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THE CRUCIAL "CORRUPT INTENT" ELEMENT IN FEDERAL BRIBERY LAWS

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I was a first-grader the first time I got in trouble at school, and it may have been the event that set me on the path to becoming a lawyer. Our teacher evaporated from the classroom, leaving behind a worksheet to busy us students in her absence. I was studiously completing my worksheet when, suddenly, I found myself lying on the cold, orange-tiled classroom floor. Another boy, for reasons unknown, had risen from his seat and shoved me out of mine. Before I knew what was happening, the boy was on top of me—I was being attacked! I was struggling with the boy in an attempt to return to my assigned seat when our teacher returned; she was displeased. In the end, we both were disciplined for "wrestling."

My sense of fairness was deeply wounded that day. I admit, I was technically out of my seat. I admit, I was technically locked in a physical struggle with my seven-year-old assailant. But, being punished felt deeply unfair—I was a victim! I lacked any intent to do wrong. Although my actus reus apparently violated school policy, my mens rea was pure as snow.

This mildly harrowing tale of my youth illustrates the momentousness of the mens rea element of any crime. When courts give short shrift to criminal intent, guiltless actors can be swept into the criminal justice system. As the United States Supreme Court has

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recognized, this danger is particularly acute among federal anti-corruption statutes.[1]

The cluster of federal criminal laws that can be described as anti-bribery statutes are alarmingly easy to violate. Many people want favors from public officials, many people treat public officials generously, and public officials do favors for each other. That is simply how the system works. Sometimes, however, these favors can resemble illegal gratuities and quid pro quos. When individuals and groups influence public officials, how can courts and juries distinguish political corruption from mere political effectiveness?

Admittedly, real bribery—bribery that harms the integrity of the political process—is a critical issue that should be vigorously prosecuted. However, courts should construe anti-corruption laws narrowly so public officials and donors need not live in fear that their legitimate campaign contributions or shrewdly executed backroom deals may expose them to criminal liability. Accordingly, this article argues that the "corrupt intent" element found in many bribery statutes, requiring juries to use their own moral reasoning to determine if a benefit given to or from a public official was given with an evil mind, is crucial. Without this "evil mind" element, swaths of benign political activity would be criminal. For this reason, the United States Supreme Court has stated that anti-corruption laws should be narrowly construed.[2] The best way to construe them narrowly is to ensure that corrupt intent remains a robust element of these offenses.

To pilfer a phrase from Justice Harlan in *Griswold v. Connecticut*, the word "corruptly" in the federal bribery statute, 18 U.S.C. § 201(b), sits on its own bottom.[3] This article specifically argues that the adverb "corruptly" must carry some meaning *in addition to* the quid pro quo described by the other statutory elements. Breathing life into "corruptly" is necessary to avoid the rule against surplusage and to comply with the United States Supreme Court's desire, expressed in *United States v. Sun-Diamond Growers of California*, that criminal anti-corruption statutes be narrowly construed to avoid capturing

1. *See infra* Part I (discussing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 406-07 (1999)).

2. *See infra* Part II (discussing judicial application of anti-corruption laws).

3. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) ("The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.").

benign political activity.[4] The corrupt intent element achieves this end by demanding that juries, in addition to uncovering a quid pro quo, exercise their moral intuition and find that the defendant offered or accepted the bribe with an evil and blameworthy purpose. As a paradigm to demonstrate the functionality of the corrupt intent element of the crime of bribery, this article focuses on bribery-by-campaign contributions.[5]

Part I surveys the federal bribery statute, 18 U.S.C. § 201, and its legislative intent. Part II examines how federal appellate opinions have treated the term "corruptly"—in cases involving § 201 as well as in other federal laws that prohibit bribe-like activity—with particular attention paid to the phenomenon of campaign contributions as bribes. Part III assesses "corrupt intent" in light of the element's historical background and discusses how different political philosophies yield divergent definitions of political corruption. Part IV attempts to delineate the circumstances under which a campaign contribution is given "corruptly," thus constituting an unlawful bribe.

I. INTRODUCTION

The federal bribery and gratuities statute, 18 U.S.C. § 201, describes several ways to violate its provisions. The provision criminalizing bribing a public official, provides:

> (b) Whoever—
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> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—
>
> (A) to influence any official act; or
>
> (B) to influence such public official . . . to commit or aid . . . any fraud . . . on the United States; or
>
> (C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or

4. *See* Nutraceutical Corp. v. Von Escenbach, 459 F.3d 1033, 1039 (10th Cir. 2006) (discussing the rule against surplusage); *Sun-Diamond*, 526 U.S. 398, 406-07 (1999) (narrowly construing public corruption statutes).

5. *See* 18 U.S.C. § 201 (2012).

> person . . . shall be fined . . . or imprisoned for not more than fifteen years, or both . . . .[6]

Subsection (b)(2) has similar wording, but describes the crime from the perspective of the official rather than the person offering the bribe.[7]

Bribing a public official thus requires proof of five essential elements: (1) a *public official*; (2) the defendant's *corrupt intent*; (3) a benefit—"*anything of value*"—given, offered, or promised to the public official; (4) a relationship between the thing of value and some *official act* (or fraud or omission of duty); and (5) the relationship must involve an *intent to influence* the official in carrying out the official act (or to induce the fraud or omission).[8]

Subsection (c) of § 201 describes the crime of unlawful gratuity.[9] This crime is important to the discussion of "corrupt intent" because

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6. *Id.* § 201(b)(1).

7. Subsection (b)(2) provides that whoever:

> (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
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> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid . . . any fraud . . . on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person . . . shall be fined . . . or imprisoned . . . .

Id. § 201(b)(2). This article will refer to subsections (b)(1) and (b)(2) collectively as "the Federal Bribery Statute."

8. *See id.*

9. Subsection (c) provides, in part, that whoever:

> (1) otherwise than as provided by law for the proper discharge of official duty—
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> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or
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> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or

the United States Supreme Court's interpretation of the Federal Bribery Statue emerged in the context of differentiating it from the Federal Gratuities Statute.[10]

In order to prevent anti-bribery laws from criminalizing normal, productive political behavior, the corrupt intent element must be read to narrow the scope of those law. In particular, the element must require there be something intuitively immoral about the act in question, beyond the mere presence of a quid pro quo.

In this regard, *Sun-Diamond* fundamentally shaped the application of § 201. There, the United States Supreme Court attempted to differentiate a bribe under § 201(b) from an unlawful gratuity under § 201(c).[11] The Court specifically compared the language in the Federal Bribery Statute ("intent to influence any official act") with the language in the Federal Gratuities Statute ("for or because of any official act"), and found the fundamental difference was that bribery requires a specific quid pro quo.[12] The Court held that § 201(c) required the prosecution to prove *some* connection between the gratuity and an official act, whereas under § 201(b) the giving of the "thing of value" would constitute a "bribe" only if the gift-giver intended to influence a *particular* official act *in the future.*[13] Accordingly, the Court emphasized the primary difference between these two crimes is the briber's intent to effectuate a quid pro quo.

