ARTICLES

Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System

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I. Introduction

Privatization of the criminal justice system[1] has taken a dangerous new form that threatens important equality interests entrusted to the impartiality of the government prosecutor. Government prosecutors have begun accepting, and in some cases soliciting, voluntary contributions from the private sector in order to pay the costs of certain types of criminal prosecutions. Such private financing of criminal prosecutions has taken place within the last few years in California, Oregon, Pennsylvania, and South Carolina.[2] The source of the money is typically that segment of the business community most affected by the crimes to be prosecuted.

Private financing of a government prosecution in a criminal case frames a unique set of questions about what role equality should play in a prosecutor's decisions.[3] Should a prosecutor be able to consider

1. Privatization in the United States usually means "enlisting private energies to improve the performance of tasks that would remain in some sense public." JOHN D. DONAHUE, THE PRIVATIZATION DECISION 6-7 (1989). While private financing of government criminal prosecutions is relatively new, the privatization of other parts of the criminal justice system has been a subject of great interest for some time. For analysis of privatization of law enforcement, correctional institutions, and the judiciary, see PRIVATIZING THE UNITED STATES JUSTICE SYSTEM (Gary W. Bowman et al. eds., 1992). For a discussion of constitutional aspects of the privatization of corrections, see Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988). For a theoretical analysis of privatization in general, see Ronald A. Cass, *Privatization: Politics, Laws, and Theory*, 71 MARQ. L. REV. 449 (1988).

2. *See infra* notes 6-10 and accompanying text.

3. Private financing differs from the use of private prosecutors in criminal cases, a practice that has a long history in the United States and that still exists in a number of jurisdictions. Private prosecution involves a private party filing a criminal complaint against another private party and hiring private counsel to prosecute that complaint. Private financing, on the other hand, involves a private party financing all or part of a criminal action brought by the government against another private person. Private financing, un-

the willingness of a victim to finance a prosecution in choosing which cases to prosecute or to what extent a case should be prosecuted? Would such victims enjoy preferential access to justice? By expanding the resources available to a government prosecutor on a selective basis, private financing introduces a new tension into prosecutorial decisionmaking: Society's interest in punishing the guilty must compete with society's interest in equal treatment by government.

In allocating their limited time and resources, prosecutors choose which crimes to prosecute based on the type of crime, the nature of the victim, and the nature of the potential defendants. Prosecutors are expected to be guided in these choices by the "public interest,"[4] but embedded in the prosecutor's conception of the public interest are trade-offs among competing public goods and competing private interests. Is it more in the public interest to prosecute insurance fraud or environmental crime? To prosecute fraud committed against businesses or against consumers? To invest heavily in a single death penalty prosecution or to spread the same investment of time and money over all crimes of violence? Currently, such choices are entrusted to the sole discretion of the prosecutor. 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.

Private financing of criminal prosecutions also raises the question of whether *institutions*, as opposed to people, can be biased by money. Prosecutorial conflict of interest typically involves a prosecutor who has some personal interest—sometimes pecuniary—in the prosecution of a given criminal case. A paradigm example is the prosecutor who prosecutes a defendant in a criminal case and simultaneously represents the victim of the crime in a civil suit against the same defendant.[5] Private financing arguably involves no such personal interest because

like private prosecution, raises questions about the capture by private interests of the government's considerable law enforcement powers. *See infra* notes 160-63 and accompanying text. For a constitutional analysis of private prosecution that includes a complete bibliography of authorities and commentary, see John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994).

4. *See* Town of Newton v. Rumery, 480 U.S. 386, 395 n.5 (1987) ("[T]he constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest."); Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980) ("Prosecutors . . . must serve the public interest."); *see also* Bessler, *supra* note 3, at 561 n.214 and authorities cited therein.

5. *See* examples cited *infra* note 57.

the money does not flow directly into the pockets of any individual prosecutor—instead, it flows into the coffers of the prosecutor's office.

Private financing has taken a number of different forms. In California's Silicon Valley, a district attorney prosecuting a trade secret case allowed the victim corporation to pay more than $13,000 for independent expert investigators and was recused by the trial judge, who found that receipt of the funds created a conflict of interest.[6] Local businesses in California's Ventura County voluntarily contributed $150,000 to a fund used by the district attorney to prosecute workers' compensation fraud, a fund that has operated with the California Attorney General's blessing.[7] In Portland, Oregon, local businesses have funded the salary and office expenses of a "neighborhood district attorney."[8] In Philadelphia, the district attorney established a nonprofit corporation for the purpose of accepting private contributions for a variety of purposes, which include financing certain prosecutions.[9] In an unusual case not involving contributions from business interests, a number of people from all parts of the country sent donations to help finance the costs of the prosecution against Susan Smith for the murder of her two sons after the media reported that the rural South Carolina county might not be able to afford the expense of a death penalty prosecution.[10]

The trend toward private financing is driven in part by chronic fiscal pressures. Prosecutors at all levels of government face budget

6. In affirming the recusal, the California Supreme Court noted that the issue was one of first impression and held that "such financial assistance to the prosecutor's office may indeed disqualify the district attorney from acting further in a case, if the assistance is of such character and magnitude 'as to render in unlikely that defendant will receive fair treatment during all portions of the criminal proceeding.'" People v. Eubanks, 927 P.2d 310, 312 (Cal. 1996) (quoting People v. Conner, 666 P.2d 5, 9 (Cal. 1983)). The court upheld the recusal based on a California statute establishing grounds for disqualification of a prosecutor. *See id* at 316-19.

7. *See* Jeff McDonald, *Private Funds OKd for Use in Prosecutions*, L.A. TIMES, Apr. 28, 1993, at B1; *see also* Paul Elias, *D.A. Inches Ahead in War on Insurance Fraud; Workers' Comp: Privately Funded Unit that Investigates and Prosecutes Suspected Cheaters Has Registered Mixed Results and Steady Criticism from Defense Attorneys,* L.A. TIMES, Feb. 19, 1996, at B1.

8. Telephone Interview with Wayne Pearson, Deputy District Attorney, Multnomah County, Or. (Aug. 5, 1995).

9. Telephone Interview with Al Toczydlowski, Deputy District Attorney, City of Philadelphia, Pa. (Dec. 9, 1996).

10. *See* Al Dozier, *Judge: Use of Private Funds OK*, THE HERALD (Rock Hill, S.C.), Jan. 26, 1995, at 4A. The case achieved national notoriety because Smith initially claimed that an unidentified African-American male kidnapped her two sons, and she pleaded for their safe return on national television. Smith subsequently confessed to drowning the children herself. *See* Jim Clarke, *Smith Held Without Bail in Death of Her Sons*, L.A. TIMES, Nov. 6, 1994, at A-22.

cutbacks at the same time that public concern about crime is at an all-time high.[11] Taxes, the traditional means of financing government prosecutions, are seen as politically unpopular.[12] Allowing some sort of private financial contribution arguably helps to close the gap between supply and demand for the prosecution of crime.

Private financing may also be seen as a way to make government more efficient in prosecuting crime.[13] Partnering public with private dollars is an increasingly popular form of "reinventing government," through which public resources are directed toward the problems that concern society most.[14] In some cases, private financing could be seen as a "user's fee" for those victims of crime who wish to use the criminal justice system.[15]

However, private financing is driven by more than just monetary concerns. Private financing taps into powerful pressures for a greater involvement of the victim in the criminal justice system. A view exists that both society's interest in punishment and the individual interests of the victim lose out to the interests of the criminal justice system's repeat players—the judges, prosecutors, and defense counsel who deal with one another on a daily basis.[16] Some believe that only through greater participation of the victim in the charging and disposi-

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11. *See, e.g.*, THE REAL WAR ON CRIME: REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 1 (Steven A. Donziger ed., 1996) (arguing that $100 billion yearly expenditures on crime control demonstrate an obsession with crime); Andrew Blum, *Prosecutors Say Money Squeeze Pinches Justice; Crime Bill Bottleneck*, NAT'L L.J., Jan. 30, 1995, at A1

12. "'All of our public-opinion polls indicate that when you confront citizens with their preference for raising revenue—user fees, property tax, local sales tax, local income tax—user fees win hands down.'" DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 203 (1992) (quoting John Shannon, former Executive Director of the Advisory Commission on Intergovernmental Relations in Washington, D.C.).

13. "In recent years, the 'public choice' movement has held that government agencies will be more responsive and efficient if they can be compelled to react to marketlike forces." DAVID H. ROSENBLOOM, PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR 9-10 (1993).

14. *See* OSBORNE & GAEBLER, *supra* note 12, at 203-04.

15. "Both user charges and fees attempt to relieve burdens placed on the general-revenue system by extracting greater contribution from service beneficiaries . . . ." JOHN L. MIKESELL, FISCAL ADMINISTRATION: ANALYSIS AND APPLICATIONS FOR THE PUBLIC SECTOR 422 (1995).

16. *See, e.g.*, GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING (1994); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 390 (1986) ("Recognizing the crime victim's privity of interest in exacting justice for the harm committed ought to be a priority of the criminal justice system."). *But see, e.g.*, Stephen Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 828 (1995) (book review).

tion of crimes will criminals get their just deserts and victims their recompense due.[17] From this latter perspective, private financing could be seen as a means both of squeezing more punishment out of a criminal justice system in which institutional players are too often willing to compromise and of shaping the course of the prosecution in a manner beneficial to the victim.

The thesis of this Article is that private financing serves economic efficiency and the interests of victims selectively, at best, and inevitably at the expense of equality interests whose importance has not been appreciated fully. Private financing in any of its likely forms threatens equality of treatment by potentially biasing the prosecutor in favor of the contributors. Such a practice sacrifices the equality of the prosecutor's choices in order to enlist the financial support of victims who have both a direct interest in the prosecution and the money to further that interest. Ultimately, the overall benefit of that support to society does not justify the damage done to the legitimacy of government prosecutions.

Part II describes how the doctrine of prosecutorial discretion entrusts the prosecutor to make decisions implicating important equality interests and argues that conflict-of-interest rules play a key role in protecting those interests. A division of labor operates in how liberty and equality interests are protected in the criminal justice process. The threat to liberty interests posed by the overzealous prosecutor whose commitment to obtaining a prosecution has overwhelmed her commitment to the truth is regulated by judicial review of the prosecutor's actions on a case-by-case basis. The threat to equality interests posed by the partisan prosecutor who favors private interests in her decisionmaking process is regulated in an entirely different fashion. Owing to the inherently discretionary nature of prosecutorial decisionmaking, judicial review of a prosecutor's actions in any individual case cannot detect such favoritism. Instead, a set of prophylactic rules shields the government prosecutor from undue influence by any private interest. These rules define as a conflict of interest any practice that threatens to impair the prosecutor's disinterestedness.

17. *See, e.g.*, Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329 (1989); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117 (1984); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988). *But see, e.g.*, Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991).

Part III argues that private financing creates such a conflict of interest. Three cases are analyzed in which the Supreme Court has considered how revenue flows can threaten institutional impartiality, and various forms of private financing are evaluated in terms of that analysis.

