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## The Public Interest and Private Financing of Criminal Prosecutions

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# THE PUBLIC INTEREST AND PRIVATE FINANCING OF CRIMINAL PROSECUTIONS\*

“Public” law need not mean that the public pays; it must mean the public controls.<sup>1</sup>

## I. INTRODUCTION

Recent trends in privatization<sup>2</sup> of the criminal justice system have provoked vigorous debate.<sup>3</sup> The argument against privatization of

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1. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 269 (1998).

2. Commentators have offered numerous definitions of “privatization.” Broader definitions appear to encompass any systematic increase in private sector involvement in a given matter. *See, e.g.*, E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 889 (1987) (“‘Privatization’ means increased governmental reliance on the private sector, rather than on government agencies, to satisfy the needs of society.”); Lewis D. Solomon, *Reflections on the Future of Business Organizations*, 20 CARDOZO L. REV. 1213, 1214 (1999) (“*Privatization* can be defined as the act of reducing the role of government, or that of increasing the role of the private sector, in an activity or in the ownership of assets.”). Narrower formulations restrict the meaning of privatization to actual transfers of ownership or control of assets to the private sector. *See, e.g.*, Michael Livingston, *Reform or Revolution? Tax-Exempt Bonds, The Legislative Process, and the Meaning of Tax Reform*, 22 U.C. DAVIS L. REV. 1165, 1199 n.112 (1989) (“‘Privatization’ refers to the private management and in some cases ownership of facilities . . . ordinarily owned and operated by a governmental unit.”). In this Note, “privatization” means a significant increase in either private sector control or influence on processes and institutions, accompanied by a decrease in the exercise of control by politically or constitutionally accountable officials.

3. Most commentary on privatization in the criminal justice context has focused on private prisons. *See, e.g.*, W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829 (1987); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359 (1996); Warren L. Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997); Savas, *supra* note 2; Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209 (1998); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987); Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489 (1999). For commentary on privatization of policing and criminal adjudication, see PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

Only one scholar has specifically discussed emerging practices that would tend to privatize the prosecution function. *See generally* Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665 (1997). Another commentator has proposed a system of private financial incentives designed to reward prosecutors for behaving properly. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995). A large body of commentary discusses the longstanding institution of private

prosecutors' offices has considerable force.<sup>4</sup> The American institution of the public prosecutor reflects a "rejection of the general notion of a privileged class within society"<sup>5</sup> as well as a "deep antipathy toward entrusting large and important matters to the vagaries and occasional self-interestedness of uninhibited private initiatives."<sup>6</sup> Submitting prosecuting entities to the control of private actors and market forces would trade the egalitarian notion that the victim's wealth should not determine whether a crime is prosecuted for the efficiency benefits<sup>7</sup> of privatization.

Beginning from the premise that such a trade-off would be undesirable, this Note considers whether prosecuting offices can operate according to the egalitarian values implicit in a "public" prosecution system while receiving, or even relying upon, private financial support.<sup>8</sup> This Note argues not only that public control can coexist with private financing, but that a private financing system, if properly structured, could *advance* egalitarian values by offsetting institutional influences that lead the prosecutor to distribute criminal justice resources inequitably. Accordingly, this Note proposes how private financing models could be structured to preserve public control and promote equitable allocation of criminal justice resources.<sup>9</sup>

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prosecution, in which an alleged victim, or a friend or relative of the victim, retains a private attorney to prosecute a criminal case. *See, e.g.*, John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992).

4. *See* Kennedy, *supra* note 3, at 666-68. One's position on privatization may be dictated more by ideology than by theoretical or empirical considerations. *See* Gold, *supra* note 3, at 359-60. Yet, privatization of prosecutors' offices would seem to implicate issues of fundamental equality in a way that privatization of utilities, or even prisons, would not. *See* sources cited *infra* notes 5-6.

5. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 17 (1980).

6. Standen, *supra* note 1, at 270.

7. For a discussion of efficiency and other benefits of privatization, see Solomon, *supra* note 2, at 1214-15.

8. This Note focuses primarily on the public interest impact of private financing rather than on whether it is ethical for prosecutors to accept private contributions, or on private financing's possible constitutional implications. Yet these issues overlap considerably. Rules of prosecutorial ethics uniformly recognize that prosecutors have a duty to act in the public interest. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1998) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). This duty has constitutional underpinnings. *See* Berger v. United States, 295 U.S. 78 (1935); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 514 (1994) (employing a public interest analysis in evaluating the constitutionality of private prosecutions). Furthermore, courts sometimes draw on professional ethics norms in considering what behavior the constitution requires of prosecutors. *See, e.g.*, Young v. United States *ex. rel* Vuitton et Fils, S.A., 481 U.S. 787, 814-15 (1987) (Blackmun, J., concurring). Justice Blackmun argued that the constitution requires a prosecutor to be "disinterested," i.e. free from conflicts of interest. *Id.*

9. This Note does not consider the impact of a privately financed prosecution on the fairness of a defendant's trial, or explore a defendant's possible remedies for a prosecutor's financially motivated

Part II of this Note sets forth hypotheticals illustrating four private financing models and summarizes the history of these models. Part III describes the prosecutor's discretionary role in allocating criminal justice resources, as well as the legal standards requiring that prosecutors exercise that discretion in a disinterested manner. Part III also briefly describes how private interests currently influence the exercise of prosecutorial discretion, and suggests that prosecutors have inherent authority to define the public interest by balancing the competing demands of many private constituencies. Part IV examines two cases that have addressed private financing schemes and analyzes these cases through the framework set forth in Part III. Finally, Part V proposes structural modifications to existing private financing models that would enable private financing to advance egalitarian values while preserving public control over the prosecution function.

## II. FOUR MODELS OF PRIVATE FINANCING

Private financing of a criminal prosecution occurs when a person acting in her private capacity contributes money to a public prosecuting entity. The following hypotheticals illustrate four possible forms of private financing. Hypotheticals *A* and *B* depict models in which private contributors target their contributions to specific cases, while *C* and *D* depict financing models aimed at broad classes of cases.<sup>10</sup>

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overzealousness. It seems doubtful that constitutional or other proscriptions against overzealousness would protect a defendant in a privately financed prosecution more than a defendant in a publicly financed prosecution. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 245-47 (1980) (rejecting defendant's argument that statute authorizing prosecuting entity to keep penalty sums collected from defendant created an impermissible risk that entity would assess unduly large and numerous penalties). *But cf. Kennedy*, *supra* note 3, at 707 ("Preferential access to justice for monied interests also threatens the defendant's distinct interest in equality . . . . Arguably, no defendant has a right to a fiscally strapped prosecutor, but the prospect of defendants facing disproportionate prosecution by the government based on the wealth of their accusers is troubling."). Rather, this Note focuses primarily on the issue of whether private financing of prosecutors' offices undermines fairness in the allocation of criminal justice resources among victims and defendants.

Victims probably do not have a justiciable interest in equitable allocation of prosecutorial resources. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). *But see DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (indicating in dictum that the Equal Protection Clause prohibits a state from denying law enforcement services to disfavored groups). The Equal Protection Clause bars "selective prosecution" of a defendant based on certain improper criteria. *See infra* note 23. A defendant claiming selective prosecution, however, must present considerable evidence of nefarious prosecutorial intent. This Note does not address the application of these constitutional principles to private financing systems. Rather, this Note considers equal allocation of criminal justice resources from a public policy standpoint.

10. There are at least two models of private financing that this Note will not specifically analyze. One model entails private parties funding all or part of a prosecutor's general office expenses rather than restricting their contributions to expenses associated with a particular crime or class of crimes.

**Hypothetical A—The Case-Specific/Non-Victim Model:** A news reporter interviews a prosecutor about a female suspect who allegedly drowned her two young sons and later publicly accused an unidentified African American male of kidnapping them. The prosecutor tells the reporter that the state might not have enough money to prosecute the woman. In response to the news report, several citizens send the prosecutor's office personal checks, some of them payable on the condition that the prosecutor seek the death penalty.<sup>11</sup>

**Hypothetical B—The Case-Specific/Victim Model:** After a bitter dispute with management, an employee of a technology company, PicoTech, Inc., resigns and accepts a position with PicoTech's competitor, ChipCo. Shortly thereafter, PicoTech management notices that its ex-employee e-mailed several computer files from PicoTech to ChipCo shortly before resigning. PicoTech informs the police and the local prosecutor that it believes it has been the victim of trade secret theft. Neither the police nor the prosecutor's investigators, however, possess the technical expertise necessary to search ChipCo's computer files for PicoTech's trade secrets. At the behest of the prosecutor, PicoTech pays for the cost of an expert investigation of ChipCo's computer files. PicoTech also reimburses the prosecutor for the cost of transcribing prosecution witnesses' taped testimony.<sup>12</sup>

**Hypothetical C—The Blind Trust Fund Model:** County Chief Prosecutor Jones learns that the county plans to cut her office budget this year for the fourth consecutive year. Last year, the state legislature enacted a statute specifically criminalizing workers' compensation fraud. Jones would like to test the new statute by prosecuting a few workers' compensation cases. Her deflated budget, however, and the high expert witness fees associated with workers' compensation cases would force Jones to set aside three street crime prosecutions for every workers' compensation case she undertook. Therefore, after obtaining approval from the state attorney general, Jones establishes a workers' compensation fraud trust fund and publicly invites contributions. The fund generates over \$150,000 in

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The dearth of reported instances suggests that such contributions occur infrequently, and in any event would seem to make an informed analysis of this model difficult. The other model involves a "bounty" system in which a prosecutor collects financial penalties from offenders. The Supreme Court has upheld the use of this model. *See* *Jerrico*, 446 U.S. 238 (upholding a statute permitting a prosecuting entity to collect a portion of penalties imposed on violators to offset prosecution costs).

