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*Private Contingent Fee Lawyers and
Public Power: Constitutional and
Political Implications*
(*post-Roundtable revision*)

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PRIVATE CONTINGENT FEE LAWYERS AND PUBLIC POWER: CONSTITUTIONAL AND POLITICAL IMPLICATIONS

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I. INTRODUCTION

Imagine a system in which all police work is performed not by governmental employees but by private contractors who are paid by the arrest: the more arrests, the more money they receive. Can anyone seriously imagine that such a system would be either constitutional or in any way consistent with the values of the American political system? I think not. Now imagine a system in which prosecutors receive no set salary but instead are paid by the success of their prosecutions: the more convictions that are obtained, the more money they make. Once again, it is difficult to conceive that such a

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system would be held to satisfy the requirements of due process. When the coercive power of the state is asserted against private individuals or entities, our constitutional and political traditions are appropriately construed to demand that those exercising that power base their decisions and conduct on a good faith assessment of the public interest, rather than on considerations of narrow focus of personal self-interest.¹

In contrast, when private individuals or entities act on their own rather than on behalf of the state, the nation's tradition of liberal autonomy not only permits but actually encourages them to establish and seek to realize their personal goals and to advance their personal welfare. To be sure, none but the most libertarian among us would suggest that individuals should be permitted to fashion or attempt to achieve these goals free from concern for or regulation in the public interest. None of us lives in a social vacuum. But within the outer contours of the needs of the community (and the dividing line between the two is concededly a murky one that has been the subject of long and often bitter debate), basic values of liberal pluralism dictate recognition of the fact that individuals are integral wholes worthy of respect.² As such, they are thought to operate within a sphere of autonomy that permits them to think and often act on their own. In so doing they will naturally often seek to satisfy their personal needs and protect and foster their own interests.

It is for this reason that our constitutional tradition has long acknowledged the public-private dichotomy embodied in the so-called "state action" requirement of the

¹ See generally Section IV, *infra*.

² For a detailed elaboration of the point, see generally Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573 (2007). See also Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 Wash. U. L. Rev. 753 (2007).

Fourteenth Amendment.³ It is only the state that is required to assure its citizens due process of the law and equal protection. Nothing in the Constitution itself prohibits private citizens from doing so.⁴ When the state acts on behalf of the polity, however, all of the Constitution's array of protections and restrictions are triggered. As an ideal, at least,⁵ when those who act on behalf of the state impose their authority on private actors they are deemed to be imbued with the fiduciary obligation to assess and pursue the public interest, rather than to foster their own personal needs.⁶ It is true, of course, that in a practical sense it will often be difficult, if not impossible, to police the motivations of those who wield state power. Any attorney who acts on behalf of the government may secretly hope that her effective enforcement of state interests will lead to fame, fortune, or at least a promotion. The same is at least conceivably true of a few judges, who may believe that resolving a case in a certain manner may influence her chances of promotion to a higher court. Those facts, however, do not justify the failure to impose at least prophylactic structural limits on the private incentives of those who exercise state power.⁷

³ U.S. Const. Amend. XIV, § 1 (limiting its restrictions to the "state".) In contrast, the Thirteenth Amendment, prohibiting slavery, imposes its restrictions on all private individuals. U.S. Const. Amend. XIII.

⁴ It should be emphasized that the mere fact that the Constitution does not itself impose these restrictions in no way means that democratically authorized bodies may not impose them, under certain circumstances. Indeed, both Title II and Title VII of the 1964 Civil Rights Act restrict the ability of private individuals to discriminate on a number of grounds. 42 U.S.C. §§ 2000a; 2000e. When the discrimination concerns issues of ideological or political association, however, the First Amendment right of free expression often insulates the private activity from governmental regulation. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

⁵ The extent to which this ideal may be attained in reality is the subject of debate. See Section IV B, *infra*.

⁶ See Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 *Widener J. Pub. L.* 235, 269 (2000) (footnote omitted) ("Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public...").

⁷ See, e.g., U.S. Const. Art. III, § 1 (federal judges possess prophylactic protections of their neutrality and independence from the federal government by means of protections of their salary and tenure).

This fundamental precept of American political and constitutional theory appears to be severely threatened by the relatively modern trend towards governmental use of private contingency fee-based attorneys to enforce state law and seek either civil damage awards or civil penalties against private actors. As any lawyer knows, under a contingency fee arrangement an attorney effectively bets everything on attainment of victory in litigation. If she wins, she recovers a predetermined percentage of the award. If she loses, however, she receives absolutely nothing. In the last ten years, state governments have increasingly resorted to this practice in their efforts to pursue “big money” claims against alleged tortfeasors.⁸

In the private sphere, the contingency fee practice has much to recommend it. It enables victims of legal wrongs to vindicate their rights and recover legally authorized damages when they would otherwise be unable to do so because of the prohibitively expensive cost of lawyering. In this way, the contingency fee arrangement can be thought simultaneously to make victims whole and, as a byproduct, enforce societal proscriptions on governmental, individual or corporate behavior. The situation is very different, however, when private contingency fee attorneys are vested with authority to vindicate the interests of the state through the litigation process. In this instance, we are presented with a dangerous mixture of public power and private motivation, effectively leaving us with the worst of all possible worlds.

To comprehend the problematic nature of the situation brought on by government’s use of private contingent fee lawyers, one need only hypothesize a

⁸ See, e.g., Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007; Section II, *infra*.

situation in which governmental prosecutors are given a financial arrangement in which they are to be paid when and only when they obtain a conviction. It is difficult to imagine an arrangement more rife with danger, cynicism and potential abuse than this one, and therefore wholly unacceptable in a constitutional democracy where government is accountable to the electorate and where an implicit social contract controls the relationship between government and the individual. And it is important to note that this is so, *even if, in a particular instance, all stipulate that the attorney did nothing improper*. Actual impropriety in a specific instance will generally be difficult to unearth. Indeed, it is quite conceivable that the government attorney herself would be unaware of the impact of the motivational twist on her behavior. It is for that reason that we generally establish *prophylactic* rules to ensure adherence to the public interest by our governmental officers. Thus, were a government prosecutor to be paid if and only if she her prosecutorial efforts are successful, such a practice would no doubt be deemed unethical,⁹ and quite probably a violation of due process.¹⁰

There are, of course, two important distinctions between my hypothetical governmental prosecutor on the one hand and the private contingent fee attorneys suing on behalf of the government, on the other. One is that the contingent fee lawyers are private individuals, not state officers; the other is that the contingent fee attorneys will function in civil cases, rather than criminal cases. Neither distinction, however, should make any difference in determining either the ethical acceptability or constitutionality of the practice. As to the former distinction, established Supreme Court doctrine makes clear that when government delegates to private agents authority traditionally exercised by

⁹ See Section IV A, *infra*.

¹⁰ See Section V, *infra*.

government, those agents are to be treated as agents of the state for purposes of the Constitution's state action requirement.¹¹ As to the latter distinction, it is important to note that the Fourteenth Amendment's due process clause¹² has been held to apply to civil litigation, as well as to criminal cases.¹³ As a textual matter, the clause's protections are unambiguously triggered by the loss of property, as well as liberty. When government is enmeshed in a suit with private individuals or entities, the social contract, constitutionally embodied in the Due Process Clause, is at stake, even when the proceeding is entirely civil.¹⁴ Therefore governmental attorneys even in civil cases have the obligation to respect and pursue the public interest in a manner that does not control the behavior of attorneys acting on behalf of private clients.¹⁵ In any event, many civil suits brought by government are inherently coercive in nature, whether in the form of civil fines or punitive damages. In these situations, the role of the Due Process Clause becomes even more significant.