Part IV evaluates the economic efficiency and victims' rights arguments in favor of private financing and discusses the equality interests threatened in terms of legitimacy, preferential access to justice, and the capture of public power by private interests.

II. The Meaning of an Impartial Prosecutor in an Adversary System

What is the proper relationship between the prosecutor and the victims of crime in our society? This question takes on special significance when there is a direct flow of money from victims to government prosecutors.

The paradox of the "impartial prosecutor" has haunted past efforts to explore the relationship between prosecutors and crime victims. Prosecutors are often described as being in some sense impartial.[18] Yet, as a participant in an adversary system, the government prosecutor is expected to be a zealous advocate.[19] Since the judge in our system of justice occupies a neutral as opposed to accusatorial role, the prosecutor alone must advocate zealously the state's interest in convicting and punishing the guilty. In such a context, "impartial prosecutor" seems to be a contradiction in terms.

The following subpart resolves this tension in the prosecutor's role[20] by arguing that equality interests and liberty interests are pro-

18. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) (stating that an impartial prosecutor generates the important feeling that justice has been done); Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."); Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985) (stating that a criminal defendant is entitled "to an impartial prosecutor, who can make an unbiased use of all options available"); People v. Eubanks, 927 P.2d 310, 315 (Cal. 1996) ("The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as a respresentative of the People as a body, rather than as individuals."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1995) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

19. *See Berger*, 295 U.S. at 88 (stating that the public prosecutor should prosecute "with earnestness and vigor").

20. *See* United States v. Young, 470 U.S. 1, 25 (1985) (Brennan, J., concurring in part and dissenting in part) (holding the prosecutor to a higher standard of behavior than defense counsel); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) ("The

tected in the criminal justice system in different ways. The remaining subparts support that argument by describing the inherently discretionary nature of prosecutorial decisionmaking and the limited judicial review of those decisions, and by analyzing the Supreme Court's leading case on prosecutorial conflicts of interest.

A. The Paradox Resolved: Different Protections for Different Interests

Confusion about the prosecutor's role has its source in a failure to distinguish between two different types of impartiality. First, government prosecutors are expected to be impartial in the sense that they are required to seek the truth and not merely to obtain convictions.[21] For example, a prosecutor who fails to disclose exculpatory material to the defense violates the defendant's right to an impartial prosecutor because it is less likely that the jury will arrive at the truth.[22] Such acts of partiality by prosecutors are often described as "overzealousness."[23]

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responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 13.10.1, at 759 (1986) ("They are the only governmental officers responsible for obtaining convictions of the guilty in litigated criminal cases; but they also bear alone the state's considerable responsibility to see that no innocent person is prosecuted, convicted, or punished."); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 698 (1992); Dirk G. Christensen, Comment, *Incentives vs. Nonpartisanship: The Prosecutorial Dilemma in an Adversary System*, 1981 DUKE L.J. 311 (1981); *see also* W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEM. ST. U. L. REV., 453, 456 (1993); Carol A. Corrigan, *On Prosecutorial Ethics,* 13 HASTINGS CONST. L.Q. 537, 537-38 (1986).

21. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) ("[H]is duty is to seek justice, not merely to convict."); STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.1 cmt. (1979) ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."); *see also* Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall."), *cited in* Bessler, *supra* note 3, at 545 n.135.

22. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (prosecutor must disclose to defense evidence that would be sufficient to undermine confidence in outcome of proceeding); Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor cannot suppress material evidence favorable to accused); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) ("[A] prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."). For a discussion of the prosecutor's due process obligations of disclosure, see Terrence Galligan, *The Prosecutor's Duty to Disclose Exculpatory Evidence After* United States v. Bagley, 1 GEO. J. LEGAL ETHICS 213 (1987).

23. One commentator has proposed a system of personal financial incentives to discourage overzealous prosecutors. Tracey L. Meares, *Rewards for Good Behavior: Influenc-*

Prosecutors are not, however, expected to be impartial as to the guilt or innocence of the defendant. While prosecutors are, in theory, zealous advocates for the truth, they develop a conception of what the truth is in particular cases and then become wedded to that conception. Embedded in the structure of the criminal justice system is a recognition that the prosecutor's partiality to that conception of truth can threaten the liberty interests of the accused. The process of judicial review, which begins once the charge is filed in court, guards against any "overzealousness" resulting from the prosecutor's belief in the guilt of the accused. Indeed, the entire procedural process of criminal cases can be seen as one continuing safeguard of the various liberty interests vulnerable to the overzealous prosecutor.[24]

The second, distinct sense in which prosecutors are expected to be impartial is that they are not supposed to discriminate for or against any particular group in deciding which cases to prosecute.[25] One aspect of this obligation is that prosecutors are not supposed to favor improperly one complaining party over another. Instead, it is expected that all victims will receive equal consideration vis-a-vis one another.[26] For example, a wealthy victim of an assault and a poor victim of the same crime should enjoy an equal claim upon the prosecutor's time and energies. A corollary expectation is that a prosecutor will not target a person for prosecution on invidious grounds.[27] This second type of impartiality has been described as "disinterestedness."[28]

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ing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851 (1995).

24. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 103-04 (1976) (prosecutor must cure false testimony by disclosure); Miller v. Pate, 386 U.S. 1, 7 (1967) (prosecutor cannot present false evidence); United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983) (prosecutor has obligation of fairness in presenting a case to grand jury); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(b) (1995) (Prosecutor must "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."); *id* at Rule 3.8(c) (Prosecutor must "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.").

25. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that discriminatorily selective enforcement bars prosecution regardless of guilt of accused).

26. *Cf.* Town of Newton v. Rumery, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring) (prosecutors cannot put private interest before the public interest); *Berger*, 295 U.S. at 88.

27. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962).

28. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804 (1987); Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984) ("It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from

The criminal justice system is not structured to protect against partiality of the prosecutor to some private interest because the prosecutor's decisions about whom to prosecute and to what extent to prosecute are not subject to meaningful judicial review.[29] For this reason, conflict-of-interest rules preclude direct ties between a criminal prosecutor and the private interests affected by her charging decisions. Thus, while it is assumed that the prosecutor will become partial to the version of reality she constructs during the charging process, conflict-of-interest rules attempt to keep the prosecutor as free from influence as possible during her construction of that version of reality and throughout the subsequent exercise of her discretion.

B. Equality and the Inherently Discretionary Nature of Prosecutorial Decisionmaking

While the liberty interest at stake in any particular prosecution resides, for the most part, in a particular defendant, the equality interest is more diffuse. For each criminal accusation filed by the government, a number of chargeable cases were not filed because of limited prosecutorial resources. The equality interest implicated in each criminal case charged is shared among all of the crime victims whose cases could potentially have been charged. Their interests in vindication inevitably compete against one another as the prosecutor allocates her limited time and resources. Favoring one victim over another as a result of personal influence violates the other victims' equality interests.[30]

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the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.").

29. *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 3 (1980) ("The American prosecutor enjoys an independence and discretionary privileges unmatched in the world."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 394 (1992) (arguing that the vast accretion of prosecutorial power has transformed the criminal justice system by skewing power in favor of the state); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Litigation*, 32 AM. CRIM. L. REV. 137, 137 (1995) (arguing that increased penalties and mandatory sentences have given federal prosecutors "greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences"); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) ("[C]ontemporary efforts to constrain the discretion of actors in the criminal justice system have not only bypassed the prosecutor, they have tended to expand her power by squeezing the system's seemingly insoluble bubble of discretion her way.") (footnotes omitted).

30. The defendant also shares in this equality interest to some degree. Defendants have a right not to be selectively prosecuted on invidious grounds. *See Oyler*, 368 U.S. at 456. Private financing raises interesting questions about the extent of this equality interest.

Any criminal case brought by the government is the product of a multidimensional selection process. In a society with sweeping laws and finite resources for enforcement, prosecutors decide which types of crimes to prosecute and which to ignore.[31] Some commentators have criticized prevailing prosecutorial policies for emphasizing property and drug crimes over so-called "white collar" crimes.[32] Yet selecting enforcement priorities is essential in a society where not all crimes are truly considered equal in terms of their impact on the public interest.

A different perspective on charging emphasizes that prosecutors decide *who* gets prosecuted and who does not. At one level, this is a function of the types of crimes that prosecutors target for enforcement. A drug enforcement policy focusing on street sales of inexpensive "crack" cocaine in economically depressed areas rather than "suite sales" of cocaine in its more expensive powder form has had the demonstrable effect of targeting poor people of color.[33] Some see these effects as incidental and others do not.[34]

However, the prosecutor's selection of who gets prosecuted may lead to unequal results on another, more fundamental level. If the police arrest two people for the same crime based on evidence of equal strength, a prosecutor has complete discretion to prosecute one and "discharge" the other.[35] This more explicit type of selectivity is a function of the many factors that prosecutors are generally expected to consider in making the charging decision. The National District

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Is equality offended if a defendant faces a more effective prosecution on account of the wealth of her victim? *See infra* notes 161-64 and accompanying text.

31. "The prosecutor commonly and normally screens potential violations and selects those which he feels most warrant investigation and prosecution. Such discretional action is induced by lack of investigative and prosecutorial resources, by legislative overgeneralization, and by low enforcement priority of some violations." NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 128 (1977) (commentary to Chapter 8) [hereinafter NATIONAL PROSECUTION STANDARDS].

32. *See, e.g.*, 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).

33. In his dissenting opinion in *United States v. Armstrong*, 116 S. Ct. 1480, 1493 (1996), Justice Stevens noted that 88% of federal offenders convicted for trafficking in crack were African-American even though the majority of crack users are white.

34. *See* Lisa Stansky, *Crack vs. Cocaine*, CAL. LAW., Feb. 1996, at 19-20.

35. *See* Wayte v. United States, 470 U.S. 598, 607 (1985); NATIONAL PROSECUTION STANDARDS, *supra* note 31, at Standard 9.3 ("The prosecutor is not obligated to file all possible charges which available evidence might support. The prosecutor may properly exercise his discretion to present only those charges which he considers to be consistent with the best interests of justice.").

Attorneys Association lists the following factors as among this relevant to the charging decision:

1. The nature of the offense;
2. The characteristics of the offender;
3. The age of the offense;
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.[36]

The relationship between these factors is fluid: "In a given case, any one or combination of these illustrative factors may be a basis for rejecting a case."[37]

A decision involving so many factors is inherently discretionary in the sense that "it cannot be reduced to a predictable formula."[38] The decision always seems to depend on the facts of the case in a way that resists abstract standards. For example, strong evidence of a nocturnal trespass by a person with a long history of burglaries may seem less charge-worthy if one envisions a seventy-five year old, terminally ill defendant. Meanwhile, equally solid evidence of a nocturnal trespass by a person with no prior criminal record and a long history of community service may seem more charge-worthy if one learns that the suspect is a campaign worker caught in the headquarters of a political rival. Context is everything in charging decisions.[39]

36. NATIONAL PROSECUTION STANDARDS, *supra* note 31, at Standard 9.3 (factor 8 omitted in original). 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 for prosecution based solely on the remaining factors.