11. Hypothetical A is based on the well-publicized Susan Smith case. *See* Jim Clarke, *Smith Held Without Bail in Deaths of Her Sons Crime: She is Jeered by Angry Townspeople Outside South Carolina Courthouse. "You're a baby murderer!" One Woman Shouts*, L.A. TIMES, Nov. 6, 1994, at A-22, available in 1994 WL 2362910; Al Dozier, *Judge: Use of Private Funds OK*, THE HERALD (Rock Hill, S.C.), Jan. 26, 1995, at 4A, available in 1995 WL 8692385.

12. Hypothetical B is based on the facts of *People v. Eubanks*, 927 P.2d 310 (Cal. 1996).

contributions. The contributors' identities are not disclosed to the public or the prosecutor's office.<sup>13</sup> Later, Jones establishes a second blind trust fund to finance prosecutions of environmental violations.<sup>14</sup>

**Hypothetical D—The Industry Assessment Model:** Four years ago, the State of Mortimer enacted a statute specifically criminalizing insurance fraud. The senator who authored the statute announced that the statute was intended to encourage local prosecutors to prosecute more insurance fraud cases. Yet, most of Mortimer's district attorneys have virtually ignored the statute, claiming that their offices do not have enough money to crack down on insurance crime. The Mortimer State Legislature responds by levying an assessment against all of the state's insurance companies. The assessment proceeds fund an insurance fraud investigative agency and an insurance fraud unit within the state attorney general's office.<sup>15</sup> As the number of insurance fraud prosecutions increases, insurance fraud decreases, Mortimer insurance companies' profit margins increase, and insurance premiums decrease.

Hypotheticals *A* and *B* illustrate case-specific private financing. In case-specific/non-victim private financing, depicted in hypothetical *A*, the prosecutor receives money to fund a particular criminal case from persons with no relation to the victim or other direct interest in the case beyond their interest as citizens. At least one trial court has approved a prosecutor's use of non-victim case-specific contributions,<sup>16</sup> and at least one has refused to do so.<sup>17</sup> In case-specific/victim private financing, depicted in hypothetical *B*, the

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13. Hypothetical *C* is loosely based on media reports of a 1992 initiative of the Ventura County, California District Attorney. See Gary Gorman, *D.A. Sets Up Fund For Workers' Fraud Cases Law Enforcement: Businesses Will Be Asked to Contribute the Money Needed for Prosecutions. Some Critics Fear that the Office's Efforts Could Favor the Donors*, L.A. TIMES, Jan. 26, 1993, Metro Part-B, at 1, available in 1993 WL 2357419; Jeff McDonald, *D.A. to Be Honored for Fraud Program*, L.A. TIMES, July 17, 1993, Metro Part-B, at 3, available in 1993 WL 2293386; Jeff McDonald, *Schools Help Fight Workers' Comp Fraud Crime: Public Education, Farmers and Others Donate \$155,000 to the District Attorney's Fund to Crack Down on Fraudulent Claimants*, L.A. TIMES, May 26, 1993, Metro Part-B, at 1, available in 1993 WL 2311683 [hereinafter McDonald, *Workers' Comp Fraud*].

14. See Tina Daunt, *Fish and Game Code Violators Targeted*, L.A. TIMES, July 21, 1993, Metro Part-B, at 3, available in 1993 WL 2292299 (discussing a trust established by the Ventura County District Attorney to prosecute fish and wildlife violations).

15. Several states have enacted similar insurance industry assessment legislation. See ARK. CODE ANN. § 23-100-104 (Michie 1997); CAL. INS. CODE § 1872.83 (West 1998); 40 PA. CONS. STAT. ANN. § 3701-303 (1998).

16. The judge in the Susan Smith case allowed the prosecutor's office to keep private contributions. See Al Dozier, *Judge: Use of Private Funds OK*, THE HERALD (Rock Hill, S.C.), Jan. 26, 1995, at 4A.

17. In Memphis, a special prosecutor received over \$300,000 from "[s]ome 350 organizations, churchgoers, business people and concerned citizens" to fund the special prosecutor's efforts to close down the city's topless clubs. See Lawrence Buser, *Private Giving Tops \$300,000 in War on Topless Clubs*, COM. APPEAL (Memphis, Tenn.), Sept. 15, 1997, at A1, available in 1997 WL 11970536. Later, a judge disqualified the special prosecutor and the district attorney's office, and dismissed seven

victim of an alleged crime funds part of the prosecution of the crime.<sup>18</sup> In a landmark decision, the California Supreme Court held that a trial court did not abuse its discretion in disqualifying an entire district attorney's office that had solicited and accepted such a contribution.<sup>19</sup>

Hypotheticals *C* and *D* depict models of private financing targeting general classes of crimes rather than particular cases. Hypothetical *C*, illustrating the blind trust fund model, depicts a chief prosecutor's initiative in establishing a formal system of private financing. The blind trust generates revenue to prosecute a given type of case while minimizing the possibility of favoritism to particular donors by withholding the donors' names from the prosecutor. In the industry assessment model, illustrated by hypothetical *D*, a legislature similarly attempts to generate revenue to use for prosecuting certain crimes while minimizing private influence on prosecutors' decisions. The industry assessment model requires businesses in a given industry to contribute fixed amounts for the prosecution of crimes which affect that industry. The mandatory nature of the contributions prevents the industry from exercising influence on prosecutorial decisions by threatening to withdraw financial support. Several state legislatures finance insurance fraud prosecutions through the general assessment model.<sup>20</sup> The Supreme Judicial Court of Massachusetts recently upheld that state's industry assessment legislation.<sup>21</sup>

### III. PROSECUTORIAL DISCRETION AND IMPARTIALITY

Opponents of the use of private funds in criminal prosecutions argue that private contributions will unduly influence prosecutors to exercise their broad discretion to favor those who contribute.<sup>22</sup> An understanding of the policies implicated by private financing therefore requires an appreciation of

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indictments because he found them "tainted" by the private contributions. See Lawrence Buser, *State to File Appeal in Topless Case Dismissals*, COM. APPEAL (Memphis, Tenn.), Apr. 24, 1998, at B2, available in 1998 WL 11202164.

18. This scenario closely parallels the historic practice of private prosecution, in which a private party files and hires an attorney to prosecute a criminal complaint. See *supra* note 3. Ordinarily, private financing raises at least one troubling possibility that private prosecution does not raise: the possibility that private interests will marshal the government's formidable investigative resources on its behalf. See Kennedy, *supra* note 3, at 666 n.3. In a criminal case involving complex technical issues, however, private financing arguably would not create this possibility because many law enforcement agencies lack personnel with sufficient technical expertise to serve as formidable forces in such cases.

19. See *People v. Eubanks*, 927 P.2d 310, 323 (Cal. 1996).

20. See *supra* note 15.

21. See *Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999).

22. See generally Kennedy, *supra* note 3.

the scope of prosecutorial discretion and of existing standards of prosecutorial impartiality.

### A. *Prosecutorial Discretion and Selective Enforcement*

The American criminal justice system relies on selectivity in enforcement,<sup>23</sup> and grants to an array of government officials the discretionary authority to administer the selection process.<sup>24</sup> In particular, the system vests prosecutors with considerable discretion in determining which cases and which defendants to prosecute.<sup>25</sup> Courts rarely review a prosecutor's affirmative charging decision,<sup>26</sup> and will almost never second-

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23. ABA standards provide that "[t]he prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." 1 ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3 § 3.9(b) (2d ed. 1980). The Supreme Court deemed conscious selectivity in enforcement constitutional in *Oyler v. Boles*, so long as the selection was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. 448, 456 (1962). A defendant who has been singled out for prosecution on the basis of an impermissible criterion may bring a claim under the Equal Protection Clause for "selective prosecution." See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But in *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court imposed an exacting standard of discovery of government documents such that proof of selective prosecution may now be virtually impossible. See generally Marc Michael, Note, *United States v. Armstrong: Selective Prosecution—A Futile Defense and Its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675 (1998).