However, defining bribery as a quid pro quo involving a public official does not obviate the statute's difficulties. The second element—corrupt intent—appears to demand something more. When "anything of value" is given to a "public official" with the "intent to influence" some "official act," a quid pro quo, including a specific intent mens rea, has been established. What function, then, does the corrupt intent element serve? As discussed *infra*, some courts define "corruptly" as intending to execute a quid pro quo; however, this

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> because of any official act performed or to be performed by such official or person . . . .

Id. § 201(c). This article will refer to subsection (c) as "the Federal Gratuities Statute."

10. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999). *Compare* 18 U.S.C. § 201(b) *with id.* § 201(c).

11. *See generally Sun-Diamond*, 526 U.S. 398.

12. *Id.* at 404-05.

13. *Id.*

definition effectively reads the word out of the statute.[14] Defining "corruptly" in a way that simply restates other elements of the crime is redundant and directly conflicts with the statutory interpretation rule against surplusage.[15]

The effect of omitting the "corruptly" element is: many public officials will unwittingly violate the terms of the Federal Bribery Statute on a regular basis. One instance is what is known as "state-bribery," which occurs when one public official receives a political benefit from the official acts of another public official.[16] Hypothetically, for example, candidate A may agree to refrain from running against candidate B for state senate if candidate B will endorse candidate A in the state house race. Another common practice that could arguably violate the Federal Bribery Statute is "logrolling" (also known as "vote-trading").[17] Logrolling occurs when, for example, legislator A offers to support legislator B's bill if legislator B supports additional funding for legislator A's pet project. Both of these illustrations involve a quid pro quo, and both are the sorts of agreements legislators make on a regular basis. Yet, legislators who swap political favors and votes are not necessarily criminals. As discussed *infra*, most of these agreements are not corrupt, because they neither harm the character of the official nor are they against the interest of the public.[18]

Another common and benign political phenomenon that could technically violate the Federal Bribery Statute is a campaign contribution from a special interest group. To use a hypothetical

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14. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 93 (2001) ("The Court has often said that every clause and word of a statute should, if possible, be given effect.") (internal quotation marks omitted).

15. *See* Nutraceutical Corp. v. Von Eschenbach, 459 F.3d 1033, 1039 (10th Cir. 2006) ("The rule against surplusage encourages courts to give meaning to every word used in a statute to realize congressional intent. In effect, this rule embodies the belief that Congress would not have included superfluous language.").

16. *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 813-14 (1985) [hereinafter Lowenstein, *Theory of Politics*].

17. *Id.*

18. Judges who sit on panels also participate in logrolling. See F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443 (2013), arguing against "blanket condemnation" of judicial vote-trading, in light of its potential benefits.

example, the National Rifle Association (NRA) makes political contributions—in the forms of money and positive publicity—to candidates who support the interests of gun owners. These contributions are made with the understanding that, in return for the NRA's support, the candidate will be motivated to vote in ways that further the Association's goals. Many other organizations across the political spectrum engage in similar conduct.[19] Does an issue-advocacy organization violate the Federal Bribery Statute when it contributes to a political campaign—especially when a bill that interests the organization is up for a vote?[20] Few would argue that it does.

Individuals and interest groups make campaign contributions using one of two strategies. In an *electoral strategy*, the person or entity chooses a candidate who appears to represent their interests and contributes to that candidate in order to get the candidate elected.[21] On the other hand, in a *legislative strategy*, a person or entity makes campaign contributions to candidates, not necessarily to help that candidate's election, but to influence that candidate in respect to certain issues.[22] Neither of these strategies is inherently corrupt.[23] However, when a donor uses a legislative strategy and attempts to

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19. *See generally* William M. Welch II, Comment, *The Federal Bribery Statute and Special Interest Campaign Contributions*, 79 J. CRIM. L. & CRIMINOLOGY 1347 (1989) (reinterpreting the Federal Bribery Statute in a way that purports to more effectively limit the influential power of special interest groups over public officials).

20. *Id.* (discussing the effectiveness of the Federal Bribery Statute in regard to campaign contributions by political action committees).

21. *See, e.g.*, Daniel Hays Lowenstein, *When is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 127, 137 (William C. Heffernan & John Kleinig eds., 2004) [hereinafter Lowenstein, *Campaign Contributions*]; Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of all Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308-09 (1989) [hereinafter Lowenstein, *Root of Evil*], *available at* http://scholarlycommons.law.hofstra.edu/ hlr/vol18/iss2/2.

22. Lowenstein, *Root of Evil*, *supra* note 21, at 308.

23. *See* Lowenstein, *Theory of Politics*, *supra* note 16, at 18. Lowenstein appears to believe that campaign contributions made as part of a legislative voting strategy are bribes—both immoral and illegal—and are not currently prosecuted only because the practice is so pervasive (and perhaps practically necessary). *See* Lowenstein, *Root of Evil*, *supra* note 21, at 329. I disagree. See also Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 113-18 (1995), critiquing Lowenstein's views.

influence an officeholder's decisions by giving targeted campaign contributions, the threat of creating an illegal quid pro quo becomes very real.[24]

Therefore, ascribing independent substance to the corrupt intent element of bribery is necessary on two grounds: to avoid rendering the corrupt intent element redundant, but also to avoid criminalizing innocent conduct.

Defining corruption as merely quid pro quo, without requiring more, criminalizes a range of common, beneficial legislative behavior. Without this freestanding "corruptly" element, the Federal Bribery Statute risks being over-inclusive and could lead to unintended consequences. First, the statute's broad scope creates a danger of selective prosecution. If most politicians regularly violate the statute (by trading political favors or votes, or by accepting contributions from special interest groups), then a prosecutor could use the statute to target almost any public official at any time. Second, because some types of quid pro quos are common and useful features of the legislative process, the expansive reach of the Federal Bribery Statute threatens to punish or deter otherwise innocuous legislative behavior. The threat of selective prosecution and potentially broad liability could have a chilling effect on productive political activity.

Some courts and legislatures have recognized this danger, and have thus required that prosecutors prove corrupt intent as a stand-alone element of the crime of bribery.[25] This requirement mitigates the risk of over-inclusivity and enables juries to distinguish legitimate campaign contributions from unacceptable bribes.[26] As courts have

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24. *See, e.g.*, United States v. Terry, 707 F.3d 607, 613-14 (6th Cir. 2013) (exploring the thin line separating the political donor who "gives money in the hope of unspecified future assistance" and who makes a contribution so the public official will "do what I asked him to do"—only the latter of which is a "corrupt bargain" and, hence, a bribe).

25. *See* Lowenstein, *Campaign Contributions, supra* note 21, at 132 ("[T]he corrupt intent element adds a normative requirement that is not entirely captured by the descriptive elements.").

26. As the Court of Appeals for the Sixth Circuit recently explained, the presence or absence of a corrupt agreement is the type of question "juries are fully equipped to assess":

> [M]otives and consequences . . . are the keys for determining whether a public official entered an agreement to accept a bribe, and the trier of fact is quite capable of deciding the intent with which words were spoken or

recognized, not every campaign contribution is "a bribe in sheep's clothing."[27] Accordingly, juries must parse the individual facts to determine when a campaign contribution contains a "corrupt bargain" that seeks to turn a public official into "a donor's marionette."[28]

In some instances, when state bribery statutes have omitted the corrupt intent element, courts have read the element into the statute.[29] These opinions appear to recognize that without some sort of normative intensifying factor, like corrupt intent, bribery laws would criminalize the day-to-day transactions of most politicians.[30]

Once corrupt intent is understood as a freestanding element of bribery, the problem becomes how to sculpt a workable definition of "corruptly."[31] The corrupt intent element adds to the quid pro quo

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actions taken as well as the reasonable construction given to them by the official and the payor.

