THE ENFORCEMENT OF VIRTUE

By F. H. Buckley

Abstract: *Corruption of public officials is the silent killer of the U.S. economy, and we should reflect carefully on how it might be reined in. That's the thought behind campaign finance laws. But broad grants of discretion to authorities, which might work in New Zealand, are more likely to be abused in low-trust America, and campaign finance laws are one example of this. First Amendment free speech rights, as interpreted by the Supreme Court, represent its reflection on the American character and the possibility of abuse when Congress tries to restrict political speech. So conservatives are apt to think, and not entirely without reason.*

KEY WORDS: Political corruption, campaign finance, first amendment, rights, discretion, free speech

> The first cause of Absurd conclusions I ascribe to the want of Method; in that they begin not their Ratiocination from Definitions; that is, from settled significations of their words.
>
> *Thomas Hobbes*

When Hobbes announced that philosophy must be rooted on the definition of words, he meant to leave theology and metaphysics in the dustbin. We lawyers, especially criminal lawyers, have a different reason for insisting on the clarity provided by definitions. If a person is to be charged with a crime, it's important that he know just how he has transgressed. Otherwise, he will not know how to avoid the law, and too much discretion will be given to prosecutors to pursue private vendettas or to criminalize political differences. The latter is a special concern when it comes to the crimes of political corruption.

To philosophers, all this might seem like that old television show, Woodworking with Mr. Chips, the carpentry of putting abstract ideas into action. To which the lawyer might respond, if you can't put them into action what's the point? Asking how corruption might be penalized also helps bring collateral concerns to mind. When it comes to pubic corruption, for example, the legislator or judge is required to measure the public's concern for public integrity against other interests, such as the liberties citizens should be permitted to enjoy in a democratic society. That's an insight that has eluded not a few theorists, including Robespierre. Without the guillotine, he said, virtue is impotent. "Terror is nothing but prompt, severe, inflexible justice; it is therefore an emanation of virtue."[1]

[1] Maximilien de Robespierre, "Sur les principes de morale politique qui doivent guider la Convention nationale dans l'administration intérieure de la République," Address to the National Convention, February 5, 1794 in *Œuvres de Robespierre* 301, A. Vermorel, ed. (Paris: F. Cournol, 1867).

doi:10.1017/S0265052519000165

Philosophers might therefore find it useful to attend to the way in which lawyers and judges have struggled to define corruption. Philosophers might of course come up with a different, more expansive idea of corruption, since the criminal penalties imposed on the corrupt public official argue for a narrower definition of corruption at law. But even then, the lawyer's tools are squarely within the traditions of analytic philosophy, after the difference in sanctions is recognized. Above all, one should want to resist the kind of philosophizing based on little more than free-floating intuitions, in which everything might be corruption, or nothing too. Like a swimmer who finds himself enveloped by a squid's cloud of ink, formless, unbounded, and murky, the lawyer struggles for clear water clarity.

I. Trees or People?

An individual may be corrupt. If so, his corrupt practices will take place within the context of a relationship that links him to other people, and this relationship in turn will often be situated in an institution of some kind. The institution might have a separate legal status, as a corporation or state does. In that case, might the institution be corrupt, along with the corrupt individuals who comprise its members? Might the institution even be corrupt when no guilt attaches to any of its members? Several of the essays in this volume argue that the answer is yes. I think not, however, except in a very special and legal way.

In freshman English, we learned to deride Joyce Kilmer's "Trees" as an example of the pathetic fallacy. That's where one ascribes to a plant or other animal a purely human attribute, and that's what Kilmer's tree did when it looked at God all day, "and lifts her leafy arms to pray." Ridiculous, we were told. Trees don't pray, and it's sentimental foolishness to pretend that they do.