In sum, government's use of private contingent fee attorneys in civil litigation is (1) inconsistent with the nation's democratic tradition, (2) unethical, and (3) a violation of the Due Process Clause. In the remainder of this Paper, I articulate and explain the political and constitutional arguments implicit in this thesis.

¹¹ See Section IV E, *infra*.

¹² U.S. Const. Amend. XIV, § 1, cl. x.

¹³ *Connecticut v. Doehr*, 501 U.S. 1 (1991); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976); see Section V, *infra*.

¹⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁵ See Section IV E, *infra*.

II. GOVERNMENTAL USE OF CONTINGENCY FEE ATTORNEYS: DEVELOPMENT OF THE PRACTICE

A. Growth and Rationale

While states have employed contingency fee contracts in litigation for many years, controversy has developed over the last ten years or so because of states' use of them in major tort litigation.¹⁶ Most prominent of its uses has been in the area of tobacco litigation, where most state attorneys general retained private attorneys on a contingency basis in their suits against the tobacco companies.¹⁷ But in addition to tobacco litigation, states have employed the device in such mass tort contexts as environmental harm and lead paint litigation.¹⁸ Today, "trial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills."¹⁹

While there may exist a variety of explanations for the development of the practice, the most obvious are the political and financial advantages to all involved—except, of course, for the defendants. In the words of one commentator:

Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?²⁰

¹⁶ Liptak, *supra* note 8.

¹⁷ See David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 315 (2001).

¹⁸ Liptak, *supra* note 8. President Bush, however, signed an executive order prohibiting the use of private contingent fee arrangements by the federal government. Its use in the states began in the 1980s when Massachusetts decided to hire private lawyers to pursue state asbestos claims. "The innovation quickly spread to other states and issues, most notably the late 1990s tobacco-Medicaid crusade which resulted in multibillion dollar payouts to both the states and their lawyers." Walter Olson, *Tort Travesty*, Point.ofLaw.com, June 4, 2007.

¹⁹ *Id.*

²⁰ *Id.*

Another conceivable motivation for the use of private contingency fee attorneys is the attorney general's "need to bypass state legislatures."²¹ According to Professor Dana, "[b]oth critics and defenders of the AGs' use of contingency fee agreements concur that had the AGs sought legislative funding to hire a staff to prosecute the tobacco litigation or to pay outside lawyers on a pay-as-you-go, hourly basis, they would have been rebuffed."²² The possibility of this strategy has led to separation-of-powers challenges against the contingency fee practice.²³ A number of states have passed legislation authorizing the practice.²⁴ Professor Coffee, however, has questioned whether use of private contingency fee attorneys is truly designed to circumvent legislative authority. He has suggested that even if funding could have been secured through the legislative process, the attorneys general would have avoided it because the risks of losing the litigations would have been too great.²⁵ In response, Professor Dana asserts that Coffee's explanation "raises the same sort of democracy concerns as the pure legislative bypass explanation....[because] by allowing AGs to cloud accountability for their actions, use of outside contingency fee counsel is [arguably] undemocratic inasmuch as transparency and accountability are regarded as core democratic attributes."²⁶

²¹ Dana, *supra* note 17, at 319.

²² *Id.* at 319-20.

²³ See, e.g., *Phillip Morris, Inc. v. Glendening*, 709 A.2d1230 (1998); *Meredeit v. Ieyoub*, 700 So.2d 478 (La. 1997); *Lynch v. Lead Ind.*, 2005 R.I. Super. LEXIS, *7 (1998).

²⁴ See, e.g., Va. Code Ann. S 2.2-510.1; Tex. Govt. Code s 2254.103; Colo. Rev. Stat. ss 13-17-301 to 13-17-304.

²⁵ John C. Coffee, Jr., "When Smoke Gets in Your Eyes": *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DePaul L. Rev. 241 (2001).

²⁶ Dana, *supra* note x, at 320, n. 8.

B. Implications for Public Policy: Is it a Good Idea?

Professor Dana has pointed out that “[e]ven if we assume that AGs’ use of contingency fee lawyers was not stupid, corrupt, or democratic, it does not mean the practice is a good idea overall.”²⁷ If one were to consider the issue purely as a matter of concrete public policy, strong arguments can be fashioned on both sides. On the positive side, one could argue that the practice enables states to vindicate the public interest by policing illegal corporate behavior in ways they would be unable to do absent the practice. In this sense, states could be compared to the private plaintiffs who benefit from the use of contingency fee lawyers in situations when they would be unable to seek to vindicate their legal rights and interests otherwise due to prohibitive costs. Moreover, as already noted, even were we to assume that states, unlike financially strapped private plaintiffs, could come up with the necessary funds, the state’s use of private contingency fee attorneys could avoid the risk to the state treasury—and therefore to the taxpayers—that would ensue from litigation failure. On the negative side of the ledger, it could be argued that “the public interest that the AGs purportedly seek to advance...will not always be best served by maximizing the states’ monetary relief. Sometimes public interest considerations dictate dropping litigation altogether or focusing on nonmonetary relief more than monetary relief,”²⁸ something that contingency fee lawyers for obvious reasons are unlikely to pursue.

The concern focused on in this Article, however, does not involve the interests of the state in particular or considerations of public policy in general. It concerns, rather, the constitutional interests of the defendants in such litigation: by creating potentially

²⁷ Id. at 323.

²⁸ Id.

distorting private incentives for those who exercise the coercive power of the state, the contingency fee practice removes the protections assured to defendants politically by the social contract that inheres in liberal democracy and constitutionally by the Due Process Clause. Both dictate that those wielding public power be restrained by the constitutional and political constraints designed to assure good faith governmental pursuit of the public interest. While use of a contingency arrangement fits well within the nation's traditions of private action, when utilized by the state against private citizens it is inconsistent with foundational precepts of constitutional democracy, and inconsistent with the constitutional dictate of procedural due process.

The constitutional and political elements of the attack on governmental use of contingency fee lawyers are inherently intertwined. Thus, before exploring the specific constitutional implications of the practice, it is first necessary to examine the public-private dichotomy that inheres in the traditions of American political theory. It is therefore to that analysis that I now turn.

III. LIBERAL DEMOCRACY, STATE ACTION AND THE PUBLIC-PRIVATE DICHOTOMY: IMPLICATIONS FOR PRIVATE CONTINGENCY FEE ARRANGEMENTS

A. The Political Theory of the Public-Private Distinction

Although democracy is by no-means an unambiguous concept, at some level it necessarily assumes something about the individual citizens that make up society. Even the most communitarian form of democracy could not constitute a truly democratic society absent a commitment to an individual's ability to make certain choices on his own behalf. The more liberal versions of democratic theory, however, are explicitly grounded

in precepts of individual pluralism and at least some level of autonomy: the individual necessarily retains some zone of autonomous behavior free from This commitment may be explained by either of two non-mutually inconsistent rationales, what can be labeled the optimistic and pessimistic alternatives. The optimistic rationale encourages a sphere of individual choice on both Kantian and utilitarian grounds. The former posits the value of individual choice as a foundational good, deriving from the assumption of the individual as an integral whole, worthy of respect. From the utilitarian perspective, recognition of a sphere of individual choice fosters personal and intellectual development, thereby assisting the individual in fulfilling her capabilities.²⁹ From the pessimistic perspective, individuals are invested with authority to pursue their own interests because otherwise those interests may never be respected. As I have previously articulated the point, the individual is allowed to watch his back because there is always someone seeking to place a knife in it.³⁰

Whatever the underlying theoretical rationale, individual autonomy could not exist at any meaningful level in a constitutional democracy absent recognition of some form of dichotomy between the public and private spheres. Because of the mythical social contract between government and individual inherent in liberal theory, some constitutional restrictions must be imposed on government to assure that individuals are treated fairly. To impose identical restrictions on the individual would effectively gut the sphere of pluralistic choice essential to the individual in a liberal democratic society. We

²⁹ I have discussed the theoretical rationale underlying the values of individual pluralism in two prior works: Redish & Berlow, *supra* note 2; Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 Emory L.J. 1, 21-25 (2004). See also Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982).