Terry, 707 F.3d at 613 (quoting Evans v. United States, 504 U.S. 225, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

27. *Id.*

28. *Id.*

29. *See* Agan v. Vaughan, 119 F.3d 1538, 1542-44 (11th Cir. 1997) (suggesting that a corrupt intent is required on constitutional grounds when the bribe is a campaign contribution); *see also* State v. O'Neill, 700 P.2d 711, 859 (Wash. 1985) (construing bribery statute to require proof of a defendant's corrupt intent); State v. Alfonsi, 147 N.W.2d 550, 553, 555 (Wis. 1967) (reading an intent to defraud requirement into a state bribery statute). The *Alfonsi* court also noted that "the element of Scienter is the rule rather than the exception in our criminal jurisprudence. This is particularly true with respect to the crime of bribery, which by its inherent nature has traditionally required a corrupt motivation." *Id.*

30. *Agan*, 119 F.3d at 1544 (suggesting that without a corrupt intent element bribery laws could interfere with political speech protected under the First Amendment).

31. The American Law Institute (A.L.I.) and the National Commission on Reform of Federal Criminal Laws have advocated for the removal of the term "corruptly" from American laws because they believe the term to be too nebulous. For example, the A.L.I.'s Model Penal Code Commentary on section 240.1, "Bribery in Official and Political Matters," suggests that "the requirement of 'corrupt' purpose provides virtually no guidance as to the intended scope of the law . . . ." Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129, 176 n.7 (2004) (citing MODEL PENAL CODE & COMMENTARIES § 240.1 at 5, 8 (1980); STUDY DRAFT OF A NEW FED. CRIMINAL CODE §1361 at 127 (Nat'l Commission on Reform of Fed. Criminal Laws 1970)).

element by requiring juries to make an intuitive judgment about whether the conduct at issue was immoral under the circumstances. However, there is no one-size-fits-all definition of corruptly.[32] Rather, prosecutors must argue to the jury some theory of why the quid pro quo was corrupt. The precise theory will differ from crime to crime and jury to jury. The important fact is that not all quid pro quos are immoral. Defining corruption as an element that depends on the "moral judgment" of the jury ensures that benign quid pro quo actions will not engender unmerited punishment. Moreover, a bribery instruction that requires the jury to find an "evil mind" or "morally blameworthy" motive would put public officials on notice that, although they will be penalized when their political arrangements violate society's intuitive principles of fairness, duty, and justice, they will not be held liable for innocuous quid pro quo behaviors.

The proposition that "corrupt intent" is an additional substantive element beyond the quid pro quo is expressed in Matthew Bender's Modern Federal Jury Instructions for Bribery of a Public Official:

> Corrupt intent means simply having an improper motive or purpose. The defendant must have promised, offered or given money or a thing of value to the public official with the deliberate purpose of influencing an official act of that person. This involves conscious wrongdoing, or as it has sometimes been expressed, a bad or evil state of mind.[33]

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32. As Professors Mills and Weisberg explain in their historical survey of the word "corruption":

> In history and the social sciences, there is a vast academic literature on the subject of describing and defining corruption—a body of work so vast that we can only briefly allude to it here. But any review of this scholarship must acknowledge that it is very difficult to derive any consensus definition of corruption or to measure the alleged harm of what positive law calls corruption, and that any effort at a positive or even normative definition of corruption is heavily contingent on independent economic, political, and social factors.

David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1378 (2008).

33. 1-16 *Modern Federal Jury Instructions—Criminal*, ¶ 16.01 (Matthew Bender) [hereinafter *Jury Instructions*].

This instruction, which continues to be used in bribery trials,[34] does an adequate job of expressing both the quid pro quo aspect of corrupt intent as well as the something more—"a bad or evil state of mind."[35] The instruction illustrates that the corrupt intent element requires juries to make an additional finding of intuitively immoral motivation. Similarly, the United States Attorneys' Criminal Resource Manual, while recognizing that "the statute is a little confusing in this respect," counsels federal prosecutors to specify to the court that the word "corruptly" in the Federal Bribery Statute "simply means 'with a bad or evil purpose.'"[36]

Therefore, as both a practical and theoretical matter, anti-bribery laws must carry an element of corrupt intent. Determining corrupt intent requires a moral judgment on the part of the jury. Without this element, anti-bribery laws threaten to criminalize a great deal of benign political behavior. Presently, not all courts agree with this conclusion.

II. A BRIEF SURVEY OF "CORRUPTLY" IN FEDERAL APPELLATE OPINIONS

Is this "moral judgment" understanding of corrupt intent being followed by federal appellate courts? This Part traces the development of the interpretation of "corruptly" and demonstrates that, although the moral judgment interpretation is still alive, most courts construe "corruptly" as simply requiring a quid pro quo without addressing—or perhaps even realizing—that this creates redundancy within the statute.

A. "Corruptly" in § 201 Cases

An early and seminal case construing the Federal Bribery Statute is *Schneider v. United States*, in which the Court of Appeals for the Ninth Circuit held that providing a jury instruction on bribery that

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34. *See, e.g.*, United States v. Quinn, 359 F.3d 666, 674 (4th Cir. 2004) (district court instruction reflects language from *Jury Instructions*, *supra* note 33).

35. *Jury Instructions*, *supra* note 33, ¶ 16.01.

36. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 2044 (1997) [hereinafter U.S. ATTORNEYS' MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02044.htm.

merely required "criminal negligence" was reversible error.[37] Bribery, the court said, is a specific intent crime.[38] Accordingly, the jury must find beyond a reasonable doubt that the defendant possessed, per the correct portion of the jury instructions, "an evil intent to violate the law."[39]

Another frequently cited case is *United States v. Brewster*, where a United States Senator was allegedly bribed by a lobbyist to oppose postal rate increases.[40] Daniel Hays Lowenstein, a professor with a leading reputation in the field of Election Law,[41] calls the *Brewster* opinion "long, confused, and highly evasive."[42] In an article concerning campaign contributions as bribes, Lowenstein opines that "little purpose" would be served by extensively analyzing the case.[43] However, the United States Attorneys' Criminal Resource Manual contains an entire section analyzing *Brewster*.[44]

The *Brewster* court analyzed § 201 in terms of the differences between bribery and illegal gratuities,[45] holding that illegal gratuity is a lesser included offense of bribery and that what separates the two offenses is the requisite level of intent.[46] The court held that the "corruptly" element of the Federal Bribery Statute "bespeaks a higher degree of criminal knowledge and purpose" than the analogous element in the Federal Gratuities Statute.[47] Likewise, the Federal Bribery Statute's phrase, "in return for being influenced in the performance of any official act," implied a higher degree of intent than the language of the Federal Gratuities Statute, to accept the same thing of value "for or because of any official act."[48] *Brewster* thus

37. Schneider v. United States, 192 F.2d 498, 503 (9th Cir. 1951).

38. *Id.*

39. *Id.*

40. United States v. Brewster, 506 F.2d 62, 64-65 (D.C. Cir. 1974).

41. Daniel Hays Lowenstein's *Biography Page*, UCLA LAW, *available at* https://www.law.ucla.edu/faculty/faculty-profiles/daniel-hays-lowenstein/ (last visited Nov. 8, 2014).