Trees aren't corrupt either. When one talks of institutions, then, the question is whether they're more like trees or people. Because if they're like people, they can be corrupt, as many of the contributors to this volume contend. But then why stop there? If they're like people, might an institution share other attributes with humans? Could a corporation be prayerful, for example, like Kilmer's trees? The Supreme Court's *Hobby Lobby* decision found that privately held family corporations might enjoy the Constitution's First Amendment religious rights,[2] which might be thought to suggest that a company could get down on its knees and praise God. But that's absurd, and the decision should not be so understood. Instead, the case was about the religious convictions of individuals, and held that a person does not sacrifice his religious liberties when he chooses to carry on business as a corporation rather than as an unincorporated sole proprietorship. He need not trade off religious freedom for limited liability.

[2] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).

That's my point. When we label an institution corrupt, what we're ordinarily doing is piercing the institutional veil to examine the behavior of the people who constitute its members. The Hobby Lobby firm enjoyed religious freedoms because it was owned by a few family members who had First Amendment rights. And if we call an institution corrupt, that's ordinarily a shorthand way of referring to its corrupt members.

But it's more complicated than that, for lawyers in any event, since corporations have a separate legal status at law, and to that extent are assimilated to people and not trees. Corporations are taxed separately from their shareholders, and corporations might be held guilty of criminal offenses. A corporation that makes a practice of bribing public officials might thus be found guilty of bribery, if the criminal scheme had been approved by the company's directing minds.[3]

Corporate criminal liability has puzzled traditional lawyers. If a company has no soul to damn, no body to kick, how can it be criminally liable? The answer is that common lawyers reason instrumentally, and can easily create a legal fiction where one is needed to give effect to broader purposes. In *Hobby Lobby* the Court ignored the formality of the corporation's separate legal status where this trenched on an individual's right to religious freedom. It treated the firm as nothing other than its sole owners. But instrumental reasoning can lead to the opposite conclusion, that legal formalities should be scrupulously observed.

Corporate taxation is one example. Those who object to it say that it amounts to double taxation. Profits are taxed as earnings in the hands of the corporation, and then a second time as dividend income when distributed to shareholders. That's why some countries, like Canada, try to eliminate the double taxation by giving corporations a tax credit for funds paid out as dividends. That aside, separate corporate taxation serves the useful purpose of limiting the accumulation of funds in the corporate till. That in turn serves two purposes. It helps save us from the prospect of overlarge corporate behemoths whose power might threaten democratic processes. And it helps reduce the accumulation of funds inefficiently retained by the firm (free cash flow) that could be put to better use if distributed to shareholders.[4] In other words, the legal fiction of separate corporate existence in tax law serves real purposes beyond a simple adherence to legal formalities.

A similar point might be made about corporate tortious or criminal liability. If liability attached only to the individuals behind the wrongdoing, the firm might be under-deterred by virtue of the limited fine that could be extracted from the individuals. If culpable negligence by the firm's agents imposed a loss of a billion dollars, but the agents in question had

[3] *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153.

[4] Michael Jensen, "Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers," *American Economic Review* 76, no. 2 (1986): 323.

only a million dollars in assets, the firm would lack adequate incentives to take care unless it were held liable. It might also be difficult to determine just which individuals are to blame. As such, the failure to pin liability on the firm might result in an incentive failure.

"Public welfare" offenses in areas such as environmental law dispense with the requirement of a guilty mind. These crimes are technical ones, and here the problem is the prospect of over-deterrence if anyone other than the corporation were criminally liable. If I might be turned into a criminal for an offense of which I was unaware, and which moreover I could not be expected to have understood, then I'll want to take excessive precautions against liability.

The argument for treating the firm as a person and not as a tree thus comes down to either protecting the rights of individuals as in *Hobby Lobby*, or correcting incentive failures in the cases of corporate taxation and corporation tort and criminal liability. Apart from the purposes this serves, we needn't worry about the goodness or badness of institutions, or their prayers, or whether they are beautiful or tender-hearted, or any of the other qualities ascribed to individuals. Above all, the lawyer's legal fictions should not be given a philosophical weight they cannot bear.