³⁰ Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DePaul L. Rev. 379 (2001).

are, then, presented with the paradox of liberal democracy: individuals must possess the discretionary authority to treat others in ways which government may not employ. Thus, the First Amendment freedom of association guarantees that individuals may shun others for no reason other than the political views of the shunned individual.³¹ This is a discretion that is denied to government because of the First Amendment rights of the individual that government wishes to shun.³² In the privacy of her home, the individual may shun others for no reason other than their race—behavior that the Fourteenth Amendment’s Equal Protection Clause clearly denies to government.

The Fourteenth Amendment’s “state action” requirement is appropriately seen as the Constitution’s means of recognizing and implementing this dichotomy. While the state is prohibited from depriving individuals of their constitutional rights, no similar restrictions are constitutionally placed on the private individual or entity.³³

A number of respected commentators have posited that, at least as a descriptive matter, it is incoherent to believe in a sphere of private authority distinct from the public sphere.³⁴ According to this argument, today the state has so pervaded all aspects of existence that to the extent the state tolerates behavior, it is effectively condoning and facilitating that behavior. One may question the “sweeping assertion that individuals engaged in ordinary activities on their own behalf, far removed from the business of

³¹ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

³² See, e.g., *Branti v. Frankel*, 445 U.S. 507 (1980); *United States v. Robel*, 389 U.S. 258 (1967) (in most situations government may not refuse to hire individuals because of their ideological associations).

³³ It should be emphasized, however, that the mere fact that the Constitution does not, in and of itself, restrict the discriminatory practices of private individuals or entities does not necessarily mean that the majoritarian branches of government may not legislatively limit those practices. The question in each instance will be whether the Constitution vests the private individual or entity with protection against such governmental interference. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment right of non-association). But even in those instances in which private discriminatory practices may be legislatively restricted, it is of course only when such behavior is collectively deemed sufficiently repugnant to lead to such governmental action that such restrictions result.

³⁴ See, e.g., Morton Horowitz, *The Transformation of American Law, 1780-1860* (1977); Cass R. Sunstein, *State Action Is Always Present*, 3 *Chi. J. Int’l L.* 465 (2002).

government, are wielding the power of the state—as though those individuals wore uniforms and badges—merely because their conduct is not prohibited by state law or protected by the Constitution.”³⁵ But the main problem with this perspective on state action is that it confuses what is designed to be a normatively structured framework with a purely descriptive one. The public-private dichotomy embodied in the state action requirement is not designed necessarily to empirically reflect social and political reality. It is, rather, designed to implement the divergent dictates of liberal democratic theory.³⁶ To function effectively as a liberal democracy, a society must simultaneously restrict government and empower private actors.³⁷ Except perhaps in the most unambiguous cases, then, the issue of state action turns not on a descriptive perspective but rather on a normative effort to insulate a sphere of private pluralism from the restrictive burdens of constitutional limitations—the very result we seek when the state, rather than a private individual or entity, is the actor.

B. Private Autonomy and Contingency Fee Arrangements for Private Clients

Private litigation represents the classic illustration of the normative, rather than descriptive nature of the public-private dichotomy. Were one to adopt a purely descriptive view, one could fashion a strong argument that the entire litigation system is inherently intertwined with the state and therefore an exercise of purely public power. And in a certain sense, this conclusion is completely accurate.³⁸ In another sense, while attorneys operating within the litigation system are deemed officers of the court and

³⁵ Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript on Professor Stone*, 130 U. Pa. L. Rev. 1331, 1338 (1982).

³⁶ See text at notes 29-32, *supra*.

³⁷ For an excellent explication of the considerations of normative liberal theory underlying the state action requirement, see generally Maimon Scharwschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 Sup. Ct. Rev. 129.

³⁸ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (state common law, developed in the course of the litigation of private claims, constitutes state action).

subject to applicable legal and ethical restrictions, within those confines their allegiance is solely to their clients. In deciding both whether and how to pursue their clients' claims, private attorneys representing private clients make their choices solely on the basis on the interests of those clients. They are not required to inquire whether a particular strategic choice is in the public interest or beneficial for society as a whole. Instead, they base those decisions on their assessment of their clients' best interests, much as the individual may do for herself when her private concerns are implicated.³⁹ To be sure, in pursuing their clients' interests they may simultaneously be fostering the broader public interest by enforcing legislative policy to police a certain segment of corporate behavior. Indeed, such vindication of private rights is often contemplated by government as a means of implementing public policy and legislative proscriptions on illegal behavior.⁴⁰ But if so, it is largely as a byproduct of their representation of their clients' interests.⁴¹

If one were to attempt to utilize a purely descriptive approach to the public-private divide, one might reasonably conclude that in representing a private client in the litigation system, an attorney is appropriately characterized as part of the state. In certain contexts, this is exactly the conclusion the Supreme Court has reached.⁴² But the very nature of the adversary system precludes a finding that attorneys acting on behalf of

³⁹ See Redish, *supra* note 30, at 376-77 (arguing that “[o]nce it is recognized that an individual, even though a member of a community, remains an integral and mentally autonomous entity deserving of dignity and respect, it logically follows that the individual should be encouraged and expected to employ her personal resources to determine the choices and courses of action that will maximize the welfare of both her and her family.”).

⁴⁰ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

⁴¹ Because the motivations are not mutually exclusive, it is of course conceivable that an attorney representing a private client could simultaneously be motivated by the goal of enforcing public values. The point, however, is that this need not be the case, and to the extent the two interests conflict it is the ethical obligation of the attorney to give preference to the interests of his client.

⁴² See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private attorney's use of peremptory challenges on racial basis held to constitute state actions).

private clients are state officers in *all* respects. Such a conclusion would be inconsistent with the liberal, pluralistic and individualistic values underlying the public-private dichotomy in the first place. The litigation system is one means by which a private individual or entity resorts to governmental processes to vindicate his rights and interests. That the state makes such processes available to the individual is itself part of the liberal social contract.⁴³ To collapse the state and the private actor into one and the same, while arguably a reasonable empirical observation, would undermine the very premises of liberal democratic society.