24. For detailed discussions of the justifications for discretion generally and prosecutorial discretion in particular, see KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) and Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

25. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). See generally James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). Broad prosecutorial discretion in charging decisions has significant consequences to the defendant as well as to society. As Professor Vorenburg observes:

The decision whether or not to charge affects a prospective defendant in three ways. First, it determines whether he must undergo the expense, anxiety, and embarrassment of criminal proceedings. Second, in those cases in which clear evidence of guilt exists or can be obtained by whatever resources and effort the prosecutor wishes to invest, the decision to charge determines whether or not there will be a conviction. Third, depending on the scope of judicial discretion in sentencing and, to a lesser extent, on the degree to which dispensing power is held by parole or corrections authorities, the charge decision may have a major effect on the penalty.

*Id.* at 1525. See also *Young v. United States ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787, 814 (1987) ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.").

The prosecutor, moreover, exercises considerable discretion in areas other than charging, including plea bargaining. See, e.g., *Bordenkircher*, 434 U.S. at 364-65; Donald B. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38.

26. Courts will review prosecutors' decisions to file a charge only if the defendant makes a prima facie showing that the prosecution violates the Constitution because it is discriminatory, see, e.g.,



guess the prosecutor's decision not to prosecute.<sup>27</sup>

Commentators have offered several policy-based rationales for selective enforcement, including the desirability of tailoring justice to the defendant's individual circumstances<sup>28</sup> and, as a corollary, legislative overcriminalization.<sup>29</sup> At bottom, however, selective enforcement exists because full enforcement would be impossible given law enforcement agencies' limited resources and the finite capacities of courts and prisons.<sup>30</sup> Prosecutors and other discretionary actors within the criminal justice system must allocate the system's resources among many meritorious cases.<sup>31</sup> In exercising their discretion, prosecutors must, and clearly possess authority to, balance the public's fiscal interests against the public's enforcement needs.<sup>32</sup> Illustratively, the charging decision standards promulgated by the National District Attorneys Association provide that a prosecutor may consider the "likely cost of the prosecution in relation to the seriousness of the offense."<sup>33</sup>

*United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974), or because it is "vindictive" in retaliating against the defendant's exercise of a constitutional right, see, e.g., *Blackledge v. Perry*, 417 U.S. 21, 27 (1973).

27. See *Heckler v. Chaney*, 470 U.S. 821 (1985); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 376-77 (2d Cir. 1973).

28. See Carl F. Pinkele, *Discretion Fits Democracy: An Advocate's Argument*, in DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 3, 11 (Carl F. Pinkele & William C. Louthan eds., 1985) ("Justice blind to the human facts of a case runs a very great risk of being blind justice. Or, as Dickens suggests in *Oliver Twist*, the law has the very great potential of being "an ass.").

29. See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2-3 (1971); Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 216 (1981) ("Given the extreme irrationality that has characterized [sentencing] grading in most American jurisdictions, and the failure to repeal . . . many crimes when community mores have shifted radically, the idea that prosecutors should not look beyond the grade fixed by legislatures cannot seriously be urged.").

30. Cf. *Santobello v. New York*, 404 U.S. 257, 260 (noting that "the States and the Federal Government would need to multiply by many times the number of judges and court facilities" if the government resolved every serious criminal charge through a full trial).

31. See, e.g., FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 159 (1969); William C. Louthan, *The Politics of Discretionary Justice Among Criminal Justice Agencies*, in DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 13, 17 (Carl F. Pinkele & William C. Louthan eds., 1st ed. 1985) ("[I]f every violation of the law were prosecuted, the cost would be beyond measure."); Vorenberg, *supra* note 25, at 1525.

32. *But see State ex rel. Ginsberg v. Naum*, 318 S.E.2d 454 (W.Va. 1984). In *Ginsberg*, the Supreme Court of West Virginia held that a prosecutor may not decline to prosecute for lack of funds. *Id.* at 456.

33. NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, Standard 9.3 (1977). The complete list of factors provided by the National District Attorneys Association follows:

1. The nature of the offense;
2. The characteristics of the offender;
3. The age of the offense;

The prosecutor's exercise of discretion in making a particular charging decision might, therefore, be defined as the authority to balance the societal benefits of pursuing a particular case against the probable costs of doing so. More generally, the prosecutor's discretion encompasses the policy-making authority to distribute finite resources according to her assessment of the public interest.<sup>34</sup>

### *B. Discretion and Private Influence*

Private financial influences on prosecutorial discretion need not be corrupting.<sup>35</sup> The dubious temptation of institutional gain created by private financing would probably not induce most prosecutors to consciously disregard their public duty.<sup>36</sup> But private financing may disserve the public interest even if it does not create a significant risk of deliberate improper behavior.

Answering the policy question raised by private financing requires a complicated balancing of conflicting interests. On one hand, the public

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4. The interests of the victim;
  5. Possible improper motives of a victim or witness;
  6. A history of non-enforcement of a statute;
  7. Likelihood of prosecution by another criminal justice authority;
  9. Aid to other prosecuting goals through non-prosecution;
  10. Possible deterrent value of prosecution;
  11. Undue hardship caused to the accused;
  12. Excessive cost of prosecution in relation to the seriousness of the offense;
  13. The probability of conviction;
  14. Recommendations of the involved law enforcement agency; and
  15. Any mitigating circumstances.

*Id.* (factor 8 omitted in original). The American Bar Association's list of permissible considerations in charging does not expressly authorize a prosecutor to consider the likely cost of pursuing charges. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-3.9(b) (1992). This list, however, sets forth only a few sample considerations, and does not purport to be exclusive. *Id.* Probably no one has attempted to establish an exhaustive list of factors that a prosecutor may properly consider in making charging decisions. For a discussion of factors and evidentiary standards applicable to the charging decision, see generally MILLER, *supra* note 31.

34. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 98 (1971) (noting that the prosecutor serves as the primary "gatekeeper" for the entire criminal justice system, and that "the effects of his work reverberate through every component of the system"); Standen, *supra* note 1, at 259-60 ("[G]iven the substantial control prosecutors now enjoy over the assignment of prison space, the remaining question . . . is whether we ought to continue to have various 'middlemen' between the prosecutor and distribution of prison space.").

35. Indeed, such influences may be corrective. See generally Meares, *supra* note 3 (proposing a system of private financial incentives to influence prosecutors not to engage in misconduct).

36. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) (White, J., dissenting).

clearly benefits to the extent that private financing reduces the burden on the public treasury. On the other hand, the policy analysis must take account of public interests that probably cannot be measured in monetary terms. Courts and commentators have recognized, for example, a public interest in ensuring that government officials exercise their duties in an impartial, or “disinterested,” manner.<sup>37</sup>

This Part evaluates the scope of the public’s interest in prosecutorial impartiality among meritorious cases at the charging stage. Specifically, this Part explores where the ethical boundaries of private financial influence on prosecutorial discretion have been, and should be, drawn. This analysis attempts to take into account the realities of the prosecutor’s political and institutional environment.

### 1. *The “Disinterested Prosecutor” Requirement*

Although several Supreme Court decisions proscribe government agents from participating in proceedings in which they have a financial interest,<sup>38</sup> no single standard of disinterest applies across-the-board to all public officials.<sup>39</sup> Judges, for example, are subject to a more stringent standard of neutrality than are prosecutors.<sup>40</sup> In *Tumey v. Ohio*,<sup>41</sup> the Supreme Court struck down on due process grounds a state law that, in effect, allowed judges to preside over trials in which they had a clear personal stake.<sup>42</sup> Later, in *Ward v.*

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37. See Kennedy, *supra* note 3, at 667 (“Private financing raises the question of whether taking voluntary contributions from victims or other private groups creates a conflict of interest—a conflict between the prosecutor’s obligation to be impartial in making these choices and the prosecutor’s institutional interest in the monies received.”); Warren L. Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 384-86 (1997) (“[A] series of Court precedents . . . amply demonstrate that financial disinterestedness is a universally-accepted, if sometimes implicit, principle of due process.”).

38. See, e.g., *Connally v. Georgia*, 429 U.S. 245 (1977); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972).

39. See Ratliff, *supra* note 37, at 386.

40. See, e.g., MODEL CODE OF JUDICIAL CONDUCT § 3E (1990) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”). ABA rules impose no similar standard of disqualification upon prosecutors.

41. 273 U.S. 510 (1927).

