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CONTENTS

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HYDE-ING FROM THE TRUTH: DOES THE HYDE AMENDMENT PROVIDE AN ADEQUATE REMEDY FOR KNOWN PROSECUTORIAL MISCONDUCT?

By William H. Knight*

Introduction

If the ability to choose our defendants is "the most dangerous power of the prosecutor,"[1] as Justice Robert Jackson famously wrote, then it follows that the abuse of this power can have the most devastating effect on society. When Justice Jackson's oft-quoted passage was written, the esteemed Justice was concerned with prosecutors searching law books "filled with a great assortment of crimes,"[2] in order to engage in targeted prosecutions against persons the prosecutor dislikes.[3] With roughly 4,000 statutorily defined federal crimes on the books today,[4] this principle rings true now more than ever before. This increasing criminalization dangerously tempts prosecutors to choose defendants first and their crimes second; accordingly, prosecutorial misconduct before a grand jury, where the state attorney's power is largely unrestrained,[5] must be regulated.

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* J.D., Sandra Day O'Connor College of Law at Arizona State University, 2013; B.S., Criminal Justice, 2008, Andrew Young School of Policy Studies at Georgia State University. The author would like to thank Professor Paul Charlton at the Sandra Day O'Connor College of Law for his mentorship, guidance, and insight into the noble calling of criminal prosecution, and Lauren Berkley, for her unwavering support and practical guidance in all things "law."

[1] *See* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940) ("If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted.").

[2] *Id.*

[3] *Id.*

[4] Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000).

[5] For a thorough discussion of the ethical, judicial, and statutory limitations on prosecutorial conduct before a grand jury, see Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1 (1999). Even still, a prosecutor's influence in grand jury proceedings is great. For instance, prosecutors can, and often do, present hearsay evidence to a grand jury that would be inadmissible at trial for the purposes of procuring an indictment. Costello v. United States, 350 U.S. 359, 362–63 (1956). Although "it is improper for a prosecutor to present hearsay testimony to the grand jury in the guise of direct evidence, where the effect of the presentation is to mislead the grand jury about the nature or source of evidence they are hearing," federal prosecutors can still accomplish this by asking witnesses to recount what *was* observed, rather than what the witness *himself* observed. This technique avoids the need to disclose the attenuated source of the observation. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS

Consider the recent disciplinary hearings of former Maricopa County Attorney Andrew Thomas and his deputies, Lisa Aubuchon and Rachel Alexander.[6] Thomas was accused of, and ultimately disbarred for,[7] numerous ethical violations, including:

> [H]olding press conferences to denounce the Maricopa County Board of Supervisors, which was his client, and threatening county officials with litigation; falsely claiming a judge had filed Bar complaints against [him], in order to have the judge removed from the case; and seeking indictments against county officials to burden or embarrass them. In one case . . . Thomas and Aubuchon brought criminal charges against a county supervisor even though they knew that the statute of limitations had already expired on the offenses. The most serious allegations involve filing criminal charges against a sitting Maricopa County Superior Court judge without probable cause in order to stop a court hearing.[8]

Unsurprisingly, the ethics panel wrote, "This is the story of County Attorneys who did not 'let justice be done,'[9] but rather birthed injustice after injustice. This is the story of the public trust dishonored, desecrated, and defiled."[10] Though this case received national attention[11] as an

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29–30 (2005). Only one circuit court that has evaluated the legitimacy of such tactics has dismissed the perfidiously acquired indictment, holding that the independence of the grand jury was impermissibly compromised by the prosecutor's deliberate attempt to obfuscate the source of the evidence. United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (citing United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966)).

[6] *See In re* Andrew P. Thomas, PDJ-2011-9002, Opinion and Order Imposing Sanctions, *available at* http://www.azbar.org/media/398414/final_thomas_aubuchon_alexander_opinion.pdf (disbarring Thomas for abuse of prosecutorial power).

[7] *Id.* at 232.

[8] Michael Kiefer & Yvonne Wingett Sanchez, *Verdict in Andrew Thomas Ethics Case Due Today*, ARIZ. REPUBLIC (Apr. 10, 2012), http://www.azcentral.com/news/politics/articles/2012/04/09/20120409verdict-andrew-thomas-ethics-case-due-today.html.

[9] Ironically, "let justice be done" was the motto of the Maricopa County Attorney's Office under Andrew Thomas. *See In re Andrew P. Thomas*, *supra* note 6, at 244.

[10] *Id.* at 245.

[11] *See, e.g.*, John Rudolf, *Andrew Thomas, Phoenix Prosecutor, Disbarred for 'Defiled' Public Trust*, THE HUFFINGTON POST (Apr. 11, 2012), http://www.huffingtonpost.com/2012/04/11/andrew-thomas-disbarred-phoenix-prosecutor_n_1415815.html; The Associated Press, *Former Prosecutor in Arizona is Disbarred*, N.Y. TIMES (Apr. 10,2012),http://www.nytimes.com/2012/04/11/us/arizona-ethics-board-disbars-ex-maricopa-county-prosecutor.html.

egregious example of the dangers of unrestrained prosecutorial aggression, it is, fortunately, an aberration. In fact, "[m]ost prosecutors are hard-working men and women of good faith who sought out a job as [a] prosecutor because they hope to further the cause of justice."[12] However, this does not change the damage done to victims like Judge Gary Donahoe, who was confronted with personal and professional embarrassment, significant legal defense fees, and life-altering public ridicule.[13]

Cases like this exemplify the impetus behind the famous Hyde Amendment,[14] which provides for awards of attorney's fees in federal cases where victims of prosecutorial misconduct can show that the government's decision to levy charges was "vexatious, frivolous, or in bad faith."[15] Such cases permit victims of prosecutorial misconduct to recover, at a minimum, the reasonable fees incurred in defending against baseless criminal allegations. However, the standard of proof is high, and though a grand jury finding of probable cause does not preclude

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[12] Paul Charlton, *Most Prosecutors Act in Good Faith, Deserve Praise*, ARIZ. REPUBLIC (Apr. 11, 2012), http://www.azcentral.com/arizonarepublic/opinions/articles/2012/04/10/20120410charlton0411-most-prosecutors-act-good-faith-deserve-praise.html.

