

Private Financing of State Attorney-General Enforcement Actions **Nicholas G. Campins, Columbia Law School, Class of 2005_**

Introduction: Why Funds are Necessary

Because of significant financial short-falls, state attorneys general are ill-positioned to assume further responsibilities and if current trends continue, they may be forced to cutback on existing enforcement. State budgets are tight and attorneys general are making substantial staff cuts across the country. In California, the Department of Justice recently cut one hundred eighteen assistants and one hundred sixty-seven support staff from its payroll. Similarly, in Oklahoma the state attorney general was forced to cut twenty-seven staff positions, including ten assistants. Even those attorneys general who have not made staff cuts have few resources with which to take on additional responsibilities.

This trend leaves state attorneys general in a state in which further cuts will lead to scaled back law enforcement. If the current situation remains in place, a number of negative consequences are likely to occur. For example, attorneys general may only take on politically popular causes so that they can more easily secure funding in the legislature, undermining their historic independence. Further, attorneys general will have to make further staff cuts, which will result in offices that are less attractive to young attorneys and the quality of staff will decline.

The availability of private funds might alleviate this situation. Not only might private funding help overcome the current deficit, it may also increase independence by insulating attorneys general from severe budget cuts in the event that their enforcement decisions prove unpopular.

Overview

This paper is organized into two parts. Part One begins by examining the public policy arguments against private financing of law enforcement activities on the basis that such financing creates conflicts of interest. Eventually, it concludes that a well-designed system can overcome many objections. Part One continues with an analysis of applicable case law in an effort to discern whether the United States Constitution and analogous state constitutions constrain or prohibit private financing of law enforcement. Part one concludes by analyzing how procedural safeguards minimize private financing's susceptibility to an attack on Constitutional grounds. In particular, it focuses on the important distinction between topic-specific financing and case-specific financing and on the important ways in which confidentiality ensures that no undue influence is gained over an attorney general's prosecutorial discretion.

Part Two surveys the laws of California, New York, Iowa and Illinois in an effort to ascertain what, if any, barriers there are to private financing under applicable state law. Although the analysis incomplete, in all of the states peripherally examined, it concludes that private financing is allowable in some form.

Part One: Conflicts of Interest Law and Policy

Objections to private financing of enforcement actions often take two forms. First, some oppose private financing as a threat to equality in both the administration (access to law enforcement) and application of the law (selective prosecution). Second, critics object that private financing is unconstitutional because it violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. While both types of arguments are important; they do not constitute insurmountable obstacles to private funding under current case law. Instead, they are akin to positive restrictions on private funding that guide the design of any funding regime. Because of their importance, I address each in turn.

Policy-Based Objections

Legitimacy is crucial to law enforcement_ both in the sense that state attorneys general are elected representatives and in the sense that the media, the citizenry and other government actors must regard decisions about prosecutorial discretion as guided by principle and not by expediency. Without legitimacy, not only is an attorney general unlikely to be reelected, the law enforcement activity itself will suffer both in its deterrent effect (regulated actors are less likely to modify behavior when prosecutions are seen as improper and arbitrary) and because defendants are more likely to engage in wars of attrition in litigation they view as having little public support. Unrestricted private financing of law enforcement threatens legitimacy in two ways. First, it leads to the perception that access to (or worse immunity from) law enforcement is bought and sold. Second, it leads to the related perception that a specific defendant is being prosecuted improperly. I address each argument in turn.

Access to Justice Critique

As set forth in Joseph Kennedy's article in the Hastings Constitutional Law Quarterly, the access argument is as follows:

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 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._

This critique is based on the assumption that private financing causes attorneys general that are funded to undertake enforcement in areas popular with contributors. Clearly, this is a valid concern that should be addressed. However, this critique is further premised on

a second assumption that the current situation is devoid of such influences. This assumption is wrong. Prosecutorial case selection is already driven in part by line-item appropriations and reelection pressures which already limit prosecutorial discretion. Accordingly, if the critique is objectively valid, it is so in the sense that private funding creates incentives that are not parallel to those that are the result of the “normal” political process. However, the “normal” political pressures that result in cuts or additions to an attorney general’s funding are similarly corrupting and we are left in a situation of choosing the least bad option. In this vein, an influx of private funding will distort enforcement in the sense that it increases enforcement in areas outside of those favored by the “normal” political process. If we assume that the “normal” political process is governed by elites, then private funds may actually increase democratic decision-making and make entrenched interests in the current system less powerful.

Nonetheless, from the standpoint of subjective legitimacy, it remains a powerful argument. If access to the law is seen as a commodity, the legitimacy of law enforcement actions suffers. It is important to consider that this can exist even independently of any actual objective effect. Perception is often more important than reality, especially in politics. Accordingly, it is possible that any private funding regime would be seen as illegitimate by some. However, this perception can be counteracted by prophylactics that making funding available to fund all enforcement activities and making any professed preference for the use of such funding legally and actually nonbinding. If attorneys general retain actual and credible discretion to bring or fail to bring cases, then any perceived or actual harm to legitimacy can be minimized.

