

CRIMINAL CORRUPTION: WHY BROAD DEFINITIONS OF BRIBERY MAKE THINGS WORSE

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Although the law of bribery may look profoundly underinclusive, the push to expand it usually should be resisted. This Article traces the history of two competing concepts of bribery—the “intent to influence” concept (a concept initially applied only to gifts given to judges) and the “illegal contract” concept. It argues that, when applied to officials other than unelected judges, “intent to influence” is now an untenable standard. This standard cannot be taken literally. This Article defends the Supreme Court’s refusal to treat campaign contributions as bribes in the absence of an “explicit” quid pro quo and its refusal to read a statute criminalizing deprivations of “the intangible right of honest services” as scuttling the quid pro quo requirement. While recognizing that the “stream of benefits” metaphor can be compatible with this requirement, it cautions against allowing the requirement to degenerate into a “one hand washes the other” or “favoritism” standard. This Article maintains that specific, ex ante regulations of the sort commonly found in ethical codes and campaign finance regulations provide a better way to limit corruption than bribery laws, but it warns that even these regulations should not prohibit all practices that may be the functional equivalent of bribery. This Article concludes by speculating about whether the efforts of federal prosecutors to reduce corruption over the past sixty years have given us better government.

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I. THE CORRUPTION DILEMMA

The scholarship of Zephyr Teachout and Lawrence Lessig has reminded us of the classic definition of corruption.¹ Corruption in its classic sense describes something that has become impure or perverted.² In Aristotle’s words, “The true forms of government . . . are those in which [rulers] govern with a view to the common interest; but governments which rule with a view to the private interest . . . are perversions.”³ *New York Times* columnist Bob Herbert explains why our government fits the ancient definition:

The corporate and financial elites threw astounding sums of money into campaign contributions and high-priced lobbyists and think tanks and media buys and anything else they could think of. They wined and dined powerful leaders of both parties. They flew them on private jets and wooed them with golf outings and lavish vacations and gave them high-

1. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 15–20, 230–47 (2011) [hereinafter LESSIG, *REPUBLIC, LOST*]; ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 9, 38–39, 41 (2014) [hereinafter TEACHOUT, *CORRUPTION IN AMERICA*]; Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1 (2014); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009); Lawrence Lessig, “CORRUPTION,” *ORIGINALLY.*, <http://ocorruption.tumblr.com> (“A blog collecting every use of the term ‘corruption’ among the records of the Framers.”) [<http://perma.cc/K7L3-3WWJ>].

2. See generally Richard Mulgan, *Aristotle on Legality and Corruption, in CORRUPTION: EXPANDING THE FOCUS* 25 (Manuhui Barcham et al. eds., 2012).

3. ARISTOTLE, *POLITICS* 114 (Benjamin Jowett, trans., Oxford Univ. Press rev. ed. 1967) (c. 350 B.C.E.).

paying jobs as lobbyists the moment they left the government. All that money was well spent. The investments paid off big time.⁴

In at least one sense, the practices Herbert decries are the functional equivalent of bribery.⁵ Quid pro quo bribes produce decisions not in the public interest—they corrupt—and unconditional contributions and gifts do too.

Declaring that implicit agreements and understandings lie behind these practices, however, would be too cynical. The problem is not that corrupt agreements are left to winks and nods. Instead, with rare exceptions, there are no agreements, express or implied. Campaign contributions and other benefits are accompanied by hope but not by an understanding that a recipient will provide anything in return. As Herbert says, the hope may turn out to be justified often enough to make the contributions good investments. Quid pro quo exchanges are rarely how corruption happens. If a public official were to do nothing to aid one of his benefactors, the benefactor usually would not say even to himself that the official had broken an implicit promise.

When the goal is to root out Aristotelian corruption, the law of bribery, extortion, and fraud looks profoundly under-inclusive. The push of prosecutors, judges, journalists, and reformers to expand this law is easily understood. The thesis of this Article, however, is that the push usually should be resisted. America can better achieve James Madison's wish "that the national legislature be as uncorrupt as possible"⁶ through specific, ex ante regulations—what Zephyr Teachout calls structural or prophylactic rules.⁷ These regulations include, in particular, campaign finance limitations of the sort today's Supreme Court strikes down,⁸ gratuity prohibitions, and ethical codes forbidding the creation of some conflicts of

4. Bob Herbert, Opinion, *When Democracy Weakens*, N.Y. TIMES (Feb. 11, 2011), <http://www.nytimes.com/2011/02/12/opinion/12herbert.html> [<http://perma.cc/4Z7D-G8F9>].

5. Many people, including former President Jimmy Carter, former Governor Jesse Ventura, and former lobbyist and prisoner Jack Abramoff, have described our campaign finance system as one of legalized bribery. See LESSIG, *REPUBLIC, LOST*, *supra* note 1, at 8 (quoting Jack Abramoff) ("I was participating in a system of legalized bribery. All of it is bribery, every bit of it."); Editorial, *The Line at the "Super PAC" Trough*, N.Y. TIMES (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/opinion/sunday/the-line-at-the-super-pac-trough.html> ("This election year will be the moment when individual candidate super PACs—a form of legalized bribery—become a truly toxic force in American politics.") [<http://perma.cc/K4FE-RRYZ>]; Thomas L. Friedman, Opinion, *Calling America: Hello? Hello? Hello?*, N.Y. TIMES (Nov. 2, 2013), <http://www.nytimes.com/2013/11/03/opinion/sunday/friedman-calling-america-hello-hello-hello-hello.html> ("[O]ur Congress has become a forum for legalized bribery.") [<http://perma.cc/ZF2T-62LW>]; Ray Henry, *Jimmy Carter: Unchecked Political Contributions Are "Legal Bribery"*, HUFFINGTON POST (July 17, 2013, 1:21 PM), http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery_n_3611882.html [<http://perma.cc/4TCY-2C5L>]; Bruno J. Navarro, *Jesse Ventura Likens Politics to Bribery*, CNBC (June 19, 2012, 10:23 PM), <http://www.cnbc.com/id/47883494> [<http://perma.cc/42Y3-TABR>].

6. James Madison, *The Journal of the Constitutional Convention* (June 23, 1787), in 3 *THE WRITINGS OF JAMES MADISON* 261 n.1 (Gaillard Hunt ed., 1902).

7. See TEACHOUT, *CORRUPTION IN AMERICA*, *supra* note 1, at 4, 284–87.

8. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

interest. Trying to block all functional equivalents of bribery even through specific, *ex ante* regulations, however, would do more harm than good.

II. TWO DEFINITIONS OF BRIBERY

This part describes two concepts of bribery, one focusing on making or offering a gift with an improper state of mind (“intent to influence” bribery) and the other on making or proposing an improper exchange (“illegal contract” bribery). It examines the history of these concepts, explores their implications, and argues that “intent to influence” has become an untenable standard. The Supreme Court has sensibly interpreted statutes that on their face seem to require only an intent to influence to require instead a *quid pro quo*—a proposed or completed exchange of a thing of value for favorable governmental action.

A. “Intent to Influence” Bribery

This section notes the origin of the “intent to influence” standard in an English common law prohibition of improper gifts to judges and the appearance of this standard in the federal government’s first general bribery statute in 1853. It argues that, even if the standard once made sense, it is now overbroad. Although the standard could be tamed by an appropriate construction of the word “corruptly,” courts rarely take this adverb seriously. This section also examines the awkward efforts of legislatures and courts to apply the “intent to influence” standard to bribe-takers as well as to the bribe-givers for whom it was initially devised.

1. The Basic Standard

On first reading, federal bribery statutes appear to make felons of everyone who supplies the kind of benefits Herbert describes.⁹ So do the bribery statutes of nearly one-third of the states. These statutes forbid giving, offering, or promising anything of value to an official with intent to influence an official act. Some of them, including the two principal federal bribery statutes, add the word “corruptly”: they forbid *corruptly* offering a benefit with intent to influence.¹⁰ Other “intent to influence” statutes, however, leave this word out,¹¹ and federal bribery statutes did not include it until 1962.¹² At least with the adverb “corruptly” set aside, “intent to influence” statutes appear to make a criminal of every lobbyist who buys lunch for a legislator and of every campaign contributor who hopes that his contribution will make its recipient more sympathetic to his interests.

9. See *supra* note 4 and accompanying text.

10. See, e.g., 18 U.S.C. § 201(b) (2012) (bribery); *id.* § 666 (federal program bribery); FLA. STAT. § 838.015 (2014); S.C. CODE ANN. § 16-9-210 (2013).

11. See, e.g., LA. STAT. ANN. § 14:118 (2013); MISS. CODE ANN. § 97-11-11 (West 2014); WIS. STAT. § 946.10 (2014).

12. Compare, e.g., An Act to Codify, Revise, and Amend the Penal Laws of the United States, Pub. L. No. 60-350, §§ 111–112, 117, 35 Stat. 1088, 1108–09, 1109–10 (1909), with An Act to Strengthen the Criminal Laws Relating to Bribery, Graft, and Conflict of Interest, Pub. L. No. 87-849, § 201, 76 Stat. 1119, 1119 (1962).

The “intent to influence” statutes took their standard from the English common law.¹³ Both this law and the earliest bribery statutes, however, applied only to benefits provided to judges.¹⁴ Congress enacted its first general prohibition of bribery in 1853—a time when Aristotelian ideals of impartiality and public service were taken so seriously that paid lobbying was considered contrary to public policy and sometimes made a crime.¹⁵ Borrowing language that initially applied only to the corruption of judges,¹⁶ the 1853 statute forbade both “bribes” and “presents” when they were given “with intent to influence” federal officials.¹⁷ Congress no doubt meant these words just the way they sound.

Some courts still take the words “intent to influence” literally. The Fifth Circuit, for example, denied a defendant’s request for an instruction that Louisiana’s “intent to influence” statute did not forbid “gifts made for customary business reasons.”¹⁸ Giving such an instruction, the court said, “would be a rank misapplication of the Louisiana bribery law. Customary business practices could embrace all sorts of extravagant favors intended to influence important business decisions.”¹⁹

2. The Adverb

The Louisiana bribery statute construed by the Fifth Circuit did not include the word “corruptly,” and perhaps the court would have reached a different result if it had. A statute that forbids corruptly giving a benefit with intent to influence seems to acknowledge that not all benefits given with intent to influence are improper. Perhaps the word “corruptly” is crucial, and perhaps it does most of the work. This fudgy adverb might prevent “intent to influence” statutes from sweeping into their net the

13. See TEACHOUT, CORRUPTION IN AMERICA, *supra* note 1, at 117–18.

14. See *id.* at 103–04, 111. The first federal bribery statute forbade giving any money “or any other bribe, present or reward . . . to obtain or procure the opinion, judgment or decree of any judge or judges of the United States.” An Act for the Punishment of Certain Crimes against the United States (Act of Apr. 30, 1790), ch. 9, § 21, 1 Stat. 112, 117 (1790). By 1798, a federal statute forbade bribing a federal “Judge, an Officer of the Customs, or an Officer of the Excise.” *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 390, 28 F. Cas. 774, 777 (C.C.D. Pa. 1798). Whether federal courts could convict people not covered by this statute of common law bribery was disputed. See *id.* In England, when officials other than judges took bribes, the common law could convict them of extortion; a bribe-giver, however, could not be convicted of this crime. See James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. REV 815, 842, 847 (1988).