[13] *See In re Andrew P. Thomas*, *supra* note 6, at 148–74 (Thomas had a criminal complaint against Judge Donahoe "walked through," despite the reluctance of and lack of personal knowledge of those signing the affidavit, and did so entirely without probable cause).

[14] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998) (codified as amended at 18 U.S.C. § 3006A (2000)). The Hyde Amendment states, in pertinent part:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code . . . . Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Id. (emphasis added).

[15] *Id.*

recovery,[16] an acquittal does not guarantee it.[17] Considering the difficulty of succeeding on a Hyde Amendment claim, and the fact that recovery is limited to "a reasonable attorney's fee and other litigation expenses,"[18] does the Hyde Amendment really redress the myriad of collateral consequences of frivolous prosecution[19] or its life-altering injuries?[20]

In this article, I will attempt to answer this question first by analyzing the history and purpose of the Hyde Amendment. Next, I will discuss the Hyde Amendment as juxtaposed against the increasing criminalization of federal white-collar offenses and possible supplemental remedies, such as criminalizing known prosecutorial misconduct. Finally, I will conclude by discussing the practicality of the proffered solutions and offer an alternative that may, for some, be simpler and more practicable than further regulation.

I. The History of the Hyde Amendment

A. The Inadequacy of Previous Remedies.

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[21] In *Costello v. United States*, however, the Supreme Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries *must* act."[22] Accordingly:

> The Fifth Amendment right requires that a grand jury actually indict the defendant, but does not prescribe what types of evidence the grand jury may consider in determining whether there is probable cause to indict. Therefore, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits."[23]

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[16] Henning, *supra* note 5, at 50.

[17] *Id.* at 52–54.

[18] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, § 617.

[19] For an argument in support of interpreting the Hyde Amendment to provide for broader recovery for victims of prosecutorial misconduct, see Lynn R. Singband, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967 (2001).

[20] *Id.*

[21] U.S. CONST. amend. V.

[22] Costello v. United States, 350 U.S. 359, 359 (1956) (emphasis added).

[23] Henning, *supra* note 5, at 10 (quoting *Costello*, 350 U.S. at 363).

"*Costello* involved a typical white collar crime, tax evasion, that usually involves a prosecutor leading a grand jury investigation by subpoenaing records,"[24] and the prosecuting attorney relied heavily on inadmissible evidence in seeking the underlying indictment.[25] As a result, prosecutors may now rely on otherwise inadmissible evidence, such as inadmissible hearsay, in procuring an indictment.[26] But can a defendant "challenge a prosecutor's conduct in the grand jury without challenging the sufficiency of [the] evidence presented to secure the indictment?"[27] What protections, if any, were left after the Supreme Court decided *Costello*?

Under the supervisory power doctrine the court retains a modicum of control over grand jury proceedings.[28] This was necessary because "[t]he lack of explicit constitutional constraints on the federal prosecutor's conduct during a grand jury investigation made the supervisory power doctrine the only means available for a court to curb tactics perceived as abuses of the government's power."[29] The independence of grand jury proceedings is the foremost concern.[30] However, the supervisory power doctrine is limited,[31] and under *Costello*, "a facially valid indictment precludes judicial review of the quality of the evidence on which the grand jury relied to decide probable cause."[32] Even if an indictment is dismissed

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[24] *Id.* at 11.

[25] *Id.*

[26] *Costello*, 350 U.S. at 363–64; *see also* CASSIDY, *supra* note 5, at 29 ("Even in the vast majority of jurisdictions where hearsay is admissible, there is a [sic] emerging body of authority that suggests that it is improper for a prosecutor to present hearsay testimony to the grand jury in the guise of direct evidence, where the effects of the presentation is to mislead the grand jury about the nature or source of the evidence they are hearing.").

[27] Henning, *supra* note 5, at 11.

[28] *See generally* McNabb v. United States, 318 U.S. 332 (1943).

[29] Henning, *supra* note 5, at 15 (citing Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 427 (1997)).

[30] *See* United States v. Williams, 504 U.S. 36, 46 (1992) (the threshold question is whether the alleged misconduct "amounts to a violation of one of those 'few, clear rules which were carefully drafted by this Court and by Congress to ensure the integrity of the grand jury's functions.'") (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)); *see also* Henning, *supra* note 5, at 43 ("[T]he prosecutor's actions must have undermined the independence of the grand jury to such a degree that its probable cause determination was not the result of a detached review of the evidence, but instead only a forfeiture of its authority to the government") (citing United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391 (9th Cir. 1983); United States v. Red Elk, 955 F. Supp. 1170, 1182–83 n.12 (D. S.D. 1997)).

[31] "If sufficiency of the evidence cannot be examined, then the determination of independence must involve a review of the prosecutor's conduct in the actual grand jury proceeding." Henning, *supra* note 5, at 44.

[32] *Id.*

under the supervisory power doctrine, it is typically dismissed without prejudice, and a properly issued subsequent indictment can act as a "cure all" for any misconduct in the previous grand jury proceeding.[33] In fact, courts will more often than not hold that prosecutorial influence over a grand jury's probable cause determination is harmless unless it raises "grave doubt" about the jury's independence.[34] Even deliberate failures to present exculpatory evidence to the grand jury cannot be held to frustrate the jury's independence.[35] Thus, although the Supreme Court has suggested that particularly egregious or recurring misconduct before a grand jury can "empower the judiciary to put a halt to prosecutorial misconduct,"[36] the Court's reluctance to review conduct outside the direct purview of the federal judiciary[37] has rendered the supervisory power doctrine largely toothless, at least when it comes to alleged prosecutorial misconduct before a grand jury.[38]

B. The Introduction of the Hyde Amendment.

Criminal indictment can prove devastating for a defendant, even if he is ultimately acquitted.[39] Moreover, defendants historically enjoyed

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[33] *See, e.g.*, United States v. Breslin (Breslin II), No. 95-cr-202, 1997 WL 50422, at *1 (E.D. Pa. Feb. 7, 1997).