Once it is assumed that private attorneys acting on behalf of private clients are appropriately viewed predominantly not as state actors but rather as facilitators of private actors' ability to further their rights and interests through resort to governmental processes, the constitutional legitimacy of the use of contingent fee arrangements becomes wholly appropriate. By enabling private actors to sue in situations where the cost of representation would otherwise be prohibitive, such an arrangement fosters private actors' ability to further state policies and interests by enforcing their private rights created by substantive law. Nor does such a structure in any way pervert the attorneys' proper incentives, since the all-or-nothing nature of contingency fees merely provides the attorney with an even stronger incentive to improve her client's recovery.⁴⁴

The purpose of this description of the role of the private attorney acting on behalf of private individuals or entities, its relationship to the public-private dichotomy, and its

⁴³ See generally Redish & Larsen, *supra* note 2.

⁴⁴ In one sense, a contingency fee arrangement appropriately cabins private attorneys' incentives, since if they billed by the hour and would be owed the full amount of their bill win or lose, they arguably would be spurred to stretch out litigation and be less concerned with maximizing recovery. In another sense, however, the two are probably a wash, since any attorney unconcerned with controlling costs or maximizing clients' recoveries is unlikely to obtain continuing business.

implications for the use of contingent fee arrangements has been to lay the groundwork for a drawing a contrast to the moral, political and constitutional obligations of full time government attorneys. The Paper now turns to that issue.

IV. THE PUBLIC-PRIVATE DICHOTOMY AND GOVERNMENT ATTORNEYS

A. Ethical and Political Limitations on Government Attorneys in Criminal Prosecutions

It has long been established that government prosecutors owe primary responsibility to the public interest, rather than to either their own personal concerns or a narrow, advocacy-based perception of their client's interest. In an often-cited passage, the Supreme Court in *Berger v. United States*⁴⁵ wrote: "The United States Attorney is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Because attorneys for the government act on behalf of, not simply a self-interested private actor seeking to maximize personal gain and minimize personal loss, but rather the public entity who acts on behalf of all of us, their incentives must be different from those who do represent private actors. Occasions will arise in which the public interest is not served by a conviction; there are cases in which a prosecutor, acting in the public interest, may determine that conviction of a particular defendant will not advance societal goals. This may be due to the prosecutor's serious doubt about the defendant's guilt, a relative choice that limited prosecutorial time should be devoted to more egregious criminals, or simply that the public interest will not be served by

⁴⁵ 295 U.S. 78, 88 (1935).

continued prosecution. These same considerations may influence the prosecutor's initial decision whether to proceed with a prosecution in the first place. These are not considerations that either should or generally do influence the strategic litigation choices made by private attorneys acting on behalf of private clients.

Creation of a distinctly personal incentive on the part of a prosecutor to pursue conviction would threaten prosecutorial pursuit of the public interest. Thus, the very idea that prosecutors could be subjected to an arrangement in which they make substantial money if they convict but no money if they fail to obtain conviction would seriously undermine the public-regarding nature of a prosecutor's function.

I draw the following implications from the Supreme Court's conclusion in *Burger*: (1) At least in a prosecutorial setting, any sort of payment structure whereby prosecutors are paid solely for convictions is ethically and politically unacceptable; (2) the same political and ethical concerns about the need for government attorneys in criminal prosecutions to focus on considerations of public interest, rather than narrow interests of client success, apply with equal force when government attorneys participate in civil litigation; and (3) when government delegates the power to litigate claims on the government's behalf to private attorneys, those attorneys are subject to the exact same ethical and political limitations as are full time government attorneys.⁴⁶ While I find little that is controversial in any of these postulates, it is appropriate at this point to posit and then respond to conceivable criticisms of each of my assertions.

⁴⁶ In the following section, I will argue further that such an arrangement involving private attorneys is not only inconsistent with ethical and political restraints imposed on government attorneys, but in addition violates the Fourteenth Amendment's Due Process Clause. See Section V, *infra*.

B. The Importance of Prophylactic Restrictions on Prosecutorial Motivation

While it is difficult to imagine anyone seriously questioning either the wisdom or propriety of an unwavering ban on prosecutorial contingent payment arrangements in criminal cases, it is appropriate to consider the argument that any such prohibition would be futile since as a practical matter it is impossible to expunge all potential motivations of personal gain on the part of prosecutors. For example, even if we were to prohibit financial rewards for successful convictions, other personal motivations, particularly professional advancement, would remain in play. Public choice theory, it could be argued, posits that all governmental choices are, at some level, based on motivations of personal gain.⁴⁷ However, even if this sweeping assertion is assumed to be true (a fact that is by no means self-evident), it does not follow that reasonable efforts need not be made to reduce the dangers as much as possible. Indeed, while Madison was all too aware of the dangers of factions and interest groups,⁴⁸ this recognition not only failed to deter him from seeking to control their invidious consequences, they actually spurred him to establish prophylactic structures of separation of powers within the governmental framework to reduce the harms to which they could give rise. That perhaps such prophylactic, formalized restrictions fail completely to avoid the problem in no way logically implies they are of no benefit or should be abandoned. The same is true of prophylactic protections of judicial independence provided for in Article III of the Constitution. Section 1 of Article III provides federal judges with protections of their salary and tenure, in an obvious effort to insulate them from the political pressures that

⁴⁷ See, e.g. Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 Harv. L. Rev. 1328, 1339 (1994). See also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

⁴⁸ Federalist No. 10 (Madison).

would inevitably result otherwise. Does this suggest that federal judges will be subject to no other improper personal motivations in deciding cases? Of course not; judges may well still be motivated by their desire to have possible future political careers, or to seek advancement within the judiciary, or to avoid retaliatory legislative restrictions on their jurisdiction. It surely does not follow, however, that there are no important benefits to judicial independence to be obtained by imposition of the formalized, prophylactic constitutional guarantees of judicial independence.

The same analysis applies with equal force to a formalized prohibition on contingent pay schemes for prosecutors. While it is certainly true that such a prohibition will not avoid all extraneous or diverting personal incentives, few could doubt that existence of such a prohibition goes far in removing the most blatant and obvious influence distracting prosecutors from their obligation to the public interest.

C. The Elusive Nature of the Public Interest

While the prohibition on contingent payment arrangements for prosecutors may be deemed an appropriate means of focusing prosecutors on pursuit of the public interest, some have argued that there is no such thing as the public interest. What modern civic republicans refer to as evil minded “pluralists” and others refer to simply as adherents of Adam Smith have argued that there is no such thing as the public interest, apart from the sum of all individual interests.⁴⁹ From this perspective, it could be argued that it is

⁴⁹ See generally Joseph H. Carens, *Possessive Individualism and Democratic Theory: Macpherson's Legacy*, in *DEMOCRACY AND POSSESSIVE INDIVIDUALISM: THE INTELLECTUAL LEGACY OF C.B. MACPHERSON 2* (Joseph H. Carens ed. 1993).

meaningless to attempt to force government attorneys to focus on pursuit of the public interest, because of the simple fact that there is no such thing.⁵⁰

In the context of the present inquiry, it is neither necessary nor desirable to reconsider the debate over the tensions among public choice theory, individual pluralism, and civic republicanism. Whether or not one is somehow able to fashion a public interest distinct from an aggregation of individual interests, it is clear that a distinction exists between a government attorney's motivation to do justice as she perceives it and an attorney's motivation to further her own personal economic interests. When candidates seek political office, they put forward a vision of the interests to be pursued, goals to be achieved and values to be fostered on behalf of their constituencies. Such political platforms may be made cynically or in good faith, but either way it is clear that they are something apart from the personal financial or professional goals of the candidate or his underlings. In attempting to shape and focus prosecutorial motivations, then, the key is not what the public interest *is* but rather what it *is not*. Whatever the public interest is, it is most assuredly something different from the attorney's personal financial interests. Thus, a formalized prohibition on contingent payment arrangements for prosecutors has only the modest goal of removing one narrow but potentially invidious incentive from their strategic decision making process.

