of this material was copyrighted and made available without the permission of the rights-holders. The conviction does not seem to be consistent with previous case law. As we have previously stated,

"[i]n *Rock and Overton*, Mr Justice Ticehurst found that under regulation 17 of the Electronic Commerce (EC Directive) Regulations 2002 there was a complete defence for any website which did not itself upload copyrighted material but merely acted as a 'conduit of information' by linking to other sites containing copyrighted material."[140]

A similar lack of attention to legal requirements may be seen in a 2013 case brought by the

[138] C. de Than and J. Elvin, "Towards a Rational Reconstruction of the Law on Secondary Participation and Inchoate Offences: Conspiracy" in A. Reed and P. Bohlander (eds), *Participation in Crime: Domestic, Comparative and International Perspectives* (Routledge, 2012), pp.151–152.

[139] Vickerman Indictment No. T2009 7188, unreported Newcastle Upon Tyne Crown Court 2012.

[140] de Than and Elvin, "Towards a Rational Reconstruction of the Law on Secondary Participation and Inchoate Offences: Conspiracy" in Reed and Bohlander (eds), *Participation in Crime: Domestic, Comparative and International Perspectives* (Routledge, 2012), pp.151–152, referring to *Rock and Overton* unreported 6 February 2010, Gloucester Crown Court. For the limits of the "mere conduit" defence in recent CJEU decisions see also *Tobias McFadden v Sony Music Entertainment Germany GmbH* (C-484/14) EU:C:2016:689, http://curia.europa.eu/juris/liste.jsf?num=C-484/14 [Accessed 10 June 2019] and *GS Media BV v Sanoma Media Netherlands BV and Ors* (C_160/15) EU:C:2016:644, http://curia.europa.eu/juris/liste.jsf?num=C-160/15 [Accessed 10 June 2019]. The current law is rather complex, but profit-making websites have a duty to check the legality of content to which they link and private users do not; it remains unclear what the precise rules are for defining "profit-making" and "private".

RSPCA, who were accused of hiding evidence, behaving unlawfully and provoking a hate campaign against a family.[141] The RSPCA instigated a cat, Claude, being put to sleep against the wishes of its owners, who were "threatened with prison and fines if they refused to sign the release form"[142] then prosecuted for alleged ill-treatment of the cat. Although the CPS eventually discontinued this prosecution[143] and the RSPCA subsequently publicly apologised to the family concerned,[144] this does not undo the harm caused by the private prosecution itself and the way in which the power to initiate one was abused. The worst of this oppressive conduct arguably happened before the institution of the private prosecution itself and it might be argued that, as an isolated example, this treatment was minor in comparison to matters that routinely happen just before a publicly brought prosecution, such as dawn raids by the police, suspects spending time in detention while being questioned, and so on. However, this does not undermine our point here that this case illustrates that there are serious dangers associated with private prosecution. It was the threat of private prosecution that forced the family to sign the release form, and it is clear that the prosecution itself caused great distress.[145] The safeguards which apply to the investigation and conduct of public prosecutions are not mirrored in their private counterparts. Moreover, the extent to which this case was part of a pattern is a matter of debate. In another case in which the RSPCA inappropriately prosecuted a 16-year-old for allegedly mistreating puppies, the defendant was acquitted and the judge made it clear that the proceedings should never have been brought since she "clearly had very little involvement with

[141] D. Kennedy, "Secret Report Shows RSPCA's Cruel Dishonesty" *The Times* 28 March 2016.
[142] J. Crone, "RSPCA Forced to Apologise for Wrongly Putting Down Cat Belonging to Family it Accused of Cruelty in Bungled Prosecution" *The Daily Mail*, 6 November 2014).
[143] We discuss this CPS power to discontinue private prosecutions below.
[144] See Crone, "RSPCA Forced to Apologise for Wrongly Putting Down Cat Belonging to Family it Accused of Cruelty in Bungled Prosecution" *The Daily Mail*, 6 November 2014.
[145] J. Curtis, "RSPCA killed a cat for having LONG HAIR - then tried to Prosecute its Owners for Cruelty" *The Daily Mail*, 28 March 2016.