[34] *Id.* at *8–10 (pressuring a grand jury to respond quickly may constitute undue influence, but currying favor by bringing the jury a box of donuts does not); *see also Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring) (reviewing courts should ask if "the violation substantially influenced the grand jury's decision to indict, or if there is *grave doubt* as to whether it had such effect" (emphasis added)).

[35] *Breslin II*, 1997 WL 50422, at *10 (citing *Williams*, 504 U.S. at 52).

[36] Henning, *supra* note 5, at 45.

[37] Courts tend to avoid the exercise of a "'chancellors foot' veto over the government because of its attorney's motives or tactics, absent a separate constitutional violation." *Id*.; *see also* United States v. Russell, 411 U.S. 423, 435 (1973) (available remedies for certain kinds of government misconduct "[were] not intended to give the federal judiciary a 'chancellor's foot veto' over law enforcement practices of which it did not approve").

[38] The supervisory power doctrine still exists, and if a case arises wherein prosecutorial misconduct truly "shocks the conscience," the Supreme Court might employ the supervisory power doctrine to hold that such misconduct represents an unconstitutional violation of due process. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (pumping a protesting suspect's stomach to produce evidence of contraband that was believed to have been consumed so shocked the conscience that it constituted a Fifth Amendment violation). For better or worse, that case has yet to occur.

[39] Merely initiating criminal charges can have a devastating and life-long effect on one's reputation, both personal and professional. In some cases, a grand jury's indictment, even one leading to an acquittal, can cost a professional his license to practice. This is why the Department of Justice requires that its prosecutors go beyond Model Rule 3.8's bare-minimum requirement of "probable cause" before seeking an indictment. *See* U.S. Attorney's Manual, § 9-27.220 (2012), *available at*

limited remedies for improperly or maliciously procured indictments. [40] Given these problems, Congressman Henry Hyde sought to protect aggrieved defendants by creating a statutory remedy.[41] Thus, in 1997, Hyde proposed what is now known as the Hyde Amendment because he believed that erroneously indicted defendants deserved more meaningful recompense for their injuries.[42]

The Hyde Amendment awards a prevailing party who can show that the "position of the United States was vexatious, frivolous, or in bad faith" with "a reasonable attorney's fee and other litigation expenses."[43] Although "Congress enacted the Amendment hastily in a highly politicized context,"[44] and the language is arguably quite ambiguous,[45]

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http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 ("The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence *will probably be sufficient to obtain and sustain a conviction*" (emphasis added)).

[40] The supervisory power doctrine fails to provide any meaningful redress. *See* Section II.A, *supra*. Additionally, common law tort actions for malicious prosecution are equally toothless due to the concept of sovereign immunity. *See* Henning, *supra* note 5, at 45–46 ("While an aggrieved defendant can pursue the common law tort of malicious prosecution against a complaining witness or police officer that fabricated evidence, prosecutors are absolutely immune from civil liability for initiating and pursuing the case.") (citing RESTATEMENT (SECOND) OF TORTS § 656 (1977)).

[41] Hyde was motivated by the same "dissatisfaction with the prosecution of Representative Joseph McDade" that led to the famous McDade Act, subjecting attorneys working for the federal government to the local ethical rules of the jurisdiction in which they are practicing. *Id*. at 48. For a discussion of Hyde's motives in proffering the Hyde Amendment, see Lawrence Judson Welle, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 336–42 (1999).

[42] See Singband, supra note 19, at 1968–69; see generally Irvin B. Nathan & John C. Massaro, *Shekels & Hyde: Little Money but Many Lessons from the Early Years of the Hyde Amendment*, 6 NO. 1 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 1, 2 (1999).

[43] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998) (codified as amended at 18 U.S.C. § 3006A (2000)).

[44] Welle, *supra* note 41, at 333–34. Welle goes on to state that the amendment passed with "virtually nonexistent opposition." *Id.* at 334. However, the Hyde Amendment did not pass *entirely* without opposition. At least one representative, Congressman Skaggs, quite vocally challenged the wisdom of passing it so hastily, and as a rider to an appropriations bill:

> Let us not do this fast, maybe wrong, and with ill consideration in the context of an appropriations bill. [Representative Hyde] has indicated that if we defeat his amendment, . . . this will be a matter taken up, as it should be, by the committee with jurisdiction over this kind of legislation, not a quick and possibly wrong resolution of the matter on an appropriations bill. Mr. Chairman, I urge my colleagues to vote no

there can be no doubt that the Amendment's promise of redress for victims of prosecutorial misconduct endeavored to satisfy a legal injury that had previously gone unrequited.[46] Congressman Hyde believed by awarding victims of prosecutorial misconduct the cost of their legal defense, his amendment would remedy, at least in part, a great evil.[47] Responding to his opponents, Hyde put it like this:

> The Constitution protects you, but it will not pay your bills. That Constitution you carry in your pocket, the property owner will not take that and your lawyer will not take that. They want to get paid with cash. When the Government sues you and, by the way, you seem to have sympathy for everybody in this picture but the victim, who has been sued and the Government cannot substantially justify the lawsuit. I really wish you had some imagination and could imagine yourself getting arrested, getting indicted, what happens to your name, to your family, and the Government has a case it cannot substantially justify. They do not need to defend against malice or hardness of heart or anything like that, just substantial justification. They do not have to win. The fact that I picked this time and we have not had hearings, that is just a dodge. This is about as simple a concept as there is. We have had it and we have been

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on this amendment.

143 CONG. REC. H7786-04, H7794 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs).

[45] Welle, *supra* note 41, at 334.