15. See TEACHOUT, CORRUPTION IN AMERICA, *supra* note 1, at 144–73. At least one court also held that political logrolling could be prosecuted as a common law misdemeanor. The court said that logrolling violated an official’s duty “to vote in reference only to the merits.” *Commonwealth v. Callaghan*, 4 Va. (2 Va. Cas.) 460, 463 (1825).

16. See Act of April 30, 1790 § 21.

17. An Act to prevent Frauds upon the Treasury of the United States (Act of Feb. 26, 1853), ch. 81, § 6, 10 Stat. 171, 171 (1853).

18. *United States v. L’Hoste*, 609 F.2d 796, 808 (5th Cir. 1980).

19. *Id.* A federal prosecutor could charge a violation of the Louisiana statute because bribery in violation of state law is a predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO). See 18 U.S.C. § 1961(1) (2012).

lobbyist's lunch, other routine entertainment, and many campaign contributions.

When a federal statute uses a word that had an established meaning at common law, courts presume that Congress meant the word to retain this meaning.²⁰ Common law extortion (which included accepting but not giving bribes²¹) required a "corrupt" intent. The English courts, however, did not use the word in the same way Aristotle (or his translators and interpreters) did.

From the thirteenth through the late eighteenth centuries, officials in England were entitled to collect statutory dues and customary fees for services, and the line between legitimate fee collection and extortion was sometimes unclear.²² The courts declared that officials acted corruptly only when they realized they were not entitled to the fees they collected.²³ "Corruptly" meant deliberately acting in violation of positive law or established norms of legitimate official conduct.

Judge Kozinski's reading of the word "corruptly" in a federal bribery statute echoed the common law.²⁴ In a dissenting opinion in the Ninth Circuit, he wrote, "Conduct is corrupt if it's an improper way for a public official to benefit from his job. But what's improper turns on many different factors, such as tradition, context and current attitudes about legitimate rewards for particular officeholders."²⁵ Kozinski added that corruption "can't be easily captured in a single formula, as it varies too much from situation to situation."²⁶

Federal juries never hear an explanation of the word "corruptly" like Judge Kozinski's. Many courts see the word as doing no work at all. They have made it redundant by declaring that a person acts corruptly whenever his conduct and mental state establish the other elements of bribery. The Second Circuit, for example, appeared to make felons of all lunch-buying lobbyists when it approved the following instruction: "A person acts corruptly . . . when he gives or offers to give something of value intending to influence . . . a government agent in connection with his official duties."²⁷ The Seventh Circuit held that omitting the word "corruptly" from

20. See, e.g., *Neder v. United States*, 527 U.S. 1, 21 (1999).

21. See Lindgren, *supra* note 14, at 821 ("Bribery behavior was routinely punished as common law extortion."). The Supreme Court relied on Lindgren's scholarship when it held that the Hobbs Act, a federal extortion statute, punishes bribery. See *Evans v. United States*, 504 U.S. 255, 260 (1992). *But see id.* at 280–81 (Thomas, J., dissenting) ("Whatever the merits of [Lindgren's] argument as a description of early English common law, it is beside the point here—the critical inquiry for our purposes is the American understanding of the crime at the time the Hobbs Act was passed in 1946.").

22. See Jeremy N. Gayed, Note, "Corruptly": *Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 NOTRE DAME L. REV. 1731, 1731 (2003).

23. See e.g., *Rex v. Vaughan* (1769) 98 Eng. Rep. 308 [310] (KB) (emphasizing the defendant's awareness that he had engaged in an "unjustifiable transaction").

24. *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting).

25. *Id.*

26. *Id.*

27. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).

jury instructions altogether was not plain error because nothing in the 1962 addition of the word “corrupt” enlarged the meaning of “intent” as an essential element of the offense.²⁸

Courts that do not make the word “corruptly” redundant typically define it in language that is just as fudgy, open-ended, and evaluative as the term itself. They use the words “improper,” “wrongful,” “evil,” and “bad.” They say that corruption refers to an “improper motive or purpose,”²⁹ an “intent to obtain an improper advantage for oneself or someone else,”³⁰ a “wrongful or dishonest intent,”³¹ a “bad purpose or evil motive,”³² or a “wrongful design to acquire or cause some pecuniary or other advantage.”³³

Even on Judge Kozinski’s interpretation, the word “corruptly” is vague.³⁴ “Intent to influence” statutes seem to require normative evaluation as well as fact-finding and mind-reading.³⁵ These statutes are relics of a time when crimes were defined far less precisely than they usually are today, when juries rather than plea-bargaining prosecutors resolved criminal cases, and when Americans had extraordinary faith in the ability of juries to determine whether defendants deserved punishment.³⁶

3. The Bribe-Taker’s Mental State

“Intent to influence” describes the mental state of someone who gives a bribe, but courts and legislatures have used other language to describe the

28. *United States v. Medley*, 913 F.2d 1248, 1261 (7th Cir. 1990) (citing *United States v. Isa*, 452 F.3d 723, 725 (7th Cir. 1971)). *But see* *Agan v. Vaughn*, 119 F.3d 1538, 1542–45 (11th Cir. 1997) (indicating that the court would have held unconstitutional a Georgia statute that prohibits giving campaign contributions with intent to influence if the state courts had not read into this statute a requirement that the contributions be given “corruptly”).

29. *See United States v. Ganim*, 510 F.3d 134, 151 (2d Cir. 2007) (quoting jury instruction).

30. *United States v. McDade*, 827 F. Supp. 1153, 1186 (E.D. Pa. 1993) (quoting *United States v. North*, 910 F.2d 843, 881 (D.C. Cir. 1990)).

31. *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 573 (1st Cir. 1996).

32. *United States v. Kay*, 513 F.3d 432, 446 (5th Cir. 2007).

33. *United States v. Frega*, 179 F.3d 793, 805 n.13 (9th Cir. 1999) (quoting CAL. PENAL CODE § 7(3) (West 2014)). Courts also say that acting corruptly means acting “with the purpose, at least in part, of accomplishing either an unlawful end result, or a lawful end result by some unlawful method or means.” *United States v. Bonito*, 57 F.3d 167, 172 (2d Cir. 1995). Someone must have worked hard to create this ponderous way of saying that the accused must have intended to do something unlawful.

34. In fact, the D.C. Circuit held the word too vague to give fair notice to a defendant accused, not of giving a bribe, but of corruptly influencing Congress by lying to a congressional committee. The court observed that many people attempt to influence Congress and that they are entitled to more notice of the line between proper and improper conduct than the word “corruptly” supplies. *United States v. Poindexter*, 951 F.2d 369, 384–86 (D.C. Cir. 1991).

35. It is sometimes said that the criminal law cares about an actor’s intention but not his motive. It’s enough, for example, that a defendant charged with homicide meant to kill; it doesn’t matter why he did it. But “intent to influence” statutes focus on motive. It isn’t sufficient that a defendant deliberately gave a thing of value to a public official; someone must figure out why he did it.

36. *See* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 39, 140–41 (2011); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 902–11 (1994).

mental state of the person who takes it. Finding an appropriate standard has not been easy.

Instructions sometimes tell juries that the alleged bribe-taker's knowledge of the donor's intent to influence is enough.³⁷ These instructions seem to make a bribe-taker of every official who allows a lobbyist to buy him lunch. If the official is awake, he surely must realize that the lobbyist intends to influence him. The Second Circuit, however, reversed a conviction because the trial court gave an instruction of this sort.³⁸ The court quoted the language of the applicable statute, which focused on the defendant's own motives rather than his knowledge of the other guy's: "[A] recipient's knowledge of a donor's intent to influence is insufficient to support conviction. The recipient must take the proffered thing of value 'intending to be influenced.'"³⁹

In fact, few bribe-takers *want* to be influenced. What a bribe-taker wants is a bribe, and he may regret that being influenced is the only way to get it. *Intending* to be influenced probably means *knowing* that one will be influenced.

Whether the word "intent" refers to purpose or knowledge, the statutory language noted by the Second Circuit seems to validate two implausible defenses: (1) "I did not intend to be influenced because I never meant to keep my promise." And (2) "I did not intend to be influenced because I already had made up my mind. I simply agreed to do what I would have done anyway."⁴⁰ A defendant who offered the first defense—"I never

37. See, e.g., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 146 (2012), https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf ("The government also does not need to prove that the defendant . . . intended to be influenced. It is sufficient if the defendant knew that the thing of value was offered with the intent to influence official action.") [<http://perma.cc/KM8H-K95A>]; *McCormick v. United States*, 500 U.S. 257, 261 n.4 (1991) (noting an instruction that the jury must be "convinced beyond a reasonable doubt that the payment . . . was made . . . with the expectation that such payment would influence [the defendant's] official conduct, and with the knowledge on the part of the defendant that they were paid to him with that expectation"); *United States v. Warner*, 498 F.3d 666, 698 (7th Cir. 2007) (noting the trial court's instruction that the receipt of a personal or financial benefit "violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making"); *United States v. Gorny*, 732 F.2d 597, 600 (7th Cir. 1984) (noting the trial court's instruction that "[t]he crime [of bribery] is completed when the property or personal advantage is accepted by the public employee knowing it was offered with the intent that he act favorably to the person offering the property or personal advantage when necessary").

38. *United States v. Ford*, 435 F.3d 204 (2d Cir. 2006).

39. *Id.* at 213 n.5 (quoting 18 U.S.C. § 666(a)(1)(B) (2012)).