II. The Elements of Corruption

Let's stick with individuals and individual corruption, then. If the lawyer asks what corruption might mean, when a person is charged, he'll be asking for the elements of an offense—for what a prosecutor must prove before he can secure a conviction. For bribery offenses, four elements are necessary. The crime must be one of intent; the official must be shown to have acted in a manner inconsistent with his duties or failed to act in a manner required by his duties; he must have betrayed someone; and he must have been corrupted by a side payment.

A. Mens rea

The first element of the offense of corruption is the lawyer's *mens rea*, the requirement of an intention to commit a crime. The empty-headed official should be turfed out of office but does not deserve a criminal prosecution if he has a pure heart.

I can easily come up with a list of public officials whose actions have been disastrous for their country. Everyone can do that. For example, I think that George W. Bush's attempts at nation-building in Iraq were foolish. But as someone who saw him at the White House immediately before he signed the War Powers Resolution on October 11, 2002, I cannot think he was intentionally at fault, and that absolves him from the charge of corruption. Those who sincerely pursue a wrong-headed course of action can be blamed for their foolishness, but not for corruption.

They might even be faulted for their negligence. In the run-up to the Iraq War, there was contradictory evidence about whether Saddam Hussein was building nuclear weapons. Many foreign leaders, particularly Dominique de Villepin, the French foreign minister, disputed this. At the time, most Americans deeply resented him in particular and the French in general. But as it turned out, the Bush administration was too hasty. Even now de Villepin remains unpopular with Americans who recall the episode. Not merely was he French, but worse still he was right; and in rushing to war the administration had negligently failed to consider the evidence on the other side. That's troubling, a serious blemish of the Bush administration. But it's not corruption.

The more difficult case is the relationship in which favors are traded for favors, without an express recognition of a quid pro quo. Evolutionary biologist Robert Trivers showed how stable patterns of cooperation can emerge among animals, without anything like back-and-forth promising.[5] Extending this, W. D. Hamilton and Robert Axelrod showed how the same kind of cooperation can emerge when individuals deal with each other over a period of time, again without explicit bargains.[6] When gifts are exchanged again and again, the parties come to expect that they'll continue to maintain their relationship in good faith, and that's as good as a promise.

The question, then, is whether a court might infer bribe-taking from a relationship where the quid pro quo is not explicit, and where it doesn't need to be in order to do its work. There will be no transcripts from an FBI sting operation, but the courts have held that these aren't necessary to secure a conviction where the pattern of favors against gifts is so apparent, at least where the gift ends up in the pocket of a public official. One such case was the prosecution of Virginia Governor Bob McDonnell for corruption, which we'll see in the next section. As it happens, McDonnell's conviction was reversed by the Supreme Court because he had not taken action to help the bribe-giver. Had he done so, however, his conviction would have been upheld, even though there was no express agreement of a quid pro quo.

B. Actus reus

The second element of the crime of corruption is an action or a wrongful failure to take action—the lawyer's *actus reus*. Let us imagine that I know of a great public issue upon which the fate of my country rests. It is crucially

[5] Robert L. Trivers, "The Evolution of Reciprocal Altruism," *Quarterly Review of Biology* 46, no. 1 (1971): 35.

[6] Robert Axelrod and W. D. Hamilton, "The Evolution of Cooperation," *Science* 211 (1981): 1390. See generally Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (New York: Cambridge University Press, 1999), 96–110.

important that something be done or not done. But then suppose that the indicated course of action is not within my purview, not something for which I bear any responsibility or duty to act. In that case, my private thoughts upon the issue could never ascend to the level of corruption.

One such example, perhaps, was President Madison's veto of a federal public works bill on March 3, 1817. The bill proposed to authorize "internal improvements," roads and canals built to promote interstate commerce, but Madison thought this beyond the powers of the federal government. It wasn't that the improvements were a bad idea, he thought. "I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity." As he understood things, however, the Constitution failed to give the federal government or the president the power to interfere in such matters. If we think that Madison's ideas about federalism were wrong we might blame him for his veto, but if we subscribed to his vision of constrained federal powers he could not be faulted. The public works bill was benign but unconstitutional, the flip side of the laws which Justice Antonin Scalia voted to uphold as "stupid but constitutional."[7] And even if Madison and Scalia had intended to harm their country, they wouldn't have been corrupt if they had held the correct interpretations of their constitutional responsibilities. In bad faith, yes, but not corrupt.