⁵⁰ As one unsympathetic commentator described the position, "public choice theory rejects the notion of an overriding public interest. Individual interests are not viewed as being amenable to aggregation in any fair sense." Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 Boston College L. Rev. 789, 804 (2000) (footnote omitted).

D. The Civil-Criminal Connection

Even if one is forced to concede—as I believe one must—that criminal prosecutors may not properly be paid on the basis of some form of contingent payment arrangement that turns on the rate of conviction, the argument could still be fashioned that the same considerations are inapplicable in governmental civil litigation. The argument might proceed in the following fashion: While prosecutors who have the power to bring to bear the government’s resources to deprive a private actor of her liberty should not be overtly influenced by considerations of personal financial gain, civil litigation involving the government is a strikingly different situation. In civil cases, the government stands in no different position from any private litigant. A private actor’s liberty is not at stake. Rather than acting coercively as in criminal litigation, the state in civil cases is either defending itself or seeking to be made whole. As a general matter, however, this suggested distinction between state attorney obligations in criminal and civil cases has been rejected.⁵¹

At the very least, this argument would seem to be inapplicable in civil cases in which the state acts in a purely coercive manner. When the state acts as the plaintiff in civil litigation and seeks to impose purely punitive, rather than compensatory relief, technical distinctions between criminal and civil litigation become far less significant. Criminal prosecutions, it should be noted, do not always threaten a private defendant’s liberty. Criminal relief often includes the possibility of fines as well as imprisonment. Even though only property rights are at stake in such situations, the inherently coercive

⁵¹ See Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 Widener Journal of Pub. L. 235,256 (2000): “Judicial decisions and other professional writings take the view that, even outside the context of criminal prosecutions, government litigators have a different role and different ethical responsibilities from lawyers representing private litigants.” See also *id.* at 239 (describing this position as “the conventional view.”).

nature of the action triggers the social contract of liberal democracy: those imbued with public power are not permitted to act out of motivations of private gain (to the extent it is possible to ascertain and prevent such a situation, of course). As Professor Berenson has persuasively argued, “[i]t is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.”⁵² This is due to the fact that “the primacy of private values that exists within traditional conceptions of [an] attorney[’s] professional role and responsibility when representing individual clients is based upon ‘notions of individual dignity, privacy and autonomy.’”⁵³ But “where the represented entity is the government, which is in at least one sense nothing more than the representative of all the people, the supplanting of public values with private ones seems particularly inappropriate.”⁵⁴ Professor Green has added to this rationale. He argues that “[f]or government lawyers to hold themselves out to the public as ‘seeking justice’ when they are simply seeking to achieve partisan ends, regardless of where ‘justice’ may lie, is cynical and deceitful.”⁵⁵ According to Green, “[w]hether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes a fiduciary duty to the public.”⁵⁶ Professor Sanford Levinson has added an alternative explanation for the unique obligations of state lawyers. At some level, he argues, government lawyers are essentially “warranting” their legal arguments, due to

⁵² Berenson, *supra* note 50, at 789.

⁵³ *Id.* at 813 (footnote omitted).

⁵⁴ *Id.* at 814.

⁵⁵ Green, *supra* note 52, at 263 (footnote omitted).

⁵⁶ *Id.* at 269.

their special status as representatives of the state.⁵⁷ Neither Green's nor Levinson's arguments, it should be noted, in any way turns on the criminal or civil nature of the proceeding in which the state lawyers are operating.

Judicial decisions have acknowledged that the special ethical obligations of government attorneys apply with equal force in civil cases. For example, Judge Abner Mikva, speaking for a panel of the District of Columbia Circuit, wrote:

A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereignty whose obligation...is not that it shall win a case, but that justice shall be done." The Supreme Court was speaking of government prosecutors...but no one, to our knowledge, has suggested that the principle does not apply with equal force to the government's civil lawyers.⁵⁸

E. Applying the Public Interest Requirement to Private Attorneys Who Exercise Public Power: The State Action Question

Once it is established that under no circumstances may government attorneys receive payment on a contingency fee basis, it logically follows that private attorneys who have been delegated governmental power are equally restricted. The reasoning in support is simple: when the state, instead of performing traditional state functions itself, delegates to private actors the power to perform those functions, those private actors must be deemed part of the state in their interactions with other private actors. Any other conclusion would allow government to circumvent the political and constitutional limits on its authority simply by authorizing previously private actors to exercise public power.

⁵⁷ Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 *Hastings L.J.* 1035, 1050-58 (1994). Note that Professor Levinson was writing exclusively in the context of the state's fashioning of *constitutional* arguments. However, I consider it reasonable to apply his reasoning more broadly to all legal arguments.

⁵⁸ *Freeport-McMoran Oil & Gas Co. v. Fed. Energy Reg. Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78 (1935)). See also *United States v. Witmer*, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993); *EEOC v. New Enter. Stone & Lime Co.*, 74 F.R.D. 628, 632-33 (W.D. Pa. 1977); *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1383 (D.N.M. 1974).

Under these circumstances, society would be left with the worst of both worlds: public power imposed on private citizens, without any of the obligations and limitations on public power normally associated with the dictates of constitutional democracy.

The point can be underscored by reference to an example no doubt recalled by many: following *Brown v. Board of Education*,⁵⁹ certain southern states transferred the authority to operate what had previously been public schools to private actors. Surely, such devious circumvention of constitutional limitations could not be tolerated.⁶⁰

The Supreme Court has recognized that the state may not avoid constitutional responsibility merely by transferring its authority to private actors. For example, in *West v. Atkins*,⁶¹ the court held that a private physician contracted the Bureau of Prisons operated under of the color of state law when attending to prison inmates. The Bureau, the Court concluded, had a constitutional obligation to provide affirmative medical care to the inmates, which it transferred to the private physician.⁶²

One may reasonably question how far this state delegation reasoning goes. Surely it does not mean that every private actor who contracts with the state automatically is deemed to be acting on behalf of the state for purposes of the Constitution. The question, I suppose, comes down to whether the private contractor is performing the very same function it performs for numerous private actors—for example, waste removal. By this standard, perhaps it could be argued that private attorneys acting on behalf of the state, at

⁵⁹ *Brown v. Bd. of Educ.*, 347 U.S. 453 (1954).

⁶⁰ *See, e.g., Allen v. County School Bd. of Prince Edward County*, 198 F.Supp. 497, 503 (E.D. Va. 1961).

⁶¹ 487 U.S. 42 (1998).

⁶² *Id.* *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (persons for whose actions the state is responsible are to be treated as state actors). In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Court held that privately employed prison guards were not entitled to qualified immunity in a section 1983 civil rights suit. However, the Court failed to decide whether the guards were engaged in state action. *Cf. Sarro v. Cornell Correction, Inc.*, 248 F. Supp.2d 52 (D.R.I. 2003) (detainee may assert a *Bivens* claim against private prison guards because they could be considered federal actors).

least in the civil context, should not be deemed to bear all of the responsibilities of a state actor. Private contingency lawyers, after all, perform much the same function for private plaintiffs as well. But the issue is not that simple. It is a legal and practical reality that the state is never fungible with a private litigant. For example, a defendant may, where appropriate, file a counterclaim against a private plaintiff. However, due to sovereign immunity it may not do so against the state as plaintiff, unless the state has consented to the suit.