40. The Seventh Circuit recently approved the "I never meant to keep my promise" defense. See *United States v. Hawkins*, 777 F.3d 880, 882–84 (7th Cir. 2015) (Easterbrook, J.) (holding that officials who purport to take bribes but do not mean to keep their promises cannot be convicted of either bribery or honest-services fraud). The Seventh Circuit did not mention its earlier decision upholding the bribery conviction of an official who took money in exchange for doing something that, unbeknownst to the bribe-giver, the official already had done. This official's unsuccessful argument was that "one cannot be influenced to do what has already been done." *United States v. Arroyo*, 581 F.2d 649, 654 (7th Cir. 1978). The Seventh Circuit also ignored a Second Circuit decision repudiating the "I never meant to keep my promise" defense. See *United States v. Myers*, 692 F.2d 823, 841 (2d Cir. 1982).

meant to keep my promise”—might be convicted of defrauding the bribe-giver,⁴¹ but a defendant who offered the second—“I’d already made up my mind”—would have delivered the action he promised and would not have deceived anyone. Under federal law, both defendants could be convicted of receiving an improper gratuity.⁴²

Certainly U Po Kyin, George Orwell’s fictional Sub-Division Magistrate of Kyauktada in Upper Burma, could not be convicted of bribery if 18 U.S.C. § 666, an “intent to be influenced” federal bribery statute, were taken literally.⁴³ Kyin always took bribes from both sides to ensure that he would decide the cases before him on strictly legal grounds.⁴⁴ Kyin did not intend to be influenced, did not know that he would be influenced, and was not in fact influenced.⁴⁵

Similarly, Sir Francis Bacon, whom the House of Lords convicted of bribery in 1621, might not be convicted if he were charged with bribery today under § 666. Bacon, the Lord Chancellor of England (as well as a path-breaking philosopher and inventor of modern science), claimed that he never allowed any of the bribes allegedly given by litigants to influence him. In fact, he said, he often ruled against the alleged bribe-givers.⁴⁶

(Newman, J.) (“[B]eing influenced’ does not describe the Congressman’s true intent, it describes the intention he conveys to the briber in exchange for the bribe.”).

41. *See, e.g., Durland v. United States*, 161 U.S. 306 (1896) (holding that false promises as well as false representations of fact can justify federal mail fraud convictions).

42. 18 U.S.C. § 666 forbids both corruptly accepting a thing of value intending to be influenced and corruptly accepting a thing of value intending to be rewarded. *See* 18 U.S.C. § 666(a)(1)(B). Several federal courts of appeals have concluded that, because the statute uses the word “reward,” it proscribes gratuities as well as bribes. *See, e.g., United States v. Bahel*, 662 F.3d 610, 636–37 (2d Cir. 2011); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990) (declaring that bribes and gratuities “are both illegal under different parts of the statute”). The First Circuit, however, recently held that § 666 does not punish gratuities, and the Fourth Circuit earlier indicated without deciding that it took the same view. *See United States v. Fernandez*, 722 F.3d 1, 6, 19–26 (1st Cir. 2013); *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

18 U.S.C. § 201, the statute most commonly used to prosecute federal officials for bribe taking, proscribes gratuities in a subsection other than the one proscribing bribes. It sets the maximum term of imprisonment for accepting a bribe at fifteen years and the maximum for accepting a gratuity at two years. *See* 18 U.S.C. § 201(b) (bribes); *id.* § 201(c) (gratuities). Prosecutors generally use 18 U.S.C. § 666, the “federal program bribery” statute, to prosecute state and local officials. If § 666 punishes gratuities, it does so in the same section that outlaws bribery, and it sets the maximum penalty for both crimes at ten years. If § 666 reaches gratuities, the statute departs from the common pattern of treating bribery as a more serious crime than taking gratuities. Moreover, the federal government punishes state and local officials for accepting gratuities five times more severely than it punishes federal officials for doing the same thing. *See generally* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 308–11 (1998).

43. *See* GEORGE ORWELL, *BURMESE DAYS* 7 (1934).

44. *Id.*

45. *Id.*

46. *See* PEREZ ZAGORIN, *FRANCIS BACON* 22 (1998). Seeking King James I’s intervention while his case was pending, Bacon wrote the King that he never had a “bribe or reward in my eye or thought when I pronounced any sentence or order.” JOHN T. NOONAN, JR., *BRIBES* 352 (1984). Some modern observers maintain that Bacon was bum-rapped by

The other major federal bribery statute, 18 U.S.C. § 201(b), is slightly less troublesome than § 666. It says that a public official may not corruptly demand, seek, receive, accept, or agree to receive or accept anything of value *in return for* being influenced in the performance of any official act.⁴⁷ An official might agree to accept a thing of value *in return for* being influenced even if he never *intended* to be influenced. Perhaps this official could be convicted under § 201(b) even if he could not be convicted under § 666. Like an official charged with violating § 666, however, an official charged with violating § 201(b) could defend by saying, “I agreed to vote in favor of the Widget Subsidies Act in return for cash, but I never agreed to be *influenced*. I had decided to support widget subsidies long before I took the money.”

B. “Illegal Contract” Bribery

Someone who contributes to an official’s reelection campaign or gives the official’s daughter a nice wedding present may hope to curry the official’s favor. This conduct may indeed influence the official, and critics may call it the functional equivalent of bribery. Few, however, would describe this conduct as bribery itself. It certainly is not the sort of behavior that should expose someone to imprisonment for ten, fifteen, or twenty years.⁴⁸ The Seventh Circuit has commented, “Vague expectations of some future benefit should not be sufficient to make a payment a bribe.”⁴⁹ As the word is most commonly used today, “bribery” probably denotes an actual or contemplated exchange of something of value for favorable governmental action, not simply a unilateral act intended to make favorable governmental action more likely.

In 1962, a commentary to the American Law Institute’s Model Penal Code (MPC) declared that the code’s definition of bribery would preclude “application of the bribery sanction to situations where gifts are given in the mere hope of influence.”⁵⁰ The MPC defines bribery as offering, giving, soliciting, or accepting a pecuniary benefit as “consideration” for an official act.⁵¹ As the Texas Court of Criminal Appeals said of a Texas bribery statute modeled on this provision,⁵² the MPC “requir[es] a bilateral

Sir Edward Coke and other political opponents, but Noonan, who provides a full account of his case, makes clear that he was not. *See id.* at 334–65.

47. 18 U.S.C. § 201(b).

48. The maximum penalty for federal program bribery under 18 U.S.C. § 666 is ten years, and the maximum penalty for bribery under 18 U.S.C. § 201(b) is fifteen years. Bribery also can be prosecuted as honest-services fraud, for which the maximum penalty is usually twenty years. *See* 18 U.S.C. §§ 1341, 1346; *infra* Part III.A.

49. *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

50. MODEL PENAL CODE § 240.1 note on status of section (AM. LAW INST., Proposed Official Draft 1962). The MPC reporters initially proposed an “intent to influence” statute, *see* MODEL PENAL CODE § 208.10 (AM. LAW INST., Tentative Draft No. 8, 1958), but criticism at the May 1958 meeting of the American Law Institute led them to revise their draft, *see* MODEL PENAL CODE § 240.1 note on status of section, *supra*.

51. MODEL PENAL CODE § 240.1(1) (AM. LAW INST., Proposed Official Draft 1962).

52. TEX. PENAL CODE ANN. § 36.02 (West 2012).

arrangement—in effect an illegal contract to exchange a benefit as consideration for the performance of an official function.”⁵³

The words “bilateral arrangement” in the Texas court’s formulation might be misleading. Like “intent to influence” bribery, “illegal contract” bribery can be committed by an individual acting alone. The crime includes offers and solicitations, and it also includes transactions in which one party merely feigns agreement. An offender, however, must seek a bargain with another person.⁵⁴ How the other person responds does not matter; by including offers and solicitations, every “illegal contract” bribery statute punishes attempted as well as completed exchanges. More than two-thirds of the states have followed the MPC’s lead and now embrace the “illegal contract” concept of bribery.⁵⁵

53. *McCallum v. State*, 686 S.W.2d 132, 136 (Tex. Crim. App. 1985).

In *Garrett v. McCotter*, 807 F.2d 482 (5th Cir. 1987), the Fifth Circuit noted “that the Texas Legislature intentionally replaced ‘with intent to influence’ with ‘any benefit as consideration for’ in order to avoid ‘application of the bribery sanction to situations where gifts are given in mere hope of influence.’” *Id.* at 485. Because this “change in language was intended to stiffen the requirements for a bribery conviction,” an indictment that described the crime as giving a benefit with intent to influence did not charge an offense under Texas law. *Id.*

54. At least when the alleged bribe consists of something other than a campaign contribution, *see infra* notes 64–67 and accompanying text, the agreement need not be express. In *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), for example, an official who heard challenges to tax assessments accepted payments from lawyers who practiced before him. The payments included a \$4000 “referral fee” although the official provided no referral, \$500 in cash passed in a white envelope under the table at a restaurant, and another \$1000 passed in the men’s room of a private club. *Id.* at 599–600.

“[U]nlike some of [his] predecessors,” the Seventh Circuit reported, the defendant in *Gorny* “did not receive payments based on the outcome of any specific case nor was the amount he received based on a percentage of the reduction of an assessment.” *Id.* at 599. His benefactors, however, “enjoyed an unusually high rate of success in their practice before the Board.” *Id.* at 600. One of them won 80 percent of his cases and another 93 percent although the average rate of success was only 35 percent. *Id.*

The defendant in *Gorny* apparently made no promises out loud, and what cases he would fix remained unspecified. *See id.* Everyone understood what the payments were for, however, and the defendant provided it by ruling in favor of his benefactors at a high rate. *Id.* A jury easily could have inferred that, at the time he accepted each payment, the defendant agreed implicitly to provide a governmental benefit in return.

Of course, the line between currying favor and seeking an implicit agreement is fuzzy. One might ask whether the alleged bribe-giver legitimately could have felt cheated rather than simply disappointed if the alleged bribe-taker had never done anything for him. Could the donor plausibly have said to the recipient, “We never spelled it out, but we did have an understanding”?

55. *See United States v. Biaggi*, 674 F. Supp. 86, 88 (E.D.N.Y. 1987) (citing thirty-eight state statutes). At least one state has approved an “illegal contract” definition of bribery for bribe-takers and an “intent to influence” definition for bribe-givers. *See* MICH. COMP. LAWS ANN. § 750.118 (West 2014) (making it a crime to accept a benefit “under an agreement, or with an understanding that [the accepting official’s] vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question”); MICH. COMP. LAWS ANN. § 750.117 (making it a crime to corruptly give any valuable thing with the purpose of influencing official action). Zephyr Teachout’s statement that “most states have not adopted a quid pro quo requirement for any of their bribery laws” seems correct only in the sense that most states do not use the Latin words. *See* TEACHOUT, CORRUPTION IN AMERICA, *supra* note 1, at 240. Requiring that a benefit be offered or accepted as “consideration” for favorable governmental action is no different from requiring a quid pro quo.

The “illegal contract” concept of bribery usually sweeps less broadly than the “intent to influence” concept. It poses no threat to a campaign contributor who hopes simply to curry favor or to someone who picks up a lunch check in the hope that doing so will generate goodwill. Occasionally, however, the “illegal contract” concept sweeps more broadly. Under this standard, an official who accepts a thing of value in exchange for a promise to do the donor’s bidding cannot escape conviction simply because he already had decided to take the action sought. And unlike the “intent to influence” concept, the “illegal contract” concept applies to bribe-givers and bribe-takers equally.