The absence of an actus reus was the basis upon which the Supreme Court unanimously reversed the conviction of former Governor Bob McDonnell for bribery in 2016.[8] McDonnell had been persuaded by Jonnie Williams, the hustling CEO of a Virginia drug company, Star-Scientific, to promote the company's signature product, Anatabloc, a tobacco-based dietary supplement. What McDonnell and his wife received from Williams came to $175,000, including a $20,000 shopping spree for his wife in New York, a $50,000 "loan" to McDonnell's company, a Rolex watch, holidays, and dinners. There was no question about the size of the gifts, but had the governor really taken official action to repay the favors, or agreed to do so? That's what is needed to prove a charge of bribery.

While McDonnell was indefatigable in urging his subordinates to assist Williams, they did nothing to promote Anatabloc. Very likely they knew the Governor was dirty. Richmond, VA is a small town, full of gossips. Crucially, when his subordinates balked, McDonnell didn't take the further step of ordering them to help the donor. This, he argued, meant that he wasn't guilty of bribery. All he had done, he said, had been to give Williams the routine courtesies that all politicians provide for their constituents. He had set up meetings, called other public officials and hosted an

[7] Jennifer Senior, "In Conversation: Antonin Scalia," *New York*, Oct. 6, 2013.
[8] *McDonnell v. United States*, __ U.S. __ (2016), *rev'g* 792 F.3d 478 (2015).

event, but no one was required to act on his suggestions. And the Supreme Court agreed with him. His conduct might have been "distasteful," but it didn't add up to bribery.

But what if, without actually ordering anyone to do anything, McDonnell had told Williams that he would do so? Under the federal bribery statute, public officials may not corruptly "demand, seek, or receive anything of value" in return for an official act."[9] So a public official's agreement to perform an act in return for a side payment is a crime, even if the official fails to perform the act in question. And was there such an agreement, in the McDonnell case? Williams must have thought he had an implicit agreement. Otherwise, why would he have spent all that money? And shouldn't McDonnell have recognized that, at a minimum, Williams thought they had a deal? One might therefore have thought that the two-year pattern of accepting gifts sufficed to establish the charge of bribery. "[I]t has been long established that the crime of bribery is complete upon the acceptance of a bribe regardless of whether or not improper action is thereafter taken."[10] But the lower courts had not found an express agreement to accept a bribe, and the Supreme Court refused to infer an implicit agreement to do so.

For criminal lawyers, an agreement to commit a crime is the crime of conspiracy, and evidence of a positive act is not needed to secure a conviction. That might seem a mere "thought crime" to the philosopher, but judges are instructed to see things differently. An agreement to do an evil act is evil in itself, and if the act is criminal as well we'll have less of it if conspiracies are criminalized. There will be fewer murders if agreements to murder are crimes, and there'd be less corruption had McDonnell's conviction been upheld.

C. Betrayal

The third element of corruption is *betrayal*, the abandonment of a responsibility to another. But then to whom? On one model the public official who is charged with corruption is simply the agent of those who elected him, charged with mirroring a Rousseauian popular will.[11] That was Robespierre's definition of corruption, for he thought that social ills never stem from the people. "To be good, the magistrate has only to sacrifice himself (*s'immoler*) to the people."[12]

That also is the test of private corruption, when agents or company managers fail to promote the interests of their principals or shareholders.

[9] 18 U.S.C. §§ 201(b)(2), 201(a)(3).

[10] *Howard v. United States*, 345 F.2d 126, 128 (1st Cir., 1965), f'lld. in *United States v. McDonnell*, __ F.3d __ (4th Cir., 2015).

[11] Nicholas O. Stephanopoulos, "Elections and Alignment," *Columbia Law Review* 114 (2014), 283.