42. Lowenstein, *Campaign Contributions*, *supra* note 21, at 138.

43. *Id.*

44. U.S. ATTORNEYS' MANUAL, *supra* note 36, § 2045.

45. *See Brewster*, 506 F.2d 62.

46. *Id.* at 73, 83.

47. *Id.* at 71; *see* 18 U.S.C. § 201(c) (2012).

48. *Brewster*, 506 F.2d at 71-72.

concluded that an otherwise legal campaign contribution could constitute a bribe under certain circumstances, but could *never* amount to an illegal gratuity:[49]

> Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official . . . there is no distinction in the case of an elected public official between an illegal gratuity and a perfectly legitimate, honest campaign contribution.[50]

If there is a *specific* quid pro quo, however, a campaign contribution can be a bribe.[51] The court found that the trial judge in Brewster's case correctly defined "corruptly" as doing an act "voluntarily and with a bad or evil purpose to accomplish an unlawful result."[52]

In *United States v. Arthur*, the Court of Appeals for the Fourth Circuit drew from *Brewster*'s "specific" quid pro quo language and the wording of the West Virginia bribery statute in its own effort to construe the intent element of the Federal Bribery Statute.[53] West Virginia, like some other states,[54] defines a bribe as "any pecuniary benefit *as consideration for* the recipient's official action as a public

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49. *Id.* at 77, 81.

50. *Id.* at 73; *cf. id.* at 77 ("[A]ll bona fide contributions directed to a lawfully conducted campaign committee or other person or entity [besides the candidate himself] are not prohibited by 201(g) [what is now § 201(c)]."). In *Brewster*, however, there was evidence that the Senator's campaign committee was a sham, thus exposing the Senator to illegal gratuity charges. *Id.* at 66; *see also* Lowenstein, *Campaign Contributions*, *supra* note 21, at 135 (examining different reasons why campaign contributions cannot be treated as "things of value" in an unlawful gratuity prosecution).

51. *Brewster*, 506 F.2d at 82.

52. *Id.* at 80.

53. United States v. Arthur, 544 F.2d 730, 734-35 (4th Cir. 1976); *see Brewster*, 506 F.2d at 72 ("The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved.").

54. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-148 (West, Westlaw through enactments of Public Acts of the 2014 Feb. Reg. Sess. Of the Conn. Gen. Assemb.); MONT. CODE ANN. § 45-7-101 (West 2013); N.J. STAT. ANN. § 2C:27-2 (West, Westlaw through L.2014, c. 75 and J.R. No. 3); 18 PA. CONS. STAT. ANN. § 4701 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 171, 173 to 198 and 200 to 204); TEX. PENAL CODE ANN. § 36.02 (West, Westlaw through 2013 Third Called Sess. of the 83rd Legis.); WYO. STAT. ANN. § 6-5-102 (West, Westlaw through 2014 Budget Sess.).

servant."[55] This conceptual intersection between bribery and contract law further fleshes out the briber's state of mind—he wishes to create a binding contract with a public official, in violation of the official's sworn duties.[56]

The Ninth Circuit directly tackled the definition of "corruptly" in the Federal Bribery Statute in *United States v. Dorri*.[57] During deliberations, the jury asked the trial judge to clarify the meaning of "corruptly."[58] The judge had previously instructed the jury, using a model jury instruction for the Ninth Circuit, that "[a]n act is 'corruptly' done if it is done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method with a hope or expectation of either financial gain or other benefit to one's self or to another."[59]

The defendant found this definition problematic because it effectively negated his defense. The defendant claimed he was not soliciting a bribe, but rather was setting up a one-man sting operation.[60] However, the defendant's innocent undercover work would be considered "corrupt" under this definition: he was seeking "a lawful result by some unlawful method" for "some benefit" because he hoped to impress his boss by exposing the bribe.[61] Because the trial judge and counsel were unable to concoct a better definition, however, the judge instructed the jury that if they found "a gap between the law and the facts as you see them," they should deal with the gap "just by filling it, collectively."[62] The majority of the Ninth Circuit found no plain error or abuse of discretion and affirmed Dorri's conviction.[63]

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55. *Arthur*, 554 F.2d at 735 (emphasis added).

56. *See id*; *see also* U.S. ATTORNEYS' MANUAL, *supra* note 36, § 2044 ("[A] bribe purchases a service (or at least is intended to do so) and is therefore bargained-for; a gratuity is more in the nature of a tip.").

57. United States v. Dorri, 15 F.3d 888, 889 (9th Cir. 1994).

58. *Id.* at 890.

59. *Id.* (internal quotation omitted).

60. *Id.* at 890-91.

61. *See id.* at 890.

62. *Id.*

63. *Id.* at 892.

Dorri[64] vividly demonstrates the tension in the law of bribery that forms the heart of this article—the dominant quid pro quo definition of bribery is intuitively over-inclusive. Juries understand that some morally innocent behavior can be classified as a bribe, and they recognize the need for some extra ingredient to separate the truly corrupt and blameworthy actions from those that merely violate the letter—but not the spirit—of the law. Although the trial judge in *Dorri* seemed unable to capture this distinction in the form of a jury instruction, his response comes close to the position this article advocates, by instructing the jury to fill in the gap "collectively."[65] In other words, the judge instructed the jury to draw from their own collective powers of discernment and to rely on their consciences and collective intuition to differentiate good from evil, even when the text of the law provided them inadequate guidance in doing so.

But this is not the last word from *Dorri*.[66] Ninth Circuit Judge Kozinski vigorously dissented, arguing that it was the judge's job to figure out the law and to instruct the jury properly, despite the defense counsel's failure to offer an alternative instruction.[67] "Corruptly," he explained, "is a concept that can't be easily captured in a single formula, as it varies too much from situation to situation."[68] Judge Kozinski further elaborated that:

> 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. . . . Attempts to cabin the definition of "corruptly" within a single rule have proven unsatisfactory.[69]

Judge Kozinski recognized that the model instruction on "corruptly" was "hopelessly circular: If Dorri's conduct was illegal, then he was using an unlawful method, which means he was acting corruptly,

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64. *Id.* at 888.
65. *Id.* at 890.
66. *Id.*
67. *Id.* at 892 (Kozinski, J., dissenting).
68. *Id.* at 894 (Kozinski, J., dissenting).
69. *Id.* (Kozinski, J., dissenting).