[46] During the congressional floor debates, Representative Hyde outlined the need for the amendment as follows:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury. They can do anything. But they lose the litigation, the criminal suit, and they cannot prove substantial justification. In that circumstance. . . you should be entitled to your attorney's fees reimbursed and the costs of litigation. . . . That, my friends, is justice.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, 143 CONG. REC. H7786-04, H7794 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde)

[47] *See generally* Dick Deguerin & Neal Davis, *If They Holler, Make 'Em Pay . . . The Hyde Amendment*, THE CHAMPION, Sept.-Oct. 1999, at 30.

> satisfied with it in civil litigation. I am simply applying the same situation to criminal litigation.[48]

The Hyde Amendment sought to accomplish this goal by mirroring the standards of the Equal Access to Justice Act (EAJA),[49] which permits private parties to recover attorney's fees in civil litigation in which they prevail over the federal government, "unless the court finds that the position of the United States was *substantially justified*."[50] "However, due to fierce opposition from the Justice Department, the Hyde Amendment was altered to replace the 'substantially justified' standard with the higher standard of 'vexatious, frivolous, or in bad faith,' which was taken from the Firearms Owners' Protection Act of 1986."[51] Hence, despite similar legal standards, prevailing on a Hyde Amendment claim is significantly more challenging than making a successful claim under the EAJA.[52]

The Hyde Amendment provides that "awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) for an award under [the EAJA]."[53] First, a Hyde Amendment claimant must meet the standing requirements of the EAJA, limiting eligibility based on the claimant's net worth.[54] Second, the claimant must file a Hyde Amendment action within 30 days of the final judgment of the underlying case.[55] This case must have been criminal in nature,[56] where the defendant was a "prevailing party"[57] represented by retained, rather than appointed, counsel.[58]

The court then determines whether an ex parte or in camera hearing is required to determine the evidentiary value of the evidence relied on by the government in procuring the initial indictment, while preserving, if possible, the secrecy of certain kinds of evidence, such as the identities of

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[48] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, 143 CONG. REC. H7786-04, H7794, 1997 WL 588683, 19 (statement of Rep. Hyde).

[49] 28 U.S.C. § 2412(d)(1)(A) (2006).

[50] Henning, *supra* note 5, at 48 (quoting the EAJA, 28 U.S.C. § 2412(d)(1)(A)) (emphasis added).

[51] Deguerin & Davis, *supra* note 47, at 31 (citing 18 U.S.C. § 924 (1999)); *see also* Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION, Sept.-Oct. 1998, at 22 n.20.

[52] Deguerin & Davis, *supra* note 47, at 32–33.

[53] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998).

[54] Deguerin & Davis, *supra* note 47, at 33.

[55] The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1994).

[56] *Id.*

[57] *Id.*

[58] *Id.* For a comprehensive checklist of the requirements of a successful Hyde Amendment claim, see Deguerin & Davis, *supra* note 47, at 33.

confidential informants.[59] The claimant must then provide the court with a signed affidavit from his criminal defense counsel, itemizing all of the attorney's fees and expenses.[60] Assuming the court determines the litigation costs were reasonable,[61] the damages will be set, and the hearing will proceed against all liable government agencies.[62] Should the claimant prevail, the prosecuting agencies will be required to pay damages from their individual budget appropriations.[63]

The inquiry will then fall on whether the government's actions were "vexatious, frivolous, or in bad faith,"[64] and if so, whether there exist any "special circumstances" that would make granting an award "unjust."[65] The mechanics of the process are fairly straightforward. However, the vagueness of the Hyde Amendment's operable language, in both the "vexatious, frivolous, or in bad faith" burden and the "special circumstances" that might make an award unjust, has led to some difficulties.[66] Thus, in practice, the Hyde Amendment might not have provided as meaningful a remedy as Representative Hyde intended.[67]

C. Interpreting the Hyde Amendment.

Although judicial review has resulted in a wide range of differing interpretations, even the earliest Hyde Amendment cases agree that mere prosecutorial negligence does not satisfy the legal standard.[68] Rather, the

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[59] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998).

[60] The Equal Access to Justice Act § 2412(d)(1)(A).

[61] *Id.*

[62] § 617, 111 Stat. at 2519.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See* Singband, *supra* note 19, at 1983–86 (criticism of the Hyde Amendment's departure from the "American Rule" with such a vague and unworkable burden); Welle, *supra* note 41, at 364–70 (detailed explanation of the "judicial perpetuation of the folly" of the Hyde Amendment's legal standards).

[67] In addition to the linguistic difficulties, the Hyde Amendment's impact is continually and significantly curtailed by boilerplate language in plea agreements that waive a defendant's ability to file a claim, pre-determining that he is decidedly *not* a "prevailing party." JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 1079 n.7 (4th ed. 2009).

[68] Singband, *supra* note 19, at 1991–92 (citing *In re* 1997 Grand Jury, 215 F.3d 430, 437 (4th Cir. 2000)) ("even though the federal prosecutor would have realized the evidence in his possession did not support the charges had he reviewed it more carefully, the defendant still failed to meet the requisite standard of proof to collect attorney's fees.").

Hyde Amendment standard is very high, and with good reason. If the standard were lower, every acquittal would undoubtedly lead to a Hyde Amendment claim, overburdening a saturated judicial system. Federal prosecutors already criticize the Hyde Amendment for being "unduly burdensome and an unlawful interference with their discretion."[69] Accordingly, most courts have interpreted the "vexatious, frivolous, or in bad faith" standard to be quite high. But exactly how much misconduct must an aggrieved defendant suffer before he is entitled to recovery? At the very least, a grand jury finding of probable cause does not preclude a defendant from making a claim.[70] Precisely what constitutes impermissibly vexatious misconduct, however, evades interpretation.[71]

In *United States v. Gardner*, an Oklahoma district court heard a Hyde Amendment claim springing from federal prosecution for numerous white-collar tax preparation offenses.[72] The prosecution culminated in a dismissal of all eighteen criminal allegations, some with and some without prejudice.[73] The court, looking to both the plain meaning of the statute as well as its "sparse legislative history,"[74] held that "the [Hyde Amendment] seeks to apply the EAJA to the *fullest extent possible* to the criminal context."[75] The court went on to hold that Gardner was, in fact, a "prevailing party" within the meaning of the Hyde Amendment, and the

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[69] Deguerin & Davis, *supra* note 47, at 31. Prior to the adoption of the Hyde Amendment, it was the Department of Justice's position that "[d]efending against [a criminal prosecution] has always been deemed to be one of the costs of American citizenship." *Id.* (quoting Abramowitz & Scher, *supra* note 51, at 23).