C. *The Federal Amalgam*

Federal bribery statutes use the words “intent to influence,”⁵⁶ but the Supreme Court’s interpretation of these words has transformed them. With a shoehorn and a shove, the Court has fit the “illegal contract” concept of bribery into these “intent to influence” statutes. The Court wrote in *United States v. Sun-Diamond Growers*,⁵⁷ “Bribery requires intent ‘to influence’ an official act or ‘to be influenced’ in an official act In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”⁵⁸

“Intent to influence” and “exchange” are not different words for the same thing. Some of the 179 people who “bundled” more than \$500,000 apiece for President Obama’s 2012 reelection campaign⁵⁹ undoubtedly hoped to influence governmental action—perhaps by increasing the likelihood of their own appointment as ambassadors.⁶⁰ One would be surprised, however, to learn of any quid pro quo or corrupt understanding at the time they gave their support. As courts have recognized, giving something with a “generalized hope or expectation of ultimate benefit on the part of the donor” is not a bribe.⁶¹

The Supreme Court might better have grounded its quid pro quo requirement on the word “corruptly.” Norms have changed since Congress enacted its first general bribery statute in 1853,⁶² and many benefits intended to influence are not seen as improper today. Before the Court

56. See *supra* Part II.A.

57. 526 U.S. 398 (1999).

58. *Id.* at 404–05.

59. See CTR. FOR RESPONSIVE POLITICS, MEET THE BUNDLERS BEHIND THE MONEY (2012), <https://s3.amazonaws.com/assets.opensecrets.org/pres12/img/bundlers.png> [http://perma.cc/DZN6-NXFW]. President Obama’s opponent, Governor Romney, did not reveal how many people “bundled” more than \$500,000 for his campaign. *Id.* No law required him to do so. *Id.*

60. See Max Fisher, *This Very Telling Map Shows Which U.S. Ambassadors Were Campaign Bundlers*, WASH. POST (Feb. 10, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/10/this-very-telling-map-shows-which-u-s-ambassadors-were-campaign-bundlers/> (noting that “23 current U.S. ambassadors or ambassadorial nominees . . . were also major campaign-donation bundlers”) [http://perma.cc/853V-NM47].

61. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976); see also *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980).

62. See *supra* notes 16–17 and accompanying text.

declared that “intent to influence” and “quid pro quo” meant the same thing, a few lower courts had in fact found a quid pro quo requirement in the word “corruptly.”⁶³

Under the Court’s decisions, a quid pro quo usually can be implied rather than express. In *McCormick v. United States*,⁶⁴ however, the Court held that campaign contributions may be treated as bribes only when “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”⁶⁵ Although the Eleventh Circuit has concluded (dubiously) that a later Supreme Court decision modified *McCormick*,⁶⁶ at least six other courts of appeals insist that an explicit agreement remains necessary.⁶⁷

McCormick did not rest its requirement of an “explicit” quid pro quo on the language of the statute.⁶⁸ The case arose under an extortion statute, the Hobbs Act, which federal courts had construed to reach bribe taking although its language simply forbade obtaining property “under color of official right.”⁶⁹ Without parsing this language, the Court emphasized the danger of allowing prosecutors and jurors to infer corrupt bargains from the conduct of campaign contributors and elected officials.⁷⁰ It said that Congress would be required to speak clearly if it wished to demand less than an explicit agreement:

To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by

63. See *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998) (“[C]ourts equate ‘corrupt intent’ with the intent to engage in a relatively specific quid pro quo.”); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (declaring that the “corrupt intent” required by § 201 is an intent “to receive some benefit in return for the payments”); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (declaring that the term “corrupt intent” incorporates an element of quid pro quo bribery and adding that the quid pro quo element “distinguishes the heightened criminal intent requisite under the bribery sections of [§ 201] from the simple mens rea required for violation of the gratuity sections”).

64. 500 U.S. 257 (1991).

65. *Id.* at 273. The trial court had given an “intent to influence” instruction. *Id.* at 265. The Supreme Court reversed because, at least in a case involving campaign contributions, this sort of instruction is erroneous. *Id.* at 267.

66. See *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (discussing *Evans v. United States*, 504 U.S. 255 (1992)).

67. See *United States v. Turner*, 684 F.3d 244, 253–54, 258 (1st Cir. 2012); *United States v. Abbey*, 560 F.3d 513, 515–19 (6th Cir. 2009); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936–37 (9th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 142–43 (2d Cir. 2007); *United States v. Antico*, 275 F.3d 245, 256–61 (3d Cir. 2001); *United States v. Giles*, 246 F.3d 966, 971–72 (7th Cir. 2001). The language of *United States v. Terry*, 707 F.3d 607, 614 (3d Cir. 2013), is inconsistent with *McCormick* (and with the Third Circuit’s earlier decision in *Antico*), but the court seemed not to notice the relevant passage of *McCormick*. See *McCormick*, 500 U.S. at 273. Similarly, *United States v. Blagojevich*, 2015 U.S. App. LEXIS 12563 (7th Cir. July 21, 2015) (Easterbrook, J.), insisted that *McCormick* does not require an explicit quid pro quo, *id.* at 16–17, but it ignored both the language of *McCormick* and Seventh Circuit precedent.

68. See *McCormick*, 500 U.S. at 277 (Scalia, J., concurring) (declaring that the statute “contains not even a colorable allusion to . . . quid pro quos”).

69. See 18 U.S.C. § 1951(a)(2) (2012).

70. See *McCormick*, 500 U.S. at 272–73.

private contributions. . . . It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.⁷¹

Although the Court embraced the “illegal contract” concept of bribery in 1991, pattern jury instructions in most circuits continue to recite the language of federal bribery statutes without elaboration. Juries rarely hear the words “quid pro quo” or the words “express,” “implied,” or “agreement.” They hear only that bribe-givers and bribe-takers must intend to influence or to be influenced.⁷² Many defense attorneys are so inept that they fail to complain about these instructions. Especially from the perspective of the jury box, the federal law of bribery is a muddle.

III. EFFORTS TO BEND, BREAK, OR CIRCUMVENT THE QUID PRO QUO REQUIREMENT

Because federal bribery statutes as construed by the Supreme Court fall far short of proscribing every functional equivalent of bribery, prosecutors, lower court judges, legislators, and other corruption fighters look for ways to stretch or get around them. The Court sometimes seems to be engaged in a tug-of-war with everyone else, and this part describes some of the back-and-forth hauling.

71. *Id.* Justice Thomas later observed, “We . . . imposed [the quid pro quo requirement] to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life.” *Evans v. United States*, 504 U.S. 255, 286 (1992) (Thomas, J., dissenting).

No court seems to have addressed directly the common situation in which a benefactor has given both campaign contributions and other things of value to an official and then has gained something of value from one or more of this official’s actions. Permitting a jury to infer an unexpressed agreement from this hybrid package surely would be inconsistent with *McCormick*. Perhaps, however, evidence of the campaign contributions could be admitted on the theory that they provide evidence of the contributor’s intent and bear on whether his other gifts were bribes. Whether the campaign contributions would in fact indicate that an implicit agreement accompanied the other benefits is problematic, however, and even if they did, inviting jurors to draw an adverse inference from the exercise of a First Amendment right might improperly “chill” the exercise of this right. A prosecutor who cannot prove an express agreement and who wishes to insulate a bribery conviction from later attack probably should present no evidence of campaign contributions at all.

72. *See, e.g.*, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 123–26, 205–06 (2012), <http://www.lb5.uscourts.gov/juryinstructions/> [<http://perma.cc/WC4W-ANBH>]; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 194–98, 209–10, http://juryinstructions.ca8.uscourts.gov/criminal_instructions.htm [<http://perma.cc/WM53-8SWL>]; ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 121, 189–90 (2010), <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf> [<http://perma.cc/EJ3C-WD8A>]. *But see* U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS 6.18.201B1 (2004), <http://www.ca3.uscourts.gov/sites/ca3/files/Chap%206%20Bribery.pdf> (requiring the jury to find that the defendant acted “corruptly with the intent to influence an official act, that is[,] . . . to give [a specified thing of value] in exchange for an official act”) [<http://perma.cc/DZ9B-CZQX>]. Although the Seventh Circuit’s pattern jury instructions omit any reference to an exchange or quid pro quo when bribery is charged under 18 U.S.C. § 201(b) or 18 U.S.C. § 666, *see* PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 145–46, 205–10 (2012), https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf [<http://perma.cc/Q9MF-CTY8>], they describe the crime differently when the government charges bribery as a form of honest-services fraud. Then the crime becomes accepting something of value in exchange for the promise or performance of an official act. *See id.* at 403.

A. *Honest-Services Fraud*

Particularly in the 1970s, prosecutors persuaded the lower federal courts that the federal mail fraud statute forbade schemes to deprive the public of “the intangible right of honest services.”⁷³ In 1987, however, the Court held that this statute outlawed depriving people of property, not an ill-defined intangible right of honest services.⁷⁴

The Department of Justice (DOJ) then complained to Congress that the Court had deprived it of an important tool in its battle against corruption.⁷⁵ Congress responded by enacting a statute that read in full, “For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”⁷⁶

This statute enabled lower federal court judges, like the priests of ancient Delphi, to explicate language ordinary mortals could not understand.⁷⁷ In *United States v. Sawyer*⁷⁸ and *United States v. Woodward*,⁷⁹ for example, the First Circuit upheld the convictions of a legislator and a lobbyist who had lavishly entertained the legislator.⁸⁰ The well-entertained legislator had supported almost all of the lobbyist’s agenda.⁸¹ After noting that bribery was an established category of honest-services fraud, the court announced that it would expand this category “from quid pro quo bribery, to include a more generalized pattern of gratuities to coax ‘ongoing favorable official action.’”⁸² It said that juries should be instructed that it is lawful for lobbyists to entertain legislators to cultivate “business or political friendship” but felonious for them to do so “to cause the recipient to alter her official acts.”⁸³ The court observed that the benefits it made criminal

73. See *McNally v. United States*, 483 U.S. 350, 362–64 & nn.1–3 (1987) (Stevens, J., dissenting).

74. See *id.* at 356 (majority opinion).

75. See *Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong. 8–11 (1988) (statement of John C. Keeney, Acting Assistant Att’y Gen. for the Criminal Division of the Department of Justice).

76. 18 U.S.C. § 1346 (2012).

77. A panel of the Second Circuit held the honest-services statute too vague to give fair notice to defendants. See *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002). But the en banc Second Circuit set this ruling aside. See *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003). Other courts also rejected vagueness challenges to the statute. See, e.g., *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003); *United States v. Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Frost*, 125 F.3d 346, 370–71 (6th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 776–77 (5th Cir. 1996); *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995); *United States v. Waymer*, 55 F.3d 564, 568–69 (11th Cir. 1995). Most federal judges apparently believed they could figure out what the statute meant.