which means his conduct was illegal."[70] Judge Kozinski therefore concluded that corruption "can only be defined case by case.... Because there is no workable generic definition of 'corruptly,' the district court should have tailored its instruction to the facts and circumstances of this case," which to Judge Kozinski meant that Dorri would only have acted corruptly if he intended to keep the money for himself.[71] Even the majority, despite upholding the conviction, expressly agreed with Judge Kozinski's treatment of the term "corruptly."[72]

In 1999, the United States Supreme Court weighed in with *United States v. Sun-Diamond Growers of California.*[73] There, the Court discussed the difference between the "intent to influence" necessary for a bribery conviction under § 201(b) and the gift "for or because of an official act" in the § 201(c) gratuities provision.[74] Based on this variation in language, the Court held the greater offense of bribery required a finding of a specific quid pro quo—something of value given in exchange for an official act—while an illegal gratuity merely required *some* link between the gift and a past or future official act.[75]

Unfortunately, in the wake of *Sun-Diamond*, many courts have defined "corruptly" purely in terms of a quid pro quo.[76] Yet, *Sun-Diamond* did not address the "corruptly" element at all.[77] In differentiating bribery from gratuities, the Court focused solely on the "intent to influence."[78] The gifts given to the public official in *Sun-*

70. *Id.* at 895 (Kozinski, J., dissenting).

71. *Id.* at 894-95 (Kozinski, J., dissenting); *see also* United States v. Jennings, 160 F.3d 1006, 1019 (4th Cir. 1998) ("Even if a court does not properly define 'corrupt intent,' it can adequately convey that concept to the jury by describing the exact quid pro quo that the defendant is charged with intending to accomplish.").

72. *Dorri*, 15 F.3d at 892 (dictum) ("We have no quarrel with the dissent's very eloquent explanation of the law of bribery.").

73. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

74. *Id.* at 404.

75. *Id.*

76. Commentators have also equated these concepts. *See, e.g.*, Flynn Burke, Brittany Libson, & Matt Trout, *Public Corruption*, 50 AM. CRIM. L. REV. 1371, 1380 (2013) (defining corrupt intent under 18 U.S.C. § 201 as intent to execute a quid pro quo).

77. The word "corruptly" appears in the *Sun-Diamond* opinion just twice, when the statute itself is quoted. *Sun Diamond*, 526 U.S. at 404.

78. *Id.* at 405.

Diamond could not constitute bribes under § 201(b) because they were not part of a quid pro quo arrangement.[79] Had there been a quid pro quo, the corrupt intent element would have come into play to determine whether the specific quid pro quo was corrupt and, thus, an unlawful bribe.

The Court's rationale in *Sun-Diamond* reinforces this reading of § 201(b). The Court explained that criminal anti-corruption laws should be narrowly construed because they are merely strands in an "intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials."[80] These criminal statutes, the Court said, are but "the tip of the regulatory iceberg."[81]

If the Federal Bribery Statute is to be narrowly construed, the "corruptly" element logically can accomplish that narrowing. At present, the United States Supreme Court has not specifically addressed the "corruptly" element of § 201(b), and lower courts are mistaken to believe *Sun-Diamond* stands for the proposition that proving bribery requires *only* quid pro quo without corrupt intent.

The majority of the Court of Appeals for the Second Circuit, for example, fell precisely into this trap.[82] In *Alfisi*, a fruit and vegetable wholesaler argued that, rather than being a participant in a bribe, he was a victim of extortion.[83] It was the routine practice among wholesalers at the Hunt's Point Market to pay kickbacks to USDA inspectors to prevent them from deliberately miscalculating the contract price of their produce.[84] Alfisi claimed the bribery and gratuity charges levied against him were actually based on his attempts to induce the inspectors to carry out their duties faithfully.[85] The majority opinion misconstrued *Sun-Diamond*, stating "[t]he 'corrupt' intent necessary to a bribery conviction is in the nature of a *quid pro quo* requirement; that is, there must be 'a specific intent to

79. *See id.* at 402, 404-05.
80. *Id.* at 409.
81. *Id.* at 410.
82. *See generally* United States v. Alfisi, 308 F.3d 144 (2d Cir. 2002).
83. *Id.* at 148.
84. *Id.* at 147-48.
85. *Id.* at 150.

give . . . something of value *in exchange* for an official act.'"[86] Thus, according to the Second Circuit, if a quid pro quo was proven, Alfisi's only recourse would be to argue the defense of coercion.[87] Although the court cited *Sun-Diamond*, an opinion that stated criminal anti-corruption laws should be narrowly construed, the *Alfisi* majority pointed to the "danger of underinclusion" to bolster its holding that quid pro quo involving a public official invariably constitutes bribery.[88]

Judge Sack dissented from the *Alfisi* majority, and persuasively argued that corrupt intent must be a separate element of bribery. Judge Sack believed the "corruptly" element requires that the briber seek to corrupt the official. "Bribery," he stated, "in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty."[89] Beyond merely seeking a quid pro quo, therefore, "the benefit sought must entail a breach of duty or trust."[90] Citing the "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect," Judge Sack accused both the majority and the district court of merely using the statute's other terms to define "corruptly,"

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86. *Id.* at 149 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404 (1999)) (emphasis added). As previously noted, the function of this statement in *Sun-Diamond* was to compare the Federal Bribery Statute's phrase "intent to influence" to the phrase "for or because of an official act" in the Federal Gratuities Statute. *Sun-Diamond*, 526 U.S. at 405-06. *Sun-Diamond* paid no heed to the word "corruptly" in § 201(b); it was outside the scope of the question presented. *See generally id. See also supra* text accompanying notes 77-79.

87. *Alfisi*, 308 F.3d. at 150-51.

88. *Id.* at 151. Oddly, the *Alfisi* majority, in the course of arguing that *Sun-Diamond* does not require them to construe § 201 narrowly, makes the point in a footnote that *Sun-Diamond* "says nothing about bribery, especially with regard to how the term 'corruptly' should be interpreted"—in spite of the fact that the majority had just defined "corruptly" by quoting from *Sun-Diamond*. *Id.* at 149, 151 n.4 (citing *Sun-Diamond*, 526 U.S. at 409-12).

89. *Id.* at 155 (Sack, J., dissenting) (quoting U.S. *ex rel.* Sollazzo v. Esperdy, 285 F.2d 341, 342 (2d Cir. 1961)); *see also* John S. Gawey, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 400-01 (2011) (emphasizing the corrupt intent element and noting that under the common law extortion and bribery "required a corrupt state of mind").

90. *Alfisi*, 308 F.3d at 156 (Sack, J., dissenting).

thereby effectively reading "corruptly" out of the statute.[91] He argued that the quid pro quo element described in *Sun-Diamond* arose not from the term "corruptly," but from the term "to influence."[92] Because the *Sun-Diamond* Court never considered the "corruptly" element, it would be a mistake to read *Sun-Diamond* as conflating the "corruptly" element with the necessity of a quid pro quo.[93]

Judge Sack's understanding of "corruptly" is correct. If "corruptly" describes a situation in which an official is tempted to breach public trust or to act hypocritically, the jury must so decide by way of its moral intuition. Although moral terms like "breach of duty," "disloyalty," and "evil state of mind" are familiar to common experience, they prove difficult to define. But putting flesh on these nebulous terms is exactly the sort of thing juries are designed to do.