these animals and was not responsible for them".[146] However, this did not undo the harm that had been caused in the meantime.[147]

Profit-making companies acting on behalf of railway companies have also been criticised for bringing, or threatening to bring, inappropriate private prosecutions for serious offences.[148] Spencer has discussed one such case at length. A Cambridge student who lost her ticket was subsequently threatened with prosecution for travelling without a valid ticket "with intent to avoid payment" contrary to s.5(3) of the Regulation of Railways Act 1889, despite offering to pay for a new ticket when challenged by a ticket inspector and subsequently providing conclusive proof of purchase.[149] She eventually reluctantly settled the matter out of court by paying nearly ten times the price of the lost ticket.[150] As Spencer says, this case raises serious concerns:

"by repeated accusations of dishonesty which they had evidence were false, and threats to prosecute for an offence of which they had evidence of innocence, they induced a person to pay them a sum of money."[151]

The abuse of procedure doctrine was of limited utility, since it was not clear that it would apply in the student's favour. Furthermore, "there is reason to believe that this sort of thing is not exceptional when train companies outsource their 'fare evasion' issues to private

[146] Quoted by A. Gilligan, "The RSPCA Made US feel like Criminals" *The Telegraph*, 29 June 2013.
[147] Gilligan, "The RSPCA Made US feel like Criminals" *The Telegraph*, 29 June 2013.
[148] Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 4.
[149] Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 5.
[150] Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 5.
[151] Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 5.

companies".[152] It appears that the figures for such cases may be very high: 277 prosecutions for fare evasion or failing to hold a valid ticket were brought in 2013 and 2014 at Cardiff Magistrates' Court alone, leading to 185 convictions; this figure excludes penalty fares.[153] Despite a new appeal system being introduced under the Railways (Penalty Fares) Regulations 2018/366, there is still a serious risk of inappropriate actual or threatened private prosecution, since the reforms relate only to penalty fares[154]; the consultation[155] which led to the reforms noted inconsistencies in use of criminal and civil law between different train companies, with responders raising serious concerns about prosecutions, but since these issues were outside the scope of consultation, there was no response to them.

On the basis of the above analysis, our view is that there are compelling arguments against leaving private prosecution in its current form in England and Wales. These potential inadequacies and/or biases of private prosecutions justify either their abolition or a safety-net, and, as we shall show, existing mechanisms fail to provide sufficient protection against such inadequacies and biases.

Existing mechanisms for controlling private prosecutions

[152] Spencer, "Professional Private Prosecutors and Trouble on the Trains" [2018] Archbold Review 5, citing Passenger Focus, "Ticket to ride? Full report" (May 2012), https://www.transportfocus.org.uk/research-publications/publications/ticket-to-ride-full-report-may-2012/ [Accessed 10 June 2019], and "Ticket to ride - an update" (February 2015), https://www.transportfocus.org.uk/research-publications/publications/ticket-to-ride-an-update/ [Accessed 10 June 2019].

[153] T. Houghton, "Nearly 200 Rail Fair Dodgers Convicted in Cardiff in the Last Two Years", https://www.walesonline.co.uk/news/wales-news/nearly-200-rail-fare-dodgers-9961224 [Accessed 10 June 2019].

[154] Save for the fact that reg.11 prevents a penalty fare being charged when a person is also being prosecuted under the byelaw offences; this is unlikely to be of much comfort in the circumstances.

[155] Department for Transport, Summary of Responses and Government Response to The Consultation on Changes to the Rail Penalty Appeals (London: TSO, 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575787/rail-penalty-fares-summary-and-government-responses.pdf [Accessed 10 June 2019].