78. 85 F.3d 713 (1st Cir. 1996).

79. 149 F.3d 46 (1st Cir. 1998).

80. *Id.* at 52–54.

81. *Id.* at 53.

82. *Id.* at 55 (quoting *Sawyer*, 85 F.3d at 730).

83. *Id.* (quoting *Sawyer*, 85 F.3d at 741). If you wish to guffaw at the court’s purported distinction, be my guest.

“may not be very different, except in degree, from routine cultivation of friendship in a lobbying context.”⁸⁴

The First Circuit grounded its rulings in *Sawyer* and *Woodward* on the legislator’s failure to disclose the conflict of interest created by his relationship with the lobbyist:

A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official’s potential motivation.⁸⁵

Punishing undisclosed conflicts of interest may sound like a fine idea—as long as the idea goes by fast. A conflicting interest, however, is any interest that might divert an official from faithful service to the public. When the official’s decision will benefit a member of his family, he has a conflict of interest. When his decision will benefit a business partner or good friend, he again has a conflict. When his decision will benefit an important political supporter, he has a conflict. When his decision will benefit a lobbyist who has taken him on golf outings, he once more has a conflict. When this official’s action will benefit anyone at all who has done any favor for which he is grateful, he has a conflict of interest. Conflicts are ubiquitous.⁸⁶

No official could compile a list of all his conflicts, and if he could, he would not know where to post it. How does one go about disclosing a conflict of interest to a disembodied public employer? Would a “my conflicts” section on the official’s Facebook page be sufficient? When no official ever has or ever could disclose every conflict, criminalizing undisclosed conflicts looks like a way to enable prosecutors to pick their targets.⁸⁷

The Supreme Court did not consider the meaning or the constitutionality of the honest-services statute until twenty-two years after its enactment. Then, in 2010, in *Skilling v. United States*,⁸⁸ three justices declared in a concurring opinion that they would hold the statute unconstitutionally

84. *Id.* (quoting *Sawyer*, 85 F.3d at 741).

85. *Sawyer*, 85 F.3d at 724 (citations omitted).

86. Show me a public official without conflicts of interest, and I will show you an official without any social life, work life, family life, religious life, or political life.

87. *Cf.* *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949–50 (9th Cir. 2009) (Berzon, J., concurring) (“The conflict of interest theory, unhinged from an external disclosure standard, places too potent a tool in the hands of zealous prosecutors who may be guided by their own political motivations [and] might also feel political pressure to pursue certain state or local officials.”).

A court or legislature can reduce the reach of a prohibition of undisclosed conflicts by requiring that an official’s non-disclosure violate a federal, state, or local reporting requirement. This limitation, however, poses problems of its own. *See* Albert W. Alschuler, *Terrible Tools for Prosecutors: Notes on Senator Leahy’s Proposal to “Fix” Skilling v. United States*, 67 S.M.U. L. REV. 501, 513–17 (2014).

88. 561 U.S. 358 (2010).

vague,⁸⁹ and the remaining justices acknowledged that the defendant's "vagueness challenge has force."⁹⁰ The majority concluded, however, that the statute could be saved by confining it to a "solid core" that every lower court had recognized.⁹¹ "[H]onest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks," the Court said.⁹² "[N]o other misconduct falls within [the statute's] province."⁹³ The Court not only rejected the government's argument that the statute criminalized failing to disclose a conflict of interest but also warned Congress that a statute embracing this standard might be held unconstitutional.⁹⁴

Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, promptly declared that the Court had "sided with an Enron executive who had been convicted of fraud" and "undermined Congressional efforts to protect hardworking Americans from powerful interests."⁹⁵ In 2012, the Senate approved without noticeable opposition a Leahy-sponsored proposal to restore twenty-year penalties for some undisclosed conflicts of interest.⁹⁶ The House Judiciary Committee unanimously approved this proposal as well,⁹⁷ but the majority leader of the House never brought it to a vote.⁹⁸ Because Congress failed to enact the Leahy proposal, the post-*Skilling* honest-services statute remains compatible with the Court's quid pro quo requirement, at least for now. The Supreme Court may be winning the tug-of-war.

B. "Stream of Benefits" or "Course of Conduct" Bribery

In *United States v. Kemp*,⁹⁹ the Third Circuit upheld a jury instruction declaring, "[W]here there is a stream of benefits given by a person to favor a public official, . . . it need not be shown that any specific benefit was given in exchange for a specific official act."¹⁰⁰ In *United States v. Kincaid-Chauncey*,¹⁰¹ the Ninth Circuit declared that accepting a "retainer" with "the understanding that when the payor comes calling, the government

89. See *id.* at 415 (Scalia, J., joined by Thomas and Kennedy, JJ., concurring).

90. *Id.* at 405 (majority opinion).

91. *Id.* at 407.

92. *Id.* at 411.

93. *Id.* at 412.

94. See *id.* at 411 n.44.

95. *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1 (2010) (statement of Sen. Patrick Leahy), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64789/pdf/CHRG-111shrg64789.pdf> [<http://perma.cc/ZD7U-LJST>].

96. See Alschuler, *supra* note 87, at 506.

97. See Clean Up Government Act of 2011, H.R. REP. NO. 112-688 (2012), <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt688/html/CRPT-112hrpt688.htm> [<http://perma.cc/RG9A-S7QF>].

98. See Seung Min Kim, *Eric Cantor Under Fire for STOCK Act Tweaks*, POLITICO (Feb. 8, 2012, 2:55 PM), <http://www.politico.com/news/stories/0212/72624.html> [<http://perma.cc/L67Q-PWBK>].

99. 500 F.3d 257 (3d Cir. 2007).

100. *Id.* at 281.

101. 556 F.3d 923 (9th Cir. 2009).

official will do whatever is asked” is bribery.¹⁰² In *United States v. Whitfield*,¹⁰³ the Fifth Circuit said, “[A] particular, specified act need not be identified at the time of payment to satisfy the *quid pro quo* requirement, so long as the payor and payee agreed upon a specific *type* of action to be taken in the future.”¹⁰⁴ In *United States v. Jennings*,¹⁰⁵ the Fourth Circuit observed, “[T]he intended exchange in bribery can be ‘this for these’ or ‘these for these,’ not just ‘this for that.’”¹⁰⁶ And in *United States v. Ganim*,¹⁰⁷ the Second Circuit wrote, “[S]o long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise.”¹⁰⁸

These declarations seem inconsistent with two descriptions of bribery by the Supreme Court. The Court wrote in *Evans v. United States*,¹⁰⁹ “[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform *specific official acts*.”¹¹⁰ It added in *United States v. Sun-Diamond Growers* that, at least under 18 U.S.C. § 201(b), a bribe must be given “for or because of *some particular official act*.”¹¹¹ These statements have led bribery defendants to argue that the government failed to identify any “particular official act” or “specific official act” they agreed to perform. Even if they agreed in general terms to do something helpful for their benefactors, the “something” remained unspecified.

As best I can tell, these defendants have never been successful.¹¹² For them, the Court’s statements have been a snare and a delusion. In bribery as in baseball, there appears to be no good reason why a transaction may not include a player to be named later. If a public official named Genie were to agree to grant three wishes in exchange for a deposit to her Cayman Islands bank account, she surely should be convicted of bribery. Moreover, an agreement to provide unspecified benefits need not be express. A

102. *Id.* at 943 n.15.

103. 590 F.3d 325 (5th Cir. 2009).

104. *Id.* at 350.

105. 160 F.3d 1006 (4th Cir. 1998).

106. *Id.* at 1014.

107. 510 F.3d 134 (2d Cir. 2007).

108. *Id.* at 147; *see also* *United States v. McDonough*, 727 F.3d 143, 152–53 (1st Cir. 2013); *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013); *United States v. Bryant*, 655 F.3d 232, 241, 245 (3d Cir. 2011).

109. 504 U.S. 255 (1992).

110. *Id.* at 268 (emphasis added).

111. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 405–06 (1999) (emphasis added); *see also* *McCormick v. United States*, 500 U.S. 257, 273 (1991) (declaring that campaign contributions may be treated as bribes only when an official has made an “explicit promise or undertaking . . . to perform or not to perform an official act”).

112. In addition to the court of appeals decisions cited above in notes 99–108, *see United States v. McNair*, 605 F.3d 1152, 1186–91 (11th Cir. 2010), *United States v. Abbey*, 560 F.3d 513, 519–22 (6th Cir. 2009), and *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997).

corrupt agreement sometimes can be inferred simply from the regular flow of benefits in both directions.¹¹³

The principal danger of the “stream of benefits” concept of bribery is nearly the opposite of the one defendants have suggested. It is not that prosecutors and juries may fail to identify precisely the action a public official agreed to perform; it is that they may fail to identify any benefit an official *accepted* in exchange for a promise of official action. Although the “stream of benefits” metaphor can be compatible with the quid pro quo requirement, it invites slippage from this requirement to a “one hand washes the other” or “favoritism” standard.

Every definition of bribery looks to the moment a benefit is received.¹¹⁴ Bribery can be committed before this moment—the crime includes offers and solicitations—but it cannot be committed after. A payment cannot become a bribe retrospectively—not even when its recipient later acts to benefit its donor, not even when the recipient is motivated in whole or in part by gratitude to the donor, and not even when the recipient hopes to encourage further favors. As Justice Stevens wrote in a dissenting opinion, “When petitioner took the money, he was either guilty or not guilty.”¹¹⁵ Words and actions that follow the receipt of a benefit may supply evidence of what the donor and recipient intended when it was received, but they cannot transform a benefit that was lawful at that time into a bribe.

Some bribery statutes proscribe giving or accepting benefits with intent to influence.¹¹⁶ Others proscribe giving or accepting benefits as “consideration” for official acts.¹¹⁷ Under either definition, favoritism following the receipt of a benefit is not bribery, cronyism is not bribery, “steering” contracts is not bribery, and “one hand washes the other” is not bribery. These things are not good government. They are corrupt in the classic Aristotelian sense of the word. They sometimes may be the result of bribery and sometimes may evidence bribery. But they are not bribery. If an official were subject to imprisonment whenever a jury could be persuaded that he had acted deliberately to benefit someone who once did a favor for him, only a fool would take the job. The circumstances must warrant an inference that, at the time the official accepted one or more of the benefits in the stream, he agreed at least implicitly to provide something in return.