The salient point is this: federal appellate courts face statutory construction issues in the application of the Federal Bribery Statute. The solution is to recognize that *Sun-Diamond* is not the final word on bribery. Indeed, the point of *Sun-Diamond* was to define unlawful gratuities. The Court did so by comparing gratuities to the "intent to influence an official act" element of bribery. The rule against surplusage and the Supreme Court's directive that criminal anti-corruption laws be narrowly construed demand that "corruptly" must therefore carry some independent meaning. Specifically, "corruptly" signals that evil is afoot, and it demands that juries make case-by-case determinations as to whether the behavior they are asked to judge is truly morally blameworthy.

B. Bribery and Corruption Under Other Federal Laws

There are federal laws other than the Federal Bribery Statute that contain the "corruptly" element, while others include bribery as a lesser included offense. Some of these laws can also be triggered by a campaign contribution. This section briefly illustrates how a corrupt quid pro quo can trigger these other federal criminal laws, and how these laws relate to the Federal Bribery Statute and the element of corrupt intent.

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91. *Id.* (Sack, J., dissenting) (citing Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973)).

92. *Id.* at 157 (Sack, J., dissenting).

93. *Id.* (Sack, J., dissenting).

1. Hobbs Act

The majority of federal appellate court opinions in which campaign contributions are alleged to be bribes arise not in the context of the Federal Bribery Statute, but in the context of the Hobbs Act.[94] The Hobbs Act criminalizes, among other things, any extortion that affects commerce in any way.[95] The term "extortion" in the Act includes "the obtaining of property from another, with his consent, induced . . . under color of official right."[96] The punishment for a Hobbs Act violation includes a sentence up to twenty years.[97]

Hobbs Act case law has evolved in such a way that a violation for extortion under color of title almost perfectly mirrors the Federal Bribery Statute. In *Evans v. United States*, the United States Supreme Court upheld its earlier decision in *McCormick v. United States* that an explicit quid pro quo is necessary for a Hobbs Act color-of-title extortion conviction.[98] Two particular holdings from *Evans* are especially noteworthy. First, the quid pro quo need not actually materialize—the Act is violated by the existence of the agreement itself.[99] Second, *Evans* essentially eliminated the coercion element of extortion by noting that the mere fact that a public official holds public office is coercive in itself.[100] In other words, the public official's "official power" is what induces the bribe. Thus, if a campaign contribution is proven to be part of a specific quid pro quo, and that contribution or agreement "in any way" affects commerce, the Hobbs Act has been violated.[101]

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94. Hobbs Act, 18 U.S.C. § 1951 (2012).

95. *Id.* § 1951(a).

96. *Id.* § 1951(b)(2).

97. *Id.* § 1951(a).

98. Evans v. United States, 504 U.S. 255, 268 (1992), *aff'g* McCormick v. United States, 500 U.S. 257 (1991). *Evans* involved a cash payment of $7,000 to a member of the Dekalb County, Georgia, board of commissioners, as well as a $1,000 check payable to the commissioner's campaign. *Id.* at 257. The check, part of an FBI sting operation, was reported on Evans's state campaign-finance disclosure form. *Id.* But this disclosure did not shield Evans from criminal liability. *See id.*

99. *Id.* at 268.

100. *Id.* at 266.

101. *See* Stirone v. United States, 361 U.S. 212, 215 (1960) (finding that even a *de minimis* impact on commerce—in this case, a slackening in the interstate

Although the Hobbs Act does not contain a corrupt intent element, this element logically carries over into Hobbs Act crimes, especially because the Court described color-of-title extortion almost synonymously with § 201(b) bribery. In fact, Hobbs Act cases have mirrored bribery cases in that some courts require a corrupt intent element while others define the crime purely in terms of quid pro quo.[102]

2. Mail or Wire Fraud

In addition, bribery by way of campaign contributions can be prosecuted as mail or wire fraud. Mail or wire fraud, as defined in 18 U.S.C. §§ 1341, 1343, and 1346, involves a scheme to defraud someone of property or the intangible right of honest services.[103] This crime includes a jurisdictional hook, which requires that some sort of mailing or interstate wire communication occur.[104] Therefore, if a public official's conduct constitutes § 201(b) bribery or a Hobbs Act color-of-title extortion and, in addition to these elements, the official uses the mail, internet, or an interstate telephone call in the process, the conduct is punishable by up to twenty years in prison.[105] Since the United States Supreme Court's decision in *Skilling v. United States*, the "intangible right of honest services" in § 1346 includes "only bribery and kickback schemes."[106]

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movement of sand to a concrete business—is enough to support a Hobbs Act prosecution).

102. To quote one analysis: "The Second, Third, Fourth, and Ninth Circuit Courts of Appeals attempt to approximate a corrupt intent element without using the 'corruptly' language. The Fifth, Sixth, and Eighth Circuit Courts of Appeals expressly recognize a corrupt state of mind requirement, but treat it as surplusage." Jeremy 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, 1779 (2003).

103. 18 U.S.C. §§ 1341, 1343, 1346 (2012).

104. *Id.* §§ 1341, 1343.

105. *Id.* The mail fraud statute, § 1341, also provides for punishment up to thirty years if certain conditions are met. *See id.* § 1341.

106. Skilling v. United States, 561 U.S. 358, 368 (2010); *see also* United States v. Terry, 707 F.3d 607, 611-12 (6th Cir. 2013) (explaining that "*Skilling* made clear" an honest services violation must piggyback on a bribe or kickback).

Skilling[107] suggests that a violation of § 1346 by depriving the public of its right to honest services encompasses bribery under § 201(b). If an honest services violation requires a bribe or a kickback, it logically follows that such a bribe would be defined in terms of the federal bribery provision. Thus, bribery appears to have become a lesser included offense of a mail or wire fraud honest services violation. In other words, while a simple bribe would violate § 201(b), which is punishable by up to fifteen years in prison, a bribe that also involves the use of mail or wire transmissions would be a mail or wire fraud violation, punishable by up to twenty years in prison. An honest services bribery charge under § 1346 would then incorporate all the elements of bribery, including corrupt intent.[108]

3. Federal Program Bribery

Another federal law implicated by bribing a public official is the federal program bribery statute, 18 U.S.C. § 666.[109] Section 666 applies when a bribe involves an agent of an organization or local government who receives at least $10,000 per year in federal funds.[110] The types of organizations involved in a § 666 violation include almost all local governments and many state and local agencies.[111] Under this statute, the crime is committed when the agent "corruptly solicits or demands . . . or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction or series of transactions of

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107. *Skilling*, 561 U.S. 358.

108. *Id.* at 412 (citing 18 U.S.C. §§ 201(b), 666(a)(2)) ("[The honest services fraud statute's] prohibition on bribes . . . draws content . . . from federal statutes proscribing—and defining—similar crimes.") (citation omitted). However, in a recent article summarizing mail and wire fraud, the implied corrupt intent element does not receive a single mention. *See* Alexa Briscoe, *Mail and Wire Fraud*, 50 AM. CRIM. L. REV. 1245 (2013).

109. 18 U.S.C. § 666 (2012).

110. *Id.* § 666(b).