37. David C. James, *The Prosecutor's Discretionary Screening and Charging Authority*, PROSECUTOR, Mar.—Apr. 1995, at 26 (discussing different charging models in use by prosecutors).

38. *Id.* at 22.

39. A prosecutor can also affect, both formally and informally, the investigation process that precedes the filing of a charge. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1536-37 (1981).

C. The Limited Nature of Judicial Review of Prosecutorial Decisionmaking

Prosecutorial decisions about whom to charge are virtually immune from judicial review on constitutional grounds.[40] The Supreme Court's decisions "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute."[41] While a prosecutor must have "probable cause to believe that the accused committed an offense defined by statute,"[42] the de minimis nature of the probable cause standard provides little real restraint on prosecutorial decisionmaking. There is only one vehicle for making the criminal prosecutor account for her charging decisions before a judge—a motion for dismissal based on a claim of selective prosecution.[43]

To prevail on a selective prosecution claim, the Supreme Court requires that a defendant show that the charging decision was "*deliberately* based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[44] This element of deliberateness requires showing not just a discriminatory effect but also a discriminatory purpose.[45] Showing a mere pattern of prosecutions against any particular group, for example, is insufficient: "'Discriminatory purpose,' however, implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[46] In essentially requiring that the defendant prove that the prosecutor charged her "because of" an illegal reason, the Court has established a burden

40. *See id.* at 1537-43.

41. Town of Newton v. Rumery, 480 U.S. 386, 396 (1987).

42. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

43. Selective prosecution motions are, by their nature, brought by defendants in cases that have been charged. There is no procedural vehicle by which a victim can challenge a prosecutor's decision not to charge a case. *See* Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) (stating that the decision to prosecute is solely within prosecutor's discretion); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (stating that a private citizen lacks a judicially cognizable interest in the prosecution of another); Dix v. Superior Court, 807 P.2d 1063 (Cal. 1991) (finding that a crime victim lacked standing to litigate sentencing issue as matter of public interest).

44. Oyler v. Boles, 368 U.S. 448, 456 (1962) (emphasis added).

45. *See* United States v. Wayte, 470 U.S. 598, 608 (1985); *cf.* McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (rejecting a constitutional challenge to Georgia's capital punishment statute based on a statistical study showing its disproportionate impact on African-Americans).

46. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (citation omitted), *quoted in Wayte*, 470 U.S. at 610.

of proof that is very difficult to sustain.[47] Given the multiplicity of factors going into the charging decision, prosecutors can almost always point to some other reason for charging a case. Proving that a single factor served as a "cause" of the decision to prosecute would require a virtual admission of discriminatory intent on the part of the prosecutorial agency.[48]

The complexity of the charging decision and the intangibility of the factors involved are the Court's primary justifications for its reluctance to second-guess prosecutorial charging decisions:

> [T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.[49]

In particular, the Court has emphasized the need for the prosecutor to "decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge."[50]

The Court has also expressed concern that "subjecting the prosecutor's motives and decisionmaking to outside inquiry" may "chill law enforcement."[51] Implicit in this concern may be a recognition of the political ramifications of charging decisions. Choices among different

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47. *See* BENNET GERSHMAN, PROSECUTORIAL MISCONDUCT 4-15 to 4-21, 4-32 (1995); Vorenberg, *supra* note 39, at 1542 n.78.

48. In *United States v. Armstrong*, 116 S. Ct. 1480 (1996), the Supreme Court held that in order to be entitled to discovery of federal prosecutorial policies, selective prosecution claimants must *first* demonstrate that "federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Id.* at 1487 (quoting *Wayte*, 470 U.S. at 608). Demonstrating a discriminatory effect required in turn that the claimant "show that similarly situated individuals of a different race were not prosecuted." *Id.* How a claimant could ever demonstrate that two potential defendants were similarly situated in light of the multitude of factors prosecutors may consider in making charging decisions the Court did not say.

49. *Wayte*, 470 U.S. at 607; *see also Armstrong*, 116 S. Ct. at 1486 ("Judicial deference to the decisions of these [federal prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts.").

50. *Rumery*, 480 U.S. at 396. Prosecutorial discretion does not end once the complaint is filed. Perhaps the most important post-charging exercise of discretion is in the area of plea bargaining. During the plea bargaining process, prosecutors inevitably balance the importance of one case to the public interest against the importance of other cases as a consequence of the limits of their own resources. A generous disposition offered on one case often reflects the need to focus time and resources on other, more important cases. Consequently, prosecutors have complete discretion about what positions to take in plea negotiations. *See* Vorenberg, *supra* note 39, at 1536-37.

51. *Wayte*, 470 U.S. at 607, *quoted in Armstrong*, 116 S. Ct. at 1486.

victims and among potential defendants can directly affect the interests of various political groups. Each time the prosecutor comes before the bench to explain charging policies, she simultaneously speaks in a political forum to these different groups.

Perhaps it is this political dimension of "outside inquiry" into prosecutorial motives that the Court finds troubling. The burden of proof in the political forum, unlike in the legal forum, is on the prosecutor, and in that context the discretionary nature of her decisionmaking process puts her at a disadvantage. Absent a more objective decisionmaking process, it would be difficult for a prosecutor to prove that a policy that had the effect of singling out certain defendants or ignoring certain victims was not intended to be discriminatory.[52]

D. Freedom from Conflict of Interest as the Predicate for Prosecutorial Discretion

The prosecutor's freedom of action is supposedly justified by a parallel freedom from influence. The prosecutor is trusted to balance competing private interests in society because she is not dependent upon any discrete private or governmental interest.[53]

Prosecutorial independence is safeguarded in a number of different ways. First, prosecutors are to different degrees politically accountable to the electorate.[54] The chief prosecutor in any office is in most cases either an elected official (as is the case in many counties and municipalities) or appointed by an elected official (as is the case with all United States Attorneys, who are appointed by the Presi-

52. In *Armstrong*, the Supreme Court dusted off the "presumption of regularity" that applies to the decisions of federal prosecutors. *See* 116 S. Ct. at 1486 ("'[I]n the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'") (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926)). The Court in *Armstrong* justified this presumption in terms of the broad discretion afforded prosecutors. *See id.*

53. One commentator has argued that this independence mirrors the structure of the administrative state as a whole in the United States. *See* William E. Nelson, *Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility*, 64 NOTRE DAME L. REV. 911, 926 (1989) (characterizing the administrative state as fragmented into a series of independent power centers "to insure that neither the bureaucracy as a whole nor any independent unit of it becomes subservient to any single social interest"); *see also* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE STUDY OF THE LEGAL PROCESS (1986) (contrasting the hierarchical model of continental European bureaucracies against the "coordinate" model of the United States, where authority is pushed downward and outward in order to fragment government power).

54. *See* People *ex rel.* Younger v. Superior Court, 150 Cal. Rptr. 156, 170-71 (Ct. App. 1978) (stating that the district attorney may be entrusted with significant discretionary powers because he is answerable to the electorate).

dent). If that prosecutor subordinates the public interest to some narrower interest, an electoral mechanism for a political response exists.[55]

A second safeguard of prosecutorial independence inheres in the separation of powers among the branches of government. In this sense, the prosecutor is independent from the judiciary and the legislature, and she traditionally enjoys a measure of independence within the executive branch as well.[56]

Another important safeguard of prosecutorial independence is the body of ethical and legal rules that define a conflict of interest as any condition under which the prosecutor might be influenced by some discrete interest to an intolerable degree.[57] These rules protect

55. To be sure, this electoral mechanism imperfectly protects the public interest. Some commentators have criticized the prosecutor's broad immunity from judicial review on the grounds that it renders political checks on her discretion meaningless. *See, e.g.*, Vorenberg, *supra* note 39, at 1559 ("The fact that prosecutors or their appointing authorities must seek election is small comfort in view of the low visibility with which they exercise their discretion."). Also, money, in the form of campaign contributions, can influence elected prosecutors. *See, e.g.*, Woodland Hills Residents Ass'n v. City Council of Los Angeles, 609 P.2d 1029 (Cal. 1980) (finding that campaign contributions can create conflicts of interest, but do not necessarily disqualify an official from acting on matters pertaining to the contribution). In this context, private financing is not the only avenue of influence over prosecutorial decisionmaking for those with money to spend.

56. *See generally* Morrison v. Olson, 487 U.S. 654 (1988) (discussing separation of powers doctrine in the context of a challenge to authority of independent counsel appointed under the Ethics and Government Act of 1978).

One commentator has argued that society's interest in the evenhanded treatment of all by the government "should be an explicit factor in the analysis of structural issues and should provide an animating principle for the jurisprudence of separated powers." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

57. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (personal interest in litigation disqualified federal prosecutor); United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) (per curiam) (prosecutor cannot have a pecuniary interest in case prosecuted); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967) (prosecutor of domestic violence case cannot represent wife/victim in divorce proceeding for a contingent fee); People *ex rel.* Clancy v. Superior Court, 705 P.2d 347 (Cal. 1985) (private attorney cannot represent the state as prosecutor on a contingency fee basis); Davenport v. State, 278 S.E.2d 440 (Ga. Ct. App. 1981) (prosecutor who represented victim of domestic violence in divorce against defendant cannot prosecute the criminal case for battery); Commonwealth v. Tabor, 384 N.E.2d 190 (Mass. 1978) (prosecutor cannot try murder case after representing victim's widow in civil case for damages); People v. Basham, 170 N.W.2d 238 (S.D. 1969) (prosecutor cannot represent victim/family in civil action even if not pending simultaneously). *But see* Dick v. Scroggy, 882 F.2d 192 (6th Cir. 1989) (prosecutor's subsequent representation of victim in civil case did not mandate disqualification); Brooks v. State, 228 So. 2d 24 (Ala. Ct. App. 1969) (no conflict of interest even though prosecutor represented victim in civil case); People v. Jimenez, 528 P.2d 913 (Colo. 1974) (defendant waived any conflict that might result from district attorney prosecuting vehicular homicide and representing victim in civil action); Allen v. State, 257 S.E.2d 5 (Ga. Ct. App. 1979) (no conflict in civil representation of crime victim by prosecutor). For a discussion of prosecutorial conflicts of interest, see

the equality interests implicated by the prosecutor's discretionary decisionmaking process by preserving the independence upon which that discretion is predicated.[58] In *Young v. United States ex rel. Vuitton et Fils S.A.*,[59] the Supreme Court implicitly recognized the role of conflict-of-interest rules in protecting the equality interests that judicial review cannot reach in individual cases.[60] *Vuitton* involved a criminal contempt action for violation of a civil injunction prohibiting the counterfeiting of the plaintiff's product.[61] The district court appointed the plaintiff's attorneys as special counsel to prosecute the contempt against the infringing parties.[62] The Supreme Court held that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order."[63] The Court essentially employed a due process analysis,

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Susan Brenner & James Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1 (1990); Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1992). For a bibliography of ethical codes and federal statutes applicable to prosecutorial conflicts of interest, see Bessler, *supra* note 3, at 546 n.140.