The dangers of the watery metaphor are illustrated by a case I lost, that of former Illinois governor George H. Ryan.¹¹⁸ The jury in Ryan’s case was directed to convict him if he failed to disclose a conflict of interest, but after the Supreme Court held in *Skilling* that failing to disclose a conflict of

113. A very clear illustration is *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), described in note 54 above.

114. *See generally supra* Part II.

115. *McCormick*, 500 U.S. at 283 (Stevens, J., dissenting); *see also Evans*, 504 U.S. at 268 (“[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts.”).

116. *See supra* Part II.A.

117. *See supra* Part II.B.

118. *Ryan v. United States*, 688 F.3d 845 (7th Cir. 2012).

interest was no crime,¹¹⁹ the Seventh Circuit concluded that the jury must have convicted him of taking bribes.¹²⁰ The court focused particularly on the award of a government contract to a lobbying client of codefendant Lawrence Warner, a political associate and family friend who had done favors for Ryan and members of his family.¹²¹ The court quoted and approved the district court's conclusion that Ryan's reason for approving the contract must have been either to promote effective law enforcement, as he claimed, or else

to compensate Warner for the stream of benefits he provided, as the Government urged. The jury rejected the good faith motive. Accordingly, the jury could only have convicted him on this count if it believed that his conduct was a response to the stream of benefits. . . . The court concludes that the jury must have found Ryan accepted gifts from Warner with the intent to influence his actions.¹²²

The court spoke of “compensat[ing] Warner for the stream of benefits” and of “accept[ing] gifts from Warner with the intent to influence [Ryan's] actions” as though they were the same thing.¹²³ But the gifts came at an earlier point than the “compensation.”¹²⁴ These gifts might have been unconditional and legitimate even if they inspired gratitude and did prompt later “compensation.”¹²⁵ By equating subsequent favoritism for a benefactor with bribery, the court concluded that the jury must have found bribery.¹²⁶ Its analysis placed every public official at risk.¹²⁷

IV. WHY DEFINITIONS OF BRIBERY SHOULD REMAIN UNDERINCLUSIVE

For once, the Supreme Court has the law just right: “[F]or bribery, there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act,”¹²⁸ and campaign contributions may be treated as bribes only when “the payments are made in return for an

119. See *supra* notes 88–94 and accompanying text.

120. See *Ryan*, 688 F.3d at 852.

121. *Id.*

122. *Id.* at 852 (quoting *Ryan v. United States*, 759 F. Supp. 2d 975, 999 (N.D. Ill. 2010), *aff'd*, 645 F.3d 913 (7th Cir. 2011), *vacated and remanded*, 132 S. Ct. 2099 (2012)). The court was correct that “the jury rejected the good faith motive.” Under the instructions, however, the jury could have found a lack of good faith simply because Ryan failed to disclose a conflict of interest, and it might have found nondisclosure of a conflict even if Ryan's only reason for approving the contract was to promote effective law enforcement. For present purposes, disregard that difficulty and assume that the jury did reject Ryan's claim that his only reason for approving the contract was to advance the public good. Imagine that Ryan acted in whole or in part to benefit his friend Warner and that the jury so found.

123. *Id.*

124. *Id.*

125. See *id.* at 850.

126. See *id.*

127. For a memoir of Ryan's case describing several rulings by the Seventh Circuit that are even more troubling than the one described here, see Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. (forthcoming 2016).

128. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404–05 (1999).

explicit promise or undertaking . . . to perform or not to perform an official act.”¹²⁹

In a concurring opinion one year after the Court required an “explicit” quid pro quo for campaign contributions alleged to be bribes, Justice Kennedy objected to this requirement: “The official and the payor need not state the quid pro quo in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”¹³⁰ As the reference to winks and nods suggests, it is distressing that the *McCormick* standard places a premium on indirection. The Supreme Court has made achieving the functional equivalent of bribery so easy that one may wonder why anyone ever resorts to the real thing. The only thing that can be said for the Court’s “explicit” quid pro quo requirement is that the alternative would be worse.

Whenever an elected official adheres to the positions that prompted contributors to support him, he exhibits a pattern of favoritism for these contributors. This pattern may bespeak conviction, not corruption. Ambitious prosecutors and cynical jurors, however, can easily infer a corrupt agreement from the common pattern. When an official has supported widget subsidies after accepting large contributions from widget manufacturers, for example, prosecutors and jurors may infer that there must have been an implicit understanding. Allowing inferences of this sort whenever officials have acted to benefit contributors could make public life intolerable. One state has gone beyond *McCormick* by declaring that a properly reported campaign contribution may not be treated as a bribe at all.¹³¹ A narrow definition of bribery like *McCormick*’s reduces the likelihood of “inferences” based on cynicism.

As a special prerogative of their position, law school teachers are allowed to pose hypothetical cases that never could happen. I therefore invite you to imagine that the great philosopher Aristotle, resurrected from the dead, is elected Governor of New Jersey.

Unlike anyone who has actually been Governor of New Jersey, Aristotle gives no thought to his own welfare or that of his family, friends, and supporters. He believes that “governments which rule with a view to the private interest . . . are perversions.”¹³² Aristotle is incorruptible, and his focus on the public good never falters.

But the inevitable happens. Many of Aristotle’s decisions benefit people who have supported him politically, and others benefit people who have done favors for him and members of his family. And when the inevitable happens, critics point to Aristotle and say, “Aha! Behold! One hand washes the other. We always knew that guy was no different from the rest of them.”

129. *McCormick v. United States*, 500 U.S. 257, 273 (1991).

130. *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).

131. See OR. REV. STAT. §§ 162.005, 162.015 (2011); cf. TEX. PENAL CODE ANN. § 36.02(a)(4) (West 2015) (requiring “direct evidence of [an] express agreement” to “take or withhold a specific exercise of official discretion” before a campaign contribution may be treated as a bribe).

132. See ARISTOTLE, *supra* note 3, at 114.

The U.S. Attorney ultimately charges Aristotle with bribery, extortion, honest-services fraud, and racketeering. He says that Aristotle accepted benefits that he must have known were intended to influence him and, further, that he must have intended to be influenced. The prosecutor adds that Aristotle failed to disclose the conflicts of interest created by many of the benefits he received. He invites jurors to infer that there must have been an unspoken understanding that Aristotle would reciprocate in some unspecified way for the favors he received.

The jurors, many of whom entered the jury box with the conviction that most politicians are corrupt,¹³³ are astonished by the number of charges. They convict on every count. The trial judge then lectures Aristotle on how serious a wrong it is to betray the public trust. He sentences Aristotle to five years, less than the twenty years proposed by the prosecutor.

Public officials who have been convicted of misconduct and their attorneys typically maintain that federal prosecutors can convict anyone they like.¹³⁴ The complaint sounds like an alibi, but broad definitions of bribery bring it close to the truth. After presenting a hypothetical case to mock grand jurors, Christopher Robertson and his coauthors reported that the vast majority voted to indict officials for “behavior that virtually any of the 535 Members of Congress engage in every day.”¹³⁵

Whenever the law of bribery is not underinclusive, it is overinclusive. There is no Goldilocks position. Indeed, the law of bribery may be radically underinclusive and radically overinclusive at the same time. It may leave many functional equivalents of bribery untouched while sending Aristotle to prison. That’s the corruption dilemma.

V. EX ANTE REGULATIONS AND WHY THEY MUST BE UNDERINCLUSIVE TOO

Zephyr Teachout writes, “Once corruption is understood as a description of an emotional orientation, rather than a description of contract-like exchange, the idea of criminalizing it seems either comical or fascist.”¹³⁶ Speaking of the kinds of rules commonly found in ethical codes and campaign finance regulations, she observes, “The emotional nature of corruption makes it better suited for bright-line rules that are unconcerned with intent.”¹³⁷

133. See *infra* notes 150–61 and accompanying text.

134. See JAMES L. MERRINER, *THE MAN WHO EMPTIED DEATH ROW: GOVERNOR GEORGE RYAN AND THE POLITICS OF CRIME* xi (2008) (quoting Dan Rostenkowski); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* xxxviii (2009).

135. Christopher Robertson et al., *535 Felons? An Empirical Investigation into the Law of Political Corruption* 7, 27–32 (Feb. 25, 2015) (unpublished manuscript) (on file with author).

136. TEACHOUT, *CORRUPTION IN AMERICA*, *supra* note 1, at 285.

137. *Id.* at 286. The rules to which Teachout refers are not *entirely* unconcerned with intent. The mental state they sometimes require, however, is simply an intent to cross the bright lines they set forth. No speculation about deeper motivation is required.

Teachout makes sense. It is only fair to tell officials and their benefactors what they may and may not do before they act. Rather than allow jurors to infer that Croesus, a wealthy industrialist, must have intended to influence Solon, a state legislator, when he entertained Solon at his ranch and gave him a \$25,000 campaign contribution, the law should tell Solon in advance whether he may accept a weekend at the industrialist's ranch and a \$25,000 contribution. When corrupting benefits take the form of campaign contributions, however, the Supreme Court has largely blocked the most appropriate form of regulation, making expansion of the bribery net more likely.¹³⁸

Although Teachout's position is sound and sensible, anyone who attempts to draft a code of ethics for public officials will soon learn that this code cannot block all functional equivalents of bribery. The range of corrupting practices is wide: soliciting and accepting gifts, accepting invitations to social events, accepting invitations to professional conferences, accepting honoraria for speeches, accepting royalties for publications, accepting referral fees, accepting investment advice, participating in privately funded fact-finding missions, creating or lending support to charities, owning stock and other passive investments, engaging in remunerative employment or private business ventures, negotiating for future private employment, accepting post-government employment, and more.

Drawing appropriate lines is challenging. Should Croesus entertain Solon less lavishly than his other friends, refusing to invite him to the ranch but meeting him later at Denny's? Must Solon, having accepted a public trust, remain cloistered like the members of an ascetic religious order, refusing to accept hospitality worth more than \$50 even from old friends? Would it be better just to require Solon to report as a gift any entertainment he receives worth more than \$50?¹³⁹

138. For criticism of the Court's failure to recognize that campaign contributions are hybrids of protected speech and unprotected gifts to candidates and that they differ greatly from other funds used to bring speech to audiences, see Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 389 (2015). The campaign finance restrictions the Court held invalid in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 558 U.S. 310 (2010), were in fact models of appropriate regulation. For the most part, they provided specific, comprehensible rules, permitted people potentially affected by these rules to obtain clarification through advisory opinions, were enforced primarily through civil sanctions, and imposed criminal penalties only for willful violations. See *Quick Answers to Compliance Questions*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_compliance.shtml (last visited Oct. 21, 2012) [<http://perma.cc/Z7S8-Q9WE>]; *Advisory Opinions*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/ao.shtml> (last visited Oct. 21, 2012) [<http://perma.cc/BKT3-RXRQ>].