111. *See, e.g.*, United States v. Dransfield, 913 F. Supp. 702, 710 (E.D.N.Y. 1996) (noting "Congress's intent that the term 'Federal program' be broadly construed").

such organization . . . involving any thing of value of $5,000 or more."[112]

The United States Supreme Court interpreted this statute in two important cases: *Salinas v. United States* and *Sabri v. United States*, both of which addressed the question of whether it is necessary under § 666 to show a connection between the bribery and the federal funds.[113] It is not.[114] Although the "corruptly" element appears in § 666, just as it does in the Federal Bribery Statute, the Court in *Salinas* and *Sabri* did not explore that element.[115] As with the Federal Bribery Statute, courts have found violations of § 666 when the bribe was a campaign contribution.[116]

In sum, the corrupt intent element of the Federal Bribery Statute is also an element of Hobbs Act extortion by color-of-title, mail or wire fraud premised on a deprivation of the right to honest services, and federal program bribery. Therefore, this article's conclusions regarding the "corruptly" element apply equally to these other federal crimes.

III. BRIBERY AND CORRUPTION IN LIGHT OF HISTORY AND POLITICAL PHILOSOPHY

In his *United States v. Aguilar* concurring opinion, Justice Scalia opined that the term "corruptly," as used in 18 U.S.C. § 1505, was not unconstitutionally vague.[117] In fact, he explained, the term has "a longstanding and well-accepted meaning."[118] According to Scalia, something done corruptly is "done with an intent to give some

112. 18 U.S.C. § 666(a)(1)(B) (2012) (soliciting a bribe); *see also id.* at § 666(a)(2) (giving a bribe).

113. Salinas v. United States, 522 U.S. 52, 56-57 (1997); Sabri v. United States, 541 U.S. 600, 604-06 (2004).

114. *See Salinas* 552 U.S. 52; *Sabri*, 541 U.S. 600.

115. *See Salinas* 552 U.S. 52; *Sabri*, 541 U.S. 600.

116. United States v. Grubb, 11 F.3d 426, 434 (4th Cir. 1993) (noting "Congress enacted section 666 to extend the reach of 18 U.S.C. § 201"). For more discussion on the intent element of 18 U.S.C. § 666, see Jared W. Olen, *The Devil's in the Intent: Does 18 U.S.C. § 666 Require Proof of Quid-Pro-Quo Intent?*, 42 SW. L. REV. 229, 244-48 (2012).

117. United States v. Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting in part and concurring in part).

118. *Id.* (Scalia, J., dissenting in part and concurring in part).

advantage inconsistent with official duty and the rights of others."[119] Yet this definition still begs the question: what is the duty of a public official, and when does an advantage become inconsistent with that duty and the rights of others?

One way to answer this question is to examine the duty of public officials in light of political philosophy, focusing on legislators as the archetypal public figure. In his article, *Political Bribery and the Intermediate Theory of Politics*, Daniel Lowenstein discusses how different political theories posit different moral requirements for legislators.[120] A person's choice of political theory would affect his or her perception of which bribe-like conduct would be corrupt. Lowenstein notes that bribery laws themselves tend to be written broadly.[121] To avoid over-breadth, he suggests that "corruptly" should be construed to require the bribe be "contrary to the public interest."[122]

Because "corruptly" depends on one's concept of duty (per Justice Scalia) or the public interest (per Lowenstein), political philosophy can act as a guide for delineating the duty legislators owe to the public.[123] The classic political debate is the "Burkean debate" between the trusteeship theory and the mandate theory.[124] Under the trusteeship theory, a legislator's duty is to rely on his own wisdom and conscience to do what he believes is best for his constituents.[125] Thus, any political pressure whatsoever would tend to "corrupt" the legislator from the exercise of his own judgment and wisdom.[126] According to Lowenstein, therefore, the trusteeship theory makes no

119. *Id.* (Scalia, J., dissenting in part and concurring in part).

120. *See generally* Lowenstein, *Theory of Politics*, *supra* note 16.

121. By way of example, a New York appellate court, in *People v. Hochberg*, held that campaign support and fundraising assistance could count as bribes. People v. Hochberg, 62 A.2d 239, 246 (N.Y.S. 1978).

122. Lowenstein, *Theory of Politics*, *supra* note 16, at 803.

123. *Id.* at 831. For a discussion of the definition of corrupt intent from an economic standpoint, see Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 LAW & CONTEMP. PROBS. 61 (2012).

124. Lowenstein, *Theory of Politics*, *supra* note 16, at 831-32.

125. *Id.* at 833-34.

126. *Id.*

comprehensible distinction between corrupt and non-corrupt political pressures.[127]

Under the mandate theory, a legislator's duty is to do what his constituents want, to be bound by their mandates and instructions.[128] Thus, pressure that does not reflect popular preferences undermines proper representation.[129] A bribe that is consistent with popular preferences, therefore, would not be corrupt, while a bribe that causes the legislator to deviate from popular preferences would be.[130]

Finding no definitive answer in political theory, Lowenstein proceeds to discuss bribery in terms of the type of harm it inflicts. Bribery can be intrinsically harmful, especially when the bribe appeals almost exclusively to an official's self-interests,[131] or it can be harmful because it births bad decisions, such as when bribery creates unacceptable advantages for the wealthy and well-organized.[132] Both concepts of corruption apply when a jury is instructed that "corruptly" is an element that requires an intuitive judgment of moral blameworthiness.

Another aspect of political philosophy relevant to this discussion is preference intensity.[133] Preference intensity suggests minority opinions may justly trump majority opinions when they are more intensely held than majority opinions.[134] For example, imagine that in a group of one hundred constituents, seventy people favor policy A with an intensity level of two. This would give policy A one hundred and forty intensity points. Now imagine that the other thirty people

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127. *Id.*

128. *Id.* at 834-36.

129. *Id.*

130. *Id.* Lowenstein also discusses a third political philosophy, Pluralism. *See id.* at 837-40. Unlike the Burkean debate, Pluralism is not normative. *Id.* Rather, Pluralism simply describes the political process in terms of pressures exerted by interest groups. *Id.* The idea of corruption makes little sense in this context—bribery would be but one of many forms of pressure that drive the morally neutral political machine. *See id.*

131. *Id.* at 844.

132. *Id.* at 848-50.

133. *See, e.g.*, Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1795-99 (1992).

134. *Id.*

favor policy B, and are very passionate about it, favoring policy B with an intensity level of seven. This would give policy B two hundred and ten intensity points. Under a mandate theory, a legislator sensitive to preference intensity would rightfully support policy B, even though it is not the preference of the majority of his or her constituents.

Preference intensity applies to bribery in the context of campaign contributions because individuals and interest groups with intense preferences for particular policies will make campaign contributions in ways that express their policy preferences.[135] These contributions may not be corrupt in the sense that they simply inform legislators of intensely held preferences among their constituencies.[136] The United States Supreme Court has observed that money, when given in the form of a campaign contribution, can be a form of speech or, at least a speech-enabler.[137] So long as legislators are not making reciprocal promises, such as "I will support your issue in exchange for your contribution," no corruption has taken place. The official has not violated his duty, and the public has not been disserved. The official will know what his constituents want, and this knowledge will likely influence his future decisions. Moreover, if the official was influenced by intensity of preference, rather than avarice, a jury may legitimately find the official committed no crime.