[70] Henning, *supra* note 5, at 50 ("The Conference Report accompanying the resolution that included the Hyde Amendment asserts that the conferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith." (internal quotations omitted)).

[71] *Compare In re* Grand Jury Subpoena Duces Tecum, 31 F. Supp. 2d 542, 543–44 (N.D. W. Va. 1998) (textual analysis of the Hyde Amendment only for its plain meaning), *with* United States v. Ranger Elec. Commc'ns, Inc., 22 F. Supp. 2d 667, 673–75 (W.D. Mich. 1998) (looking to the admittedly sparse legislative history of the amendment to determine where the legal standard lies), *and* United States v. Gardner, 23 F. Supp. 2d 1283, 1295 n. 22 (N.D. Okla. 1998) (looking to both the plain meaning of the amendment and its legislative history).

[72] 23 F. Supp. 2d at 1285–86.

[73] *Id*.

[74] *Id.* at 1287.

[75] *Id.* at 1297 (emphasis added). Lawrence J. Welle argues that "the [*Gardner*] court fell prey to the lure of legislative history as a substitute for independent judicial analysis," which led to an erroneous departure from well-established judicial precedents and legal doctrines. Welle, *supra* note 41, at 364. This approach served only to perpetuate the attendant congressional errors of hasty legislation that failed to adequately consider its own costly collateral implications. *Id.* at 367.

dismissed charges, including the ones dismissed without prejudice, were "final judgments" from which he could seek relief.[76] Although the Supreme Court has held that a dismissal without prejudice does not constitute a final judgment,[77] the *Gardner* court distinguished Hyde Amendment claims,[78] reasoning that, "to rule in favor of the government would be 'inconsistent with both logic and the purpose behind the statute, which is to deter vexatious governmental conduct.'"[79] Unsurprisingly, Mr. Gardner recovered his reasonable attorney's fees.[80] Alternatively, in *In re Grand Jury Subpoena Duces Tecum*,[81] the Fourth Circuit held that a dismissal without prejudice did not render the defendant a "prevailing party" within the meaning of the Hyde Amendment, precluding him from recovering as a matter of law.[82]

Judicial inconsistency does not end with interpretations of what constitutes a "prevailing party" or a "final judgment."[83] Courts have also reached different conclusions regarding what constitutes a "criminal case," a "reasonable fee," actionable "litigation expenses" beyond reasonable fees, a "substantial justification," and "special circumstances" capable of rendering an award unjust.[84] Most importantly, courts have disagreed on the meaning of the "vexatious, frivolous, or in bad faith standard."[85] "Vexatious" has been interpreted both as "[w]ithout reasonable or probable cause or excuse,"[86] and as "lacking justification and intended to harass."[87] "Frivolous" prosecution has been interpreted as levying charges

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[76] *Gardner*, 23 F. Supp. 2d at 1298.

[77] Parr v. United States, 351 U.S. 513, 518 (1956).

[78] *Gardner*, 23 F. Supp. 2d at 1292.

[79] Welle, *supra* note 41, at 366 (quoting *Gardner*, 23 F. Supp. 2d at 1292). Welle submits that the *Gardner* court actually broadened the scope of the Hyde Amendment with its liberal statutory interpretation, "fl[ying] in the face of the *Alyeska Pipeline* holding that federal courts are not permitted to extend departures from the American rule and sovereign immunity doctrine without *specific* statutory guidance." Welle, *supra* note 41, at 366 (citing Alyeska Pipeline Svc. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975) (emphasis in original)).

[80] *Gardner*, 23 F. Supp. 2d at 1298.

[81] 31 F. Supp. 2d 542 (N.D. W. Va. 1998).

[82] *See id.* at 544–45 (successfully quashing a subpoena and obtaining a dismissal of criminal charges without prejudice did not render defendant a "prevailing party").

[83] For a detailed examination of the differing statutory constructions of the various components of a Hyde Amendment claim, see Deguerin & Davis, *supra* note 41, at 32–33.

[84] *See id.*

[85] *Id.* at 33.

[86] United States v. Reyes, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998) (citing BLACK'S LAW DICTIONARY 668, 1595 (6th ed. 1990)); *see also* United States v. Gardner, 23 F. Supp. 2d 1283, 1293 (N.D. Okla. 1998).

[87] United States v. Holland, 34 F. Supp. 2d 346, 359–60 (E.D. Va. 1998) (quoting

"of little weight or importance,"[88] or as "having no basis in law or fact . . . light, slight, sham, irrelevant, superficial."[89] Attempts to define "bad faith" as a legal term of art have garnered voluminous case law and academic scholarship, but in the Hyde Amendment context, courts have held "bad faith" to mean either "reckless disregard for the truth,"[90] or "conscious doing of a wrong because of dishonest purpose or moral obliquity."[91] The vague language of the Hyde Amendment has resulted in both confusion and radically different standards between jurisdictions. However:

> The Hyde Amendment is not limited to situations that would meet the requirements of the tort of malicious prosecution, such as requiring proof of a lack of probable cause to indict or of actual malice, although evidence along those lines would go a long way toward demonstrating the government's position was vexatious, frivolous, or in bad faith.[92]

Accordingly, "[w]hile the standard is flexible, the scope of the Hyde Amendment should be determined carefully by the courts, which must be mindful not to interfere in grand jury investigations."[93]

Despite the varying perspectives on what constitutes actionable prosecutorial misconduct, the resolution of most Hyde Amendment claims is often mercifully predictable: Regardless of how different courts interpret the legal threshold, most claims of misconduct fail to rise to a level commensurate with the Hyde Amendment's lofty standard.[94] No

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MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY (1993)).