139. Mandating disclosure is the regulation of easiest resort. As Omri Ben-Shahar and Carl E. Schneider observe, "[T]he intervention is soft and leaves everything substantive alone." Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 681 (2011). This regulatory technique addresses a problem (or makes a show of it) without notably affecting the public treasury. People burdened by the new regulations often do not protest lest they be thought to have something to hide. More information (and more and more) is thought to facilitate wiser decisions, although no one is

If Solon serves part-time as most state legislators do,¹⁴⁰ who may patronize his law firm, insurance brokerage, or real estate agency? Who may give his spouse, adult child, or niece a job? Who may contribute to his favorite charity—or his spouse’s favorite charity?¹⁴¹

Wherever the lines are drawn, people seeking favor are likely to go beyond them. The authors of an ethical code may determine that the code should not require the spouses, parents, children, nieces, nephews, and political associates of public officials to refuse customary gifts and social invitations or to decline ordinary business opportunities. This judgment, however, will create an opening for favor-seekers. When people who may be interested in doing business with the state send silver to family weddings

likely to read it. Ben-Shahar and Schneider conclude, “Mandated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure.” *Id.* at 681.

To be sure, the utility of disclosure varies from one situation to the next. When opponents, the press, and watchdog groups review the mandated disclosures of political candidates and elected officials, they discover things the public should know. Nevertheless, the disclosures of candidates and elected officials often do not convey useful information, *see* LESSIG, *REPUBLIC, LOST*, *supra* note 1, at 251–60, and the disclosures of less prominent public employees are likely to remain unread on the internet and in file drawers.

Compliance with reporting requirements also is likely to be burdensome. Abner Mikva, a former Member of Congress, former Chief Judge of the D.C. Circuit, former White House counsel, and recent recipient of the Presidential Medal of Freedom, declared,

[W]e already require the filing of too many forms. Every year all of our senior officials spend countless hours preparing countless disclosure forms The reports are so complicated that most reviewers can’t understand what they are reviewing, but they do serve as wonderful traps to snare the unwary official.

Abner J. Mikva, Opinion, *From Politics to Paranoia*, WASH. POST (Nov. 26, 1995), <http://www.washingtonpost.com/archive/opinions/1995/11/26/from-politics-to-paranoia/08b95ba8-ca04-462d-9b40-fe72982fdb3/> [http://perma.cc/943G-T8FM]. Mikva observed, “[G]overnment cannot daily prove its rectitude to the cynic convinced of government’s corruption.” *Id.*

140. *See Full- and Part-Time Legislatures*, NAT’L CONF. OF STATE LEGISLATURES (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> (noting that the work of a state legislator is a full-time job in only ten states) [http://perma.cc/6HLU-6FTA].

141. In Louisiana, Supriya Jindal created the Supriya Jindal Foundation for Louisiana’s Children shortly after her husband, Bobby Jindal, became the state’s governor. The Jindal Foundation provides high-tech equipment to schools, and Mrs. Jindal travels throughout the state to deliver this equipment personally. One early contributor to the foundation was AT&T, which gave \$250,000. At about the same time, AT&T sought the Governor’s approval of an arrangement for providing television cable services. Marathon Oil, which also gave \$250,000, sought an increase in the amount of oil it could refine at its facility in Louisiana. The Governor’s press secretary said of the foundation,

It is a completely nonpolitical, nonpartisan organization created by the first lady, who as an engineer and the mother of three children, has a passion for helping our young people learn science and math. . . . Anything other than this reality has plainly been dreamed up by partisan hacks living in a fantasy land.

See Eric Lipton, *Wife’s Charity Offers Corporate Tie to a Governor*, N.Y. TIMES (Mar. 2, 2011), <http://www.nytimes.com/2011/03/03/us/politics/03jindal.html> [http://perma.cc/JZ6Y-F8FD]; *see also* Raymond Hernandez & David W. Chen, *Gifts to Pet Charities Keep Lawmakers Happy*, N.Y. TIMES (Oct. 19, 2008), <http://www.nytimes.com/2008/10/19/us/politics/19charity.html> [http://perma.cc/HU7K-DFNH].

and flowers to family funerals, critics may howl about loopholes and functional equivalents.¹⁴²

The effect of ex ante regulation often may be to substitute weaker for stronger conflicts of interest. In fact, giving a job to an officeholder's favorite nephew is usually not the functional equivalent of promising post-government employment to the officeholder himself. Although regulations have hydraulic effects, one should not assume that they can neither reduce the amount of money devoted to buying influence nor increase the cost of buying it.¹⁴³

The impossibility of suppressing all functional equivalents of bribery through either corrupt-intent bribery laws or ex ante regulations may lead one to say with Rutherford B. Hayes, "Law is no substitute for character."¹⁴⁴ Hayes's observation is noble and spot-on, but it may not be of great comfort in a world in which all of us have been banished from the Garden.

VI. FROM STEVENSON TO BLAGOJEVICH:
HAS THE EFFORT TO CLEAN UP GOVERNMENT
THROUGH CRIMINAL PROSECUTION MADE THINGS BETTER?

Over the past sixty years, Congress has given prosecutors an ever-larger arsenal of tools for fighting corruption.¹⁴⁵ Although the Supreme Court has reined in the lower federal courts as best it can, these courts have construed anticorruption measures expansively. Corruption trials have become longer. Many United States Attorney's Offices have established Public Corruption Units,¹⁴⁶ and experienced prosecutors have competed for

142. The difficulty of drawing appropriate lines ex ante pushes regulators toward employing fuzzy mental-state standards ex post. They may declare it permissible for Croesus to entertain Solon at the ranch if Solon is in fact an old friend but impermissible if Croesus is trying to influence Solon's performance of his official duties.

143. *But cf.* *McConnell v. FEC*, 540 U.S. 93, 224 (2003) ("Money, like water, will always find an outlet."); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("[W]e think political money, like water, has to go somewhere. It never really disappears into thin air.")

144. Letter from Rutherford B. Hayes to Colonel G. Bickham (Dec. 5, 1888), in 4 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES 426 (Charles R. Williams ed., 1922).

145. *See, e.g.*, 18 U.S.C. § 1952 (2012) (the Travel Act, enacted in 1961); *id.* §§ 1961–1968 (the RICO Act, enacted in 1970); *id.* § 666 (the federal program bribery statute, enacted in 1984); *id.* § 1956 (the Money Laundering Control Act, enacted in 1986); *id.* § 1346 (the honest-services statute, enacted in 1988); Pub. L. No. 107-204, § 903, 116 Stat. 745, 800 (2002) (codified at 18 U.S.C. § 1341) (part of the Sarbanes-Oxley Act, increasing the maximum penalty for mail and wire fraud from five to twenty years). Although members of Congress speak of giving "tools" to prosecutors, they seem never to speak of giving "tools" to defense attorneys.

146. *See, e.g.*, *The United States Attorney's Office Southern District of New York: Criminal Division*, U.S. DEP'T OF JUSTICE (May 14, 2015), www.justice.gov/usao-sdny/criminal-division (describing the Public Corruption Unit in the U.S. Attorney's Office for the Southern District of New York) [<http://perma.cc/33QC-JE9E>]; *The United States Attorney's Office for the Northern District of Illinois: About*, U.S. DEP'T OF JUSTICE (July 24, 2015), www.justice.gov/usao-ndil/about ("[T]he Public Corruption and Organized Crime Section continues the office's long tradition of prosecuting those who violate the public trust . . .") [<http://perma.cc/GR92-WSAP>]; *The United States Attorney's Office for the*

assignments to these units. In addition, the Justice Department has created a Public Integrity Section staffed by “about 30 prosecutors who travel the country to help local United States attorney’s offices develop complex and often politically contentious corruption cases.”¹⁴⁷ In 1976, federal prosecutors indicted 337 officials for corruption, a five-fold increase from the number six years earlier.¹⁴⁸ The number of officials prosecuted annually by the federal government today is about eight hundred.¹⁴⁹

Perhaps the federal effort to lock up public officials has given America better and less corrupt government, but if it has, the public has not noticed. The percentage of Americans who believe that “quite a few” government officials are “crooked” has doubled in fifty years (from 24 percent in 1958 to 51 percent in 2008),¹⁵⁰ and the percentage of people who believe they can trust the federal government most of the time has dropped by more than two-thirds in thirty years (from 70 percent in 1980 to 22 percent in 2010).¹⁵¹ Forty-seven percent of the public say that most members of Congress are corrupt (slightly more than say that most are not corrupt).¹⁵² An impressionistic glance toward today’s public officials may also suggest that the effort to improve government by locking up officials has misfired.

Eastern District of Virginia, U.S. DEP’T OF JUSTICE (Apr. 22, 2015), www.justice.gov/usao-edva/criminal-division (describing the Financial Crimes and Public Corruption Unit in the U.S. Attorney’s Office for the Eastern District of Virginia) [<http://perma.cc/P3K2-HJPS>].

147. Charlie Savage, *Another High-Profile Failure for a Justice Dept. Watchdog*, N.Y. TIMES (May 31, 2012), <http://www.nytimes.com/2012/06/01/us/edwards-case-a-blow-to-justice-dept-corruption-unit.html> [<http://perma.cc/9TV7-PAV9>].

148. See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172 n.1 (1977).

149. See U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2012 24, 25–26 tbl.II, <http://www.justice.gov/criminal/pin/docs/2012-Annual-Report.pdf> [<http://perma.cc/4JDL-B76N>]; TRACREPORTS, OFFICIAL CORRUPTION PROSECUTIONS DECLINE UNDER OBAMA (2014), <http://trac.syr.edu/tracreports/crim/358/> (reporting somewhat lower figures than those supplied by the Justice Department) [<http://perma.cc/9A8V-8E6B>]; Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, in PRIVATE AND PUBLIC CORRUPTION 127, 129 tbl.6.1 (William C. Heffernan & John Lowenstein eds., 2004). The high-water mark came in 1991 when the federal government prosecuted almost 1200 officials. See *id.*

150. See LESSIG, REPUBLIC, LOST, *supra* note 1, at 167 (citing *New Judicial Watch/Zogby Poll: 81.7% of Americans Say Political Corruption Played a “Major Role” in Financial Crisis*, JUDICIAL WATCH (Oct. 21, 2008), <http://www.judicialwatch.org/press-room/press-releases/new-judicial-watch-zogby-poll-82-7-american-say-political-corruption-played-major-role/> [<http://perma.cc/9S33-X8A2>]).

151. *Id.* (citing THE PEW RESEARCH CTR., THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR (2010), <http://people-press.org/files/legacy-pdf/606.pdf> [<http://perma.cc/L9W2-SHLL>]; JEFFREY BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON POLITICAL POWER IN AMERICA 10 (2000)).