[12] Maximilien de Robespierre, "Sur la constitution," in *Œuvres de Robespierre*, at 276, 278.

Applied to the political arena, public officials would be bound to mirror the wishes of their constituents, as agents to their principals.

An agency-cost model of corruption is generally accepted in the economic literature, but its ambiguities are sometimes ignored. Would it stigmatize the Burkean representative who puts what he thinks is the good of the country above the wasteful self-interests of his constituents? As a Member of Parliament from Bristol, Burke supported a bill to remove trade barriers with Ireland. His constituents, at least those who were voters in those pre-Reform Act days, opposed free trade and asked him to reconsider. Burke refused, and was obliged to run in a different constituency thereafter. In his Speech to the Electors of Bristol, he justified his votes by appealing to a very different sense of the duties of a Member of Parliament.

> Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*.

What Burke had rejected was a *democratic distortion* theory of corruption, one in which an elected official might be replaced by a machine that accurately reflected the wishes of the voters who elected him. In doing so, Burke raised two objections to the mere cypher theory of corruption. First, the official would likely have a better understanding of public policy than a low information voter. That is very likely the case, though less so today than in the past, and one suspects is too often the excuse for an official to pursue private ends that have nothing to do with the public good.

Burke's second objection to democratic distortion theories is that the official should disregard the interests of those who elected him in favor of the more encompassing group to which he considers himself bound to serve. For Burke this was Great Britain as a whole, including Ireland, and not simply the merchants of Bristol. He was not even bound to promote the interests of all the subjects of Great Britain, or of the Empire, if this conflicted with the interests of future subjects. The Burkean social contract was famously a partnership among the living, the dead, and those yet to be born.

The idea that an official's desire to please his constituents might, so far from being blameless, be a source of corruption in itself, should be familiar to any observer of American politics. The separation of powers between a president elected by the nation at large and Congressmen elected by their particular districts, has given us a form of corruption in which Congressmen favor their own districts at the expense of the majority of Americans.

The most glaring examples of this are the budgetary earmarks which directly or indirectly specify the recipient, which are directed to a particular district, and which circumvent the otherwise applicable merit-based or competitive allocation processes. Think here of all the pork sent to West Virginia by Robert Byrd or to Johnstown, Pennsylvania by John Murtha. Corrupt and wasteful this might be, yet the system continues since the costs are borne by American taxpayers in general while the benefits are concentrated with the residents of the Congressman's state or district. Sadly, the structure of American government tends inefficiently to shift wealth from dispersed nationwide losers to concentrated winners in individual Congressional districts.[13]

That's not what the Framers wanted, when they drafted our Constitution. The evils of government under the Articles of Confederation could be attributed, they thought, to ill-educated populists in the state legislatures who were deaf to the national interest and all too ready to advance wasteful local interests. What had emerged, for nationalists such as Washington and Madison, was a new understanding of civic virtue, seen in a patriotic attachment to the country as a whole. Corruption, by contrast, meant a beggar-thy-neighbor preference for one's particular state. Shunning corruption, the patriot was a person of "enlarged" or "extensive" views, with "a real concern for the welfare of our whole country in general."[14]

There was a third reason why the Framers rejected a democratic distortion understanding of corruption. Apart from the low information voter and the problem of local partisanship, none of the delegates had a particularly elevated idea about a virtuous citizenry. George Washington was the paragon of republican virtue, but privately he agreed that governments could not rely upon a disinterested citizenry, writing to Madison's father that "the motives which predominate most in human affairs" are "self-love and self-interest."[15] If government under the Articles of Confederation was falling apart, the Framers thought this could be attributed to an "excess of democracy," with its "turbulence and follies."[16] For his part, George Mason believed that "it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man."[17]

[13] See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 2nd ed. (Cambridge, MA: Harvard University Press, 1971).

[14] Samuel Wales, "The Dangers of Our National Prosperity," in *Political Sermons of the American Founding Era, 1730-1805*, 2nd ed., Ellis Sandoz, ed. (Indianapolis, IN: Liberty Fund, 1998), 837, 849.