58. A prosecutor's immunity from civil suit also protects the prosecutor's independence. *See* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.").

59. 481 U.S. 787 (1987). For commentary on *Vuitton*, see Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992); Terri L. Braswell, Comment, *Criminal Procedure*—Young v. United States *ex rel.* Vuitton et Fils S.A.: *The Right to a Disinterested Prosecutor in a Federal Criminal Contempt Proceeding Arising from the Underlying Civil Litigation.*, 18 MEM. ST. U. L. REV. 143 (1987).

60. *See* 481 U.S. at 812-13.

61. *See id.* at 789-90.

62. *See id.* at 791.

63. *Id.* at 790. While a majority agreed that private attorneys should not prosecute contempt in such circumstances, it split over whether to reverse the conviction per se or whether to remand the case for a harmless-error review. That portion of Justice Brennan's opinion that concluded that the error was fundamental and required per se reversal, *id.* at 809-14, was joined by Justices Marshall, Blackmun, and Stevens. Justice Powell, joined by Chief Justice Rehnquist and Justice O'Connor, dissented from Justice Brennan's fundamental error analysis and from the judgment as well, arguing that the case should be remanded to determine whether the appointment of the private prosecutor was harmless error. *See id.* at 825-27. In a separate concurring opinion, Justice Scalia provided a fifth vote for per se reversal on the ground that the appointment of a contempt prosecutor by a federal court violates the separation of powers between the judiciary and the executive branch. *See id.* at 815.

although it based its holding on the Court's supervisory powers over the prosecution of judicial contempt actions.[64]

The distinction in *Vuitton* between liberty and equality interests is somewhat inchoate because the Court shifted back and forth between different conceptions of prosecutorial impartiality. The Court began its analysis by discussing the prosecutor's general obligation to justice and truth as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and *whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.[65]

In pointing out that a private lawyer prosecuting a charge of criminal contempt acts in essence as a public prosecutor, however, the Court expressed the obligation of impartiality in terms of disinterestedness with respect to any particular private party:

> Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. . . . The prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as *disinterested* as a public prosecutor who undertakes such a prosecution.[66]

This concept of disinterest clearly involved a concern that the prosecutor might further the interests of a private person over the public interest. The Court warned that

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64. Justice Blackmun wrote a concurring opinion arguing that appointing an interested party's counsel as prosecutor for a criminal contempt violated the due process requirement of "a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.*

Holdings based on the Court's supervisory authority have sometimes been subsequently extended to the states through due process jurisprudence. *See, e.g.*, Bloom v. Illinois, 391 U.S. 194 (1968) (recognizing a due process right to a jury trial for nonpetty contempts); Cheff v. Schackenberg, 384 U.S. 373 (1966) (recognizing under supervisory authority the right to jury trial for nonpetty contempts). One commentator has argued that *Vuitton* should be extended to ban all private prosecutions on due process grounds. *See* Bessler, *supra* note 3, at 571-602. Another commentator has argued that *Vuitton* should not be extended to state courts through due process because private enforcement is a key value in the contempt context. *See generally* Meier, *supra* note 59.

65. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added), *quoted in Vuitton*, 481 U.S. at 803.

66. *Vuitton*, 481 U.S. at 804 (emphasis added).

> [a] prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.[67]

The Court then noted that the appointment of private counsel illustrated "the *potential* for private interest to influence the discharge of public duty."[68]

Thus far, the Court in *Vuitton* seems to be primarily concerned with the prosecutor's need to be disinterested in the sense of not having a bias that would favor any private interest. In acknowledging the difference between the standards applicable to a judge and a prosecutor, however, the Court mixed the concept of disinterestedness with that of zealousness: "The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges."[69] The Court then noted with approval its statement in an earlier case that "[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law."[70]

By introducing zealousness into its analysis, the Court blurred two different conceptions of prosecutorial impartiality. Up to this point the Court had been concerned with the threat to impartiality posed by a prosecutor who favors the private interest of some person or group.[71] Such a prosecutor is "interested" in the sense that she favors private interests over the public interest. This concern makes sense in the context of the case that was before the Court, in which an attorney representing a private party was concurrently acting as public prosecutor. Zealousness, however, concerns the threat to impartiality posed by the prosecutor's *own* interests in the outcome of the case. This concept of zealousness is illustrated by *Marshall v. Jerrico, Inc.*,[72]

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67. *Id.* at 805.

68. *Id.*

69. *Id.* at 807.

70. Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980), *quoted in Vuitton*, 481 U.S. at 807.

71. The *Vuitton* Court's reference to the plaintiff's interest in suppressing the counterfeiting of their goods as a private interest leaves unmentioned the public's interest in the enforcement of anti-counterfeiting laws. At the root of the *Vuitton* Court's concern, perhaps, is a recognition that such private interests are not completely congruent with the public interest and on some occasions can be in conflict with it. *See infra* notes 141-45 and accompanying text.

72. 446 U.S. 238 (1980).

the case cited by the *Vuitton* court to distinguish the obligations of judge and prosecutor.

In *Jerrico*, the Court rejected a due process claim alleging that a government agency performing prosecutorial functions would be tempted to over-prosecute a statute in order to increase its share of the monetary penalties collected.[73] Such over-prosecution would not have singled out any particular persons or groups, and the *Jerrico* Court explicitly noted that, had that been the case, its decision might have been different.[74]

In *Vuitton*, however, the Court seemed to ignore the distinctions between the *kinds* of interests operating to influence the prosecutor and instead based its decision on the *degree* of influence:

> Ordinarily we can only speculate whether other interests are likely to influence an enforcement officer, and it is this speculation that is informed by appreciation of the prosecutor's role. 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.[75]

The private interest present in *Vuitton* violated the lower standard of disinterestedness applicable to prosecutors because "the ethics of the legal profession *require[d]*" that this interest be taken into account.[76]

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73. *See id.* at 251-52.

74. *See id.* at 250 n.12.

75. *Vuitton*, 481 U.S. at 807.

76. Resolving the issue of private financing of government criminal prosecutions through the application of existing ethical rules would be problematic at best. Accepting money from a victim or any other third party raises ethical issues that require an informed waiver by the client. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-21 (1982) ("A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1995) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected . . . ."); *id.* at Rule 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Since the client is the State itself, however, the issue of obtaining a waiver is obviously problematic. Even when obtained from clients in ordinary criminal cases, such waivers are increasingly disfavored. *See, e.g.*, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) commentary at 149 (2d ed. 1992) ("With regard to criminal cases involving third-party payment of legal fees, courts increasingly recognize that the court's interest in maintaining the integrity of the criminal justice system can outweigh client consent to payments by third parties.").

In a revealing footnote, however, the Court did distinguish between overzealousness and partiality towards some private interests:

> It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. That problem, however is personal, not structural. . . . [S]uch overzealousness "does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction."[77]

This discussion implies that these different threats to the impartiality of the prosecutor must be regulated in different ways. The threat to due process posed by the overzealous prosecutor overly committed to conviction is addressed by judicial review on a case-by-case basis. However, the threat to due process posed by the prosecutor committed to the interest of some private party is a "structural problem," and presumably cannot be handled as it arises in each case.[78]

The suggestion that a prosecutor partial to a private interest constitutes a structural problem is also evident in the Court's justification for not applying harmless-error analysis to conflict-of-interest cases. One of the reasons advanced by the Court for requiring per se reversal in such cases was that "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record."[79] Earlier in its analysis the Court had described some of these "invisible" decisions as follows:

> A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. *These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.*[80]

77. *Vuitton*, 481 U.S. at 808 n.18 (quoting Polo Fashions, Inc. v. Stock Buyers Int'l, Inc., 760 F.2d 698, 705 (6th Cir. 1985)).

78. *Cf.* Arizona v. Fulminante, 499 U.S. 279, 309 (1991) ("[S]tructural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards.").

79. *Vuitton*, 481 U.S. at 813.

80. *Id.* at 807 (emphasis added).

A prosecutor partial to a private interest presents a "structural problem" in the sense that the structure of judicial review does not permit detection of signs of such influence, a limitation that precludes any attempt to determine whether the error permitting the conflict was indeed "harmless."

In defending its decision not to apply harmless-error analysis, the *Vuitton* Court made analogies to cases where the judge or jury was subject to influence: "We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty."[81] The Court then referred to past decisions refusing to apply harmless-error analysis to racial discrimination in the selection of the grand jury and to the exposure of a petit jury to publicity unfavorable to the defendant.[82] Implicit in this comparison is the suggestion that, because prosecutors, like juries, make decisions that are subject to limited review, great care must be taken to filter out influences that might taint their decisions.[83]

Ironically, it is the sweeping nature of prosecutorial discretion that makes it impossible for a court to tell if a prosecutor is acting under the influence of private interests. This led the *Vuitton* Court to

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81. *Id.* at 810.

82. *See id.*

83. Analogous issues were raised—though ultimately resolved differently—in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). In *Rumery*, the Court considered the validity of release-dismissal agreements where a criminal defendant releases her right to file a civil rights action in return for a prosecutor's dismissal of pending criminal charges. *See id.* at 394. The Court refused to hold all such agreements invalid per se on due process grounds and upheld the agreement before it because the release had been voluntarily executed and was not adverse to the public interest. *See id.* In a concurring opinion that provided the crucial fifth vote, Justice O'Connor described the potential conflict between public and private interests in such cases as follows:

> [T]he availability of the release option may tempt officials to ignore their public duty by dropping meritorious criminal prosecutions in order to avoid the risk, expense, and publicity of a § 1983 suit. The public has an interest in seeing its laws faithfully executed. But, officials may give more weight to the private interest in seeing a civil claim settled than to the public interest in seeing the guilty convicted.

Id. at 400 (citation omitted); *see also* Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993) (invalidating a release agreement on the grounds that the prosecutor made no attempt to show that the public interest was advanced by the release); Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1993) (upholding a release-dismissal agreement on the grounds that docket control, the costs of prosecution, and concern that dropping charges without a release would be misconstrued as an admission of police misconduct were legitimate interests for a prosecutor to consider). *See generally* James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41 (1985) (arguing that ethical rules should be amended to forbid prosecutors from bargaining for waivers of civil liability against government entities or private persons).

impose a blanket rule to eliminate the possibility of such influence in cases of criminal contempt.[84] The Court implicitly recognized that, because the equality interests at play in prosecutorial decisionmaking cannot be protected by judicial review in individual cases, they must be protected across-the-board by preserving that aspect of the system's structure that justifies the prosecutor's wide discretion in the first place—the independence of the prosecutor. While influences that make the prosecutor merely overzealous find some regulation in judicial scrutiny of a prosecutor's actions against any particular defendant, the invisible damage done to equality interests by improperly selective prosecutions must be pre-empted by prophylactic rules that shield the prosecutor from influence by private interests.[85]

III. Funding Sources as an Institutional Influence upon Government Discretion

Private financing raises the question of whether public officials such as prosecutors can be influenced by a flow of private money to the institutions in which they operate. The Supreme Court has not had to confront a case where a voluntary flow of private money into institutional coffers allegedly threatened prosecutorial discretion. The Supreme Court has, however, recognized the existence of comparable "institutional biases" in three of its past decisions.[86] Those cases dealt with the impact upon judicial or prosecutorial officials of certain schemes for the distribution of fines or administrative penalties. Each case involved a claim that officials were fining as many people as possible in order to maximize revenues for their institutions.[87]

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84. *See Vuitton*, 481 U.S. at 807-09.