Selective Prosecution Critique

Even more damaging to legitimacy than the access critique is the threat that private funding will lead to selective prosecution. In the context of attorneys general, the critique might be that attorneys general will be overzealous in their prosecutions in areas for which funding is available. In many cases, these might be persons who are politically unpopular. In this regard, the California Supreme Court’s summary of the trial court’s statement in *People v. Eubanks*, a case involving the private financing of a local prosecution, might be taken as indicative of this general line of reasoning: 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 whom doesn't offer to pay existing debts?" Answering its own rhetorical question, the court found the payment of the district attorney's incurred debt "rather strong evidence of a reasonable possibility that the discretionary function that's fundamental to a District Attorney is compromised and thereby would not necessarily be used in an even-handed manner." _

Thus, the critique would have it; the prosecution assumes a greater burden to the paying citizen than it has to the citizenry at large. If this is so, then not only does it demonstrate preferential access to the prosecutor it also shows that the prosecutor will be more severe with the accused. This threatens the traditional impartiality of the law enforcement.

One partial solution to this problem would be to have a regime in which funding is not accepted for individual controversies. This would prevent the worst type of “paying customer” mentality that might come with private funds. Perhaps the ideal prophylactic solution in this regard would be for funds not to be tied to any kind of enforcement. This would blunt the edge of an argument that a particular industry is being prosecuted at the behest of donors. While this might make private financing harder to achieve as a practical matter, because any funds would have to be given on the basis of fidelity to the general causes of an attorney general, it would have the virtue of being neutral. Similarly, another prophylactic might be to shield the attorney general from any knowledge of whom the contributors are (assuming this could be accomplished under state analogs to the Freedom of Information Act).

Whatever solution is chosen, it is important to recognize that this is a real problem, whose implications go beyond mere policy and into the legal arena as will be discussed below. However, it is not impossible to have private funding that does not create incentives for selective prosecution. Similarly, any solution need not achieve perfection. After all, selective prosecution is already a fact of life. Legislatures increasingly appropriate line-item funds and electoral pressures constantly influence decisions as well.

Legal Conflicts of Interest Analysis

At the outset, it must be noted that attorneys general undertake a variety of civil and criminal enforcement activities. Accordingly, a variety of federal and state constitutional provisions will be applicable depending upon both the type of litigation and the nature of the interest involved. For the purposes of this discussion, analysis will be confined to the Fourteenth Amendment’s Due Process and Equal Protection Clauses generally. More specifically, I will focus on criminal prosecutions, both because the law is well-developed and because the law of criminal prosecution often, if not always, defines a stricter standard than that which is applicable to most other types of governmental conduct. Thus, if a system comports with criminal standards, it likely meets other standards.

The Default Rule: Judicial Review of Prosecutorial Decision-making is Limited

The Supreme Court is extremely deferential to prosecutorial discretion:

Our...cases uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions are not readily susceptible to the kind of analysis the courts are competent to undertake, we have been properly hesitant to examine the decision whether to prosecute._

As the court in *Rumery* recognized, for a variety of reasons, prosecutorial discretion is beyond judicial competence.

Similarly, defense challenges to selective prosecution are almost never successful; because courts are reluctant to interfere with the prosecutorial prerogative. Indeed, most defendants' motions are still-born because they cannot even make the threshold showing necessary to get discovery, which requires that: "the defendant...produce some evidence that similarly situated defendants...could have been prosecuted, but were not." In other words, for any defendant to obtain discovery on a selective prosecution motion, they must demonstrate that similarly situated defendants of some group could have been prosecuted and they were not. Moreover, even if the defendant is able to get discovery, his or her burden of proof is high:

A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to 'a practical denial' of equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'

Hence, as currently formulated, it is unlikely that a defendant could show that the "system of prosecution" amounts to "a practical denial" of equal protection simply because his prosecution was funded using private funds.

Supreme Court Cases in which a Potential Conflict of Interest has Raised Constitutional Concerns

The Supreme Court has recognized a prosecutorial conflict of interest in two circumstances. First, the Supreme Court has recognized a potential due process violation in extreme cases of fiscal institutional bias. In other words, if prosecutors and judges are driven to seek convictions only for pecuniary gain, than such prosecutions would constitute a violation of due process. Second, the Supreme Court has also recognized, in dicta, a due process and equal protection right to an impartial prosecutor, meaning that a prosecutor must not be personally interested in the outcome of a case.

Thus, the question presented by private financing of enforcement is whether the acceptance of funds amounts to a denial of due process to a defendant prosecuted using those funds? While the Supreme Court has never addressed this precise question, the answer is that it probably does not. This is because Supreme Court case law in analogous cases suggests that prosecutors are held to a lower constitutional standard than judicial officers. In any case, the primary benchmark for activity seems to be a "personal interest" in the outcome.

In *Tumey v. Ohio*, a case involving "mayors' courts" (courts in which city mayors acted as judges) used to enforce the federal prohibition on the sale of alcohol, the Supreme Court found that because the "mayor received for his fees and costs in the present case \$12" the defendants were denied due process:

We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal._

However, as the quote itself suggests, the denial of due process in *Tumey* stemmed from the fact that the adjudicator himself gained financially if a defendant was convicted. Accordingly, the Court's holding rested heavily on the fact that the mayor was acting as judge and on the historical importance of judicial impartiality._ Moreover, even if we were to read the holding as establishing a principle applicable to law enforcement officials, it would simply mean that law enforcement officials should not prosecute a case in which they have a direct financial interest. This is largely uncontroversial and it should not create a major impediment to private funding.