152. Joseph Carroll, *Americans Increasingly View Most Members of Congress As Corrupt*, GALLUP NEWS SERV. (May 17, 2006), <http://www.gallup.com/poll/22837/americans-increasingly-view-most-members-congress-corrupt.aspx> [<http://perma.cc/2U83-3RUT>]; see also INST. OF POLITICS, HARVARD UNIVERSITY, SURVEY OF YOUNG AMERICANS’ ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE (2013), http://www.iop.harvard.edu/sites/default/files_new/spring_poll_13_Exec_Summary.pdf [<http://perma.cc/6QH2-4G3J>].

My home state, Illinois, has gone within my memory from Governor Adlai Stevenson to Governor Rod Blagojevich.

The Stevenson-to-Blagojevich observation may provoke your own impressionistic assessment, but I confess that it's a rhetorical ploy. Most public officials were not as virtuous as Adlai Stevenson sixty years ago, and few are as lacking in character as Rod Blagojevich today.

In 1948, the year Stevenson was elected governor, the election of a Democratic majority in the Illinois House made Representative Paul Powell a leading candidate to become Speaker. Powell famously remarked on election night, "I can smell the meat a-cookin."¹⁵³ He did become Speaker and later Secretary of State, and when he died in 1970, people found \$800,000 in cash in shoeboxes, briefcases, and strongboxes in his Springfield hotel suite.¹⁵⁴ They also found forty-nine cases of whiskey, fourteen transistor radios, and two cases of creamed corn.¹⁵⁵ Although Powell's salary never exceeded \$30,000 per year, he left an estate worth \$4.6 million, \$1 million of it in racetrack stock.¹⁵⁶

Your speculation about whether federal corruption prosecutions have made things better or worse is as good as mine. My own guess, however, is "both." My sense is that officials like Powell have become less common than they were sixty years ago, and so have officials like Stevenson. Federal corruption prosecutions may have played a part in both stories.

Although the Federal Bureau of Investigation found \$90,000 in cash in Congressman William Jefferson's freezer in 2005,¹⁵⁷ corruption prosecutions today rarely involve shoeboxes stuffed with cash or offshore bank accounts. The officials who wind up in prison are likely to be figures like Alabama Governor Don Siegelman, accused of agreeing to appoint someone to a state board in exchange for financial support of a program to generate education funds,¹⁵⁸ and Robert Sorich, a Chicago mayoral aide accused of patronage hiring in violation of a civil consent decree.¹⁵⁹ The public's greater mistrust of public officials may reflect changed standards or simply a more resentful mood rather than either the officials' changed behavior or the public's changed perception of what they do.¹⁶⁰

153. See MERRINER, *supra* note 134, at 17.

154. Steve Aschburner, *Déjà Vu: Growing Up with Chicago Pals in the 'Land of 10,000 Snakes'*, MINNPOST (Dec. 10, 2008), <http://www.minnpost.com/politics-policy/2008/12/d%C3%A9j%C3%A0-vu-growing-chicago-pals-land-10000-snakes> [http://perma.cc/787Z-GAYD].

155. *Id.*

156. *Id.*

157. See Jerry Markon, *Ex-Rep. Jefferson (D-La.) Gets 13 Years in Bribe Case*, WASH. POST (Nov. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html> [http://perma.cc/WP9B-L32U].

158. See *United States v. Siegelman*, 640 F.3d 1159, 1165–68 (11th Cir. 2011).

159. See *United States v. Sorich*, 523 F.3d 702, 705 (7th Cir. 2008); *Sorich v. United States*, No. 10 C 1069, 2011 U.S. Dist. LEXIS 86213 (N.D. Ill. Aug. 4, 2011).

160. Few public officials banish altogether from their thoughts and actions the impulse to aid friends and supporters and to encourage further support. Unfortunate though their favoritism may be, even the best officials are likely to give friends and supporters a leg up. This conduct once did not spark moral indignation. When cronyism went too far and appeared to compromise the public interest, political opponents might complain, people

If shoeboxes full of cash are indeed rarer today, perhaps the reason is that public officials and their corruptors now have more class. They may have learned that campaign contributions and other “functional equivalents,” even if not “equivalent,” are plenty good enough. Cash bribes may have become infrequent not only because they are criminal but also because they are unnecessary. I am inclined to believe, however, that deterrence through criminal punishment has played a part.¹⁶¹

Detering bribery is a fine idea, but deterring Adlai Stevenson from running for office is not. Federal corruption prosecutions might have made twenty-first century Stevensons less likely to enter politics for two reasons.

First, these prosecutions reflect and reinforce the dark view of politicians voiced by economists, taxi drivers, and radio talk-show callers. When office-holders are presumed corrupt, many virtuous people may find the game not worth playing. Daniel Patrick Moynihan commented, “[P]olitics, business, and war have ever been the affairs of adventurers and risk takers,”¹⁶² and Moynihan’s observation may be especially true today. The adventurers still attracted to the game may be more likely than today’s Adlai Stevensons to cut corners. Criminal prosecutions probably have contributed to rather than ameliorated the public’s sense that most politicians are “crooked.”

Second, corruption prosecutions reinforce the sense that running for office means entering a world of sharpened knives. Although a twenty-first century Stevenson might not be concerned that seeking office could land him in the cell next to Aristotle’s, he could not avoid noticing that to enter politics is to enter a jungle. Candidates today must not only be wary of the knives of others but also consider how sharp a knife to wield themselves. A present day Stevenson might well conclude that, if he wants to be successful, he cannot remain Adlai Stevenson.¹⁶³ Although journalists, political consultants, and politicians have done more than prosecutors to make politics a game of “gotcha,” prosecutors have played a part.¹⁶⁴

might call for more civil service reform or competitive bidding, and voters might fail to reelect an official. But no one seemed to demand long prison terms.

161. When I wrote an article about the prosecution of former Illinois governor George Ryan, my goal was to criticize the overreach of Congress, federal prosecutors, and the courts, not to advance the cause of effective law enforcement. See Albert W. Alschuler, *The Mail Fraud & Rico Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2D 113 (2006). Someone told me, however, that the Speaker of the Illinois House circulated copies of my article to his staff along with a note asking them to notice how easy it is to get in trouble. If the story is true, it illustrates deterrence in action.

162. Daniel Patrick Moynihan, *When the Irish Ran New York*, CITY JOURNAL (Spring 1993), <http://www.city-journal.org/article02.php?aid=1499> [<http://perma.cc/7P73-5VPZ>].

163. Stevenson once said, “The hardest thing about any political campaign is how to win without proving that you are unworthy of winning.” See Larry J. Sabato, *Foreword to THOMAS J. BALDINO & KYLE L. KREIDER, U.S. ELECTION CAMPAIGNS: A DOCUMENTARY AND REFERENCE GUIDE* xv, xvii (2011) (quoting Stevenson). What was the hardest thing when Stevenson ran for office sometimes may be an impossible thing today.

164. The DOJ censured U.S. Attorney Thomas DiBiagio after a newspaper learned of memoranda he had sent his staff. DiBiagio told his subordinates that he wanted three “front page” white collar or public corruption indictments by November 6, a date close to election day. See Editorial, *A Vote of No Confidence*, WASH. POST (July 20, 2004), <http://www>.

CONCLUSION

Government corruption stirs resentment. It unites almost everyone, including members of both the Occupy Wall Street and Tea Party movements. When public officials and their benefactors can engage in practices that resemble bribery and escape punishment, people get angry. Nearly everyone appears to favor broader anti-corruption laws. They may assume that the only reason these laws don't exist already is that lawmakers are corrupt and want to stay that way.

This Article has argued, however, that broader anticorruption laws generally make things worse. It has traced the history of two competing concepts of bribery—the “intent to influence” concept and the “illegal contract” concept—and it has taken the language of various definitions of bribery more seriously than this language often has been taken.

“Intent to influence” may be an appropriate standard when applied to benefits given to appointed judges (both in the seventeenth century and today), but it is a preposterous standard when applied in the twenty-first century to people who must collect donations to run for office and who are appropriately subject to persuasion in a wide variety of social settings bearing little resemblance to a courtroom. The “illegal contract” concept is more appropriate.

Although the Supreme Court's refusal to treat campaign contributions as bribes in the absence of an “explicit” quid pro quo is easily criticized

washingtonpost.com/wp-dyn/articles/A63069-2004Jul19.html [http://perma.cc/N6U2-HE PD]. In view of the incentives of the U.S. Attorney's Office, one commentator expressed surprise that anyone was surprised. See George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 403 (2005).

When a Justice Department task force examined the removal of nine U.S. Attorneys during the administration of President George W. Bush, it found evidence that some had been encouraged to file prosecutions for political reasons. See U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 190–200 (2008). In what was probably the most egregious case, the task force documented a stream of phone calls and other communications from Republican office holders and party officials to David Iglesias, the U.S. Attorney for the District of New Mexico. The communications encouraged faster and more vigorous prosecution of Democrats in two corruption cases and a voting fraud case. *Id.* at 53.

A call late in the series came on October 26, 2006, shortly before the elections of that year. In an apparent reference to one of the corruption cases, U.S. Senator Pete Domenici asked whether he could expect an indictment before November. When Iglesias answered that he did not think so, Domenici said, “Well, I'm very sorry to hear that” and hung up. *Id.* at 179.

On Election Day, November 7, Domenici's Chief of Staff wrote in an email to the President's Deputy Chief of Staff and Senior Advisor Karl Rove, “We worry still about the USA here.” *Id.* at 185. At a White House meeting one week later, Heather Wilson, a Republican Member of Congress, remarked to Rove that “the U.S. Attorney in New Mexico is a waste of breath.” Rove replied, “That decision has already been made. He's gone.” *Id.*

On December 7, a deputy White House counsel informed Senator Domenici's office that Iglesias would be asked to resign. The counsel then emailed a DOJ official that “Domenici's COS [Chief of Staff] is happy as a clam.” *Id.* Another DOJ official requested Iglesias's resignation the same day. See *id.* at 190–200.

Even when prosecutors are not partisan and are not subject to outside pressure, they are likely to view a state's governor in the same way a big game hunter views a cape buffalo.

("That's not how it's done!"), inviting inferences of criminal behavior whenever the actions of elected officials have benefitted donors to their campaigns would be worse. The Court has appropriately rebuffed efforts to use a statute criminalizing deprivations of "the intangible right of honest services" to scuttle the quid pro quo requirement. Moreover, although the currently fashionable "stream of benefits" metaphor can be compatible with the "illegal contract" concept of bribery, courts should not allow talk of streams, retainers, meal plans, and open bars to degenerate into a "one hand washes the other" or "favoritism" standard.

Broad definitions of bribery not only sweep into their net common and widely accepted behavior, they also invite unjustified inferences and empower prosecutors to pick their targets. Most people, however, toot only one horn of the corruption dilemma.