42. See *id.* at 523. The statutory scheme at issue in *Tumey* created a “mayor’s court” in which the mayor of the municipality presided over prohibition trials. The mayor had the power to assess fines and keep a portion of sums collected. See *id.* at 520. Moreover, the mayor received no compensation for his services as judge except out of the fines collected from defendants. *Id.* In striking down this statutory scheme, the Court expressly recognized the distinction between the standard of disinterestedness applicable to judges and that applicable to prosecutors. *Id.* at 535. The Court stressed that legislatures “may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people.” *Id.*

*Village of Monroeville*,<sup>43</sup> the Court extended *Tumey*, striking down a statutory scheme that gave judges a more indirect, institutional stake in proceedings over which they presided.<sup>44</sup> Furthermore, in *Aetna Life Insurance Co. v. Lavoie*,<sup>45</sup> the Court explained that due process “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.”<sup>46</sup>

In *Marshall v. Jerrico*,<sup>47</sup> however, the Court unanimously upheld a statutory private financing scheme that gave a prosecuting entity an institutional incentive to enforce the law zealously. The Court noted that “[p]rosecutors need not be ‘entirely neutral and detached’” and that “[t]he rigid requirements of *Tumey* and *Ward*” do not apply to prosecutors.<sup>48</sup> The statute in *Jerrico* allowed an administrative agency, which the Court deemed analogous to a prosecutor, to keep a portion of the penalty sums collected from child labor law violators.<sup>49</sup> One might argue that “bounty” statutes such as the one upheld in *Jerrico* do not raise the equality issues that victim-funded criminal prosecutions implicate. Nonetheless, the *Jerrico* decision recognized that the Constitution does not bar prosecutors from participating in every case in which their institutions have a clear financial interest.<sup>50</sup>

The Court adopted a “disinterested prosecutor” requirement in *Young v. United States ex rel. Vuitton et Fils, S.A.*<sup>51</sup> In exercising its supervisory

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43. 409 U.S. 57 (1972).

44. The Court in *Ward* invalidated another mayoral court scheme, but in *Ward*, unlike in *Tumey*, the mayor-judge had no direct financial interest in the outcome of the cases over which he presided. *See id.* at 62 (White, J., dissenting). Rather, the Court invalidated the scheme because the mayor’s fiscal responsibilities as the primary executive officer for the municipality might tempt him to impose higher fines in order to enhance the city’s treasury. *See id.* at 60. The Court cited *Tumey* and asserted that “[t]his, too, is a ‘situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial.’” *Id.* (quoting *Tumey*, 273 U.S. 510, 534).

45. 475 U.S. 813.

46. *Id.* at 825 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

47. 446 U.S. 238 (1980).

48. *Id.* at 248 (quoting *Ward v. Village of Monroeville*, 49 U.S. 57, 62 (1972)).

49. *Id.* at 239.

50. Moreover, the statute upheld in *Jerrico* raises the same allocative equality concerns that a victim-funded prosecution system would implicate. The prospect of financial rewards accruing to a prosecuting entity could encourage the entity’s personnel to engage in “rent-seeking” by prosecuting an ever-increasing number of arguable or de minimis violations, thereby continuously expanding the entity’s activity. *Cf.* Standen, *supra* note 1, at 262-69. One prosecuting agency’s aggressive expansion would likely divert public resources from enforcement efforts in substantive areas that fall outside of the agency’s jurisdiction. Even if collected “bounties” funded all prosecution costs, cases appealed from the expanding agency would consume an increasing proportion of court time, diverting judicial resources from other uses.

51. 481 U.S. 787, 807 (1987). The Court has long recognized, however, that the prosecutor’s duty to act in the public interest includes a duty to apply the law evenhandedly. As the Court stated in *Berger v. United States*, 295 U.S. 78 (1935), “[t]he [prosecutor] is the representative not of an ordinary

power to disapprove private prosecutions of criminal contempt,<sup>52</sup> the Court stated that “a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision.”<sup>53</sup> Although *Young* is susceptible to broader interpretations,<sup>54</sup> the “disinterested prosecutor” requirement may merely bar private prosecutions.<sup>55</sup> First, the Court in *Young* cited *Jerrico* with approval and emphasized that the rigid standards of disinterest designed for judges do not apply to prosecutors.<sup>56</sup> Secondly, several lower courts have indicated that *Young* applies only to private “interested” prosecutions.<sup>57</sup> Finally, the *Young* Court repeatedly emphasized that the private prosecution created an “actual” conflict of interest between the private prosecutor’s ethical obligations to his private client and the public interest.<sup>58</sup> The private prosecutor’s duty to zealously represent the interests of the private client was clearly important to the Court.<sup>59</sup> While the dictum in *Young* is broad, that case involved a much clearer conflict of interest than that which most private financing schemes would create.

In summary, the Court has repeatedly emphasized that the more stringent proscriptions against judicial bias do not apply to prosecutors. Moreover, the Court upheld a statutory scheme providing for private financing of criminal prosecutions in *Jerrico* and has never required that prosecutors be free from

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party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Id.* at 88.

52. See *Young*, 481 U.S. at 806. For discussions of the doubts that the *Young* opinion casts on the permissibility of private prosecutions generally, see Bessler, *supra* note 3; Meier, *supra* note 3, at 100-07.

53. *Young*, 481 U.S. at 808 (quoting *Jerrico*, 446 U.S. 238, 249-50).

54. See *People v. Eubanks*, 927 P.2d 310, 320 (“[A] prosecutor ‘is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant.’”) (emphasis in the original) (quoting *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984)).

55. See Meier, *supra* note 3, at 96 (“[A]lthough the Court [in *Young*] framed the issue as one of ‘interested’ versus ‘disinterested’ prosecutors, the distinction is more properly between ‘private’ versus ‘public’ prosecutors. This is apparent . . . from the language of the decision itself, from its reliance on *Marshall v. Jerrico, Inc.*, and from subsequent decisions construing *Young*.”).

56. See Meier, *supra* note 3, at 96 (“The [*Young*] Court’s reliance on *Jerrico* demonstrates that the Court actually eschewed prosecution by *private parties* rather than by ‘interested’ ones.”) (emphasis in original).

57. See *id.* at 97 (citing *FTC v. American Nat’l Cellular*, 868 F.2d 315 (9th Cir. 1989); *Rollins v. State*, 748 P.2d 767, 770 (Alaska Ct. App. 1988); *State v. Britt*, 377 S.E.2d 79, 82 (N.C. Ct. App. 1989)).

58. *Young*, 481 U.S. at 807. The Court emphasized that “[i]n a case where a prosecutor represents an interested party . . . the ethics of the legal profession *require* that an interest other than the Government’s be taken into account.” *Id.* (emphasis in original). See also Meier, *supra* note 3, at 97.

59. See *Young*, 481 U.S. at 804 (“The concern that representation of other clients may compromise the prosecutor’s pursuit of the Government’s interest rests on recognition that a prosecutor would owe an ethical duty to those other clients.”).

the institutional biases that a private financing system might create.

## 2. *The Presumption of Regularity in Prosecutorial Policy-Making*

The prosecutor's responsibility to serve the interests of "the public" in effect requires that the prosecutor consider private interests, because "the public" consists of private individuals and factions with competing desires and preferences.<sup>60</sup> Furthermore, the prosecutor's institutional needs create considerable pressure to serve the private interests of two constituencies in particular—crime victims and police.<sup>61</sup> A "disinterested prosecutor" requirement that prohibited even severe institutional conflicts of interest would seem wholly impractical unless the requirement permits consideration of countervailing justifications for the conflicts.

The Supreme Court's decision in *Town of Newton v. Rumery*<sup>62</sup> reveals considerable deference to prosecutorial decisions made in the face of such conflicts. A majority of the Court in *Rumery* rejected a § 1983 plaintiff's public policy challenge to a "release-dismissal" agreement in which the plaintiff released his civil claims against, among others, the victim and the police, in exchange for the prosecutor's dismissal of criminal charges pending against him.<sup>63</sup> Justice Powell, joined by three other justices, suggested that the prosecutor's dismissal decision was consistent with public policy<sup>64</sup> because the prosecutor *could have concluded* that protecting public

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60. Cf. *FTC v. American Nat'l Cellular*, 868 F.2d 315, 319 (1989).

61. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10.1 (1986). Professor Wolfram indicates that, although police, victims, judges, and other government officials cannot properly be regarded as the prosecutor's "clients," each of these constituencies exercises some influence on the prosecutor's decisions. See *id.* In elaborating on prosecutorial conflicts of interest, Professor Wolfram observes that conflicts can arise from the prosecutor-police relationship because the "relationship is typified by unity of purpose, a sense of a real and dangerous common enemy, and an emotional commitment to the full exploitation of legal resources to bring criminals to bay." See *id.* at § 8.9.2. See also MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 224 (1990) ("The prosecutor's job can be extremely onerous if he does not have the willing cooperation of the police. . . . As a consequence, the prosecutor can be under considerable pressure to ignore or to cover up police misconduct.").

62. 480 U.S. 386 (1987).

63. After being charged with witness tampering, Rumery, a businessman, engaged an experienced criminal defense attorney. See *id.* at 390. The defense attorney warned the prosecutor that the state "had better [dismiss] these charges, because we're going to win them and after that we're going to sue." *Id.* Rumery and the prosecutor subsequently entered into an agreement in which Rumery released any claims he might have against the town, its officials, and the victim in exchange for dismissal of the criminal charges. See *id.* at 390-91. Rumery subsequently filed a § 1983 action, alleging that "the town and its officers had violated his civil rights by arresting him, defaming him, and imprisoning him falsely." *Id.* at 391. A majority of the Court upheld the agreement because the evidence showed that Rumery had entered into it voluntarily, and because the prosecutor had been motivated in part by the desire to spare the victim from testifying. See *id.* at 397-98.