The tort of malicious prosecution provides only partial protection against the potential inadequacies and/or biases of private prosecutions. Given the nature of the harm in some malicious prosecution cases, it may be impossible for money to genuinely "put the party who has suffered in the same position as he would have been if he had not sustained the wrong".[156] Indeed, an unsuccessful private prosecutor may not have the resources to provide compensation. Moreover, a person will only be liable for malicious prosecution if he pursues a claim without foundation and with a dominant purpose other than success in the claim.[157] Thus, a private prosecutor could never be liable for successfully prosecuting a person for an antiquated offence even if the purpose of the prosecution were something other than its professed purpose, such as to take revenge against an ex-spouse or irritating neighbour for personal reasons. Similar points can be made about the power to recover costs incurred in defending inappropriate private prosecutions.[158] "A private prosecutor will not be liable for costs merely because the prosecution fails or is withdrawn, still less because it is a private prosecution".[159]

There are currently three main mechanisms for preventing the abuse of the right to bring a private prosecution.[160]

Magistrates' discretion

[156] The purpose of an award of compensation in tort, as outlined in *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] A.C. 174 at 187; [1979] 3 W.L.R. 44, per Lord Scarman.
[157] *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] A.C. 366 at [101], per Lord Kerr.
[158] Furthermore, it must be noted that such costs awards do not aim to compensate for emotional suffering.
[159] *R. (on the application of Haig), v City of Westminster Magistrates' Court* [2017] EWHC 232 (Admin); [2017] 1 Costs L.R. 175 at [37]. In *R. (on the application of Aisling Hubert) v Manchester Crown Court v Dr Prabha Sivaraman* [2015] EWHC 3734, Burnett LJ held that "ordinarily a prosecutor should expect to have to bear the costs of a defendant in criminal proceedings where, on proper analysis, the prosecution never had any prospect of success and thus should never have been brought" (at [27]).
[160] For a complete list, see Law Commission, *Consents to Prosecution* (London: TSO, 1998), LC 255, para.2.14.

First, magistrates have the discretion to refuse to issue a summons or a warrant. A private prosecution is commenced by "laying an information" at a magistrate's court.[161] An information is an allegation of a criminal offence. As Sally Almandras puts it,

"Once an information has been laid, the magistrate will consider it and decide first whether to 'grant process' (i.e. to proceed with the case) and second whether to issue a summons or a warrant".[162]

When deciding whether to issue a summons, the magistrate must ascertain

"whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time-barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute." [163]

If these requirements are met, the magistrate should issue the summons,

"unless there are compelling reasons not to do so—most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay);

[161] Part 7 of the Criminal Procedure Rules governs the form and content of the information; for example, by stipulating that it must contain a statement identifying the offence in question.
[162] S. Almandras, *Private Prosecutions* (SN/HA/5281), p.4.
[163] *R. (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [22]; [2018] Crim. L.R. 855 summarising the previous case law. For a recent, high-profile case of a magistrate refusing to issue a summons on the grounds that the allegation was not of an offence known to English law, see *R. (on the application of Al Rabbat) v Westminster Magistrates' Court* [2017] EWHC 1969 (Admin); [2018] 1 W.L.R. 2009, involving an attempted prosecution against Tony Blair, the former Prime Minister.

or is an abuse of process; or is otherwise improper".[164]

Like public prosecutors, advocates and solicitors handling private prosecutions owe a duty to the court to ensure that the proceedings are fair,[165] which includes a duty to provide all relevant material to the court and the defence. There is a duty of candour that applies to an ex parte application for the issue of summonses, which may be described as one of "full and frank disclosure" including a duty "not to mislead the judge in any material way".[166] This also requires disclosure to the court of "any potentially adverse material" which may otherwise be relevant to the judge's decision.

In this context, it is also worth noting that unrepresented private prosecutors must make a statement that the allegations are "substantially true",[167] that "the evidence on which the applicant relies will be available at trial",[168] and that "the application discloses all the information that is material to what the court must decide".[169] However, crucially "[t]here is no obligation on the magistrate to make inquiries" in determining whether to issue a summons, although "he may do so if he thinks it necessary".[170] Furthermore, while a magistrate has the power to seek information from a proposed defendant, the latter has no right to be heard,[171]