Once it is acknowledged that private actors suing on behalf of the state are to be deemed state actors, it logically follows that behavior deemed unacceptable for government attorneys must also be deemed unacceptable for private actors performing the identical functions. As already shown, any contingent fee arrangement for government attorneys acting on behalf of the state would unquestionably be deemed an unethical violation of the social contract of liberal democracy, whether in the criminal or civil contexts, because it would confuse the attorney's obligations to pursuit of the public interest with her own personal financial gain.⁶³ The state should not be permitted to circumvent its ethical and political obligations merely by delegating its litigating authority to private attorneys.

F. The *Qui Tam* Analogy

Professor Dorf has defended the legitimacy of the state's use of private contingent fee lawyers in seeking remedial relief through the litigation process by drawing an analogy to *qui tam* actions, which he describes as "a continuing tradition that pre-dates

⁶³ See Section IV A, *supra*.

the American republic...”⁶⁴ In these actions, private plaintiffs are authorized, under defined circumstances, to sue to assert state remedial interests, and recover a portion of whatever damages are recovered for harm to the state, even though the private plaintiffs have not suffered injury in fact. Today, as Dorf notes, the *qui tam* action is embodied in the False Claims Act, which authorizes private citizens (described as “relators”) to bring suit against defendants who have knowingly defrauded the United States government. In order to induce private parties to take such action, the law allows them to recover a percentage of the proceeds from the suit.⁶⁵ In this way, “the *qui tam* provision works to provide an incentive for private litigants to expose the fraud and benefit from the recovery.”⁶⁶ Professor Dorf also accurately notes that “at the time of the Founding...even private criminal prosecutions...were brought to enforce a wide variety of legal duties.”⁶⁷

Professor Dorf’s reference to the historical use of *qui tam* actions for criminal purposes may well prove too much. Today, there can be little question that privately run criminal prosecutions would be deemed unacceptable and quite probably unconstitutional. Thus, the mere fact of historical pedigree does not automatically justify continuing constitutional validity. But he is surely correct that, at least in the civil-remedial context, what begin as government claims may under prescribed circumstances be pursued by non-injured private individuals who stand to gain financially from success in litigation. Whether relators under the False Claims Act are nevertheless wholly analogous to private contingency fee lawyers, however, is open to serious question.

⁶⁴ Michael Dorf, *Dorf on Law*, July 10, 2007, <http://michaeldorf.org/2007/07>.

⁶⁵ 31 U.S.C. ss 3729; 3730(b). See Dorf, *supra* note 64; Redish, *supra* note x, 2003 U.Chi. L. Forum at 91-92.

⁶⁶ Gretchen L. Forney, Note, *Qui tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 Minn. L. Rev. 1357, 1364 (1998). See also Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 Temple L. Rev. 23 (1998).

⁶⁷ Dorf, *supra* note 64.

The most obvious distinction is that the relator, unlike the private attorneys, is the named party to the suit. This distinction is not merely cosmetic. In holding that relators had standing under Article III, the Supreme Court found in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*⁶⁸ that relators satisfy Article III requirement of injury in fact because they are deemed assignees of the rights of the United States.⁶⁹ Nor does the relator possess “representational standing” on behalf of the United States. He possesses Article III standing, however, because he is deemed the partial assignee of the rights of the United States.⁷⁰ The Court noted that it routinely entertains suits brought by assignees, presumably because once the assignment is made the assignee stands in the legal position of the assignor. Viewed in this manner, relators in *qui tam* actions are suing to vindicate their own rights.⁷¹ In this sense, they are more analogous to private plaintiffs than they are to private contingent fee lawyers representing the state.

The issue is complicated, however, by the fact that in addition to recovering for themselves, relators recover also for the United States. The relators take only a specified percentage of the damages awarded.⁷² In this sense, the relator does appear analogous to private contingency lawyers suing on behalf of the state. For three reasons, however, the

⁶⁸ 529 U.S. 765 (2000).

⁶⁹ Id. at 773 (footnote omitted): “The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” The Court expressly rejected the notion that the relator’s financial interest in the suit, created by statute, in and of itself provided the requisite injury in fact: “A *qui tam* relator has suffered no such invasion [of a legally protected right]—indeed, the ‘right’ he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.” It noted that “an interest that is merely a ‘byproduct’ of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.” Id.

⁷⁰ Id.

⁷¹ Id. at 772 (emphasis in original): “It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name...* the suit is brought—and that the relator’s bounty is simply the fee he receives *out of the United States’ recovery* for filing and/or prosecuting a successful action on behalf of the Government. This analysis is precluded, however, by the fact that the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery.”

⁷² Id. at 769-770; 31 U.S.C. §§ 3730(d)(1)-(2).

analogy should ultimately be rejected. First, the fact that the relators in *qui tam* actions are suing at least in part on their own behalf conceptually distinguishes the two situations. Whether it is or is not appropriate to permit the relator, suing as an injured party to vindicate her rights, also to seek damages on behalf of the United States, the very fact of the relator's injury fundamentally alters the DNA of the contingent fee lawyer situation. In a relative sense, at least, private contingent fee lawyers representing the state in litigation are far more analogous to full time government lawyers representing the state in litigation, and it is clear that such lawyers could not legitimately be paid on a contingency basis.

The full time government lawyer analogy is more apt also because it is far less likely to give rise to unacceptable governmental deception of the electorate. In the *qui tam* context, the very nature of the process makes formally clear to anyone concerned that a private actor motivated by financial concerns, in addition to the government, is a party to the suit against the private defendant. In the case of the contingency fee lawyers, in contrast, the sole named litigant is the state itself, implicitly conveying the message that it acts as the representative of the people and is therefore focused primarily on pursuit of the public interest, rather than the narrow financial concerns of private actors.

Finally, the *qui tam* analogy is inapplicable for an additional ultimately dispositive reason: tradition. *Qui tam* actions are deemed legitimate today, despite the serious questions of separation-of-powers under both Articles I and II,⁷³ largely because they have existed for such a long period in English and American practice. In *Vermont Agency of Natural Resources* the Court, in upholding *qui tam* actions, emphasized their

⁷³ The issue under Article II concerns the extent to which Congress may vest executive power in someone other than the President, in whom the provision vests the executive power. The Court left it issue open in *Vermont Agency*. 529 U.S. at 778, n.8.

“the long tradition...in England and the American colonies.”⁷⁴ It pointed to their origins “around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown’s behalf.”⁷⁵ It further noted that such actions “appear to have been as prevalent in America as in England....”⁷⁶ One may seriously question, then, whether such actions would have been considered legal had they only recently been created.

One might reasonably question the legitimacy of blind reliance on tradition to determine modern constitutional validity. As I have pointed out in other contexts, our “tradition” includes such unfortunate practices as slavery and near genocide of the Native American population. The mere fact of tradition, then, amounts to something akin to proof by adverse possession—hardly a way in which modern constitutional analysis should be conducted.⁷⁷ Yet rightly or wrongly, tradition has played an important role in modern constitutional law.⁷⁸ If one were to reject such a significant role for tradition, one today might well dismiss *qui tam* actions as unconstitutional procedures in countless ways. But if it is fundamentally tradition alone that is preserving the *qui tam* action in modern times, then of course it cannot be mindlessly bootstrapped into a rationale for use of an entirely new, equally suspect procedure. Yet that is exactly what Professor Dorf does. He gleans no valuable normative constitutional insight from *qui tam* actions by some form of constitutional reverse engineering. Rather, he simply draws an analogy to an accepted practice: because *qui tam* actions are valid, and because use of private

⁷⁴ Id. at 774.