In this regard, the Court's more recent opinion in *Marshall v. Jerrico*, is instructive._ *Jerrico* involved a due process challenge to "§ 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e)," in which "sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties."_ Defendants contended and the court below found "that the reimbursement provision created an impermissible risk of bias on the part of the assistant regional administrator."_ The Supreme Court reversed, finding: that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. The biasing influence that appellee discerns in § 16(e) is, we believe, too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions._

In dicta, the court went onto state:

The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 414 (1958); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Prosecutors need not be entirely 'neutral and detached,' cf. *Ward v. Village of Monroeville*, 409 U.S., at 62, 93 S.Ct., at 84. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties._

The Court found that prosecutors need not be completely “neutral” and that the constitutional interests in preserving a fair and open process for decision are not implicated to the same degree if it is the prosecutor and not the judge who has a pecuniary incentive. However, the Court went onto state in dicta:

We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger v. United States*, 295 U.S. 78, 88 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See *Dunlop v. Bachowski*, 421 U.S. 560, 567, n. 7 (1975); *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939). Moreover, the decision to enforce--or not to enforce--may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis Administrative Law Treatise 215-256 (2d ed. 1979). 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. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); cf. 28 U.S.C. § 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime._

Consequently, the constitutional standard which any private funding of law enforcement must comport with is that of “personal interest.”_ The prosecutor must not have a “personal interest” in the case that would bring irrelevant or impermissible factors into the prosecutorial decision. Similarly, even if there are some “irrelevant or impermissible factors” are considered, the court stated only that in “some contexts” it may “raise serious constitutional questions.”_

This requirement is not a substantial one, so long as the attorney general has no personal interest in a particular case, e.g. an assistant’s continued employment is not contingent upon further private financing or the like. As a prophylactic measure it is wise that there be no quid pro quo at all. For example, it should be impermissible for a person donating to a fund to request that a specific prosecution be made or to have a successful prosecution as the benchmark for further funds. The exercise of discretion must remain untied to the funds in all cases. Further, it may also be desirable to not have funds tied to any particular area of enforcement at all, at least in any legally cognizable sense. State Constitutional and Quasi-Constitutional Barriers: *People v. Eubanks*

The aforementioned discussion has related primarily to federal constitutional considerations and it has thus presented at most half the picture. While it may be taken as persuasive as to state constitutions, especially those modeled on the federal constitution, it is far from dispositive. It is thus important to consider what limited state

jurisprudence there is on this matter to see how other states (and potentially the federal government) might look at this issue. In this regard, the leading case is a California Supreme Court case, *People v. Eubanks*, in which one competitor financed certain costs associated with the investigation and prosecution of a competitor. Ultimately, the Court disqualified the district attorney finding that he should have recused himself under Cal. Penal Code §1424.

The facts are egregious and their opprobrium probably motivated the court's holding; so it is worthwhile to set them forth. *Eubanks* involved two defendants, one, Eugene Wang was vice-president of "Borland International, a software developer and the other Gordon *Eubanks* was president and chief executive officer of Symantec, a competitor of Borland." In protest to a management decision, Wang "submitted his resignation." "Fearing Wang might have conveyed internal Borland information to outsiders, Borland officers reviewed Wang's electronic mail files. They found several messages to *Eubanks* containing what they believed was confidential Borland information." They then telephoned Silicon Valley police who enlisted the help of prosecutors. Because the evidence was highly technical, the district attorney's chief inspector, "asked Borland officials if Borland could provide one or more technically competent employees to assist in the search." The Borland representatives declined because they were afraid of potential legal liability. Instead, they suggested that independent consultants be used instead and offered to pay for their assistance. Accordingly, a "\$25,000 blanket purchase order was drawn up and approved by the legal department in November 1992 for miscellaneous services and fees / Symantec lawsuit." Borland also paid for transcriptions of prosecutor's interviews with its employees at the district attorney's request. Accordingly, the entire investigation involved extensive payments from Borland to persons working directly for the prosecutor. Moreover, this sponsored investigation was done at the behest of one competitor to gain a tactical advantage against another competitor.

At the outset, it is crucial to note, that the California Supreme Court's opinion is premised on its interpretation of Cal. Penal Code § 1424 and that by its terms §1424 applies only to district attorneys and it does not apply to the attorney general's office. Section 1424 reads, in pertinent part:

(a)(1) Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary. The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. An order recusing the district attorney from any

proceeding may be reviewed by extraordinary writ or may be appealed by the district attorney or the Attorney General. The order recusing the district attorney shall be stayed pending any review authorized by this section. If the motion is brought at or before the preliminary hearing, it may not be renewed in the trial court on the basis of facts that were raised or could have been raised at the time of the original motion.

Similarly, a later section refers the district attorney's role vis-à-vis city attorneys. Nowhere does the statute contemplate the recusal of the Attorney General. Moreover, in California, the Attorney General is a separate constitutional officer whose mandate is spelled out specifically in the California Constitution. All of these factors lead to the conclusion that the Attorney General was intended to be excluded from §1424.