[88] *Reyes*, 16 F. Supp. 2d at 761 (quoting BLACK'S LAW DICTIONARY 668, 139 (6th ed. 1990)).

[89] *Holland*, 34 F. Supp. 2d at 359–60 n.22 (quoting MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY (1993)).

[90] United States v. Troisi, 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998) (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)); United States v. Ranger Elec. Comm'cns., Inc., 22 F. Supp. 2d 667, 676 (W.D. Mich. 1998).

[91] *Reyes*, 16 F. Supp. 2d at 761 (quoting BLACK'S LAW DICTIONARY 139 (6th ed. 1990)).

[92] Henning, *supra* note 5, at 52.

[93] *Id*.

[94] *Compare* United States v. Lain, 640 F.3d 1134, 1139–40 (10th Cir. 2011) (failed prosecution for delivering a firearm without a federal license did not warrant Hyde Amendment recovery), *and* United States v. Monson, 636 F.3d 435, 442 (8th Cir. 2011) (legitimate finding of probable cause in drug and firearm case precluded Hyde Amendment recovery), *and* United States v. Isaiah, 434 F.3d 513, 519–20 (6th Cir. 2006) (prosecution not vexatious when circumstances surrounding alleged charges were highly suspicious, even if ultimately innocent), *and* United States v. Schneider, 395 F.3d 78, 88-89 (2d Cir. 2005) (Hyde claim denied despite existence of internal U.S. Attorney

matter where a court draws the line, it is sure to be high. Although there are some examples of clear Hyde Amendment violations, such as *United States v. Aisenberg*—where the government engaged in a prolonged campaign of unwarranted surveillance, harassment, falsifying evidence, and suborning perjury[95]—such examples are few and far between. Thus, succeeding on a Hyde Amendment claim is both difficult and rare. This is the case for two reasons: First, proving the various elements of a Hyde Amendment claim requires a great deal of evidence that a criminal

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memorandum recommending against pursuing prosecution), *and* United States v. Manchester Farming P'ship, 315 F.3d 1176, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 326 F.3d 1028 (9th Cir. 2003) (initiation of charges based on information from a "vengeful tipster" was "less than laudable," not vexatious as a matter of law), *and* United States v. True, 250 F.3d 410, 425–26 (6th Cir. 2001) (antitrust prosecution not sufficiently vexatious where underlying offense supported by ample probable cause), *and* United States v. Gilbert, 198 F.3d 1293, 1304-05 (11th Cir. 1999) (reversal of conviction for expiration of statute of limitations insufficient to warrant recovery), *and* United States v. Schneider, 289 F. Supp. 2d 328, 334-35 (E.D.N.Y. 2003), *aff'd*, 395 F.3d 78 (2d Cir. 2005) (Hyde claim properly denied after acquittal where prosecutors had adequate evidence to establish each element of the crimes charged), *and* United States v. Morris, 248 F. Supp. 2d 1200, 1206-07 (M.D. Ga. 2003) (existence of some evidence of defendant's guilt precluded recovery of fees), *and* Catano v. United States, 248 F. Supp. 2d 1158, 1161-62 (S.D. Fla. 2003) (suspicious circumstances surrounding defendant's receipt of money in conspiracy sufficient to overcome claim of vexatious prosecution), *and* United States v. Holstrom, 246 F. Supp. 2d 1101, 1110 (E.D. Wash. 2003) (decision to initiate federal arson charges following decision by state prosecutor to decline prosecution in the same matter did not necessarily constitute vexatious prosecution), *with* United States v. Aisenberg, 247 F. Supp. 2d 1272, 1323-24 (M.D. Fla. 2003), *rev'd in part, vacated in part*, 358 F.3d 1327 (11th Cir. 2004) (parents of missing child subjected to charges based on government's unfounded and borderline obsessive certitude in defendants' guilt, prolonged tape recording based on warrant issued pursuant to affidavits containing knowingly false allegations, failure to continue seeking other leads despite complete lack of inculpatory evidence, offering knowingly perjured testimony, and fabricating incriminating evidence allegedly obtained from completely unintelligible tape recordings, constituting egregious prosecutorial misconduct such that defendants prevailed on Hyde Amendment claim with damages far in excess of EAJA fee maximums (on appeal, the 11th Circuit affirmed the award, but greatly reduced it in order to comply with EAJA standards)), *and* United States v. Knott, 106 F. Supp. 2d 174, 179-80 (D. Mass. 2000) *aff'd in part, rev'd in part*, 256 F.3d 20 (1st Cir. 2001) (Clean Water Act prosecution was vexatious where government lacked credible evidence, failed to make *Brady* disclosure until specifically requested to do so, and agents harassed corporate employees during search), *and* United States v. Chan, 22 F. Supp. 2d 1123, 1127-28 (D. Haw. 1998) (government's refusal to pay defendant's court ordered restitution to crime victim out of the funds defendant forfeited to the government constituted vexatious misconduct), *and* United States v. Gardner, 23 F. Supp. 2d 1283, 1292 (N.D. Okla. 1998) (dismissal of charges, both with and without prejudice, sufficient to support award of fees, in keeping with statutory purpose "to deter vexatious government conduct").