[15] *Volume II: The Papers of George Washington, Confederation Series 18 July 1784–18 May 1785*, W. W. Abbot, ed. (Charlottesville, VA and London: University of Virginia Press, 1992), 165.

[16] *The Records of the Federal Convention of 1787*, vol. 1 (Elbridge Gerry, May 31); (Randolph, May 31), Max Farrand, ed., rev. ed. (New Haven, CT: Yale University Press, 1937), 48; 51 (hereafter "Farrand").

[17] Farrand, II.31 (July 17).

For an answer to these ills, Madison borrowed David Hume's ideas about the refinement or *filtration* of representatives, in which higher levels of representatives would be chosen by those at lower levels, rather than directly elected by the people.[18] Ordinary voters would elect local representatives, who would then elect a higher level of representatives, and the cream would rise to the top. The Virginia Plan, which the large states of Virginia and Pennsylvania tried mightily to see adopted, incorporated Madison's filtration principle. The "first" or lower house, today's House of Representatives, would be popularly elected; but the second or higher branch, our Senate, would be selected by the first branch; and together the two branches would elect the president.

That would have given America an essentially parliamentary system, and was cogent enough to persuade Sir John A. Macdonald when he arrived at the first Canadian constitutional convention seventy-seven years later with the American Framers' debates under his arm. In their Constitution, the Americans had produced one of the most skillful works that human intelligence ever created, said Macdonald; but the Canadians could do better. Like Madison, Macdonald thought that democratic impurities should be filtered in a scheme of parliamentary government. Call Madison the father of the Constitution if you wish, but do make clear which country you're talking about.

The Supreme Court has also rejected democratic distortion explanations of corruption as inconsistent with First Amendment free speech rights, when an anti-distortion rationale is given for restrictions on campaign spending. In the canonical *Buckley v. Valeo* decision,[19] the Court held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[20] This has been condemned as a betrayal of the Framers' intent.[21] It's not, however. Distortion is what most of them wanted, in the sense of filtering voter desires, since they were so suspicious of democracy.

The failure to attend to the need for the element of betrayal, before someone can be charged with corruption, explains why the essays by Richard Miller and Elijah Millgram in this volume fail to persuade. Miller's essay should properly be read backward. If one does so, Miller can be seen to begin by arguing that the excessive influence enjoyed by corporate donors results in a form of crony capitalism. Most people object to crony capitalism, and we're with him thus far. But having brought us along, Miller then slips in the idea that corruption of this kind amounts

[18] David Hume, "Idea of a Perfect Commonwealth," in Hume, *Political Essays*, ed. Knud Haakonssen (New York: Cambridge University Press, 1994), 221.

[19] 424 U.S. 1 (1976).

[20] 424 U.S., at 48–49.

[21] Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, 2014).

to exploitation, and that all corruption must necessarily be exploitative. Having done so, he moves on to argue that all employment contracts in free market economies exploit employees, in the Marxist sense of exploitation. Were he correct, he would thus have shown that capitalism is necessarily corrupt.

It's not, of course, and not just because capitalism beats any of the alternatives that come to mind. Rather, Miller's argument fails because no one is corrupt unless he's betrayed some other person or institution, and that seldom happens in a bargaining context. When bargaining over the formation of a contract, whether for the purchase of a rug or the hiring of an employee, neither party owes a duty to the other. As such, employers do not betray employees when they negotiate the terms of the contract.

It can happen, of course, that one bargainer owes a preexisting duty to the other, and there it is proper to speak of exploitation. For example, a trustee betrays his beneficiary when he fails to account for trust moneys, and a company director is in breach of his fiduciary duties to his company when he expropriates a corporate opportunity. The preexisting duty might also arise because the parties are already bound by a contract that one of the parties seeks unfairly to modify when he enjoys a threat advantage. If a contractual breakdown between us will impose tiny costs on me and enormous costs on you, I might be able to persuade you to agree to modify the contract on terms much more favorable to myself. That's a form of post-contractual opportunism, and courts have often set aside such modifications under the doctrine of duress.[22] But absent special circumstances, the parties do not owe duties to each other, and one party cannot be said to betray another in his negotiations. As such the charge that all such bargains and capitalism in general are corrupt fails.