[164] *R. (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [22]; [2018] Crim. L.R. 855.
[165] *R. (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [22]; [2018] Crim. L.R. 855.
[166] *R. (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [25]; [2018] Crim. L.R. 855.
[167] The Criminal Procedure Rules (as amended April 2018, r.7.2(5) and (6)).
[168] The Criminal Procedure Rules (as amended April 2018, r.7.2(5) and (6)).
[169] The Criminal Procedure Rules (as amended April 2018, r.7.2(5) and (6)).
[170] *R (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [22]; [2018] Crim. L.R. 855.
[171] *R (on the application of Kay) v Leeds Magistrate Court* [2018] EWHC 1233 (Admin) at [22]; [2018] Crim. L.R. 855.

which raises an issue of inequality of arms. In the vast majority of cases,[172] magistrates simply consider the material provided by the informant. Thus, they are rarely in a position to be able to determine whether an allegation is vexatious or otherwise improper. This means that there is no effective filtering process to eliminate inappropriate prosecutions: obtaining a summons or a warrant from a magistrate is in effect largely just a matter of completing the paperwork correctly, notwithstanding the fact that "[a] misconceived private prosecution can cause great distress to the defendant, even when it is dismissed".[173] It must be remembered here that private prosecutions do not have to satisfy the Code for Crown Prosecutors.[174] As the High Court put it in 2006,

"[t]he criterion to be adopted by the justices for deciding whether to issue a summons for a private prosecution is much less onerous than the test which has to be applied by the Crown Prosecution Service in deciding whether to bring or to continue a prosecution." [175]

As will be seen, we submit that compliance with the same standards as the CPS should be an important element of a new Code for Private Prosecutions if the power to initiate a private prosecution is to continue. In our view, this Code must be binding, with sanctions, and not merely good practice self-regulation by interested parties.

Consent

[172] *West London Justices, ex parte Klahn* [1979] 1 W.L.R. 933 at 936; [1979] Crim. L.R. 393.
[173] G. Cross, former Director of Public Prosecutions of Hong Kong, "Private Prosecutions", http://www.doj.gov.hk/eng/archive/pdf/art1001e.pdf [Accessed 10 June 2019]. This is a point to which we shall return below.
[174] S. Almandras, *Private Prosecutions* (SN/HA/5281), p.4.
[175] *R. (on the application of Charlson) v Guilford Magistrates' Court* [2006] EWHC 2318; [2006] 1 W.L.R. 3494 at [17].

The second main procedural mechanism designed to prevent inappropriate private prosecutions is the requirement to obtain consent from the Attorney General or the Director of Public Prosecutions before instituting proceedings for certain offences. Dozens of offences require such consent,[176] but the vast majority do not (there are thousands of offences in English criminal law). As Lord Neuberger put it in *Gujra*, the right to "initiate private prosecutions … [is] virtually unlimited".[177] Thus, this second procedural requirement acts as a control mechanism in only a small minority of situations.

CPS power

The third protection against inappropriate private prosecution is the CPS power to take them over. When the CPS exercises its power to take over a private prosecution, it can decide either to continue or discontinue the prosecution. In principle, this means that the CPS can take over and halt a private prosecution where it does not have a "realistic prospect" of resulting in a conviction or where the prosecution does not meet the public interest stage of the CPS test. According to the Code for Crown Prosecutors, where there is a realistic prospect of a prosecution resulting in a conviction, it should proceed "unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour."[178] In suitable cases, the public interest can be properly served by an out-of-court disposal rather than prosecution.[179] The Code for Crown Prosecutors contains examples of factors relevant to determining whether a prosecution would be in the public interest. This CPS

[176] See the list in Annex 1 of CPS, "Consents to Prosecute", at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/#a01 [Accessed 10 June 2019]. The CPS explain the rationale behind this requirement and outline the relevant statutory provisions. There are some other offences that require consent from other authorities: see Law Commission, *Consents to Prosecution* (London: TSO, 1998), LC 255, para.1.16.
[177] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [60]; [2013] Crim. L.R. 337.
[178] CPS, *The Code for Crown Prosecutors*, 8th edn (2018), para.4.10.1.
[179] CPS, *The Code for Crown Prosecutors*, 8th edn (2018), para.4.10.1.