⁷⁵ Id.

⁷⁶ Id. at 776.

⁷⁷ For my prior criticism of the relevance of tradition to modern constitutional analysis, see generally Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 Rutgers L.J. 675 (1991).

⁷⁸ See, e.g., *Michael H. & Victoria D. v. Gerald D.*, 491 U.S. 110 (1989).

contingency fee lawyers by the state is analogous to a *qui tam* action, it logically follows that modern private contingency fee suits on the part of the state are likewise valid.⁷⁹ For reasons I have already explored,⁸⁰ modern contingency fee suits are *not* analogous to *qui tam* actions. But even if they were, they lack the tradition that quite clearly has insulated *qui tam* actions from serious constitutional attack.⁸¹

G. The Libertarian Paradox

The argument against the use of private contingent fee lawyers on behalf of the state at some point will likely come up against what I call “the libertarian paradox.” From the libertarian perspective, such an arrangement appears simultaneously to possess both very positive and extremely negative qualities. On the one hand, presumably a libertarian, already instinctively grudging in her concessions to the authority of the state, should be especially concerned that state power not be abused for purposes of personal gain. In the relatively rare instance in which the state should exercise power in the first place, it should do so solely in good faith and within the confines of that grant of power. For example, to the extent libertarians concede to the state the authority to raise and operate armed forces, presumably they would not want decisions about the conduct of the military to be grounded in the personal financial interests of those in charge, regardless of the impact on the welfare of the citizenry as a whole. On the other hand, because libertarians generally believe in the efficiency of the marketplace, where decisions are grounded in economic self-interest, they may well conclude that vesting decision making

⁷⁹ See Dorf, *supra* note 64.

⁸⁰ See text at notes 68-73, *supra*.

⁸¹ It should be noted that in any event, the modern form of the *qui tam* action has never been subjected to scrutiny under the analysis by which I have found the private contingency fee action improper.

authority in private contingent fee attorneys is more likely to produce efficient results than would vesting comparable decision making power in officials charged with pursuing some mythical public interest. From this perspective, it might be thought that the private contingent fee lawyers are likely to make the wiser choices.

This libertarian perspective, of course, differs significantly from that of a liberal democrat, who recognizes legitimate roles for both the state and the individual. To the extent feasible, the liberal seeks to have governmental decision making grounded in good faith efforts to ascertain the interest of the community, while vesting in the individual herself autonomy over a wide array of personal choices. To directly mix considerations of personal financial gain and assessment of the public's interest thus unwisely swims half way across a river. It would be absurd to assume, *ex ante*, that decisions that financially benefit the individual who exercises state power will automatically benefit society as a whole. There are too many cases of cost overruns, contract kickbacks, and patronage deals that have proven disastrous to justify such a prediction. Libertarians can reasonably debate the extent of the power to be vested in the state. But it is unwise, if not reckless, to assume that once the decision has been made to cede the particular authority to the state, the same individual market dynamic thought to operate so effectively in the private sphere would produce the same efficient results in the public sphere.⁸²

⁸² One might reasonably question whether even private attorneys who bill by the hour, rather than operate on a contingent fee arrangement, unwisely insert a personal financial incentive into public decision making. After all, these attorneys possess a personal financial incentive to keep litigation active, regardless of the needs of the state. There seems to be some truth to this reasoning, but I make no judgment about it in this Article.

V. CONSTITUTIONAL IMPLICATIONS OF THE STATE'S USE OF PRIVATE CONTINGENCY FEE ATTORNEYS

A. Placing the Constitutional Argument in Perspective

I have already demonstrated that the modern use by the state of private contingency fee attorneys is inconsistent with the political values and traditions of liberal democratic theory.⁸³ In this section, I consider the extent to which the practice can actually be deemed unconstitutional. Before undertaking such an analysis, I should emphasize a number of important points. First, while I ultimately conclude that, purely as a matter of normative constitutional theory, the practice should be deemed a violation of the guarantee of procedural due process,⁸⁴ I fully acknowledge the controversial nature of my argument. Although I do believe that analogous legal precedent exists on which to support such a conclusion, certainly no prior decision is close to being on all fours, and the argument I make is on the frontier of constitutional theory. I put it forth, then, more as a thought experiment in constitutional theory than anything else. Second, even were one to reject my constitutional argument, that fact should not detract from my severe criticism of the practice from the perspective of American political theory.

B. Procedural Due Process and the Neutral Adjudicator

With those caveats in mind, my due process analysis begins with the doctrinally and conceptually uncontroversial assumption that whatever else procedural due process dictates, the guarantee requires that neither property nor liberty be revoked absent the provision of a neutral adjudicator. A number of years ago, Professor Lawrence Marshall

⁸³ See Section IV, *supra*.

⁸⁴ See text at notes 85-90, *infra*.

and I developed an elaborate constitutional defense of this proposition.⁸⁵ Our point, basically, was that no other procedures really matter unless the adjudicator is completely free of pre-dispositions in favor or against one of the parties on grounds unrelated to the merits of the suit. Neither dignitary nor utilitarian concerns underlying procedural due process, therefore, can be deemed satisfied absent a neutral adjudicator. The requirement's origins are venerable, extending back to Lord Coke's famed opinion in *Dr. Bonham's Case*,⁸⁶ where he held that no man may be a judge in his own case. Since that decision, courts—including the United States Supreme Court—have consistently held that “officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided.”⁸⁷

The requirement of neutral adjudicator, it should be noted, applies in a prophylactic manner. In other words, for an adjudicator to be deemed to have violated the constitutional requirement of neutrality, actual perversion of the decision making process in a particular case need not be shown. All that is necessary, rather, is whether there exists a “possible temptation to the average man as judge.”⁸⁸

C. Applying the “Adversarial Neutrality” Requirement to the Private Attorney Contingent Fee Arrangement

The neutral adjudicator requirement, of course, has no direct applicability to the constitutionality of the state's use of private contingent fee attorneys. Those who

⁸⁵ See generally Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455 (1986).

⁸⁶ 77 Eng. Rep. 646, 8 Coke 114a (C.P. 1610).

⁸⁷ *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1985); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972).

⁸⁸ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

represent the state in litigation act as advocates, not adjudicators. I posit, however, that much the same reasoning that deems the absence of a neutral adjudicator a due process violation suggests that attorneys who represent the state must also be made free as reasonably possible from distorting personally driven motivations.

One can, I believe, reach this conclusion by drawing a series of probative analogies. First, imagine a situation in which public prosecutors are paid exclusively on a contingent fee basis: they are paid for convictions, but not for acquittals. While I am unaware of any case considering such a situation, I have little doubt that such a scheme would be found to violate the due process rights of the defendant. The Due Process Clause stands as the constitutional enforcer of the political social contract that inheres in our nation's commitment to constitutional democracy. Because such private abuse of coercive public power so fundamentally undermines core notions of governmental good faith and does so by resort to the judicial process, there should be little doubt that such a practice would constitute deprivation of liberty without due process of law. Nor should such a distortion of prosecutorial good faith be deemed somehow purified by the neutrality of the judge and jury. Presence of an improper personal motivation on the part of the judge is not purified by the presence of an honest jury, nor is improper jury behavior deemed purified by the presence of a wholly neutral judge. Due process in the criminal context is rightly construed to demand good faith pursuit of the public interest on the part of *all* levels of the criminal process. This properly includes the prosecutor, as well as the judge and jury.