64. The Court in *Rumery* examined the policy justifications for the prosecutor's decision not to

officials from the expense of defending against frivolous civil rights claims served the public interest.<sup>65</sup> Specifically, the plurality approved the prosecutor's decision because defending against "meritless" suits "require[s] the time and attention of the defendant officials, to the detriment of their public duties."<sup>66</sup> Justice Powell cited no evidence that the plaintiff's suit actually lacked merit, or even that the prosecutor *thought* that it lacked merit. The Powell plurality thus applied a strong presumption that the prosecutor's decision was guided solely by considerations of justice and the public interest even though the prosecutor had a clear institutional conflict of interest.<sup>67</sup>

On the other hand, this approach has not been adopted by a majority of the Court. Another four-justice plurality in *Rumery* declared that "[t]he public is entitled to have the prosecutor's decision to go forward with a criminal case . . . made independently of his concerns about the potential

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pursue a case only because this decision was embodied in the contract—the release-dismissal agreement—that the plaintiff challenged on policy grounds. Courts ordinarily refuse to review prosecutors' non-enforcement decisions. See *supra* notes 26-27 and accompanying text. The overwhelming majority of instances in which prosecutors dismiss or fail to bring charges are therefore never subject to judicial or public scrutiny. See Vorenburg, *supra* note 25, at 1559.

65. The parties stipulated that one factor in the prosecutor's decision to enter the release dismissal-agreement centered around protecting the victim and key witness from the "trauma she would suffer if she were forced to testify." *Rumery*, 480 U.S. at 390. A majority of the Court deemed this factor an "independent, legitimate reason" to uphold the agreement, *id.* at 398, and left open the question of whether a release-dismissal agreement could be valid absent such an independent justification. See *id.* at 398 n.10 ("We have no occasion in this case to determine whether an inquiry into voluntariness alone is sufficient to determine the enforceability of release-dismissal agreements.").

66. *Id.* at 395-96 (Opinion of Powell, J.). Justice O'Connor, who cast the swing vote, seemed to reject this expansive conception of the public interest. In her view, "[t]he central problem with the release-dismissal agreement is that public criminal justice interests are explicitly traded against the private financial interest of the [public officials] involved in the arrest and prosecution." *Id.* at 401 (O'Connor, J., concurring). Similarly, Justice Stevens argued in his dissenting opinion that a release-dismissal agreement creates "an obvious potential conflict between the prosecutor's duty to enforce the law and his objective of protecting members of the Police Department who are accused of unlawful conduct." See *id.* at 412 (Stevens, J., dissenting).

67. Justice Powell noted that a "mere opportunity to act improperly" does not permit courts to assume that a prosecutor will engage in misconduct. See *id.* at 397 (Opinion of Powell, J.). See also Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 832 (1999) ("Simply because prosecutors can abuse their authority does not mean that they must be abusing it.").

In effect, Justice Powell seemed to adopt a "rational relation" test in reviewing the prosecutor's judgment as to whether the private interests at stake coincided with the public interest. Justice O'Connor indicated in her concurring opinion that she would review this prosecutorial policy judgment more strictly, expressing the view that the party seeking to rely on a release-dismissal agreement to bar a civil claim has the burden to prove that the agreement was voluntary and in the public interest. See *Rumery*, 480 U.S. at 401 (O'Connor, J., concurring) ("The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, . . . and in the public interest. But they must *prove* that this is so; the courts should not presume it.") (emphasis in original).

damages liability of the police department.”<sup>68</sup> In addition, as suggested above, one might interpret the Court’s opinion in *Young* to suggest that any tendency on the part of a prosecutor to favor a private interest inherently jeopardizes the public interest.<sup>69</sup>

As already noted, however, *Young* may have little bearing on whether public prosecutors should take private interests into account when making discretionary decisions. *Young* did not involve review of a public prosecutor’s exercise of discretion. Rather, the Court in *Young* considered the permissibility of a private prosecution. Private prosecutors cannot exercise the full range of prosecutorial discretion because, like other privately retained attorneys, they have a duty to zealously represent the interests of their private clients.<sup>70</sup> A private prosecutor cannot conduct the prosecution in the manner she deems most consistent with the public interest if doing so would jeopardize the legitimate objectives of the private party she represents.<sup>71</sup> *Young* seems to require nothing more than that the prosecutor reserve the discretion necessary to act in the manner that *she believes* will best advance the public interest.<sup>72</sup> *Young* does not require that a prosecutor form that belief in an environment hermetically sealed against private influences.

In light of the limited judicial review of prosecutorial decisions, it is clear that the prosecutor has significant unchecked *power* to consider a variety of private influences when exercising her discretion.<sup>73</sup> The important issue would seem to be whether society does, or should, recognize that the *authority* to consider private interests inheres in the prosecutor’s policy-making role.<sup>74</sup> Recognition of such authority would realistically acknowledge that the prosecutor must balance the competing interests of many private

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68. See *id.* at 412 (Stevens, J., dissenting).

69. See *supra* notes 52-55 and accompanying text.

70. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”).

71. See *Young*, 481 U.S. at 814 (noting that the private prosecutor’s duties required him to “serve two masters”); cf. WOLFRAM, *supra* note 61, § 13.10 n.35 (deeming private prosecutors a “barbaric exception” to the generalization that the prosecutor is an officer with several important constituencies but no client). For example, a private prosecutor may not dismiss a case that he considers contrary to the public interest if the prosecution serves the legitimate interests of his private client.

72. The Court observed that:

Ordinarily we can only speculate whether . . . interests [extraneous to the public interest] are likely to influence an enforcement officer. . . . In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government’s be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.

*Young*, 481 U.S. at 807 (emphasis in original).

73. See *supra* notes 25-27 and accompanying text.

74. See WOLFRAM, *supra* note 61, § 8.9.2 (noting that a prosecutor’s role includes the policy-making duty of deciding how to expend public resources).



constituencies in exercising her discretion. Regardless of whether society recognizes this authority, however, a prosecutorial environment devoid of clamorous private influences is not a viable option.<sup>75</sup> In making this point, this Note certainly does not suggest that prosecutorial discretion is already so adulterated with private influences that society might as well allow it to become even more adulterated. This Note suggests only that society tolerates some private influences on prosecutors because important societal needs justify doing so. As Part V of this Note argues, important societal needs also justify toleration of private financing schemes.

#### IV. JUDICIAL RESPONSES TO VICTIM-FUNDED PROSECUTIONS

Two states' highest courts have directly considered whether prosecutors may accept institutional contributions from crime victims. Both courts evaluated the financing scheme through a prosecutorial disinterest framework. Though the two courts reached different results, both courts paid particular attention to how the financing schemes at issue would appear to the public.<sup>76</sup> The focus on public perception led one court to prohibit prosecutors from receiving case-specific contributions from victims, and the other court to uphold a legislatively enacted industry assessment model.

##### A. Case-Specific/Victim Private Financing—*People v. Eubanks*

*People v. Eubanks*,<sup>77</sup> on which Hypothetical B<sup>78</sup> is based, provides a notorious example of the potential evils of case-specific/victim private financing.<sup>79</sup> In *Eubanks*, the alleged victim, a technology company, funded

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75. See Meares, *supra* note 3, at 852 (noting that the entire criminal justice system is governed by perverse incentives).

76. For a discussion of ethical standards linked to "appearances," see Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 840-42 (1992).

77. 927 P.2d 310 (Cal. 1996). For a detailed discussion of *Eubanks*, see Kelly C. Quinn, *Criminal Law, California Supreme Court Survey, April 1996-July 1997*, 25 PEPP. L. REV. 183, 256 (1997).

78. See *supra* note 12 and accompanying text.

79. See, e.g., Kennedy, *supra* note 3, at 707; Arlene Levinson, *Businesses Asked to Pay for White-Collar Crime-Fighting*, THE ASSOCIATED PRESS, Apr. 1, 1994, available in 1994 WL 10122355. *Eubanks*' notoriety seems due in part to the probable ulterior motives of the victim, a competitor of the defendant's company. The victim-company may have decided to fund the prosecution in an attempt to harass its competitor out of business. See Robert A. Spanner, *On the Take*, THE RECORDER (American Lawyer Media, L.P.) July 29, 1998, at 5 ("Every high-tech corporation . . . knows that the prosecution of an irksome competitor for technology misappropriation will usually eliminate that company as a competitive factor."). Moreover, the victim-company might have thought that the criminal prosecution, whether or not it ultimately resulted in a conviction, would help the company prevail in a related civil action. See *Eubanks*, 927 P.2d at 324 (George, C.J., concurring). The

part of the trade secret theft prosecution of its competitor's principal.<sup>80</sup> Interpreting a state statute restricting the grounds upon which a court may disqualify a prosecutor for a conflict of interest,<sup>81</sup> the California Supreme Court upheld the trial court's decision to disqualify the entire prosecuting office.<sup>82</sup> The court reviewed the trial court's decision only for abuse of discretion,<sup>83</sup> and did not state whether the trial court would have abused its discretion if it had not disqualified the prosecutor.<sup>84</sup>

In sweeping language that belied the narrowness of its holding, however, the court asserted that "[a] system in which affluent victims . . . were assured of prompt attention from the district attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public. Even the appearance of such impropriety would be highly destructive of the public trust."<sup>85</sup> The court went on to categorically reject the prosecutor's arguments that no conflict existed because the

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alleged victim in *Eubanks* had filed such a parallel lawsuit. *See id.* *Eubanks* therefore illustrates more than a wealthy victim's simple desire for vengeance; it suggests that a prosecutor's office can be commandeered for private ends wholly unrelated to the public administration of justice. As the concurring justice in *Eubanks* pointed out, "the district attorney could 'reimburse' [the complaining company] for paying the [prosecution costs] simply by exercising discretion to continue or extend the criminal investigation for longer than it otherwise would." *See id.*

80. *See Eubanks*, 927 P.2d at 313.