power to take over and discontinue private prosecutions exists to protect individuals and their families from inappropriate prosecutions, as well as to prevent waste of the limited resources of the criminal justice system.[180] It could be objected here that a criminal trial would not be inappropriate simply because it would be unlikely to result in a conviction, since "juries may … be unreasonable and prejudiced"[181]; for example, in the context of so-called "date rape" allegations. While this would be a valid point, it would nevertheless be true to say that the power of the CPS to take over and discontinue private prosecutions exists to limit the irreparable harm caused by inappropriate prosecutions, however one defines the term "inappropriate".

There are two reasons why this CPS power to discontinue prosecutions is of limited relevance in this context. First, there is no requirement for a private prosecutor or a magistrates' court to notify the CPS of the initiation of a private prosecution[182] and the reality is that the vast majority of private prosecutions never come to the attention of the CPS. Second, the CPS power to take over and discontinue prosecutions does not prevent the *initiation* of private prosecutions and the events which may precede them. Thus, it only partially protects the defendant from mental anguish, damaged reputation, career disruption and financial costs,[183] whether or not that prosecution continues to trial, as has been underlined by the de Freitas case cited above. There is no statistical information about the length of time it normally takes for a defendant to a private prosecution to discover whether the CPS will discontinue it.[184] The published CPS

[180] See Royal Commission on Criminal Procedure (RCCP), Report (London: HMSO, 1981), Cmnd. 8092, para.9.1.
[181] Lady Hale, *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [129]; [2013] Crim. L.R. 337.
[182] See Law Commission, *Consents to Prosecution* (London: TSO, 1998), LC 255, para.7.2–7.3.
[183] Law Commission, *Consents to Prosecution* (London: TSO, 1997), CP 149, para.1.9.
[184] According to the CPS, it "does not maintain a central record of private prosecutions referred to it" (CPS, 20 October 2017, reply to a Freedom of Information Act 2000 request, https://www.whatdotheyknow.com/request/satistics_on_private_prosecution [Accessed 10 June 2019]).

private prosecution policy does not stipulate a deadline for the making of the decision.[185] The CPS took over two months to reach a decision in *Gujra*,[186] nearly two months in a 2015 case involving the prosecution of two doctors,[187] and seven months in relation to a 1998 private prosecution concerning the Hillsborough stadium disaster.[188] Even if it typically responds with greater speed than this, it is evident that a significant amount of harm can be caused in the meantime. Unjustified accusations of criminal wrongdoing can cause anxiety, panic attacks, depression, post-traumatic stress disorder, and high blood pressure even if they do not result in conviction.[189] Whilst the impact of such accusations may remain even after any legal proceedings are discontinued, research suggests that a protracted delay before discovery that there will be no further action can cause greater worry and therefore greater harm.[190]

Conclusions and a reform proposal: the middle ground

The Law Commission recommended limited reform when reviewing the need for consents to private prosecution. Their key proposals were that the DPP should have the power to license bodies to bring private prosecutions without notification,[191] but that the CPS should be automatically notified of all other private prosecutions.[192] We agree with the underlying sentiment of the Law Commission here, but would go much further with our proposals. One

[185] CPS, "Private Prosecutions", http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/ [Accessed 10 June 2019].
[186] See *R. (on the application of Gujra) v CPS* [2011] EWHC 472 at [3]–[4]; [2012] 1 W.L.R. 254.
[187] See *R. (on the application of Hubert) v Manchester Crown Court* [2015] EWHC 3734 (Admin).
[188] *Adlington v Duckenfield and Murray*, https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/duckenfield-and-murray-ruling.pdf [Accessed 10 June 2019].
[189] See e.g. Carolyn Hoyle, Naomi-Ellen Speechley and Ros Burnett, *The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices* (Oxford: Centre for Criminology, University of Oxford, 2016), pp.35–39.
[190] Hoyle, Speechley and Burnett, *The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices* (Oxford: Centre for Criminology, University of Oxford, 2016), p.40.
[191] Since notification would not be necessary where the body bringing the prosecution applies tests similar to those which the CPS would apply.
[192] Law Commission, *Consents to Prosecution* (London: TSO, 1998), LC 255, para.1.28.