[95] *See Aisenberg*, 247 F. Supp. 2d 1272.

defendant may have difficulty procuring.[96] Second, and more importantly, prosecutorial misconduct rising to this level is exceedingly rare, and cases like *Aisenberg*, *Gardner*, and *In re Andrew Thomas, et al.* are aberrations, representing the exception, not the rule. Most prosecutors are true ministers of justice, and adhere to the principles espoused in *Berger v. United States*:[97] They regularly strike hard blows, but never foul ones.[98]

II. Prosecutorial Misconduct: Civil Injury or White-Collar Crime?

A. The Increasing Federalization of White-Collar Crime.

In recent years, Congress has promulgated numerous criminal statutes governing so-called "white-collar crimes,"[99] or "those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge, or illegal circumvention."[100] Essentially, white-collar is any non-violent offense involving dishonesty, motivated by a desire for personal gain.[101] Many of these crimes, such as bank fraud,[102] can be incredibly devastating to numerous victims and certainly warrant criminal sanctions. However, "[a] great many white-collar cases involve attempts to deceive the government about a range of matters, including compliance with regulatory requirements, entitlement to government jobs, privileges, or

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[96] *See* Nathan & Massaro, *supra* note 42, at 5.

[97] 295 U.S. 78 (1935).

[98] Charlton, *supra* note 12, at 2 (referencing *Berger*, 295 U.S. at 88 ("The United States Attorney is the representative not of an ordinary party 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*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows*, *he is not at liberty to strike foul ones*. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.") (emphasis added)).

[99] *See generally* Ehrlich, *supra* note 4.

[100] Tony G. Poveda, *White-Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIME, L. & SOC. CHANGE 235, 241 (1992) (quoting U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR WHITE-COLLAR CRIMES 5 (1977)).

[101] Since the term was coined over sixty years ago, the definition of white-collar crime has changed many times. For the purposes of this article, I will limit my definition to non-violent crimes involving dishonesty, typically motivated by personal gain or profit. For a comprehensive analysis of the evolution of the term "white-collar crime," see Stuart P. Green, *The Concept of White-Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2002).

[102] 18 U.S.C. § 1344 (2007).

program benefits, and monies owed to or by the government."[103] Regardless, the United States Code is now filled with thousands of malum prohibitum white-collar crimes, many more than gave Justice Jackson pause in 1940, and meaningful reform is, at best, a distant prospect.[104]

B. Prosecutorial Misconduct as a White-Collar Crime

Although "the Hyde Amendment provides courts with an opportunity to use judicial review to guide prosecutorial discretion objectively,"[105] its vague standards,[106] limited effectiveness,[107] subjective applicability,[108] and nominal financial remedies[109] have rendered it undesirable, unworkable, and largely inoperative. Although vexatious prosecution is admittedly uncommon, when it does occur, the result is undeniably catastrophic. With the Hyde Amendment largely innocuous, its deterrent effect against prosecutorial misconduct is de minimis at best. So what, if anything, can be done to prevent and/or redress egregious prosecutorial misconduct, such as that perpetrated by Andrew Thomas and his deputies?

With the supervisory power doctrine virtually toothless, sovereign immunity preventing most tort actions, and disciplinary action doing little to make an aggrieved defendant whole, supplemental proceedings seem to be the most viable solution.[110] "One recommendation is to give the grand jurors independent legal counsel and thereby eliminate the jury's reliance on the prosecutor's legal advice—advice possibly tied to the prosecutor's stake in the outcome of the proceeding."[111] However, this suggestion ignores the fact that independent counsel would have little more power to prevent or remedy most vexatious tactics, such as suborning perjury, than the grand jury itself, not to mention that the addition of an extra layer of

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[103] O'SULLIVAN, *supra* note 67, at 7. Susan Ehrlich suggests that many of these crimes are enacted in order "to bring votes to politicians at election time." Ehrlich, *supra* note 4, at 826; *see also* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE vii–x (2004) (arguing that our society's crime control model has grown out of control due to moral panic incited by "pusillanimous politicians").

[104] *See generally* Robert Joost, *Federal Criminal Code Reform: Is it Possible?*, 1 BUFF. CRIM. L. REV. 195 (1997).

[105] Singband, *supra* note 19, at 2003.

[106] *Id.* at 1997–99.

[107] *Id.* at 1994–96.

[108] *Id.* at 1999–2002.

[109] *Id.* at 1996–97.

[110] Henning, *supra* note 5, at 45–47.

[111] *Id.* at 46 (citing Renée B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1361 (1994).

procedure would likely slow the entire process.[112] "[R]eforms that focus on refining the grand jury's accusatory role . . . ignore the core issue of making prosecutors accountable for their misconduct."[113]

So if accountability is the key to preventing and redressing misconduct, then the Hyde Amendment, though ineffective, seems to be on the right track. If the courts could develop a more workable construction of Hyde Amendment standards, perhaps it would be more influential. However, two problems come to mind. First, in the early years of Hyde Amendment actions, Dick Deguerin and Neal Davis predicted that as the litigation grew beyond its infancy, we would develop a better understanding of its underlying legal principles and the law's "impact on frivolous and malicious prosecutions."[114] Unfortunately, more than a decade later, "it remains to be seen whether 'the breath of accusation' will continue resulting in 'lame acquittal.'"[115] Second, if we are looking for personal accountability in cases of prosecutorial misconduct, then any supplemental proceeding that redresses individual misconduct from the coffers of the wrongdoer's employer, rather than from the wrongdoer himself, misses the mark entirely.

This leads me to my suggestion. Prosecutorial misconduct constitutes a non-violent offense motivated by a desire for personal gain, such as public recognition, adversarial competitiveness, or professional advancement. Its victims, like Judge Gary Donahoe, suffer devastating intangible injuries. So if known vexatious prosecution, like that perpetrated by Andrew Thomas, bears such uncanny similarities to other non-violent offenses motivated by personal gain, then does not it seem like a proper white-collar crime? Why, then, should such criminal conduct not be punishable like so many other white-collar offenses, by fines and/or jail time proportionate to the injuries inflicted? Perhaps this would generate the desired personal accountability—or even a mild deterrent effect discouraging vexatious tactics in advance.