81. CAL. PENAL CODE § 1424(a)(1) (West Supp. 1997). The statute provides: "The motion [to disqualify a district attorney] may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." *Id.* The court interpreted this limitation to mean that a finding of a conflict of interest could not be based solely on the possibility that the prosecutor's further involvement would "appear unseemly." *See Eubanks*, 927 P.2d at 317. The court held, however, that the statute's proscription on prosecutorial conflicts of interest "contemplates both 'actual' and 'apparent' conflict when the presence of either renders it unlikely that a defendant would receive a fair trial." *Id.* (quoting *People v. Conner*, 666 P.2d 5, 8 (Cal. 1983)). For a discussion of ethical standards relating to prosecutorial conflicts of interest, see Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1, 16-23 (1993). *Cf.* Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 734-39 (1998) (proposing that the Model Rules of Professional Conduct should incorporate an "appearances of impropriety" standard to govern all aspects of the prosecutor's official conduct).

82. *See Eubanks*, 927 P.2d at 323.

83. *See id.*

84. In his concurring opinion, Chief Justice George argued that the facts underlying *Eubanks* required recusal as a matter of law. *See id.* at 323 (George, C.J., concurring).

85. *See id.* at 318. In a footnote to this text, the court acknowledged that it did not believe that such a system existed in the district attorney's office, nor elsewhere in the state. *See id.* at 318 n.5. In fact, the court noted that "large corporations often have difficulty interesting local prosecutors, whose resources are already strained by the fight against violent crime, in the investigation and prosecution of business fraud and other complicated crimes against corporate victims." *See id.* (quoting *I.B.M. Corp. v. Brown*, 857 F. Supp. 1384, 1388-89 (C.D. Cal. 1994)). The court, then, based its decision in part on the need to eliminate even the appearance that the prosecutor favored wealthy corporate interests. Ethical standards that base liability on the appearance of impropriety have been sharply criticized. *See, e.g.,* WOLFRAM, *supra* note 61, § 7.1.4.

prosecutor had only an institutional interest in the contributions,<sup>86</sup> and that accepting private contributions amounts to a proper prosecutorial response to revenue shortages.<sup>87</sup> The *Eubanks* court's rationale extends much farther than the case's troubling facts,<sup>88</sup> as at least one trial court in another state has applied *Eubanks* in disapproving case-specific contributions by non-victims.<sup>89</sup> *Eubanks* thus seems to cast at least some doubt on courts' future willingness to tolerate any form of private financing.<sup>90</sup> The *Eubanks* court did, however, expressly reserve the question of whether industry-funded private financing schemes create an intolerable conflict of interest.<sup>91</sup>

### B. Industry Assessment Financing—Commonwealth v. Ellis

In *Commonwealth v. Ellis*,<sup>92</sup> the Supreme Judicial Court of Massachusetts rejected the defendants' state and federal constitutional challenges to industry-assessment legislation similar to that depicted in Hypothetical D.<sup>93</sup> The statute levied assessments against two voluntary associations of insurance carriers and directed the attorney general to use the proceeds to investigate and prosecute insurance fraud.<sup>94</sup> Specifically, the statute required the attorney general to designate a specified number of full-time assistants to investigate and prosecute insurance and workers' compensation fraud.<sup>95</sup> The statute further authorized the two insurance associations to create and finance an insurance fraud bureau that would investigate and refer suspected instances of insurance fraud to law enforcement authorities.<sup>96</sup> Moreover, the insurance fraud bureau and the attorney general's office developed a "special public/private partnership" in which the bureau worked closely with the attorney general's staff and occasionally reimbursed miscellaneous expenses that the attorney general incurred in insurance fraud prosecutions.<sup>97</sup>

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86. See *Eubanks*, 927 P.2d at 310, 318-19.

87. See *id.* at 319-20.

88. See *supra* note 79 and accompanying text.

89. A Tennessee trial judge cited *Eubanks* in dismissing obscenity charges against topless club owners, concluding that private contributions in excess of \$300,000 had "tainted" the prosecution. See Lawrence Buser, *State to File Appeal in Topless Case Dismissals*, COM. APPEAL (Memphis, Tenn.), Apr. 24, 1998, at B2, available in 1997 WL 11970536.

90. See Spanner, *supra* note 79 ("[T]o be against *Eubanks* is to be for the compromised impartiality of public servants; . . . indeed, standing against *Eubanks* can be characterized as a stand for the selling of justice.").

91. See *Eubanks*, 927 P.2d at 321.

92. 708 N.E.2d 644 (Mass. 1999).

93. See discussion of Hypothetical D, *supra* note 15 and accompanying text.

94. See *Ellis*, 708 N.E.2d at 646.

95. See *id.*

96. See *id.* at 645.

97. See *id.* at 652-53. These reimbursed expenses included witnesses' travel expenses, computer

The *Ellis* court assumed that the Constitution guaranteed an “impartial prosecutor” and concluded that the statute at issue enabled prosecutors to be impartial.<sup>98</sup> In rejecting the defendants’ argument that the statute gave insurance carriers control over the system, the court emphasized that the statute left the decision of whether to prosecute to the prosecutors.<sup>99</sup> The court found the fraud bureau’s voluntary reimbursement of prosecution expenses “more problematic,” but deemed this assistance too “minimal” to amount to a constitutional violation.<sup>100</sup> That the legislature had approved the private financing scheme seemed to go far in persuading the *Ellis* court of its constitutionality.<sup>101</sup> The court acknowledged that “statutory endorsement of an unconstitutional plan cannot make it constitutional,” but went on to suggest that the constitutional issue turned on the public appearance of the financing system, and concluded that legislative control over the scheme “substantially changes appearances.”<sup>102</sup>

The results in *Ellis* and *Eubanks* seem correct, but the courts relied on questionable reasoning. Both courts employed analytical frameworks that emphasized procedural fairness to the individual defendants.<sup>103</sup> To the extent

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equipment, and expert witness fees. *See id.* at 653 n.24.

98. *Id.* at 650. The court concluded that the Massachusetts Constitution does guarantee a right to a disinterested prosecutor “in the sense that the prosecutor must not be nor appear to be influenced . . . either by his or her personal interests or by a person or entity to whom the prosecution of a criminal case will or may bring significant benefits.” *Id.* Thus, in upholding the industry assessment legislation, the court not only held that the legislation did not “influence” prosecutors, but also that it did not even create an appearance of influence. Clearly, the court adopted a restrictive definition of “influence.” The legislation obviously appears to influence, and indeed to require, prosecutors to devote more attention to insurance fraud cases in the aggregate. Perhaps the court meant that a prosecutor’s personal interests must not make her more likely to prosecute any individual insurance fraud suspect in lieu of another.

99. *See id.* at 650-52. The court first rejected the argument that because participation in the rating associations that funded the prosecutions was voluntary, the insurance companies could exercise control over the prosecutor if they threatened to cut off funding by withdrawing from the associations. *See id.* at 651. The court reasoned that any such threat would be “an obvious paper tiger” because the legislature could amend the statute to assess the insurance carriers based on the number of premiums written or on some other objective criterion. *Id.* Secondly, the court asserted that the statute did not operate to benefit insurance companies. *See id.* at 651-52. In support of this proposition, the court reasoned that insurance companies would have to credit any amounts they collected in restitution against their reported losses at rate filing, and that “the Legislature . . . devise[d] this plan . . . to face a serious problem of false [insurance claims] that inflate insurance premiums for insurance buyers.” *Id.* at 652.

100. *Id.* at 653.