possibility for reform is to completely abolish private prosecutions on the basis that the disadvantages outweigh the advantages of their existence. We are attracted to this option as a matter of principle, but do not believe that the political will currently exists for such a radical reform. The Government has shown no interest in abolishing private prosecution.[193]

At the other extreme, there is the possibility of leaving the legal system unchanged in this area. We do not believe that this is appropriate either because there are limited controls on the right to initiate a private prosecution and this right can be exercised in a way that is seriously inappropriate; further, as examined above, theory struggles to find a basis to support the current position.

We propose a middle ground involving the introduction of a statutory Code relating to private prosecutions, regulating all aspects of preparation, and involvement in, such prosecutions. It is beyond the scope of this article to provide all of the details of such a Code.[194] However, we submit here that this Code should at a minimum introduce the following significant legal changes and principles.

Filters

First, in relation to unlicensed private prosecutors,[195] we agree with Findlay Stark and the Law Commission that the CPS should be notified whenever a private prosecution is initiated.[196]

[193] This might be because such a move would not only be unpopular but also undermine public faith in the criminal justice system. Significantly, the Crime Survey for England and Wales indicates that currently only 62 per cent of adults are "very" or "fairly" confident in the CPS (Office for National Statistics, "Confidence in the Crown Prosecution Service by Selected Personal Characteristics, year ending March 2018 CSEW" (2018)).
[194] We intend to provide these details in a subsequent publication.
[195] We will propose a licensing system for corporate and charitable prosecutions in a forthcoming article.
[196] F. Stark, "The Demise of the Private Prosecution?" [2013] Cambridge Law Journal 7, 9, referring to Law Commission, *Consents to Prosecution* (London: TSO, 1998), LC 255, paras 7.2–7.9.

This would help the CPS to use their power to take and over and discontinue prosecutions effectively and further, in the twenty-first century, could be a fully automated part of the court procedures with minimal costs or administrative burden. Indeed, we think that reform should go further in this respect and that there should be an initial hearing, where unlicensed private prosecutors are concerned, as a filtering mechanism. At one point in English legal history, the grand jury performed such a role and arguably served "a useful purpose in stopping unjustified prosecutions before trial".[197] The grand jury system was abolished in England by the Administration of Justice (Miscellaneous Provisions) Act 1933. Whilst this abolition may have been appropriate, there is a need for greater controls on the ability to initiate a private prosecution, given the potential for such a right to be abused. One way that such abuse could be limited is by the introduction of a pre-trial review by a magistrates' court. Magistrates are currently rarely in a position to be able to determine whether an allegation is vexatious or otherwise improper. The criminal justice system could be improved by requiring a private individual to refer their intention to commence a private prosecution to a relevant Crown prosecutor, who would then apply the three-way decision process which we describe below. If the result of that process were that the CPS decided not to bring a public prosecution on the grounds that there was not a "realistic prospect" of a prosecution resulting in a conviction or that such a prosecution would not be in the public interest, then a would-be private prosecutor could use the VRR scheme, where applicable, and/or make an application to a magistrates' court. The Crown prosecutor would be required to attend a pre-trial review to explain the decision not to prosecute. Leave to proceed with a private prosecution would be granted by the court only if there was a "realistic prospect" (as this terminology is explained below) of the

[197] N. Elliff, "Notes on the Abolition of the English Grand Jury" (1938) 29 Journal of Criminal Law and Criminology 3.

prosecution resulting in a conviction and the court was satisfied that a prosecution of D would be in the "public interest" as this term is defined in the Code for Crown Prosecutors.[198] Prosecutions should not be brought where they would not be in the public interest. This is a reason why Vickerman should not have been prosecuted. As the CPS reportedly put it in a letter explaining why it chose not to prosecute him:

"His 'crime' is to make it easier for others to find what is already there [on the internet]. This begs the rather obvious question of why he is being pursued rather than those who actually breach the copyright by displaying the material."[199]