85. *Cf.* Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984) ("'[T]he practical impossibility of establishing that the conflict [of interest] has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice.'") (quoting People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. 1980)).

86. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927); *cf.* Schweiker v. McClure, 456 U.S. 188 (1982) (denying due process challenge to use of private insurance carriers to administer Medicare claims where claims paid from federal funds); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that administrative board of optometrists cannot hear charges filed against competitors).

87. A number of lower courts have also recognized due process violations flowing from an institutional interest in maximizing revenues or minimizing costs to government. *See* United Church of the Med. Ctr. v. Medical Ctr. Comm'n, 689 F.2d 693 (7th Cir. 1982) (state statute allowed Medical Center Commission to decide which lands revert by eminent domain to the Commission; provisions of Medical Center Act gave the Commission financial stake in outcome of proceedings); Augustus v. Roermer, 771 F. Supp. 1458 (E.D. La. 1991) (state statute requiring 2% bail fee payable to county coffers to support criminal

An ad hoc quality haunts the Supreme Court's attempts to wrestle with this sort of fiscal institutional bias. In each case the Court attempted to weigh the potential influence by looking at the amount of money involved. In two of the three cases, the Court actually calculated the amount of fines collected and compared that number to the institution's total operating budget.[88] That calculation seemed to serve as the basis for guessing whether the amount of the fines was sufficient to influence the officials involved.

Three questions can be extracted from these three opinions that are relevant to assessing a private financing scheme's potential influence over prosecutors. First, to what degree could the prosecutor influence the amount of money received? Second, what measure of dependency upon the money is likely to develop? Third, will the resulting influence contribute to prosecutions against particular persons or groups? Applying these three questions to the various forms that private financing has already taken yields useful insights about both the nature of private financing's potential influence and how that influence might be doctrinally framed.

A. The Fiscal Institutional Bias Cases

In *Tumey v. Ohio,*[89] the Supreme Court recognized for the first time that government officials and their institutions can be influenced by the possibility of increased flows of money. The Ohio statutes challenged in *Tumey* provided that criminal violations of the Prohibition Act would be tried before the town mayor, and the local municipality would receive all fines collected for the violations.[90] In holding that these statutes violated due process, the Court found that the revenues resulting from these fines created an "official motive to convict and to graduate the fine to help the financial needs of the village."[91]

judicial system); Meyer v. Niles Township, 477 F. Supp. 357 (N.D. Ill. 1979) (town supervisors decided who qualified for payment from township's fund for medical injuries); Gore v. Emerson, 557 S.W.2d 880 (Ark. 1977) (town received majority of revenues from fines imposed by mayor in his judicial capacity); People v. Barboza, 627 P.2d 188 (Cal. 1981) (public defender's office could maximize budget by not declaring conflicts of interest in cases). *But see* Baran v. Port of Beaumont Navigation Dist., 57 F.3d 436 (5th Cir. 1995) (statute granting ports the power to veto pilotage rates did not violate due process); People v. McDonnell, 434 N.E.2d 71 (Ill. Ct. App. 1982) (rewarding police officers who made ten arrests for driving while under the influence by giving them a day off with pay did not violate due process rights of defendants arrested).

88. *Jerrico*, 446 U.S. at 245; *Ward*, 409 U.S. at 58.

89. 273 U.S. 510 (1927).

90. *See id.* at 516-17.

91. *Id.* at 535. Under this statutory scheme, the mayor had both personal and institutional interests in the result of the trial: the mayor would receive his costs in addition to his

The Court noted that the state legislature had intentionally created this incentive, having drafted the statute "to stimulate small municipalities . . . to organize and maintain courts to try persons accused of violations of the Prohibition Act."[92] The specific inducement offered to these small municipalities was the money they would receive after "dividing between the state and the village the large fines provided by the law for its violations."[93] Toward this end, the statute "offer[ed] to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation."[94] The Court believed that the legislature's incentive plan was working—the mayor had stated that he would only convene the court if the village needed finances and that "substantial sums" from the fines were used for "village improvements and repairs."[95]

In finding that adjudication by the mayor violated due process in these circumstances, the Court repeatedly emphasized the mayor's role in the political structure of the village and his responsibility for fiscal matters. For example:

> The mayor is the chief executive of the village. . . . He is charged with the business of looking after the finances of the village. . . . [T]he law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village and cannot escape his representative capacity. . . . With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?[96]

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regular salary only for a case in which a conviction was obtained. *See id.* at 519. The Court found that these costs constituted a direct and substantial pecuniary interest in the outcome of the case, but held that the institutional interest constituted a separate due process violation: "[T]he pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here." *Id.* at 532.

Where officials have a personal pecuniary interest in the outcome of a decision made, the conflict of interest analysis is more straightforward. *See, e.g.*, Connally v. Georgia, 429 U.S. 245 (1977) (finding both the Fourth and the Fourteenth Amendments violated where judges received fees for granting search warrant requests). Private financing involves not a personal but an institutional interest in the monies received.

92. *Tumey*, 273 U.S. at 532.

93. *Id.* at 532-33.

94. *Id.* at 533.

95. *Id.* at 521.

96. *Id.* at 533. In *Dugan v. Ohio*, 277 U.S. 61 (1928), the Court denied a due process challenge to a similar fine scheme where the mayor had no executive responsibilities and

At the heart of the due process violation found in *Tumey*, then, was a recognition that public officials can be influenced by the prospect of an increased flow of money into their institutions.

Ward v. Village of Monroeville[97] also involved a "mayor's court." In *Ward*, the Supreme Court actually attempted to quantify the possible influence by calculating the money involved. Noting that a major part of the village's income came from the fines, forfeitures, costs, and fees imposed by the village mayor in his judicial capacity, the Court compared the dollar amount of fines collected each year to the village's total revenues for those years.[98] The Court also pointed out that the mayor repeatedly ordered the chief of police to charge suspects under village ordinances rather than state statutes whenever possible in order to ensure that monies collected would be paid to the village and not to the county.[99]

Invoking *Tumey*, the majority in *Ward* held that this statutory scheme did not provide the neutral and detached judge required by due process.[100] The dissent disagreed as to whether the mayor-judges were likely to be influenced by the amounts involved.[101] The dissent argued that the facts did not justify the assumption "that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, per se rule" adopted by the majority.[102] Accordingly, the dissent argued that the due process issues involved should be considered on a case-by-case basis.[103]

The ad hoc nature of this disagreement revealed itself in the brevity of the two opinions—together they added up to only about five

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exercised only judicial functions even though the mayor's salary was affected by the number of convictions.

97. 409 U.S. 57 (1972). The Ohio statute at issue authorized mayors to sit as judges in cases involving traffic offenses and violations of local ordinances. *See id.* The Court framed the issue as whether trial before an official who was also responsible for revenue production and law enforcement denied the due process guarantee of a disinterested and impartial judicial officer. *See id.* at 59. The statute did not provide for any direct personal benefit to the mayor from a conviction.

98. *See id.* at 58. For each year, the fines amounted to one third to one half of total village revenues. *See id.*

99. *See id.* at 59 n.1. The Court also noted that when legislation threatened the loss of these funds, "the village retained a management consultant for advice." *Id.* at 58.

100. *See id.* at 61-62.

101. *See id.* at 62 (White, J., dissenting). The dissent also argued that the holding in *Tumey* should be limited to cases where the official had a direct pecuniary stake in the outcome of the case. *See id.*

102. *Id.*

103. *See id.*

pages. The Justices found themselves on terrain where it was difficult to make principled distinctions. Either the money was enough to sway someone or not, and there was simply not much more to say.

In only one case has the Supreme Court considered whether fines could bias a prosecutorial agency in its exercise of discretion. *Marshall v. Jerrico, Inc.*[104] involved a statutory scheme under which monies collected as civil penalties for child labor violations were funnelled to the responsible agency of the Department of Labor as reimbursement for the costs of enforcement. In concluding that there was no "realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts,"[105] the Supreme Court once again found itself counting dollars and analyzing budgets. The penalties collected amounted to less than 1% of the agency's budget, and the agency had not spent its full budget appropriations during the relevant years.[106] The unspent funds that were returned to the treasury each year also substantially exceeded the amount of the penalties collected.[107] Based on these facts, the Court concluded that the penalties collected had not "resulted in any increase in the funds available to the [agency] over the amount appropriated by Congress."[108]

In *Jerrico*, however, the Court added a gloss to its interpretation of the numbers: "Unlike in *Ward* and *Tumey*, it is plain that the enforcing agent is in no sense *financially dependent* on the maintenance of a high level of penalties."[109] In characterizing *Ward* and *Tumey* as concerning fiscal dependency upon fines, the *Jerrico* Court gave context to its comparison of the amount of fines collected to the institution's total budget. The Court apparently reasoned that the greater the share of total revenues accounted for by fines, the more the money would be missed if the amounts assessed decreased. An official who was counting on those revenues would presumably be influenced by the prospect of their loss.

The *Jerrico* Court also examined the degree to which the administrator-prosecutor could influence the level of revenues received. In

104. 446 U.S. 238 (1980). Analogies continue to be made between the discretion afforded the criminal prosecutor and the discretion afforded the agency administrator prosecuting civil actions. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877 (1989); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).

105. *Jerrico*, 446 U.S. at 250.

106. *See id.*

107. *See id.* at 250-51.

108. *Id.* at 246.

109. *Id.* at 251 (emphasis added).

Tumey and *Ward* the mayor-judges sat as both judge and jury and could directly influence the amount of revenues received through their verdicts and sentences. In *Jerrico*, in contrast, the national office of the labor agency—not the regional officers making the prosecutorial decisions—allocated the penalties collected.[110] Furthermore, the penalties had "never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices."[111] Ultimately, the Court found the potential for bias too contingent.[112]

Finally, the *Jerrico* Court distinguished between prosecutorial and judicial officials in a way that left open the question of what standards would apply to an alleged influence that threatened to make a prosecutor not overzealous but selective.[113] Referring explicitly to the wide discretion traditionally accorded criminal prosecutors, the Court reasoned that the prosecutorial nature of the Labor Administrator's function merited a more relaxed standard than that applicable to officials acting in a judicial capacity.[114] Conceding that the Due Process Clause does impose some limits on "the partisanship of administrative prosecutors," the Court acknowledged that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."[115] In the *Jerrico* footnote discussed earlier,[116] the Court distinguished sharply between overzealousness and partiality to

110. *See id.* at 246.