Nonetheless, the opinion is useful for several reasons. First, the facts themselves show the inherent danger in public law enforcement's cooperation with private actors, by showing the ease with which private aims can become entangled with the public law enforcement goals if professional distance is not maintained. Second, the court's analysis under the statute is a useful guideline and proxy for a type of heightened conflicts analysis that could potentially be applied. As set forth in pertinent part, the court's standard is:

[W]hether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant--the likelihood that the defendant will not receive a fair trial-- must be real, not merely apparent, and must rise to the level of a likelihood of unfairness. Thus section 1424, unlike the Greer standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system._

Thus, even under § 1424, "the potential for prejudice to the defendant--the likelihood that the defendant will not receive a fair trial-- must be real, not merely apparent, and must rise to the level of a likelihood of unfairness." This is similar to the Supreme Court's dicta in *Jerrico* that a personal interest, if severe enough, could effect a denial of due process and it represents a high standard for a defendant to meet._

Third, *Eubanks* also contains general dicta about federal constitutional law which might be applicable to the attorney general:

More to the present point, 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. As Judge Friendly put it in *Wright v. United States*, supra, 732 F.2d at 1056, a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant." (Italics added.) The tie that binds the prosecutor to an interested person may be compelling though it derives from the prosecutor's institutional objectives or obligations. Thus, in *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, the high court, pursuant to its supervisory authority, forbade a private law firm from prosecuting a contempt on behalf of the Government, because the firm, as a matter of legal ethics, bore

the "obligation of undivided loyalty" to its private client, *Vuitton*, which in turn had a private pecuniary interest in prosecution of the contempt. (Id. at p. 805, 107 S.Ct. at pp. 2136-2137.) A public prosecutor must not be in a position of "attempting at once to serve two masters," the People at large and a private person or entity with its own particular interests in the prosecution. (*Ganger v. Peyton* (4th Cir.1967) 379 F.2d 709, 714.). Private influence, exercised through control over the prosecutor's personal or institutional concerns, is a conflict of interest, under section 1424, if it creates a reasonable possibility the prosecutor may not act in an evenhanded manner._

Although it comes in dicta, this statement is more troubling for private financing. Essentially the court is saying that the prosecutor must be disinterested and it states a seemingly lower standard for §1424 than it stated a few pages earlier, that private influence creates a conflict if it creates a "reasonable possibility that the prosecutor may not act in an evenhanded manner." This is a more exacting standard and it should be regarded with some skepticism. Nonetheless, any private financing scheme should attempt to comply with it to avoid scrutiny.

Response to Legal Conflicts Analysis: Potential Procedural Safeguards Designed to Curb Influence

It is clear from the aforementioned case law and public policy discussion that any private funding regime should avoid creating any "personal interest" on the part of an attorney general in the outcome of particular litigation. It is also clear that an attorney general should try to formulate a strategy in which there is no possibility that private funding would give rise to "a reasonable likelihood" that prosecutorial decision-making and discretion would be subject to influence by contributors. However, what remains to be discussed is how, in light of these considerations, such a scheme could be devised. In this regard, legal scholarship with regard to private financing of prosecution is instructive.

The Critical Distinction between Case-Specific Financing v. Topic-Specific Financing

Case-specific private financing, of the type used in *Eubanks*, *infra*, in which private financing is used to fund one specific legal action, is inherently fraught with peril._ This flows from the fact the level of "interestedness" increases markedly in such cases from the nature of the public official's relationship with the donor. Logic dictates that if an individual is given funds from a victim or a group to undertake a specific law enforcement activity, she is now beholden to that group in some way (money is seldom free). This interestedness might manifest itself in either a trivial way, such as increased zealotry, or in a strong way, such as influencing a decision to undertake a particular prosecution. While the latter influence might be desirable to some, it runs afoul of due process as discussed in *Eubanks* and *Jerrico*. As the facts of *Eubanks* demonstrate, courts and the public at large are unlikely to tolerate what they see as the use of state power by private actors. Similarly, the background norms against selective prosecution

and unequal access are also violated if funds are used in a way that may not parallel the broader public interest.

Juxtaposed to the model of case-specific financing, might be an intermediate level of financing, which might be called “topic-specific” financing. Under this model, private funds could be allocated to fund a specific area of enforcement, e.g. environmental enforcement or white collar crime enforcement. While there is no academic literature or case law on this model, it would seem to allow for a measure of targeted funding that would aid in soliciting funds, without running afoul of any of the case law mentioned above. This is because topic-specific funding creates no propensity to go after an individual and this is crucial. After all, by its terms, the Fourteenth Amendment to the Constitution applies only to persons (corporations are persons too) and in part, only to citizens:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws._

Thus the outer limit of its reach is necessarily groups of persons or categories of persons. Properly done, topic-specific financing might not even go after particular industries and instead could go to broad and vague categories of enforcement generally. One potential drawback of this approach is that it is difficult to police. Any use of this approach would entail scrupulous avoidance of mentioning any activity or making any promise of enforcement. Any other approach might cause the funding to lose its “intermediate” status and become “case-specific.”