Another way to arrive at a workable definition of the "corruptly" element is to approach the element historically. Sociologist and law professor James Lindgren surveyed the historical roots of bribery and extortion and found the crimes overlapped theoretically, historically, and pragmatically.[138] Lindgren concluded these crimes were rooted in "the misuse of a representative power for personal gain."[139] The evil

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135. For example, the hypothetical NRA campaign contributions. *See* discussion *supra* Part I.

136. *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 127 (1995) (explaining how political money is a measure of preference intensity, albeit an impure one).

137. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (discussing the effects of statutory limits on campaign contributions and expenditures on the First Amendment right to free expression).

138. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1738 (1993).

139. *Id.*

these laws sought to eradicate was the avarice of public officials.[140] The difference was that bribery laws criminalize both the giver and the recipient of the bribe, while extortion laws punished only the public official.[141] This historical overlap also accounts for the similarities between bribery and Hobbs Act extortion.[142] Lindgren asserts that corruption forms the core of both bribery and extortion and that the quid pro quo requirement is a more recent element, which serves to limit the vagueness inherent in "corruptly."[143] This historical perspective helps correct the common mistake, based on a misreading of *Sun-Diamond*,[144] that bribery is essentially—or even exclusively—defined in terms of a quid pro quo.[145]

Another historical analysis is that of Eric Tamashasky. His study focuses on the meaning of the term "corruptly," beginning at its roots in English common law, and "duty" and "rights," which are embedded in the concept of political corruption.[146] New York's Field Code of 1865, for example, defines "corruptly" in terms of "a wrongful design to acquire or cause some pecuniary or other advantage."[147] A treaty from the 1999 Council of Europe defines "corruption" in terms of "distort[ing] the proper performance of any duty" and an "undue

140. *Id.* at 1704-05 ("[The earliest English bribery statute and extortion statute were both] clearly focused on the acquisitive uses that can be put to state power, rather than the distortion of official decisionmaking . . . . The concern seemed to be greedy officials, rather than powerful subjects distorting government.").

141. Lindgren's "lay definition of bribery" is that "bribery is a corrupt benefit given or received to influence official action so as to afford the giver better than fair treatment." *Id.* at 1699.

142. *See id.* at 1740 ("[F]rom the earliest discussions of the crime of bribery in the common law treatises (Coke and Hawkins) through the twentieth century, bribery has been understood as a 'color of office' offense.").

143. *Id.* at 1738 (noting that, while the reciprocity requirement of Hobbs Act extortion articulated in *Evans v. United States*, 504 U.S. 225 (1992), was not required by the common law of extortion, the reciprocity requirement does serve to limit the statute to the most common and easily prosecuted forms of serious corruption).

144. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

145. See, for example, *United States v. Alfisi*, 308 F.3d 144 (2d Cir. 2002), discussed *supra* Part II.A.

146. *See* Tamashasky, *supra* note 31. Tamashasky advocates defining "corruptly" as "with the purpose to secure an unlawful benefit for oneself or another." *Id.* at 145.

147. *Id.* at 132.

advantage."[148] In both early and contemporary law, therefore, corruption is tied to wrongfulness, duty, and advantage. Tamashasky believes the different meanings of "corruptly" that have emerged in federal courts stem from the different meanings of "unlawful advantage," which emerge on a case-by-case basis.[149]

Tamashasky further explains that, under English common law, crimes were divided into two categories: crimes against the laws of God and crimes against the laws of man.[150] Crimes against the laws of God were classified by the term "corruptly."[151] Under this regime, "corruptly" was not an element of the crime, but a way of classifying the crime as an inherently immoral act—one that was *malum in se*, as opposed to *mala prohibita*.[152]

Whether historically or philosophically approached, the definition of corruption appears to spring from the concepts of duty, improper advantage, and morality. Therefore, anti-bribery laws should be construed in such a way as to capture only the political quid pro quos that controvert an official's moral duty or create an unfair advantage. Whether a quid pro quo is corrupt is better decided by the moral intuition of a jury than by a one-size-fits-all definition.

IV. CONCLUSION—WHEN IS A CAMPAIGN CONTRIBUTION CORRUPT?

Campaign contributions can be corruptly given under several circumstances. For example, a donor may condition a campaign contribution on the candidate's promise to perform a particular future act. Conversely, a candidate may promise a particular act, on the condition that a contribution is given. In both circumstances, there is a quid pro quo—the reciprocity that distinguishes bribery and extortion from an unlawful gratuity. In both circumstances, there is also corruption. The bribing donor seeks an unfair advantage for himself; the soliciting official seeks self-enrichment in ways that

148. *Id.*

149. *Id.*

150. *Id.* at 133.

151. *Id.*

152. *See id.* at 136 (demonstrating, from Justice Willes's 1854 opinion in Cooper v. Slade, 27 L.J.R. 449 (Q.B. 1858), that the word "corruptly" "classifies conduct rather than explicitly defining it").

subvert both his ability to apply his unbiased judgment and to fairly represent his constituents.

By requiring an "evil state of mind" to satisfy corrupt intent, the law criminalizes corrupt behavior without criminalizing more benign political behavior, such as logrolling and interest group contributions, which neither corrupt public officials nor betray public trust. Moreover, narrowing the corrupt intent element is harmonious with the United States Supreme Court's stated preference that federal anti-corruption laws should be narrowly construed.[153]

Political contributions involving a corrupt quid pro quo can be prosecuted under § 201(b), if the bribe concerns federal officials,[154] or § 666, if the bribery relates to an entity receiving sufficient federal funds.[155] If a bribe involves mails or interstate wires, it can also be prosecuted as a scheme to defraud the public of the right to honest services under § 1346.[156] And, if the bribe affects interstate commerce "in any way," it can be prosecuted under the Hobbs Act.[157] Under each of these statutes, a finding of corrupt intent is necessary to avert the danger of over-inclusiveness. Additionally, with respect to §§ 201 and 666 offenses, the corrupt intent element must embody something beyond the quid pro quo to avoid the problem of statutory surplusage. Specifically, the "corruptly" element demands that the quid pro quo was offered or solicited with an "evil mind." Such a finding is a moral judgment well-suited for jury determination.

While some jury instructions make the corrupt intent element explicit, not all do. This article therefore suggests, as a potentially helpful jury instruction:

> "Corruptly" means that the defendant acted with an immoral purpose to secure an improper advantage for himself in violation of his (or the official's) duty to the public. Not every quid pro quo involving a public official is wrong or illegal. You the jury must find not only that a specific agreement existed, but that this agreement was morally blameworthy.

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153. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 406-07 (1999).

154. *See* Part I, *supra*.

155. *See* discussion *supra* Part II.B.3.

156. *See* discussion *supra* Part II.B.2.

157. *See* discussion *supra* Part II.B.1.

Such an instruction would allow the jury to draw on its own collective moral intuition to decide whether the alleged arrangement was designed to enrich either the giver or the recipient in contravention of the official's duty to the public.