101. *See id.* at 652. The court stated that “[i]f we were confronted with a challenge to an arrangement between insurers and the Attorney General of the sort involved here that was not endorsed by statute, the appearance of the possibility of improper influence would have been far clearer.” *Id.*

102. *Id.*

103. Professor Sklansky points out that the framework focusing only on fairness to individual defendants predominates within criminal procedure generally. *See Sklansky, supra* note 3, at 1280-81

that the courts focused on the public, they asked only whether the public would perceive the financing scheme as fair—not whether the scheme would actually result in unfair allocation of resources among the public.<sup>104</sup> Because a defendant has no cognizable right to an underfunded prosecution,<sup>105</sup> a framework that focuses only on the defendant's rights would not seem to go far enough in safeguarding public control of the prosecution function.<sup>106</sup> Courts may, however, be reluctant to delve too deeply into a financing scheme's tangible effect on the public due to a belief that the legislative and executive branches should resolve such issues.<sup>107</sup>

Yet, if the political branches are better qualified to decide how to allocate public resources, the *Eubanks* and *Ellis* courts' focus on "appearances" would seem misdirected. Assuming that a financing scheme is sufficiently visible to enable the public to form a negative view of the scheme, the political process would seem to provide an adequate avenue through which to express that view.<sup>108</sup> If the judiciary's role is to safeguard the integrity of the political process, courts should ask only whether the private financing scheme is visible to the public eye, and not whether the public will like what it sees. Legislative endorsement improves a private financing scheme because it preserves visibility and public control, not because it makes people feel better about the government.<sup>109</sup> Instead of addressing private financing

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("[C]riminal procedure has been overwhelmingly focused on issues of fairness writ small: the procedural obligations owed by the state to an individual suspected of crime . . . not with questions of distributional justice.").

104. Moreover, courts' concerns about the public perception of the criminal justice system's fairness often surface in their attempts to rationalize heightened procedural protections for defendants. *See, e.g.,* *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (noting that the criminal justice system's procedural safeguards help preserve the system's apparent fairness).

105. *See* *Wright v. United States*, 732 F.2d 1048, 1057 (2d Cir. 1984).

106. For example, appellate review of a privately financed conviction focusing only on a defendant's rights would seem to provide insufficient protection if the court applied harmless error analysis. *Cf. Young*, 481 U.S. 787, 811-12 (1987) (plurality opinion) (arguing that harmless error analysis should not apply to violations of the right to a disinterested prosecutor because "[a] concern for actual prejudice . . . misses the point, for what is at stake is the public perception of the integrity of our criminal justice system").

107. *See* Sklansky, *supra* note 3, at 1281-83.

108. *See* Carl F. Pinkete, *Discretion Fits Democracy: An Advocate's Argument*, in *DISCRETION, JUSTICE, AND DEMOCRACY* 3, 11 (Carl F. Pinkete & William C. Louthan eds., 1985) ("Is politics enough of a check? It is not only enough, but in a democratic mold it is the legitimate one."). Pinkete sets forth several factors that indicate whether the democratic process serves as an effective check on a discretionary actor's decisions. *See id.* at 3. These include the actor's accessibility, responsiveness, and acceptance of public responsibility for fiduciary decisions. *See id.*

109. Several commentators have, however, noted the legitimating force of democracy. *See, e.g.,* James D. Wright, *Political Disaffection*, in *THE HANDBOOK OF POLITICAL BEHAVIOR* 12-13 (Samuel L. Long ed., 1981) (noting that democracy "help[s] members to accept or tolerate outputs to which they are opposed").

through the framework of an appearance-oriented individual right, courts should acknowledge that the “right” they are protecting belongs to the public.<sup>110</sup> A court should exercise its inherent authority to disqualify a prosecutor who accepts contributions randomly or secretly, or in some other manner that the public could not control through the political process.<sup>111</sup> Otherwise, in the absence of cognizable harm to the defendant, courts should defer to the policy choices of politically accountable officials.

#### V. TAILORING PRIVATE FINANCING TO PROMOTE ALLOCATIVE FAIRNESS

Private financing would probably not significantly increase the total number of prosecutions and incarcerations, thereby contributing to the government’s tendency to enforce societal norms through harsh and repressive means. The criminal justice system has a finite capacity, so every privately financed prosecution would to some degree displace other prosecutions and alter the existing allocation of criminal justice resources.<sup>112</sup> Some such change would seem desirable; the fact that prosecutors must consider costs in making charging decisions suggests that the current allocation of resources does not optimally coincide with society’s values and needs.<sup>113</sup>

One reason for the noted under-enforcement of white-collar crimes<sup>114</sup>

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110. This Note does not suggest that private financing never unfairly harms defendants. This Note suggests only that courts should not redress harm that is solely public in the guise of protecting a private right.

111. For example, the plurality in *Young* invoked its supervisory power to reverse the conviction. *Young*, 481 U.S. at 809 n.21.

112. Even if prosecutors’ salaries and expenses were funded entirely by private interests, a total increase in prosecutions would require greater court capacity and perhaps more public defender resources. See Kennedy, *supra* note 3, at 699-700 (“Private financing of criminal prosecutions will not . . . increase the total capacity of the criminal justice system; it will merely change the mix of cases prosecuted. . . . Each privately financed criminal case would displace a publicly financed prosecution to some extent.”).

113. See *id.* at 676 n.36 (“Clearly the fact that prosecutors are forced to consider the cost of a prosecution under the current regime is the single most compelling argument for considering the use of private financing. In an ideal world, the prosecutor would be free to select crimes based solely on [non-fiscal] factors.”).

114. See *I.B.M. Corp. v. Brown*, 857 F. Supp. 1384 (C.D. Cal. 1994). The court noted:

[I]t is . . . virtually impossible for large corporate victims to secure prosecution of crimes committed against them, especially if they are unwilling or unable to make a significant contribution to the criminal investigation at their own expense. The result has been that crimes against large corporations may be committed with criminal impunity.

*Id.* at 1388. See generally Michael L. Benson et al., *Community Context and the Prosecution of Corporate Crime*, in *WHITE COLLAR CRIME RECONSIDERED* 269 (Kip Schlegel & David Weisburd eds., 1992). Moreover, white collar crimes such as insurance fraud exact heavy costs on society. See Ruth Gastel, *Insurance Fraud*, 3 INS. ISSUES UPDATE (Insurance Information Institute), Aug. 1998.

Translated into dollars, the fraudulent portion of [auto insurance claims] amounted to 17 to 20

may be that prosecutors must invest more resources to prevail in white-collar cases than in other cases.<sup>115</sup> A myriad of other political and institutional factors might also lead to the under-enforcement of such crimes.<sup>116</sup> For example, a prosecutor might decline to bring meritorious white-collar crime cases because she believes that she can more easily “win” cases against indigent defendants in street crime cases.<sup>117</sup> A private financing scheme would seem to advance egalitarian values if it tended to correct under-

cents of every payment dollar. This adds up to \$6.3 billion every year to the nation's auto insurance policy-holders bills . . . The nation's bill for health care fraud is enormous—as large as \$95 billion.

*Id.* See also *I.B.M. Corp.*, 857 F. Supp. 1384, 1388 (“[The] virtual lack of criminal exposure for white collar crime against large corporations may be partly responsible for a dramatic increase in business crimes over recent years. The effects . . . may be such ills as higher prices and loss of jobs.”). Not only does insurance fraud raise policyholders’ premiums, see *id.*, but insurance fraud and other white-collar crimes may impose costs directly on taxpayers. See, e.g., Rebekah Young, *Cheap Tricks: Employers Without Workers Comp Insurance*, WASH. MONTHLY, Sept. 1998, at 34, available in 1998 WL 14398565. Furthermore, overt non-enforcement of white-collar crimes may greatly undermine public morale. See Gastel, *supra*. Some individuals rationalize their own acts of fraud on the grounds that “everyone is doing it,” while those who do not engage in fraud may come to feel that they are being taxed for their honesty. See *id.* (“Two thirds of the poll’s respondents thought that fraud was justified because insurance premiums increase. . . . Sixty percent . . . think that people who commit fraud are looking for a fair return on the premiums they have paid. . . . In addition, 27 percent think that nobody tells the truth on insurance fraud applications.”).

Many political and institutional factors other than financial cost probably contribute to under-enforcement of white-collar crimes.

115. See Meares, *supra* note 3, at 877-79.

116. An example of such a factor is the prosecutor’s institutional need to maximize conviction rates. See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 119 (1975); Sidney I. Lezak & Maureen Leonard, *The Prosecutor’s Discretion: Out of the Closet, Not Out of Control*, in DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 44, 46 (Carl F. Pickele & William C. Louthan eds., 1st ed. 1985); MILLER, *supra* note 31, at 22. See also Marc D. Goodman, *Why the Police Don’t Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 478-82 (1997) (explaining that the excitement-oriented, “machismo” culture of law enforcement leads officials to ignore technology crimes); Meares, *supra* note 3, at 853-54 (explaining that lack of institutional and ethical constraints on prosecutors leads prosecutors to engage in misconduct and to overcharge in order to undermine defendants’ bargaining power in plea negotiations); Arlene Levinson, *Businesses Asked to Pay for White-Collar Crime-Fighting*, ASSOCIATED PRESS, Apr. 1, 1994, available in 1994 WL 10122355. One prosecutor spoke of being laughed at when he asked city hall for money to fight crimes such as consumer fraud and municipal corruption. See *id.*

117. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 12 (1971) (“The fact that [white-collar] violators . . . often [have] status in the community creates special enforcement difficulties and poses controversial questions regarding the use of traditional penal sanctions.”); Meares, *supra* note 3, at 877-79 (explaining that indigent defendants may be in an inferior bargaining position relative to non-indigent defendants). Cf. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 651 n.141 (1998) (“[I]magine that a prosecutor accepts lower pleas or even drops certain charges against defendants who hire private attorneys. Targeting the poor in this way could increase the prosecutorial win rate. Public defenders generally have less experience and less time to spend on a given case.”).

enforcement<sup>118</sup> without overcompensating or surrendering public control.<sup>119</sup> Accordingly, the following discussion proposes how private financing models might be structured to conform to these criteria.