At the opposite extreme, private financing of the general activities of an attorney general might be even further immune from attack. If the funding is purely neutral and it is not directed toward any specific project at all, it seems that it would be difficult to prove interestedness. However, this would probably create practical difficulties in the sense that it would be far more difficult to raise funds for such an endeavor; as it is hard to get people excited about enforcement activities generally.

Other Possible Safeguards

No Promises

Regardless of what financing scheme is chosen, no attorney general or member of his or her staff should ever make any promise to induce a donation. Any promise would be prima facie evidence of a conflict and a personal interest in the outcome. Even if such promise was not legally enforceable and failure to perform resulted only in harm to reputation, this would still be the case because the failure might have other adverse

consequences in the future i.e. it would be harder to raise future funds or political contributions.

The Blind Trust Model

As proposed in a Washington University Law Quarterly Note, a blind trust model would take the following form:

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

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

Accordingly, such a model would have the virtue of promoting a disinterested decision-maker and it would also seemingly satisfy all relevant federal constitutional criteria.

However, as the author above notes, states which require public disclosure of names of contributors because of a public records statute would presumably defeat the aims of having a blind trust, at least in spirit. Nonetheless, one could disagree with the author that a court would not recognize the formality of such a trust in a state with a public records disclosure act, since most states with such a statute require disclosure only to individuals upon request.

In this regard, this model is not completely untested. Apparently a district attorney in Ventura, California has already employed such a model. In that model, the prosecutor solicited private donations to fund workers compensation prosecutions. The funds were

to be donated into a blind trust and the prosecutor was not allowed to know the identities of any of the contributors._

Part Two: Gift Laws and Other State Legal Obstacles

As was alluded to in the discussion of state constitutional concerns and *Eubanks*, supra, the importance of state law to the ascertaining the legality and workability of private financing of law enforcement activities by state attorneys general can not be overstated. State law will have a determinative impact on the viability of private funding. Of course it would be a prohibitively time-consuming to undertake an examination of the impact of state laws in every state. Indeed, it is impossible within the scope of a white paper to undertake a comprehensive analysis of any one state's legal regime. Accordingly, the paper will examine four states: California, New York, Iowa and Illinois, in an effort to predict what laws in each have an obvious bearing upon the workability of a funding regime. In the end, it concludes that a private financing scheme is likely workable in all of them.

Case Study: California

Of the four states evaluated, California appears to have the most comprehensive experience with private financing of law enforcement activities. As mentioned above, at least one prosecutor in Ventura County has established a blind trust for the public financing of workman's compensation insurance prosecutions._ Similarly, the Los Angeles County District Attorney's office has operated a similar fund for over a decade and it has been consistently upheld in state appellate courts._ Further as mentioned above, the landmark case, *Eubanks* originated in California. Thus, it appears the state has been generally receptive to such financing schemes, except in extreme cases like those found in *Eubanks*.

However, even though not applied in *Eubanks*, other aspects of California law suggest that private financing could be attacked on the basis of gift and ethics law incorporated into the Government Code. Most obvious in this regard is California Government Code Section 19990(d), which states in pertinent part:

A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

- (a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.
- (b) Using state time, facilities, equipment, or supplies for private gain or advantage.

- (c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.
- (d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.
- (e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.
- (f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee._

Two parts of Section 19990 are troublesome. First, in the perambulatory clause, the law may codify conflicts law when it states that any officer shall not engage in any “activity” which is “clearly inconsistent” or incompatible with “his or her duties.”_ This provision is worrying because it may codify some common law regarding the “duties” of state officials in a way that would permit a judge to interpret fundraising as inconsistent with the duties of the attorney general. However, such activity must be “clearly” inconsistent implying that there is a higher standard that must be met. Similarly, this statute does not seem to be self-executing or to create a private right of action or to waive sovereign immunity, so it is unclear if anyone other than the Attorney General would have the authority to enforce this statutory prohibition against himself and his subordinates. This is especially the case given the fact that the second perambulatory sentence suggests that the “appointing power shall determine, subject to approval of the department” those activities which are inconsistent with the employees’ duties._ Nevertheless, the statute goes on to specify duties which are always inconsistent with an employee’s duties. The second area of concern is Section 19990(d), which prohibits “receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.”_ This prohibition might be read to bar the direct payment of salaries using private funds and as to only allow funding of other incidental costs. However, it is not clear if private funds for enforcement would be properly conceived of as a gift to the state or to an officer of the state. If you were to conceive of the funds as a gift to the state, then conceivably Section 19990(d) would pose no bar to its use in paying salaries. In this regard, California Government Code Section 82028 which defines “gift” is unhelpful in deciding the matter._

Taken together, the positive law just mentioned and the dicta in *Eubanks* suggest that California is possibly hostile to private financing of attorney general enforcement actions. However, the fact that the statute at issue in *Eubanks* does not facially apply to the attorney general and the fact that the gift law and ethics law mentioned above are likely not enforceable by defendants or private parties combine to imply that this seeming

hostility may be illusory. Further, the idea that California would be hostile to any funding is also belied by the state's substantial experience with such funding at the district attorney level. Accordingly, it appears that private financing of attorney general enforcement actions in California is viable.