111. *Id.* The Court also noted that in the one year in which the penalties were allocated to regional offices and not retained by the national office, the zealous assessment of fines was rewarded only indirectly in the sense that the funds were allocated on the basis of expenses incurred, not penalties collected. *See id.* at 251.

112. *See id.* The Court reasoned that only under the following facts would an administrator be tempted to over-prosecute under the statute in order to obtain a higher allocation of penalties: the national office would have to decide to allocate the penalties to the regional offices; the sums allocated would have to exceed the amount returned; the regional administrators would have to receive authorization to expend additional funds to increase enforcement; the increased effort would have to result in increased penalties; and the administrative law judge and any reviewing courts would have to go along with the penalties. *See id.* at 252.

113. *See id.* at 248-50.

114. *See id.* at 250. The Court declined to apply *Tumey* or *Ward* on the grounds that the functions of the administrator "resemble those of a prosecutor more closely than those of a judge." *Id.* at 243. While the administrator-prosecutor was authorized to assess a civil penalty of up to $1,000, an assessed party was entitled to a de novo hearing before an administrative law judge. *See id.* at 244-45.

115. *Id.* at 249-50.

116. *See supra* note 74 and accompanying text.

prosecutions against particular persons: "In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process."[117]

Thus, despite the "remoteness" and insignificance of the alleged influence in *Jerrico*, the Court reserved the question of whether an influence that made the prosecutor improperly selective rather than merely overzealous might lead to a different result. In leaving open the question of the improperly selective prosecutor, the *Jerrico* Court implicitly distinguished between the equality and liberty interests implicated by prosecutorial decisionmaking. The *Vuitton* Court quoted this passage when it observed that influences that might make prosecutors improperly selective should subject them to the same standards of disinterestedness as judges.[118]

B. Assessing the Institutional Bias of Private Financing

The voluntary nature of private financing creates a potential for influence different from the fine schemes considered by the Supreme Court in *Tumey*, *Ward*, and *Jerrico*. A prosecutor is not tempted to favor the interests of a defendant sentenced to pay a fine because fine payments are involuntary.[119] However, a private party making voluntary contributions toward criminal prosecutions might expect something in return. Therein lies a potential for influence not yet considered by the Supreme Court: A privately financed prosecutor might be tempted to favor her donors in order to justify past contributions or to attract future contributions.[120]

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117. *Jerrico*, 446 U.S. at 250 n.12.

118. *See* Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 810 n.22 (1976).

119. The same distinction can be made with respect to the traditional means of financing criminal prosecutions by the government—taxes. Prosecutors are not tempted to favor victims by virtue of how much tax they pay because taxes are also paid involuntarily. A taxpayer who does not like a prosecutor's decisions still has to pay her taxes.

120. The public finance literature analyzing the impact of user fees upon government bureaucracies describes exactly this type of influence. For example:

> [A] user-charge program may improve operating efficiency because agency staff must respond to client demand. Agencies usually operate with funds obtained from and justified to a legislative body. That justification will elaborate needs as estimated by the agency staff and will be defended according to performance criteria established by the agency staff. User-charge finance, however, requires a shift to preferences articulated directly by customers. The agency must provide services that are desired by consumers, or it will fail the financial test for survival. It cannot define what clients should want in its budget defense; it must provide the services clients actually will purchase.

Such favoritism was envisioned by the trial judge in *People v. Eubanks*,[121] the Silicon Valley case described earlier.[122] The judge questioned the prosecutor for allowing the victim corporation to pay over $13,000 for independent expert investigation costs:

> Doesn't that put the District Attorney in a position, as a human being, to feel a greater obligation for this particular victim than some other fellow or person who doesn't offer to pay existing debts? . . . [L]et's assume that the District Attorney's office, in the review of their case ultimately conclude that, 'Well, you know, maybe our case isn't as strong as we thought at the inception.' Would it be easier for them to tell a victim who paid no money to the D.A.'s office, 'You don't have a case,' than it would be for one that you received $15,000 from?[123]

The judge's questions suggest that a privately financed case that might otherwise have been dismissed on its merits could be pressed to trial out of a sense of obligation to the contributing victim and that a privately financed victim might receive greater consideration than a "nonpaying customer."[124]

Since private financing involves an influence that could potentially affect prosecutions against particular persons—those targeted by the contributor—rather than a general overzealousness in the enforcement process, *Jerrico, Ward,* and *Tumey* yield no insight about what *degree* of potential influence, if any, the Supreme Court might tolerate in this context. However, the *Jerrico* Court's concern with fiscal dependency and the prosecutor's influence over the amount of money received do provide two interesting lines of inquiry.

The potential for a prosecutor to become dependent upon private financing depends to some degree upon how the private money is put

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MIKESELL, *supra* note 15, at 425; *see also* B. GUY PETERS, THE POLITICS OF BUREAUCRACY 131-32, 155, 262 (1989) (describing the influence of pressure groups over bureaucracies through budgetary politics). To some degree, those who would argue that private financing would make criminal prosecution more efficient assume that prosecutors would be so influenced.

121. 927 P.2d 310 (Cal. 1996).

122. *See supra* note 6 and accompanying text.

123. Brief for Respondents, People v. Eubanks, 44 Cal. Rptr. 2d 846 (Ct. App. 1995) (quoting Record at 4561, 4563). The California Supreme Court agreed: "No reason is apparent why a public prosecutor's impartiality could not be impaired by institutional interests, as by personal ones." People v. Eubanks, 927 P.2d 310, 319-20 (Cal. 1996).

124. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-22 (1982) ("Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.").

to use. *Eubanks*, for example, involved payment of some of the investigation costs,[125] an expense constituting a variable cost in the sense that it arises only if the investigation is continued. Other schemes for private financing involve payment of salaries, an expense that is fixed in the sense that the salaries must be paid regardless of whether any particular case is prosecuted. In California's Ventura County, for example, proceeds from the workers' compensation fraud prosecution fund established by local business contributions were to be used to pay the salary of the assistant district attorney responsible for prosecuting those cases.[126]

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. The potential for influence on the individual level is even stronger. For example, a prosecutor whose salary is paid out of business contributions to a fund for a certain category of white collar crime might fear that her salary would not be forthcoming for the next fiscal year if her prosecutorial decisions did not satisfy her contributors.[127]

Even private financing only of variable costs—such as the expert investigator costs in *Eubanks*—could engender such a dependency. A prosecutor assigned to complex fraud cases who relied on voluntary contributions from insurance companies to pay for special investigative costs necessary for the successful prosecution of those cases might feel vulnerable to pressure from those contributors. Fiscal dependency, moreover, is not the only type of dependency that might motivate the decisions of prosecutors. Prosecutors who accept private financing of variable costs in white collar cases might feel that their credibility in the relevant business community depends on their ability

125. *See* 927 P.2d at 312-14. What particularly concerned the California Supreme Court was that most of the private funds were used to reimburse the district attorney for expenses that had already been incurred. *See id.* at 321.

126. *See* McDonald, *supra* note 7, at B1.

127. *See* Model Code of Professional Responsibility EC 5-23 (1982) ("A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. . . . [A]n employer may seek, consciously or unconsciously, to further its own economic interests through the action of the lawyers employed by it.").

to justify the investments made by obtaining the results desired by their contributors.[128]

Assessing the prosecutor's ability to influence the level of contributions to be received is complicated. Like the administrator-prosecutor in *Jerrico*, and unlike the mayor-judges in *Tumey* and *Ward*, the prosecutor cannot directly set the amount of money to be received via the typical private financing scheme. The ability of prosecutors to maintain or increase the amount of private financing that is forthcoming depends in part upon the degree to which they can serve the interests of contributors. For instance, in the private financing in *Eubanks*, the donor contributed only to the prosecution of the case in which the donor was the victim.[129] Given the high level of interest the donor-victim had in his own case, the prosecutor could directly serve the donor's interests by an aggressive and successful prosecution of that particular case.[130] Serving such a contributor successfully might increase the chances that future contributions from other similarly situated victims would be forthcoming.

In the Ventura County example, however, business interests contribute to a fund to be used to prosecute an entire category of crime. Because the funds of various contributors are commingled together, the relationship of the donors individually, or even as a group, to any particular case is less direct. On the other hand, the possibility that a prosecutor might come to depend upon the continued flow of those funds is arguably much greater since they finance an entire category of criminal behavior on an ongoing basis.[131]

128. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21 (1982) ("The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence.") (footnote omitted).

129. *See generally* 927 P.2d 310.

130. The California Supreme Court recognized the potential for improper influence in such a situation: "[A] prosecutor may have a conflict if institutional arrangements link the prosecutor too closely to a private party, for example a victim, who in turn has a personal interest in the defendant's prosecution and conviction." *Id.* at 320.

131. A practice closely related to voluntary private financing by business interests is the use of dedicated taxes or assessments to finance certain types of business-related prosecutions. In Pennsylvania, insurance companies are assessed fees based on their volume of business in the state, and the proceeds are placed in a fund that is disbursed to prosecutors for use in insurance fraud prosecutions. *See* 40 PA. CONS. STAT. § 3701-303(c) (1996). Given the mandatory nature of the "contributions" to the fund, prosecutors are not subject to the same degree of pressure to satisfy the insurance companies funding their activities. While representatives of the insurance companies have seats on the commission that determines how the funds are distributed among prosecutorial agencies, *see* 40 PA. CONS. STAT.

Ironically, the example of private financing that arguably involves the lowest potential for influence is also the least typical. In the Susan Smith case,[132] the individuals who mailed in contributions to fund the capital prosecution of Smith presumably had no direct interest in the outcome of the case beyond a general desire for justice or vengeance. There was also little prospect of the prosecutor receiving future contributions given the unusual circumstances that led to nationwide interest in the case in the first place. Even so, the South Carolina Attorney General's opinion authorizing the county to accept the contributions stipulated that the county prosecutor needed to state clearly that by accepting the money he was not agreeing to exercise his prosecutorial discretion in any particular way.[133] Further, contributions made expressly on the condition that the death penalty be sought had to be returned.[134]

To the degree that a scheme for private financing of government prosecutions creates a flow of money that can influence the prosecutor to favor the contributor's interests and upon which the prosecutor might grow dependent, private financing itself creates the type of fiscal institutional influence that the Supreme Court foresaw in *Tumey*, *Ward*, and *Jerrico*. Because that influence threatens to make the prosecutor partial to discrete private interests and not merely overzealous in the prosecution of all crime, the fiscal institutional bias cases provide no guidance as to whether the mere possibility of such influence should trigger the across-the-board prohibition applied in *Vuitton,* or whether some potential bias should be tolerated. Ultimately, that question turns upon the importance attached to the equality interests threatened by the private financing of government prosecutors.[135]

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§ 3701-301(B) (1996), the amount of money available to be disbursed is a function solely of the volume of insurance business transacted in the state.

132. *See supra* note 10 and accompanying text.