Elijah Millgram argues that philosophers are corrupt when they settle into a comfortable mediocrity. Once again, the argument fails because the crucial element of betrayal is absent. Against this, Millgram might argue that the philosopher betrays himself when he does nothing more than perform the minimal duties of his job description. That assumes in turn that a person can be said to owe duties to himself, and at this point many philosophers will get off the bus. Not me, mind you. I think it makes perfect sense to condemn someone, or oneself, for ignoring the counsels of perfection. My problem with Millgram is different. If one betrays oneself by failing to seek perfection, that turns every vice, indeed every failure to live a fully virtuous life, into corruption. So every moral lapse is corruption. But if everything is corruption, the word loses its meaning.

Next, Millgam might argue that the philosophical mediocrity has betrayed Philosophy with a capital-P. But that's like saying that the poet,

[22] See *Austin Instruments, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. Ct. App., 1971); see generally Timothy Muris, "Opportunistic Behavior and the Law of Contracts," 65 *Minnesota Law Review* 521 (1981).

trained in a classical meter, owes duties to the iambic hexameter. If so, he might then be faulted for abandoning the *vers alexandrine* for blank verse. Or because he wants to be a fireman. That can't be right.

Finally, Millgram might argue that the mediocre philosopher betrays his students. That's more plausible, but it introduces other difficulties. I sense that Millgram's philosophical hero is Wittgenstein, but the philosophical hero is often a terrible teacher. The mediocrity who tailors his lectures to his students' abilities is arguably more faithful to his duties to others. One might, of course, dispute this, but it would lead us into a very different kind of discussion, one with perhaps a greater degree of charity for pauvre humanité.

D. Side payments and corrupt motives

If we follow Burke and the Framers in rejecting the principle of democratic distortion, corruption still requires some private gain, some side payment before an official can be found to have taken a bribe.[23] As we saw, the federal bribery statute proscribes demanding, seeking, or receiving anything of value in return for an official act. What that excludes are the official's high-minded acts of misbehavior for which no bribe is taken. Britain's Cambridge spies, Burgess and McLean, betrayed their country to help the Soviet Union. That made them traitors, but it didn't make them corrupt. By contrast, American spy Aldrich Ames took money to betray his country. That made him both a traitor and a corrupt official.

What this would not seem to cover are cases in which the official seeks a benefit not for himself but for his constituents. That's what Burke would have done had he abandoned his free trade principles to placate the electors of Bristol. We might have criticized him for this, and some might even think it corruption, but it doesn't much look like a crime.

Consider the orgy of deal making when Obamacare was passed in 2010. To get a filibuster-proof majority, Senate Majority Leader Harry Reid (D-NV) had to bargain with the members of his caucus who demanded special earmarks. The list went on and on,[24] and the popular revulsion at the side payments was plausibly one reason for the Republican sweep

[23] Apart from the federal bribery statute, 18 U.S.C. §§ 201(b)(2), 201(a)(3), several other federal criminal offenses piggyback on the bribery prohibition. The Supreme Court has held that the honest services wire fraud statute, 18 U.S.C. §§ 1343, 1346.16, which requires the government to prove that the defendant sought to carry out a fraudulent scheme to defraud a person of his intangible right to honest services, creates an antibribery offense. *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010). A second statute, the Hobbs Act, makes it criminal to commit extortion by obtaining property "under color of official right," 18 U.S.C. § 1951(b)(2), which again the Supreme Court has found comes down to taking a bribe. *Evans v. United States*, 504 U.S. 255, 260, 268 (1992).