Such an approach would predictably foster as much, if not more, opposition than the Hyde Amendment itself did. The most significant challenge to a criminalization of prosecutorial misconduct would likely be "its potential 'chilling effect' on federal prosecutors, especially in regard to crimes where the government has to rely on witnesses who often are reluctant to testify, such as child abuse and pornography."[116] However, if

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[112] *Id.* at 46–47.

[113] *Id.* at 47.

[114] Deguerin & Davis, *supra* note 47, at 33.

[115] *Id.* (quoting PERCY BYSSHE SHELLEY, THE CENCI (1819)).

[116] United States v. Gilbert, 198 F.3d 1293, 1300–01 (11th Cir. 1999) (citing 143 CONG. REC. H7786–04, H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Rivers)

the history of the Hyde Amendment is any indication, vexatious prosecutions will continue to "generally involve[] white collar criminal charges, including bank fraud, import violations, government program bribery, and tax evasion."[117] Moreover, the burden of proof in a criminal charge of prosecutorial misconduct, like other criminal proceedings, would have to be "beyond a reasonable doubt," even higher than the Hyde Amendment's already lofty standard. Furthermore, attentive legislative drafting would ensure that the standard is workable, uniform, and easy to apply. The requisite mens rea for the offense would most likely have to be *knowing* prosecutorial misconduct, which would alleviate prosecutors' fears that accidental errors arising from reluctant witnesses could lead to a criminal sanction. In fact, the Hyde Amendment already addresses this concern by precluding recovery in cases of negligent misconduct. Thus, there will be no legitimate chilling effect on federal prosecutions in response to the criminalization of known prosecutorial misconduct.

Another criticism might be that criminal sanctions, like disciplinary actions, constitute mere retributive justice and would not actually redress the serious harms inflicted by frivolous prosecution. However, potential criminal penalties should have some deterrent value, effectively preventing misconduct before it becomes a problem. Additionally, criminal penalties could include orders to make restitution, which, unlike Hyde claims that are limited to an award of reasonable attorney's fees and other litigation expenses, could redress some of the other consequences of vexatious prosecution, such as financial injuries resulting from a collateral loss of reputation, good will, or professional licenses.

Finally, people may question the severity of threatening prosecutors with jail time for misconduct. However, the potential sentence does not have to be very high to accomplish goals of personal accountability and deterrence. Even a misdemeanor sentence could be enough to make a prosecutor considering a bad faith strategy to think twice, especially considering the collateral impact it would have on one's employment and professional reputation before the bar. Moreover, by requiring a knowing mens rea for the offense, the charge will likely never be raised against any but the most infamous offenders. Considering the deplorable consequences of an unwarranted criminal prosecution,[118] the comparatively minor penalties faced by violating a misdemeanor criminal offense,[119] the need for meaningful redress of these rare but shocking

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(Congressman Rivers challenged the Hyde Amendment under this same theory)).

[117] Henning, *supra* note 5, at 54–55.

[118] *See* Section I, *supra*.

[119] Federal misdemeanor crimes typically carry a maximum potential sentence of roughly six months. *See* POSTCONVICTION REMEDIES § 40:2 (Westlaw 2011).

offenses, and the fact that such a criminal charge would fit perfectly into our modern conceptions of appropriate white-collar criminal prosecution,[120] I urge the legislature to consider enacting a law criminalizing known prosecutorial misconduct, at least before the grand jury.

Conclusion

Unfortunately, considering the significant opposition the Hyde Amendment faced,[121] and that it was only an amendment providing for limited legal fees to victims of frivolous prosecutions, attempting to redress prosecutorial misconduct with criminal sanctions will undoubtedly generate even greater criticism. Lawyers, and prosecutors especially, tend to be very conservative inasmuch as they do not appreciate change.[122] Opening the door to criminal liability for known prosecutorial misconduct may be a good idea, but it will probably generate so much knee-jerk disapproval that it would take a truly herculean effort to see it through.

In the interim, consider both sides of the equation. On the one hand, you have the occasional prosecutor like Andrew Thomas, who "dishonored, desecrated, and defiled"[123] the trust the public placed in him, whose outrageously unethical conduct had a ruinous impact on the lives of many innocent public servants. On the other hand, prosecutors like that are extremely rare. Most prosecutors are quite selfless public servants who spend their careers living by the motto of Thomas's former office, "let justice be done."[124] I still believe that criminalizing known prosecutorial misconduct is the next step in combating vexatious, frivolous, or bad faith prosecutorial misconduct. However, considering both the massive effort involved in passing such a law and the rarity of these offenses, a cost/benefit analysis indicates the relative inefficacy of working meaningfully toward this goal.

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[120] If the people are subjected to an ever increasing number of white-collar criminal offenses, some of which going so far as to attach criminal liability to negligent behavior, then it only makes sense to redress known prosecutorial misconduct, a near perfect archetype of white-collar crime, by criminalizing this atrocious behavior and providing for restitution to victims. *Cf.* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

[121] *See generally* 143 CONG. REC. H7786–04 (daily ed. Sept. 24, 1997).

[122] Paul K. Charlton (Former U.S. Attorney for the District of Arizona), Final Lecture Before Arizona State University Law's Spring 2012 Prosecutorial Decision Making Class (Apr. 11, 2012).

[123] *In re Andrew P. Thomas*, *supra* note 6, at 245.

[124] *See id.*

Alternatively, I would encourage my fellow prosecutors to always remember their roles as ministers of justice. Injuries caused by prosecutorial misconduct are easy to avoid if we just remember to listen to the dictates of our conscience.[125] Moreover, "good leadership reminds even the veteran prosecutors that their goal is not to seek a conviction, but do what is right."[126] Accordingly, one prosecutor's example might just have a comparable preventative effect on another's misconduct.

[125] *See generally* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635 (2006) (Aristotelian ethics argument for resolving the most difficult questions in prosecutorial ethics by relying on individual conscience and personal morality).

[126] Charlton, *supra* note 12.