

James W. Spertus
Spertus, Landes & Umhofer, LLP
1990 S. Bundy Dr., Suite 705
Los Angeles, CA 90025
(310) 826-4700
jim@spertuslaw.com



DEFINING CRIMINAL CONDUCT:
WHERE SHOULD WE DRAW THE LINES?

Public officials elected to office by the People should be accountable to the People for their actions. There are several ways to hold public officials accountable, and it is important in a free society to ensure that the right tools are employed under the right circumstances to balance competing goals. As a free society we want to ensure official accountability for official misconduct, but at the same time we want to ensure a separation of powers that prevents politically motivated actions and allows our form of government to function. We also want qualified people to seek public office without fear that they can unknowingly commit crimes and face prosecution for ministerial functions or perceived abuses of their discretion when they took the actions at issue with a clear conscious and innocent intent.

A public official who does not faithfully serve his or her constituency should be removed from office by that constituency. The elections are the best mechanisms for choosing who our elected officials will be. We should be very careful not to delegate removal powers to the executive branch of government by allowing prosecutors to file civil and criminal cases, except in the most rare and egregious cases. In most cases, the power to remove someone from office should reside exclusively with the People speaking directly through their ballots during election processes, and it should be rarely for prosecutors (executive branch

officers) to accuse public officials of crimes or civil wrongs that effectively remove the official from office through court action, rather than through an election.

We need to appropriately define civil or crime criminal misconduct for public officials so that there are clear lines defining what conduct is actionable and what conduct is not actionable. Without clear lines, executive branch of officials will be able to influence legislative or administrative action in an inappropriate manner. The tool that draws the lines in the appropriate place is the definition of crime, or civil wrong. Prosecutions of public officials should be limited to those circumstances where the official had a mental state that public officials should not have. Most torts or crimes require intentional misconduct, and there are strong arguments that public corruption cases should also require evidence of intentional misconduct by the defendant public official. Although we obviously want legislators to be held criminally accountable for the same conduct that would be a crime if committed by a private individual, public corruption cases lower the mental state requirements, and there are arguments for and against the lower mental state requirements for prosecutions of public officials.

The City of Bell cases charged crimes that would not be crimes if committed by private individuals. The core offense charged by the criminal prosecutors in the City of Bell cases was Penal Code section 424, which makes it a crime to misappropriate public funds. Penal Code section 424(a) reads in relevant part as follows:

Each officer of this state, or of any . . . city . . . charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

- (1.) Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or,

- (2.) Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law ...

is punishable by imprisonment”

Cal. Penal Code § 424(a) (2012) (emphasis added). In sum, misappropriating public funds means spending public money without lawful authority. Expenditures are either authorized or they are not, and if prosecutors can prove that a particular expenditure was technically not authorized, should the prosecutors be permitted to charge a public official with a crime even if the public official believed at the time he authorized the expenditure that the expenditure was in fact authorized? Should prosecutors be permitted to charge crimes when the proposed defendant believed his or her conduct was lawful?

“Misappropriating” funds does not mean “stealing” or “embezzling” funds, or committing any similar crimes. When prosecutors charged the defendants with misappropriating funds in the City of Bell cases, the prosecutors believed they could charge that crime if they could prove that the officials charged spent public money without authority, regardless of whether the Bell officials believed they had the authority to spend the funds in the manner spent. If a public official believed she could order a stapler from Office Depot, and then placed that order, according to the theories of the prosecutors adopted at the time the Bell cases were filed, the official was “misappropriating funds” if it later turned out that her expenditure was in fact not unauthorized, whether or not she believed the expenditure was authorized at the time she bought the stapler.

Application of this view to the City of Bell cases supported the District Attorney’s Office position that various expenditures by Mr. Rizzo were not authorized because they were not approved by the City Council in compliance with the Brown Act, and the case quickly devolved into an analysis of the requirements for Council action under the Brown Act. In fact, even the naming of City

ordinances became a major trial issue. The City Council had adopted resolutions delegating various authorities to Mr. Rizzo, and if there had been a trial in the case the trial issue would have been whether the City's resolutions had complied with the procedures set forth in the Brown Act. Most members of the public believe that the case against Mr. Rizzo involved theft and embezzlement because the City frequently used those terms in its briefing, but no one has ever charged Mr. Rizzo with theft or embezzlement, not could the elements of those offenses be met under the facts of this case.

After the Bell cases were filed, the California Supreme Court clarified the required mental state for a criminal prosecution under Section 424(a). In Stark v. Superior Court, (2011) 52 Cal.4th 368, the California Supreme Court defined the criminal intent required for a violation of Penal Code section 424(a), and the Supreme Court held that a violation of Penal Code section 424(a)(1) required proof “that the defendant knew, *or was criminally negligent in failing to know*, the legal requirements that governed the act or omission.” Id. at 377. Stark raised the bar for prosecutors, and raising the bar was important to align criminal prosecutors with social goals. It is now clear that prosecutors must introduce *some* evidence of criminal negligence by a defendant to establish that he or she failed to determine whether money could be spent in a certain manner before the public funds were spent. Arguably, the standard should be higher.