It is of course true that, unlike the judge and jury, the prosecutor is an advocate on behalf of a client. In an adversary proceeding, a lawyer for the government, similar to

attorneys for private clients, needs to vigorously pursue his client's interests. But as shown in earlier discussion,⁸⁹ even as an advocate, a lawyer acting on behalf of the state is recognized to possess ethical and moral obligations far beyond those imposed on an attorney acting on behalf of a private client. State lawyers thus bear the obligation of what I have previously labeled—somewhat paradoxically—“adversarial neutrality.”⁹⁰ Under this dictate, while lawyers acting on behalf of the state will naturally assume the role of advocate, making strategic litigation choices on that basis, they simultaneously have an obligation under both due process and the political social contract not exercise their authority on behalf of the interests of the public, rather than on behalf of their own potentially competing personal interests. The public interest may, on occasion, be furthered not by continued litigation, not by gaining damage awards, but either by cessation of litigation or acceptance of a form of non-monetary relief. To be sure, the fact that state attorneys are to be paid solely out of damages awarded does not automatically imply that they will, in specific cases, base their litigation choices on something other than their good faith perception of the public interest. But the same is true of judges who stand to gain from convictions. The Supreme Court has readily found such schemes unconstitutional, without any requirement of a showing of specific judicial choices made because of that arrangement.⁹¹ Such improper influence would likely be all but impossible to demonstrate in an individual case, and in any event the appearance of judicial fairness would be destroyed by the mere existence of the arrangement. And such arrangements are deemed violative of due process, even though it is effectively

⁸⁹ See Section IV, *supra*.

⁹⁰ Redish & Mathews, *supra* note 29.

⁹¹ See sources cited in note 87, *supra*.

impossible to avoid other potentially distorting personal motivations, such as the hope for professional advancement.

The issue is admittedly more complex when one transfers the issue to advocates acting on behalf of the state. But as earlier discussion demonstrated, the special status of lawyers acting on behalf of the state is well accepted in sub-constitutional contexts, and it should therefore not be difficult to recognize their unique status for constitutional purposes, as well.

Now consider a change in the hypothetical. Imagine a coercive civil action—i.e., an action to impose civil penalties—brought by the state against a private actor, where the state is represented by full time state attorneys who are paid solely on a contingent fee basis. Here, the constitutional implications may not be as readily obvious as they are in the context of a criminal prosecution. Nevertheless, the two situations should be treated similarly, for a number of reasons. Civil coercive actions trigger most of the same political and constitutional concerns implicated by criminal prosecutions. True, civil actions do not implicate the array of special constitutional protections traditionally associated with criminal prosecutions, such as the right to confront accusers or the requirement of proof beyond a reasonable doubt. The fact remains, however, that the potential loss of property, as much as the loss of liberty, triggers the protections of procedural due process.⁹² When the state acts coercively against its citizens through the judicial process, its obligations to act in good faith in pursuit of the public interest, rather than out of potentially distorting personal motivations, the dictates of due process would seem to be equally applicable.

⁹² See, e.g., sources cited in note 13, *supra*.

The final hypothetical permutation concerns a purely remedial civil action brought by the state against a private actor. In this context, we have moved farther and farther away from the paradigm of the criminal prosecution. Nevertheless, the Court has made clear that procedural due process protections apply even in purely remedial civil actions between private litigants.⁹³ It would seem that *a fortiori*, procedural due process should apply in civil remedial actions when the state itself is the plaintiff. In remedial actions, no less than coercive civil actions, the defendant's property is at stake, and when a private actor's property rights are threatened by the judicial process, procedural due process protections apply. But it is of course true that this fact does not necessarily tell us whether or not procedural due process requires that state lawyers pursue the public interest, rather than their personal financial concerns. That it does so require, however, flows logically from the following premises, previously established: (1) when either property or liberty is at stake, procedural due process protections apply, and (2) procedural due process requires that those acting on behalf of the state in the course of litigation pursue the public interest as they reasonably understand it, rather than their own personal financial interests. Once these two premises are accepted, the conclusion is inescapable that the same dictate applies even in civil remedial actions.

Once it is established that in criminal prosecutions, coercive civil actions, or remedial civil actions brought against private actors, due process requires that attorneys acting on behalf of the state may not be paid on a contingent basis, the implications for private contingency fee lawyers acting on the state's behalf would seem to flow inexorably. As demonstrated by the prior analysis of the Fourteenth Amendment's state

⁹³ Id.

action requirement,⁹⁴ there can be little doubt that when private actors have been delegated the power of the state they simultaneously assume the constitutional, political and ethical obligations of the state. Indeed, there could be no other answer: to allow the state to circumvent its constitutional and political responsibilities by the simple act of delegation of its responsibilities to private actors operating under the direction of the state would render those limitations on state power rather hollow. It would also invite cynical state maneuvering that could hardly be deemed consistent with the values of a constitutional democracy. All this leads to one conclusion: private contingency fee lawyers acting on behalf of the state, no less than full time state attorneys, may not benefit from a financial arrangement that tempts them to make litigation choices that further their personal financial interests.

VI. CONCLUSION

It seems to be such a simple, inviting alternative. By using private contingency fee lawyers to pursue its civil claims, the state appears to have the best of all possible worlds: It risks nothing, and potentially gains everything. As is often the case when government becomes involved, however, the issue is far from that simple. Private attorneys representing private clients, within predetermined ethical boundaries, possess an obligation only to their clients. If their clients win, they win; it is as simple as that. When lawyers act on behalf of the state, however, we have long recognized their special moral and ethical obligations deriving from their association with public power in a constitutional democracy. When government acts legally, it is not considered to be the typical adversary in the adversary system. At times, by government winning society loses, because government is obligated to pursue the best interests of society and at times

⁹⁴ See Section IV E.

that may mean no litigation at all, or at least litigation that seeks relief other than the award of damages.

The irony in the state's use of private contingent fee lawyers is that were the state itself to employ such an arrangement for its own lawyers there should be little doubt that the framework is ethically improper and perhaps a due process violation as well. At the very least this is true in the case of criminal prosecutions. Those exercising the full force of public power on behalf of the state should not be allowed to have their motivations be shaped by stark personal financial considerations. Because procedural due process interests are triggered in purely civil cases as well,⁹⁵ and because the unique ethical obligations of state lawyers apply in civil as well as criminal actions,⁹⁶ it seems not a dramatic extension to find the state's payment of its lawyers on a contingency basis equally improper and unconstitutional in civil suits.

If there is anything clear about the often murky state action doctrine, it is that what would be unconstitutional for the state to do itself cannot be somehow constitutionally laundered by delegating the very same authority to private actors operating under ultimate state control.⁹⁷ Thus, if one accepts each of the steps of my political and constitutional analysis to this point, there can be little doubt that an arrangement in which private lawyers are hired on a contingent fee basis to perform litigation functions traditionally performed by state attorneys is, at the very least, politically improper. It is highly likely that it is unconstitutional as well.

⁹⁵ See Section V C, *supra*.

⁹⁶ See Section IV A, *supra*.

⁹⁷ See Section IV E, *supra*.