### A. Case-Specific Models

As this Note has previously suggested, the electoral process inadequately safeguards the public interest in the case-specific financing context.<sup>120</sup> Further, as *Eubanks* demonstrates, permitting case-specific contributions from victims would create a significant risk that the prosecution function could be directed toward ends that have nothing whatsoever to do with the public interest, such as harassment of a competitor.<sup>121</sup> State legislatures should statutorily prohibit case-specific contributions. A legislature that does not enact such a prohibition should enact a requirement that a prosecutor to whom a private party offers a contribution should either reject the contribution or immediately disclose it to the court.

### B. The Blind Trust Model

For a blind trust model to preserve public control, prosecutors must adhere to strict disclosure requirements. The prosecutor creating the trust should announce the existence of the trust to the media and publish a pamphlet describing in detail how the policy will operate.<sup>122</sup> Only a prosecutor who is directly accountable to an electorate, such as a district attorney or a state attorney general, should create such a trust. A government official independent from the prosecutor's office should administer the trust. Moreover, because the key advantage to the "blindness" of the trust, preventing favoritism to donors *vis-a-vis* non-donors,<sup>123</sup> obviously disappears upon public disclosure of donors' names, a prosecutor should not create a blind trust system if the state's public records statute would require disclosure of donors' names.<sup>124</sup>

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118. Cf. Meares, *supra* note 3, at 857 (noting that a system of financial rewards designed to encourage prosecutors to act properly could provide prosecutors with a "correcting bias" in favor of advancing justice).

119. See Standen, *supra* note 1, at 269-70.

120. See *supra* note 111 and accompanying text.

121. See *supra* note 79.

122. To some degree, the nature of the blind trust model helps to ensure public disclosure, because a prosecutor must announce the existence of the trust to potential contributors.

123. Clearly, if a prosecutor does not know who contributed to the fund she cannot favor the contributors. See Barbara Murphy, *Countywide Fraud Unit Reaches Fund-Raising Goal*, L.A. TIMES, Apr. 8, 1993, at 2, available in 1993 WL 2330250.

124. Cf. McDonald, *Workers' Comp Fraud*, *supra* note 13. McDonald sets forth a list naming the



A prosecutor structuring a blind trust to advance allocative equality values should build in safeguards to account for the fact that donors could stop contributing. A prosecutor's salary or working conditions should not depend upon money generated by such a fund.<sup>125</sup> Ideally, private contributions should finance no fixed costs, but only the variable costs that arguably contribute to under-enforcement of certain crimes, such as expert witness fees and initial expert investigations.<sup>126</sup> Such structural constraints would advance allocative equality by helping to put cases involving insurance fraud, technology offenses, and other under-enforced crimes on equal financial footing with other cases<sup>127</sup> while ensuring that prosecutors do not allocate an excessive proportion of public resources to industry out of fear of losing their jobs.<sup>128</sup> Moreover, such constraints would minimize the possibility that prosecutors will allocate an unduly large proportion of criminal justice resources to industry in seeking "rents" from industry such as raises, professional advancement, or better working conditions.<sup>129</sup>

### C. *The Industry Assessment Model*

Legislative enactment potentially enhances visibility and facilitates public control over private financing schemes, but does not alone resolve the equality issues that private financing implicates. If revenue generated through

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largest donors to the Ventura County workman's compensation fraud fund, a list that the L.A. times acquired by filing a request pursuant to the California Public Records Act. *See id.*

125. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 245 (1987) (upholding a scheme authorizing a prosecuting agency to keep monetary penalties in part because no official's salary was affected by the amount of penalties collected); Carol Bidwell, *Businesses Donate \$150,000 To Battle Work-Injury Fraud*, L.A. DAILY NEWS, Apr. 8, 1993, at SV4, available in 1993 WL 3516763.

126. Sometimes the initial investigation costs associated with determining whether a white-collar crime has been committed are so prohibitively high that a prosecutor never becomes able to evaluate the evidentiary strength of a case or the overall public interest value of prosecution. As the court in *IBM Corp. v. Brown* noted, "[b]usiness frauds often involve very complex schemes. As a result, very large expenditures of funds and resources are often necessary before a bona-fide suspicion of fraud can be affirmed." 857 F. Supp. 1384, 1389 (C.D. Cal. 1994). Some prosecuting offices have addressed this problem by asking corporate victims to conduct the investigations themselves, or to contribute their experts to determine whether a crime has been committed. *See Spanner, supra* note 79, at 5.

127. *See Dennis Jay, Playing Fair on Insurance Fraud*, BOSTON GLOBE, Mar. 3, 1998, at D4, available in 1998 WL 9120677.

128. As Joseph Kennedy notes:

An institution that depends on voluntary contributions to pay the salary of any of its personnel is dependent upon those contributions in an important way, given that most bureaucracies struggle to avoid having to eliminate positions . . . [and] a prosecutor whose salary is paid out of business contributions to a fund for a certain category of white collar crimes might fear that her salary would not be forthcoming for the next fiscal year if her prosecutorial decisions did not satisfy her contributors.

Kennedy, *supra* note 3, at 695.

129. For a discussion of prosecutorial rent-seeking, see Standen, *supra* note 1, at 261-67.

this model pays prosecutors' salaries, the assessments should occur on an involuntary basis in order to eliminate the prosecutor's perception that she might lose her job if her performance does not satisfy the industry.<sup>130</sup> Additional safeguards would also seem desirable; a prosecutor might make allocative choices with an eye toward pleasing industry if she worried that the industry might lobby the legislature to repeal or amend the statute providing funding for her salary.<sup>131</sup> It would seem difficult to fully safeguard against such possibilities. Ideally, therefore, industry assessment legislation should not fund salaries.

If revenues from assessments are used to finance the fixed costs of maintaining insurance fraud units within prosecuting offices, prosecutors and legislatures should make every effort to ensure that working conditions for prosecutors within the insurance fraud units are the same as those for prosecutors in other units.<sup>132</sup> A financing scheme would greatly undermine equality if it encouraged the most experienced prosecutors to work in insurance fraud units by offering particularly attractive employment perquisites. Furthermore, to ensure visibility of all contributions and to prevent prosecutors from kowtowing to industry in order to obtain more institutional contributions, a legislature should prohibit industry from contributing more than the statute specifically allows.

#### IV. CONCLUSION

Private financing has the potential to further public values by providing a corrective offset of fiscal and other institutional influences on prosecutorial

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130. The Massachusetts legislation seems problematic in this respect, because it assesses only members of voluntary associations of insurance companies. A prosecutor whose salary depended on the continuation of industry funding might favor the insurance industry too much out of fear that the industry would withdraw funding by dissolving the associations. *But see* Commonwealth v. Ellis, 708 N.E.2d 644, 651 (Mass. 1999) (deeming any possible threat of withdrawal an "obvious paper tiger" because the legislature could amend the statute to base assessments on a different criterion). Industry assessment statutes typically assess companies based on the amount of business they transact within the state. *See, e.g.*, ARK. CODE ANN. § 23-100-104 (Michie 1999); CAL. INS. CODE § 1872.85 (West 1999); 40 PA. CONS. STAT. ANN. § 3701-303 (1999).

131. A Pennsylvania industry assessment statute, in an apparent attempt to address such problems, provides that:

No funding reduction . . . can be imposed . . . which would operate to reduce funding for any multiyear approved program for which persons have been hired for full-time positions to a funding level where such positions must be terminated, unless the organization . . . certifies either that other equivalent positions are available or that such positions . . . can be funded from other sources.

40 PA. CONS. STAT. ANN. § 3701-303(f) (1998).

132. *See Ellis*, 708 N.E.2d at 652 (emphasizing that the prosecutors in the insurance fraud unit "are treated no differently from others in the Attorney General's office").

discretion that lead to inequitable allocation of criminal justice resources. Canceling out such influences would enable prosecutors to make charging decisions on a financially-level playing field and enhance the prosecutor's freedom to pursue the cases and offenders most deserving of prosecution. The blind trust and industry assessment models provide two workable frameworks for private financing. These models, however, must be carefully structured so as to avoid overcompensating for institutional influences leading to under-enforcement and to preserve public control over the prosecution function.

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