Such a proposed review could strengthen oversight of prosecutorial discretion, allowing for the instigation of private prosecutions in appropriate cases. It would add to the VRR, which grants victims the right to review CPS decisions but which "is not as wide as it might be".[200] The VRR scheme only allows "victims" to review CPS decisions, a "victim" being defined as "a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was *directly* caused by criminal conduct".[201] Thus, organisations such as FACT or the RSPCA cannot use this scheme, since they do make such allegations; nor can the "vigilante" paedophile-hunters. Similarly, the VRR scheme does not apply where the police have not formally requested that the CPS make a decision to charge or

[198] In other words, the private prosecutor would be obliged to present sufficient evidence to demonstrate that, notwithstanding any decision of the CPS not to prosecute, it was possible that D had committed the crime and that D's prosecution would be in the public interest.
[199] CPS prosecutor, quoted by T. Lee, "Private justice: How Hollywood money put a Brit behind bars", https://arstechnica.com/tech-policy/2012/08/private-justice-how-hollywood-money-put-a-brit-behind-bars/2 [Accessed 10 June 2019].
[200] Rogers, "A Human Rights Perspective on the Evidential Test for Bringing Prosecutions" [2017] Crim. L.R. 678, 693.
[201] CPS, *Victims' Right to Review Guidance* (2016), p.5.

where a victim's evidence has been considered by a Crown Prosecutor, who has decided to bring some charges but not for every allegation or against every suspect.[202]

Statutory duty

Leading on from this, we submit that the CPS duty in relation to private prosecutions should be fixed by statute in a clear, specific manner, and should apply both at the initial filter stage and throughout any subsequent proceedings which began as an attempted private prosecution. One problem here is that the CPS power to take over private prosecutions is largely unfettered as long as it does not "defeat or frustrate the policy of the Act from which it is derived".[203] Although the CPS is bound by published policies, it is clear from *Gujra* that such policies can be changed at any time.[204] Our view is that a would-be private prosecutor should be required to refer their intention to commence a private prosecution to a relevant Crown prosecutor. On notification of such an intention, a three-way decision-making process would occur between proceeding with it as a public prosecution, disallowing it or allowing it to proceed as a private prosecution with monitoring and review. There would be a duty to give reasons attached to this decision-making process. We submit in particular that the CPS should have a statutory duty to take over and discontinue a private prosecution at any point where it does not have a "realistic prospect" of resulting in a conviction or where the prosecution would not be in the public interest as the public interest is currently defined in the Code for Crown Prosecutors, including, for example, where the offence alleged is archaic or, has fallen into disuse. Trials should not

[202] CPS, *Victims' Right to Review Guidance* (2016), p.4. It appears that the CPS has a discretion, but not a duty, to review cases that fall outside of the VRR scheme (see *R. (on the application of Chaudry) v DPP* [2016] EWHC 2447 at [46]; [2017] Crim. L.R. 231 and CPS, *Victims' Right to Review Guidance* (2016), p.4).
[203] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [76], per Lord Kerr; [2013] Crim. L.R. 337.
[204] See K. Amirthalingam, "Private prosecutions and the public prosecutor's discretion" [2013] Law Quarterly Review 325, 328. For the current CPS policies, see CPS, "Private Prosecutions", http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/ [Accessed 10 June 2019].

begin or continue where they do not have a "realistic prospect" of resulting in a conviction or where the prosecution does not meet the public interest stage of the Code. As Lord Wilson put it in *Gujra*:

"A defendant would have a legitimate grievance about subjection to criminal prosecution at the instance of a private prosecutor in circumstances in which, by application of lawful criteria to the strength of the evidence against him, there would be no public prosecution",[205]

and indeed, it is difficult to justify the public purse refunding costs in such cases; hence all prosecutions should, so far as is reasonably possible, be subject to the same safeguards.