Case Study: New York

New York is unique among the states examined, because in New York the attorney general has already solicited private funds and is currently using them to undertake initiatives. In this regard, the New York Attorney General is fortunate in that he has recourse to a state ethics board who can issue an advisory and binding opinion as to the legality of private funding and pursuant to said arrangement the attorney general has already obtained pre-clearance to use such funds. Accordingly, because of its importance, the opinion will be analyzed in depth.

The basic background is as follows: Richard Rifkin, Deputy Attorney General proposed “an agreement wherein the AG would partner with two not-for-profit organizations on a project designed to modernize and update a registry that it maintains of not-for-profit corporations, charitable trusts, and fund raising professionals.”_ Rifkin acknowledged that “[p]art of the agreement will involve the not-for-profit organizations' solicitation of contributions to fund the project from sources that may be regulated by the AG.”_

“Pursuant to its authority,” “the New York State Ethics Commission” concluded “that the AG, through a written service agreement, may partner with not-for-profit corporations to modernize its registry and the not-for-profit corporations may seek funds from entities that the AG may regulate, as the arrangement is part of an agreement for consideration and does not constitute gifts to individual employees or to the agency.”_

The Commission reached this result using the following analysis:

Both Public Officers Law §§ 73 and 74 are specifically applicable to gifts made to individual State employees. They are not, however, enforceable against agencies with respect to gifts. The Commission has, however, considered the question of whether and under what circumstances an agency may accept gifts. In Advisory Opinion No. 92-1, the Commission first applied Public Officers Law § 73(5) and § 74(2) to the receipt of gifts by State agencies. The Commission permitted the agency to accept contributions from regulated individuals or entities, but determined that it was inappropriate for any State agency to accept contributions from persons and entities under investigation by or in litigation against the agency. The Commission further held that for all other donations, it was necessary to consider the source, timing and value of any gift prior to acceptance. This position has been reiterated throughout subsequent Commission opinions governing gifts to State agencies._

Accordingly, the commission drew a sharp distinction between an agency's receipt of gifts and an individual employee's receipt of a gift. It also noted that in the past it had

approved gifts even by regulated entities to state agencies so long as the regulated entity was not contemporaneously under investigation or in litigation against the agency. Interestingly, the opinion then went on to state:

Looking first at the nature of the proposed transaction, the Commission views the proposal as essentially an agreement for consideration between two parties rather than as a traditional gift. Through the service agreement, the AG receives a complete, modern, and updated registry for its registrants and the public, and, in return, [not-for-profit A] and [not-for-profit B] receive timely access to data enabling them to compile a comprehensive national statistical database, which would not be possible without New York's participation.

The Commission notes that any funds raised will be earmarked for the modernization project, and will not be available for unconditional use by the agency, unlike a traditional gift. Furthermore, the contract can be structured in a way as to allay any concern that the AG's regulatory role will be undermined by receiving an inappropriate contribution. The terms and conditions of the contract should specify that funds may not be collected from an entity that is the subject of a complaint, inquiry or that is in litigation against the AG. Such an arrangement, particularly when introducing the element of bargained for consideration, does not run afoul of the Public Officer Law.

Thus, the commission further found that two considerations made the monies even less objectionable than a standard gift. First, it found that the agreement was essentially one that was for consideration rather than a traditional gift. Presumably, under the commission's logic this makes the financing less of a "gift" which makes it even less objectionable. Second, the commission found that the funds were not available for general use and so it was even less of a "gift."

The commission's opinion presents a veritable blueprint for private financing of law enforcement activities in New York. It provides that the traditional gift law is inapplicable to agencies and that few ethical problems are posed by gifts, even when those gifts are made by regulated industries. The opinion also shows the way in which considerations under conflicts law are in tension with considerations under gift law. In this regard, the commission found the fact that the agreement was one for consideration a favorable factor and the fact that the funds were not available for general uses as a favorable factor. It is arguable that each of these considerations cut the exact opposite way from a conflict's analysis because both make the Attorney General more beholden to the gift giver. A fact not considered by the opinion. In sum, current New York law seems to be conducive for private financing of law enforcement activity by the attorney general.

Case Study: Iowa

Unlike its sister states, New York and California, Iowa does not appear to have any history with private financing of law enforcement activity (at least none that has been reported on). Similarly, a search of Iowa cases also turned up no law on the matter.

Nonetheless, Iowa's positive law seems to be rather conducive to private financing as a general matter. In this regard, three sources of law are relevant: Iowa's gift law, its conflicts of interest law and its Constitution.

As described by in an opinion by the Attorney General, in which he found the solicitation of charitable contributions for a non-governmental charity legal, Iowa's gift law applies only to individuals and not to other entities:

The stated purpose of the gift law is to discourage state public officials and public employees from accepting gratuities or favors from those who could gain advantage by influencing official actions. Iowa Code § 68B.21 (1993). Gifts that create unacceptable conflicts of interest or appearances of impropriety are prohibited. Id.

As amended by 1993 Iowa Acts, chapter 163, section 1, a "gift" is defined in section 68B.2(9) as "a rendering of anything of value in return for which legal consideration of equal or greater value is not given and received." Cash donations fall within the statutory definition. Op.Att'y Gen. #93-7-7(L).