133. *See* Letter from Charles Molony Condon, Att'y Gen. of South Carolina, to Robert E. Guess, Union County Attorney, S.C. (Jan. 25, 1995), *available in* 1995 WL 67626.

134. *See id.* The Union County prosecutor did unsuccessfully seek the death penalty against Smith, but all of the contributions had already been returned. The blessing of the South Carolina Attorney General notwithstanding, some county officials were reportedly repulsed by the donors' calls for Smith's execution. *See Donations to Aid Smith Prosecution to Be Returned,* Herald (Rock Hill, S.C.), Feb. 1, 1995, at 6A ("We can't guarantee anybody's death.").

135. An interesting analogy can be drawn between the incentives created by private financing of criminal prosecutions and the incentives created when a law enforcement agency receives funds from civil forfeitures in criminal cases. In both cases, a mechanism exists by which officials can increase the revenues at their institution's disposal. This aspect of civil forfeiture in criminal cases has drawn much criticism. *See, e.g.*, Michael F. Alessio, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429 (1995); David P. Atkins & Adele V. Patterson,

IV. Efficiency, Legitimacy, and the Tension Between Public and Private Interests

Private financing focuses attention on an unappreciated aspect of the status quo—the degree to which financing government prosecutions through taxes reserves control over the prosecutor's vast powers to the government. Financing government prosecutions through voluntary private contributions inevitably surrenders a measure of that control to the contributors in a way that may affect how the benefits and the punishments of the criminal justice system are distributed. Attempts to justify this surrender on the grounds of economic efficiency[136] and victims' rights[137] are foreseeable, but private financing serves those interests selectively, at best, and at the expense of equality.

Society's interest in the equal treatment of all victims and all defendants has always been submerged beneath the independence of the government prosecutor. In undermining that independence, private financing clarifies what society has at stake in the equality of the prosecutor's choices. Exploring these equality interests systematically is beyond the scope of this Article, but this Part argues that equality in areas of discretionary decisionmaking is ultimately a question of legitimacy and of control over government power.

Punishment or Compensation? New Constitutional Restrictions on Civil Forfeiture, 11 U. BRIDGEPORT L. REV. 371 (1991); Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1 (1994); Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255 (1994). For an economic analysis of such forfeiture schemes, see Catherine Cerna, Note, *Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs*, 46 HASTINGS L.J. 1939 (1995).

The incentives for misconduct created by civil forfeiture could be eliminated if the proceeds from the forfeiture were not retained by the law enforcement agencies involved. While raising revenue by seizing ill-gotten gains is a worthy goal, it does not necessarily follow that law enforcement must keep the proceeds. "Civil forfeiture . . . operates as a tax, in that revenue arises from application of the system of laws. Police agencies have no more special right to these proceeds than does the IRS have a special claim to its . . . tax collections." MIKESELL, *supra* note 15, at 427. Unlike civil forfeiture, however, private financing involves *voluntary* contributions that would probably not be forthcoming unless applied to prosecutions in which the contributors had an interest.

136. *See, e.g.*, PETER SELF, GOVERNMENT BY THE MARKET? (1993) (defining public choice theories of politics as arguing that government should be remodeled and transformed according to market concepts of competition and efficiency).

137. *See supra* notes 16-17 and accompanying text.

A. The Unstated Assumptions of Efficiency

By coaxing additional dollars from the private sector, private financing increases the resources available for prosecuting crime without any increase in public spending. Private financing thus seems efficient in the sense that society can prosecute more crime with the same investment of public dollars.[138] Private financing of criminal prosecutions will not, however, increase the total capacity of the criminal justice system; it will merely change the mix of cases prosecuted.

Privately financing one part of a publicly financed criminal justice system would inevitably divert an additional share of public resources toward the privately financed cases. Providing private dollars for prosecutors in insurance fraud cases, for example, while not providing private money for more courtrooms, judges, and public defenders for those cases would mean that, ultimately, more public dollars would have to be spent on insurance fraud cases than would otherwise have been spent in order to keep pace with the increase in prosecutions. Given the general lack of excess capacity in the criminal justice system, a "systemic inflation" of sorts would result from a greater number of cases chasing a fixed number of courtrooms. Ultimately, the only way to avoid this effect would be for the contributor to finance *all* costs of the criminal justice system. This, however, is an unlikely prospect.[139]

Diversion of public resources would be even greater if only variable prosecution costs (such as expert witness fees) were financed. Given the limited number of prosecutors available, privately financed and publicly financed cases would compete for their time and attention. Since such fixed costs of the prosecutor's office would continue to be publicly financed, private financing of only the prosecution's variable costs would lead to an even greater public investment in the privately financed cases. They would be more likely to be prosecuted because of the greater resources available for them.[140]

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138. For a comprehensive economic analysis of "user fees" by government in other contexts, see Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987).

139. To the extent that privately financed cases would be brought against the indigent, more is at stake than merely increasing the congestion of the criminal justice system. If private funds are available for providing expert witnesses for the prosecution in certain types of cases but not for the defense, for example, either the public will have to spend more on indigent criminal defense or the relative quality of indigent criminal defense will be compromised.

140. This unseen diversion of public dollars is a common problem with user fees or charges for government services in general. Sometimes fiscal problems are exacerbated as a result: "During periods of tight finances decision makers are tempted to expand reve-

Given the lack of excess capacity in both prosecutors' offices and the criminal justice system in general, a privately financed case would inevitably involve an opportunity cost for society. Each privately financed criminal case would displace a publicly financed prosecution to some extent. To be sure, it is possible that the displaced case might not have served the public interest as well as the privately financed case. On the other hand, the fact that some group in society is willing to privately finance a case does not necessarily mean its prosecution would advance society's interest more than would prosecution of the displaced publicly financed case. The existence of an individual or group willing to finance the prosecution of a crime or category of crimes simply means that such a group believes prosecution of that crime is in its interest. The absence of willing financiers might reflect that the costs of a privately "unfinanced" crime are diffused throughout society and not concentrated in any one individual or group with money to spend.[141]

A prosecutorial choice is truly "efficient" to the degree that it yields the greatest social good for the least investment of resources. Private financing is only "efficient" if one assumes that the financing would flow toward those problems affecting society most profoundly. Presumably, private financing will always be efficient from the contributors' point of view because their interests will be served by the diversion of public resources toward prosecutorial attention to the crimes that concern them most.[142]

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nue-generating activities, often reasoning that any revenue will help with the fiscal problem. Unfortunately, such expansion can actually increase the total subsidy required for that service and worsen the overall budget condition." MIKESELL, *supra* note 15, at 424.

141. For this reason, private financing is unlikely to serve as a panacea for the problem of white-collar crime. "Many white-collar crimes tend to be diffuse in their victimization—affecting a large number of victims with injuries ranging from trivial to great." Kip Schlegel & David Weisburd, *White-Collar Crime: The Parallax View*, *in* WHITE COLLAR CRIME RECONSIDERED, *supra* note 32, at 3, 11. An environmental crime, for example, could potentially affect an entire community, but the perceived interest of any one individual in prosecuting the offender would probably be too slight to elicit a contribution.

Private financing would probably also not be forthcoming where an "identifiable victim" does not exist, as would be the case in many environmental crimes.

> [T]he temporal feature of many white-collar crimes both masks and complicates the victimization. It masks the victimization because the injuries often occur much later than the actual act. It complicates victimizations because the crimes are often not singular or isolated acts, but part of a sequential chain of events leading to detectable injury.

Id. at 11-12.

142. Discriminating between activities that bring in some form of revenue and those that do not is a common phenomenon:

B. Public Good, Private Good, and the Interests of the Victim

In an important sense, society's interest is served anytime a violation of its criminal laws is prosecuted. Arguably, all criminal prosecutions serve society by deterring others from violating the law. Thus, law enforcement has been described as a "public good" in that society benefits from having it and suffers from its absence.[143] Fire protection is an example of a public good. When a house fire is extinguished, the greater community benefits because the fire might have spread. Similarly, the benefits resulting from enforcement of criminal laws is understood to extend beyond the parties affected by any particular crime. A violator jailed through a privately financed prosecution would be unable to commit further crime against others. Crime that goes unpunished may also spread, like fire.

Thinking of criminal prosecution solely as a public good, however, fails to recognize the substantial benefit that a successful prosecution can confer on private parties. Sometimes, this benefit dwarfs society's more general interest in the prosecution of crime. *People v. Eubanks*[144] illustrates this contention. The victim corporation there was also the plaintiff in a parallel civil suit against the same defendants.[145] Victory in the criminal case would greatly assist victory in the civil case.[146]

> The ability to charge for particular services can distort agency decision making. Thus, a high school football team receives magnanimous resources because gate receipts are sizable, whereas the girls' volleyball team gets hand-me-downs. The question for resource allocation is contribution to the purposes of the community (or social benefits); simple cash flow should not be the determining factor in such an instance.

MIKESELL, *supra* note 15, at 425.

143. *See id.* at 2-5; *see also* Standefer v. United States, 447 U.S. 10, 25 (1980) ("'[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant.'") (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3rd Cir. 1979)); STANDARDS FOR CRIMINAL JUSTICE Standard 3-2.1 cmt. (1979) ("The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established.").

144. 927 P.2d 310 (Cal. 1996).

145. *See id.* at 324.

146. Even if a conviction were not obtained, the victim would still enjoy substantial benefits: the defendant's legal strategy would probably have been revealed in the criminal case, the victim corporation would undoubtedly benefit from some "free discovery," and the defendant's resources for legal defense would be somewhat diminished. *See generally* Gabriel L. Gonzalez et al., *Parallel Civil and Criminal Proceedings*, 30 AM. CRIM. L. REV. 1179 (1993).

Such a benefit could be seen as coming within the victim's legitimate interest in restitution for the crime committed against him.[147] While the victim's restitutionary interest in a criminal case certainly does not conflict with society's interest in prosecuting a case, neither are the two interests congruent. A victim can benefit more from a prosecution than society in general, just as the resident whose kitchen fire is extinguished by the fire department before it consumes his entire house benefits more than someone who lives on the opposite side of town.[148]

Many of the benefits flowing to a victim from a criminal prosecution may still obtain even if the accused is not guilty of the crime. In such situations the interests of society and those of the victim diverge. The defendant corporation in *Eubanks*, for example, was a competitor of the victim corporation, and facing criminal prosecution for intellectual property theft probably compromised the defendant's ability to compete against the victim to some extent.[149] Distracting the company's top management, chilling the company's relations with customers and suppliers, pushing down the price of the company's stock—all of these problems are arguably more serious for a company that is indicted by the government for criminal violations than for a company merely sued by a competitor in a civil action.[150] The "victim" corpora-

147. Some scholars have developed theories of crime that give the victim's interest in restitution a central role. *See, e.g.*, RANDY E. BARNETT, ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349, 363 (1977); Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117 (1980).