Our proposals would not eliminate private prosecutions but allow them to continue where there is a "realistic prospect" of them resulting in a conviction and they would be in the public interest. It could be argued that it would "be preferable to make the CPS responsible for prosecuting [such] cases"[206] because there is no good reason why "the pursuit of these cases should depend on the action of private prosecutors".[207] However, in response to this, it can be counter-argued that it is important to allow such private prosecutions to proceed "[i]n the absence of a particular need for CPS involvement"[208]; for example, where a court granted leave to proceed with a private prosecution and the private prosecutor understandably has no confidence in the CPS because of its earlier conduct or where the private prosecutor has technical knowledge and/or skill lacked by public prosecutors and is for this reason best placed

[205] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [36]; [2013] Crim. L.R. 337.
[206] Stark, "The Demise of the Private Prosecution?" [2013] Cambridge Law Journal 10.
[207] Stark, "The Demise of the Private Prosecution?" [2013] Cambridge Law Journal 10.
[208] Stark, "The Demise of the Private Prosecution?" [2013] Cambridge Law Journal 10.

to prosecute. Before proceeding to our next reform proposal, we submit that, in determining whether a trial has a "realistic prospect" of resulting in a conviction, the CPS and a court conducting a pre-trial review should pay appropriate attention to what ought reasonably to happen and determine that a trial has a "realistic prospect" of conviction where

"an objective, impartial and reasonable jury, or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged".[209]

Such an interpretation of the term "realistic prospect" is important because "in certain areas actual statistics regarding convictions may not be a reliable guide to what ought reasonably to happen".[210]

Sanctions

Another reform which we believe is essential is that there should be clear sanctions where a defendant has been subjected to a malicious private prosecution or to behaviour by a private prosecutor or their agents which breaches the normal requirements of the laws of criminal procedure and evidence, including our proposed statutory Code. Such protection would be important even if our earlier proposals were implemented; for example, because a private prosecution might proceed to trial based on fabricated evidence which was exposed during the trial process itself or by other means. Protection of suspects' rights should not vary depending upon the identity and nature of the prosecutor. It is currently possible to obtain exemplary

[209] CPS, *The Code for Crown Prosecutors*, 8th edn (2018), para.4.7.
[210] *R. (on the application of Gujra) (FC) v CPS* [2012] UKSC 52 at [98] per Lord Mance; [2013] Crim. L.R. 337.

damages for malicious public prosecutions, since they constitute "oppressive, arbitrary or unconstitutional action by the servants of the government".[211] However, it is debatable whether a private prosecutor is a "servant of the government" for this purpose. In *Rookes v Barnard*, Lord Devlin suggested that he would not extend this head of exemplary damages to include "oppressive action by private corporations or individuals"[212] because private corporations or individuals are not "servants of the people"[213] whose use of power "must always be subordinate to their duty of service".[214] On the other hand, subsequent cases have suggested that "'servants of the government' should be broadly, not technically, construed".[215] For instance, in *Cassell & Co v Broome*, Lord Hailsham LC stated:

"I am not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest … might not at some future date be assimilated into the first category".[216]

The law needs settling here. It should be possible to obtain exemplary damages for malicious private prosecution, since the potential for such damages could help to protect us from the potential inadequacies and/or biases of private prosecutions. What is important here is not the nature of the prosecutor but the need to protect individuals from the abuse of power.

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[211] *Rookes v Barnard* [1964] A.C. 1129 at 1226; [1964] 2 W.L.R. 269, per Lord Devlin.
[212] *Rookes v Barnard* [1964] A.C. 1129 at 1226; [1964] 2 W.L.R. 269, per Lord Devlin.
[213] *Rookes v Barnard* [1964] A.C. 1129 at 1226; [1964] 2 W.L.R. 269, per Lord Devlin.
[214] *Rookes v Barnard* [1964] A.C. 1129 at 1226; [1964] 2 W.L.R. 269, per Lord Devlin.
[215] *Clerk and Lindsell on Torts*, 22nd edn (London: Sweet & Maxwell, 2017), pp.28–137.
[216] *Cassell & Co v Broome* [1972] A.C. 1027, 1078; [1972] 2 W.L.R. 645.

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Crim. L.R. 2019, 8, 656-683