Ordinarily, we would next determine whether the gift was from a "restricted donor" as that term is defined in section 68B.2(24), because under section 68B.22 a public employee may not solicit or receive a gift from a restricted donor. Because the gift law is intended to apply only to gifts given to public employees and officials, however, the threshold question is whether the public employees are in fact the donees._

Accordingly, it is clear that Iowa's gift law would not apply to the Attorney General because it only applies in situations in which "public employees are in fact the donees." _

Similarly, earlier in the same opinion, the Attorney General also set forth the standard for conflicts of interest:

Where public officials are concerned, this office has opined that generally a conflict of interest exists "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'y Gen. 220, 221. We believe that the same rationale applies to public employees under section 68B.2A. Section 68B.2A clearly prohibits public employees from using the employer's time, equipment, and uniform for an outside activity from which the employees benefit personally. We conclude the statute prohibits any personal gain or advantage to employees who use their uniform, public time or property to solicit funds for charity. If any gain or advantage exist, the activity is illegal._

Thus, Iowa's gift law is broadly in accord with the "personal interest" standard alluded to in *Jerrico* and *Eubanks*. Consequently, we can assume that in Iowa, so long as there is no potential for personal gain, no conflict exists in receiving such private funds. Moreover, the Iowa Constitution itself contains an explicit provision permitting the Attorney General to accept private funds for a limited purpose in accordance with his or her duties:

12. Inform prosecuting attorneys and assistant prosecuting attorneys to the state of all changes in law and matters pertaining to their office and establish programs for the continuing education of prosecuting attorneys and assistant prosecuting attorneys. The attorney general may accept funds, grants and gifts from any public or private source which shall be used to defray the expenses incident to implementing duties under this subsection._

Correspondingly, the Attorney General may accept private funds to help inform all prosecuting attorneys and their assistants about “all changes in law.” While not broad in scope, it is indicative of the general acceptability of the use of private funds in Iowa. In conclusion, Iowa law seems conducive to a private funding scheme, so long as it comports any other applicable Iowa state law. In this regard, it is significant, that in Iowa, so long as the donee is the State and not the official, the law appears to allow gifts. Similarly, the Attorney General has explicit constitutional authority to receive private funds for “educational” purposes.

Case Study: Illinois

Similar to California and New York, Illinois does appear to have some experience with private financing of law enforcement; however it does not appear to have any recent experience (again at least not any that was covered by the media). In this regard, the limited case law it has and its positive law suggest a sympathetic environment for private financing.

In this regard, the Illinois Supreme Court’s decision in *People v. Looney* is instructive._ In that case, “[i]t was shown that a citizen's committee had raised by popular subscription a fund of \$35,000 ‘to clear up Rock Island,’ to be used in paying expenses in connection with the investigation and prosecution of crime, and it was claimed that the Attorney General's assistants were to be paid out of this fund.”_ At a court appearance, the “assistants testified on the hearing of the motion that they represented to Attorney General only, and looked to him for their compensation.”_ During the appearance, “[o]bjections to questions asked as to the source of the Attorney General's funds were sustained.”_ The Illinois Supreme court affirmed finding that “[s]uch questions were incompetent” and that “[w]hether the assistant attorneys general were paid or not paid was immaterial.”_ In so doing, the court held:

A defendant charged with crime cannot call upon the state's attorney or Attorney General to disclose the source from which the funds required to pay the expenses of investigating and prosecuting him if particular or crime in general are derived There is no rule which declares the private subscription of funds for the prevention, discovery, or prosecution of crime to be contrary to public policy. It needs not to be said that neither the state's attorney nor the Attorney General may receive any private funds for his own use, either as compensation or for personal expenses, and nothing of the kind is claimed to have occurred._

While the specific holding, that there is no right to inquire into the names of donors for the funds, may or may not be still applicable, the logic supporting it that there is “no rule which declares the private subscription of funds for the prevention, discovery, or prosecution of crime to be contrary to public policy,” is definitely still important.

Similarly, Illinois gift law does not appear to pose any obstacle to private financing either. The relevant gift ban provides:

§ 10-10. Gift ban. Except as otherwise provided in this Article, no officer, member, or State employee shall intentionally solicit or accept any gift from any prohibited source or in violation of any federal or State statute, rule, or regulation. This ban applies to and includes the spouse of and immediate family living with the officer, member, or State employee. No prohibited source shall intentionally offer or make a gift that violates this Section._

Thus, by its terms, the Illinois gift ban applies only to “officer, member, or State employee.”_ Moreover, the definitional section seems to foreclose any interpretation that would apply the gift ban to agencies._

Taken together, the Illinois Supreme Court’s decision in Looney and the relevant gift law both suggest that private financing of law enforcement is viable in Illinois.

Conclusions from these case studies

In conclusion, all four case studies suggest that private financing of attorney general law enforcement is viable in the states examined. While the case studies provided only a brief survey of the law of each of these states, it seems to indicate that state law is generally conducive to private financing. Further, even in California, the state with the strictest laws on the matter, private financing of law enforcement seems viable. Accordingly, these results should be encouraging for advocates of private financing of attorney general enforcement action. Most importantly, however, they demonstrate the importance of thoroughly researching the applicable state law before soliciting any private funding.