148. The existence of a victim who is willing and able to pursue a civil remedy has been used as a justification for nonprosecution by the Assistant Attorney General in charge of Antitrust for the Reagan Administration:

> When private parties suffer substantial injury, their incentives to seek redress are high, particularly in light of the availability of treble damages and attorneys' fees. In such cases there is little reason for the government to prosecute and spend resources that could otherwise be used against more systematic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable.

William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 691 (1982).

149. Chief Judge George expressed this concern in his concurring opinion. *See Eubanks*, 927 P.2d at 323-25.

150. Of course, it would be unethical for either a private lawyer or a public prosecutor to press a criminal case to obtain a civil advantage. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(A) (1982) ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."); *see also* AMERICAN BAR FOUND., ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 343 (1979) ("The criminal process, which is designed to protect society as a whole, is undermined when it is used to force settlement of private claims or controversies . . . .").

tion enjoys the benefits flowing from the accusation against its competitor regardless of whether its competitor is guilty. To the degree that the mere filing of a criminal accusation by the government against an innocent party is enough to confer substantial benefits on a victim, the victim's interests in seeing the prosecution pressed can directly conflict with society's interest in prosecuting only the guilty.[151]

Financing entire categories of crime through funds established by the businesses affected involves similar disparities between the public and private interests. While all of society benefits from the prosecution of workers' compensation fraud—especially when the costs of this crime are shifted to consumers through higher prices—the companies directly affected by the fraud arguably benefit more.[152] A company that does not have to pay a fraudulent claim enjoys a direct benefit, and other companies similarly situated receive a deterrence benefit that is greater than society's more general interest in the deterrence of crime. Successful prosecution of workers' compensation fraud deters such fraud against local businesses more than it deters crime generally.

A potential conflict between society's interest and the victim's interest also exists in this context. The people have an interest in seeing only fraudulent workers' compensation claims deterred, but to the extent that legitimate claims are also chilled because of a perceived alliance between business and the district attorney's office, the contributing businesses derive an additional benefit from not having to pay these claims.[153]

To the degree that an individual or group in society benefits disproportionately from the prosecution of certain crimes, and to the degree that those individuals or groups have money to spare, those crimes may be likely candidates for private financing. The willingness of monied interests to finance certain prosecutions does not necessarily mean that those crimes are in society's interest to prosecute. That determination requires a comparison of the social benefit of the pri-

151. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (stating that the public interest is harmed if an innocent person is convicted).

152. Even if a company shifted 100% of the cost of such crimes to consumers through pricing, the company would still suffer because the increase in price would decrease revenues unless the demand for the company's services did not decrease.

153. Other types of potential conflict between victims' and society's interests in the prosecution of a crime exist. For example, a victim might want to accept an offer of restitution in exchange for dismissal of the charge, whereas society's interest might be better served by prosecution of the offender. This scenario is not uncommon in many white collar crimes. *See, e.g.*, Paul Jesilow et al., *Reporting Consumer and Major Fraud, in* WHITE COLLAR CRIME RECONSIDERED, *supra* note 32, at 149, 166-67.

vately financed prosection to the social benefit that would have resulted from the publicly financed cases that would have been prosecuted but were not. This, again, is a measure of the cost to society of lost opportunity, something to which the existence of a willing group of private financiers does not speak.[154]

C. Legitimacy as the Substance of Equality in Matters of Discretion

Ultimately, society's best answer to the question of what prosecutorial choices will result in the greatest good for the greatest number is a process, a process that is considered legitimate in part because it denies everyone equally a direct influence over the prosecutor's decisions.[155] In the absence of any objective and widely accepted standard for determining whether prosecuting insurance fraud or environmental crime best serves society's interest, for example, the legitimacy of that process serves as the very substance of equality.

This relationship between the inherently discretionary nature of the prosecutor's decisionmaking and the need for legitimacy was captured by the Supreme Court in its analogy in *Young v. United States ex rel. Vuitton et Fils S.A.*[156] between prosecutors and juries.[157] Decisionmaking by prosecutors and juries is to some degree a "black box" process. Just as outsiders are not permitted to observe the deliberations of the jury, scrutiny of the prosecutor's deliberative processes is discouraged. In both cases, the scope of review of the decisions made is strictly circumscribed. Finally, both juries and prosecutors make decisions that are inherently discretionary in the sense that they are not reducible to any sort of formula or meaningful standard.[158] Given the absence of any standard for judging the validity of the decision reached, the legitimacy of the decisionmaking process is all that remains.

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154. Peter Self has argued that public choice arguments ultimately deny the meaning of the concepts of "public good" and "public interest." *See* SELF, *supra* note 136, at 232-36. He accuses public choice advocates of wanting to fragment the concept of a public interest by "establishing more direct linkages between personal interests and public policy." *Id.* at 236. He argues for a return to a more positive concept of active citizenship based on a wider range of social values in place of the "consumer democracy" that public choice offers. *Id.*

155. For a procedural model of equal protection analysis that describes legitimacy primarily in terms of equal representation of all interests in governmental decisionmaking, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

156. 481 U.S. 787 (1987).

157. *See supra* notes 81-83 and accompanying text.

158. *See supra* notes 36-38 and accompanying text.

As in all questions of legitimacy, much depends upon appearances.[159] To the degree that prosecutors who take private money will be seen as beholden to the contributors, the legitimacy of the prosecutorial decisionmaking process suffers, as will the legitimacy of the entire criminal justice process, given the central role played by prosecutorial discretion.

The legitimacy of the prosecutor's decisionmaking process has been recognized as inextricably linked to the polity's willingness to accept the authority of government.[160] A criminal prosecution by the government both confers legitimacy upon a private complaint and depends upon legitimacy for its acceptance. The authority of government prosecutions may be diminished if they are perceived as being exercised disproportionately on behalf of the wealthy.[161]

D. Preferential Access to Justice as a Threat to Equality

Determining to what degree prosecution of a crime advances the public interest has traditionally been entrusted to the prosecutor's sole discretion. To the degree that private financing enables the prosecutor to select from a broader menu of cases to prosecute by adding to the resources at her command, it offers a benefit. To the degree that private financing compromises the prosecutor's ability to place the public interest above the interests of her contributors, it exacts a cost. The prosecutor's own interest in maximizing the resources subject to

159. *See Vuitton*, 481 U.S. at 811 ("[A]n interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.").

160. *See Vuitton*, 481 U.S. at 811 (warning that misuse of special powers of the prosecutor "'impair[s] public willingness to accept the legitimate use of those powers'") (quoting WOLFRAM, *supra* note 20, § 8.10.2 at 460).

161. Under Madisonian constitutionalism, the legitimacy of government depends on limiting the influence of such factions. Madison defined "faction" as any group "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961). Faction has been interpreted by some scholars in terms of divisions in wealth. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 14-15, 153-54 (1941) (citing unequal distribution of property as primary concern); DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 39 (1989) (defining faction as encompassing religious, economic and political divisions).

For Madisonians, the capture of government power by private interests destroys the legitimacy of government power. "Factionalized ends . . . were illegitimate ends. They could not be justified in terms of the deeper value of equality that is fundamental to constitutional government, namely that political power must be reasonably justifiable to all persons as respecting their rights and serving the common interests of all." RICHARDS, *supra*, at 258. Consequently, the Fourteenth Amendment's guarantee of equal protection is seen as an articulation of "the underlying moral ideal of the equality of all persons" upon which the Constitution is based. *Id.*

her control could conflict with society's interest in the equal consideration of each case. This equality interest concerns the fair or optimal allocation of the prosecutor's resources.

Even if one assumes that private financing would add to the number of crimes prosecuted without detracting from the opportunities of nonpaying victims to secure redress, or if one assumed that the prosecutor would only accept the financing when it was in the public interest and not merely in her institutional interest to do so, private financing would still threaten a distinct equality interest that is not related to the fair allocation of scarce resources: Privately financed victims will enjoy preferential access to justice. Even if private financing does not diminish the access to justice for others, the privately financed victim would still enjoy superior access to justice by virtue of her wealth. A two-tier system of criminal justice would develop in which privately financed cases would enjoy the best experts and services while publicly financed cases would be left to compete for their share of limited public funds. A rich victim might get a better prosecution than a poor victim. This threat to equality makes no assumptions about influence or trade-offs between cases.[162]

162. This prospect clearly concerned the California Supreme Court in *Eubanks*: "A system in which affluent victims, including prosperous corporations, 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." 927 P.2d at 318 (footnote omitted). The dangers of a two-tier system of criminal prosecution are a subset of a larger problem involving the privatization of services traditionally provided by the government. In the words of Robert Reich, "the fortunate fifth is quietly seceding from the rest of the nation." EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 175 (1994) (quoting Secretary of Labor Robert Reich). As more and more government services are "privatized," some fear that monied interests in society will seek to withdraw from public institutions: "I am trying to envision what happens when 10 or 20 per cent of the population has enough income to bypass the social institutions it doesn't like in ways that only the top fraction of 1 per cent used to be able to do." *Id.* at 175 (quoting Charles Murray).

A danger exists that those who can privately finance "pet prosecutions" may grow less willing to pay taxes to support public prosecutions generally. Evan McKenzie described exactly this phenomenon in the context of common-interest-housing developments ("CIDs"):

> Advocates of CIDS have long contended that the assessments residents pay to their associations are the equivalent of property taxes. . . . They contend that if they are paying for their own trash removal, for maintenance of their own streets, and for upkeep on their own park, they should not have to pay property tax assessments for such services. . . . The solution, from their perspective, would be to permit CID residents to deduct some or all of their assessments from their property tax bill. In areas with large numbers of CIDS, this could amount to a serious loss of local government revenues.

Id. at 165. In the CID context, what began as a voluntary effort by private associations to provide additional services for themselves has resulted in pressures to withdraw their tax

Preferential access to justice for monied interests also threatens the defendant's distinct interest in equality. To the degree that the quality of the prosecution a defendant faced might depend on the wealth of the person accusing her, a different sort of inequality obtains. 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.[163] The powers wielded by government are considerable, as is the cost of merely being accused by the government of criminal conduct. To the degree that the wealthy would enjoy a superior ability to unleash these forces on those who offend their interests, inequalities in political power that already exist as a function of wealth would be exacerbated.[164]

Ultimately, private financing forces a choice between competing goods. To the extent that private financing might allow prosecution of certain crimes that are foregone solely because of cost, society's interests in punishing the guilty are advanced. To the extent that these additional prosecutions are the product of preferential access to justice for monied interests, society's interests in the equal treatment of all victims and of all defendants suffer. Private financing inevitably pits these two interests against one another.

dollars from public institutions responsible for those same services. Conceivably, private financing of criminal prosecutions could result in pressure for a similar withdrawal.

163. *Cf. Vuitton*, 481 U.S. at 811 ("If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant.").

164. For a thoughtful polemic arguing that the disproportionate influence of monied interests over government is society's most serious problem, see RICHARD N. GOODWIN, PROMISES TO KEEP 13 (1992) ("To a significant extent, private power has subordinated the structures of representative democracy to the service of its own interests. . . . Our welfare . . . has been damaged by a profane combination of private interests with public authority . . . .").