The typical cases involving violations of section 424(a) are “where a public employee or official, in the course and scope of his or her employment, receives money and converts the money *to his or her own use* rather than turning it over to the public entity” or “where the employee in his or her official capacity, having access to public moneys and having the authority to disburse the public moneys for certain purposes, *embezzles the money to his or her own purpose.*” Webb v. Super. Ct. (1988) 202 Cal.App.3d 872, 886, 248 Cal.Rptr. 911. Theft and embezzlement

cases typically involve evidence on an intent to cheat or lie, and such cases do not raise the issue of whether a lower or higher mental state should be required when we evaluate what conduct to define as a crime.

A good illustration of how vague standards for a criminal mental state could allow the prosecution of conduct that should not be prosecuted are the “loan” counts filed in the City of Bell cases. At the time, the District Attorney’s office took the position that Mr. Rizzo lacked authority to allow employees to “cash out” vacation time through the City of Bell loan program because there was no resolution from the City Council adopted in compliance with the Brown Act that authorized employees to borrow against their accrued vacation pay. The City of Bell loan program had been in place long before Mr. Rizzo became Chief Administrative Officer in 1993, and the City Council separately approved each and every loan during Mr. Rizzo’s tenure before each loan was made. The City Charter delegated to the Chief Administrative Officer the responsibility for administering the affairs of the City, and so long as the payments served a valid public purpose all involved believed that the loans were lawful. In fact, five separate Chiefs of Police had availed themselves of loans under the loan program, as well as many other high ranking City of Bell law enforcement officers. The loan program had been in place since the 1980s, long before Mr. Rizzo began working for the City.

All loans at issue in the Bell cases were fully collateralized, with the sole exception of a \$1,500 payment to a City recreation attendant who needed the money for emergency medical expenses. Testimony at Mr. Rizzo’s preliminary hearing established that everyone employed by the City was aware of the loan program and believed that there was nothing wrongful about the program. For example, Rebecca Valdez, the Bell City Clerk, testified that she was aware of the vacation pay program because as of July 2007 she did payroll changes and would

be the one to input the deduction for the repayment of the loans, and she believed the loans were perfectly lawful. Lourdes Garcia, the Director of Administrative Services for the City of Bell, also testified that she “didn’t think [the employee loan program] was anything wrong.” Further, every single payment made to fund each of the charged loans was approved by the City Council. Ms. Garcia testified that for each payment made to fund the loan, both the City Council and the City’s outside accounting firm that audited the City of Bell’s financial books were provided with the “check number, date, payee, description, [and] amount.” Bell City Attorney Ed Lee had informed Mr. Rizzo that he believed Mr. Rizzo had been delegated the authority under the Charter to authorize the loans, and there was not a shred of evidence adduced at the preliminary hearing that anybody who received a loan from the City had any basis to believe that there was anything wrongful with Mr. Rizzo authorizing the loan.

Further, Ms. Garcia testified that there was never any intent to hide any of the loans. To the contrary, each and every payment made under the vacation pay program was presented to and approved by the City Council, and the City’s independent financial auditor was also aware of the issuance of the payments. The City’s finance department would never fund an employee loan under the vacation pay program without the proper documentation of the loan. Mr. Rizzo never told the finance department how to code the loans in the accounting system. Ms. Valdez testified that based on her observations, it appeared that everyone at the City, including Mr. Rizzo, believed that the vacation pay program was a perfectly legitimate, lawful thing to do. The court at the preliminary hearing struck the “great taking” allegations for the counts involving loans. The court struck the allegations because it found that there was no evidence of any intent on the part of Mr. Rizzo to cause the City of Bell any loss, but rather “[t]he loans were issued with the intent that they be paid back.”

Putting aside the other charges filed against Mr. Rizzo that are not referenced in this document, it remains an interesting question whether, based on these facts, Mr. Rizzo should have been prosecuted for misappropriating public funds based on his administration of the loan program. At the time he was charged, he could have been found guilty whether or not he had a guilty state of mind. After Stark, the question was whether he was criminally negligent in failing to know whether he had authority to administer the loan program, and the legal opinion from the City Attorney for the City of Bell that the loan program was lawful would likely have been a complete defense. Although the criminal negligence standard articulated in Stark is better than the strict liability standard articulated by the District Attorney's Office at Mr. Rizzo's preliminary hearing, arguably the prosecution of crimes against public officials should require specific intent. The Supreme Court concluded otherwise, and the state of the law permits prosecutions based on criminal negligence, but where we draw the lines is a question we should continually re-examine to ensure that we hold public officials to high standards, but not deter qualified people from running for public office.