Conclusion: Recommendations_

Ideally, all funding of attorney general enforcement actions would come from the state. This would minimize the risk of conflicts and it would be the best system from a public policy standpoint. However, the exigencies of the current fiscal crisis may require resort to a suboptimal scheme of private financing.

If private financing is resorted to, it is important to maintain, as guiding principles, the importance of equal access to justice and the equal application of the law, so that legitimacy can be maintained. Similarly, a precautionary reading of case law requires that such funding create no “private interest” in the outcome of litigation so that no attorney general is placed in situation where there is a likelihood of improper motivations.

Preferably, any private funding should not be attached to any promises of enforcement action. However, if some type of specification is required; funding should only be made to topic-specific areas and not to fund particular cases. Moreover, if possible, the confidentiality of donors should be assiduously maintained, so that there is no appearance of favoritism or improper motivation. Further, prior to the receipt or solicitation of any funds, it is exceedingly important that state gift law be consulted to ensure that such funding is not in violation of state law.

_ Disclaimer: The author is not yet an attorney. This paper does not constitute an opinion of counsel or legal advice and it should not be relied upon by any person or entity as such.

_ Gary Delsohn, California Department of Justice sends out layoff notices, Sacramento Bee, July 14, 2004.

_ Ryan McNeill, State's public defenders caught in budget crunch; Daily Oklahoman, November 2, 2003 at 9A.

_ See Joseph Kennedy, Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System, 24 Hastings Const. L.Q. 665, 704 -05 (1997).

_ Id. at. 679-86; subsection b, *infra*.

_ I use law enforcement to connote both criminal and civil enforcement actions directed at changing the primary conduct of defendants (and similarly situated actors).

_ Joseph Kennedy, Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System, 24 Hastings Const. L.Q. 665, 705-06 (1997) (emphasis added).

_ People v. Eubanks, 927 P.2d 310, 314 (Cal. 1996).

_ The Fourteenth Amendment to the United States Constitution states, in pertinent part: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV (emphasis added).

_ Town of Newton v. Rumery, 480 US 386, 396 (1987) (internal citations and quotation marks omitted).

_ United States v. Armstrong, 517 U.S. 456, 469 (1996).

_ Armstrong, 517 U.S. 456, 464-65.

_ Tumey v. State of Ohio, 273 U.S. 510, 531-32 (1927).

_ Id. at 526-532.

_ Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

_ Id. at 239.

_ Id. at 241.

_ Id. at 243-44 (emphasis added).

_ Id. at 248-49 (emphasis added).

_ Id. at 249-50 (emphasis added).

_ Id. at 249.

- _ Id. at 250.
- _ .People v. Eubanks, 927 P.2d 310 (Cal. 1996).
- _ Id. at
- _ Id. at 312.
- _ Id. at 312.
- _ Id. at 312-13.
- _ Id. at 314.
- _ Cal. Penal Code § 1424 (West 2004).
- _ Eubanks, 927 P.2d at 317.
- _ See Jerrico., 446 U.S. 238.
- _ Eubanks, 927 P.2d at 320.
- _ See generally, Rebecca Pinto, The Public Interest and Private Financing of Criminal Prosecutions, 77 Wash. U. L.Q. 1343, 1347-48 (1999).
- _ U.S. Const. Amend. XIV (emphasis added).
- _ Pinto, supra note _ NOTEREF _Ref87949745 \h __38_, at 1365-66.
- _ Gary Gorman, D.A. Sets Up Fund for Workers' Fraud Cases Law enforcement: Businesses will be asked to contribute the money needed for prosecutions. Some critics fear that the office's efforts could favor the donors, LA Times, Jan. 26, 1993, 1993 WL 2357419.
- _ Id.
- _ Ted Rohrlich; Evelyn Larrubia, Public Fraud Unit Favors Those Who Privately Fund It D.A.'s workers' comp section is paid for with money from employers that is doled out by insurers. Prosecutors tend to ignore both but go after workers. Courts see no problem. LA Times, August 6, 2000 at A1. 2000 WL 2267029.
- _ Cal. Gov. Code §19990 (West 2004) (emphasis added).
- _ Id (emphasis added).
- _ Id.
- _ Id.
- _ Cal. Gov. Code §82028 (West 2004).
- _ N.Y. Adv. OP 3-05, 2003 WL 23374545, *1 (May 29, 2003).
- _ Id.
- _ Id.
- _ Id. at 3.
- _ Lexis Search on
- _ Westlaw Search on
- _ Opinion No. 94-1-6(L), 1994 Iowa Op. Atty. Gen. 86, 1994 WL 68692, *3-4 (January 27, 1994) (emphasis added).
- _ Id.
- _ Id. at 3.
- _ I.C.A. § 13.2
- _ 145 N.E. 365 (Ill. 1924).
- _ Id. at 367.
- _ Id.
- _ Id.
- _ Id.
- _ Id.

_ 5 Ill. Comp. State 430/10-10 (2004).

_ Id.

_ 5 Ill. Comp. State 430/1-5 (2004).

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