[24] Dana Milbank, "On Health-care Bill, Democratic Senators are in States of Denial," *Washington Post*, December 22, 2009; Chris Frates, "Payoffs for States get Harry Reid to 60 Votes," *Politico*, December 19, 2009.

in the 2010 Congressional elections. None of this ascended to the level of crime, however, and even poor Rod Blagojevich deserved a pass over some of the bargains he made.

"Blago" was the governor of Illinois when Barack Obama was elected President in 2008. That meant he'd have to give up his Senate seat, and as governor, Blago had the responsibility for choosing Obama's successor for the remaining two years of his term. Blago thought he could trade the Senate seat in return for a seat in the cabinet, but Obama turned him down. Worse still, everything Blago had said was being recorded by the FBI, and he was convicted of a long list of offenses, one of which was his attempted sale of a Senate seat. On appeal, the Seventh Circuit reversed on whether this amounted to bribery. It wasn't, the appellate Court held. It was merely logrolling, and fundamentally different from selling an office for money. It was the way the wheels were greased when legislators had to forge a compromise.[25] That was how, suggested the Court, Earl Warren came to be appointed Chief Justice of the United States, in exchange for delivering the California delegation to Eisenhower at the 1952 Republican convention. And even a muckraker might shrink from calling this corruption.

That didn't help Blago, mind you. There was more than enough other evidence of bribery to keep him in prison.

III. Prophylactic Rules

If federal bribery statutes might seem too lax, especially in light of the Supreme Court's reversal of the McDonnell conviction, the legislator might enact prophylactic barriers that criminalize acts that might not amount to bribery but don't pass the smell test. In such cases, we're not talking about corruption strictu sensu, but perhaps only what the *Buckley* court called the "appearance of corruption." More broadly, the proscribed act might not even appear corrupt, but might seem to facilitate corruption if permitted. These might simply be technical offenses, ones that don't twig the conscience, and we should therefore be on guard against too hasty ascriptions of moral blame, and the free pass given to the partisan and corrupt prosecutor. The easiest case, one that today seems evil in itself, are the gifts public officials accept from people whom the official might help or harm. As Lord Chancellor, Francis Bacon made a practice of accepting gifts from litigants, but his plea that he did not allow himself to be influenced by this in his decisions did not save him from a conviction for bribery. In judging him, the House of Lords simply assumed that he had favored the gift-givers. But it's not necessary to consider such defenses under prophylactic federal regulations that ban government employees

[25] *United States v. Blagojevich*, ___ F.3d ___ (7th Cir., 2015), cert. den. ___ U.S. ___ (2016).

from accepting gifts above a minimal ceiling from people whose interests might be substantially affected by the employee's official duties.[26]

That leaves the difficult intermediate case, the quid pro quo where the quid takes the form of a campaign contribution. While no public good was served when Williams took Mrs. McDonnell shopping, campaign contributions are used to educate voters about issues and promote democratic competition, and those are public goods. Without campaign spending, our elections would be less competitive, and if that served to immunize dishonest politicians from electoral competition our politics would be a lot more corrupt. So we wouldn't want to ban campaign contributions or spending. But we might want to regulate them.

That can be a problem, however, when technical, prophylactic election law rules are broken. Prophylactic rules are a useful auxiliary when they serve to defend a legal norm that resists easy proof. But they have this particular danger. In our campaign finance laws, they address the appearance of corruption, but can too easily be confused with corruption itself. Naïfs such as Dinesh D'Souza who give more than he is permitted under the caps set on campaign contributions might thus become felons even though there was no quid pro quo, no special advantage they sought for themselves. In the hyper-technical world of America's election laws, the offender will have committed the crime of participating in politics without a lawyer at his side. The message thus conveyed is that American politics are too noble, too sacred a calling, for anyone to take part in without a law degree or the advice of counsel.

Philosophers should guard against the temptation to treat the technical and prophylactic *malum prohibitum* like the obviously evil *malum in se*. The person who, without a lawyer at his side, contributes more than he should to a political party might not know that he's broken our election laws, but is nonetheless apt to be vilified by his political opponents and might even be charged by a partisan prosecutor. If the FBI wants to jail Al Capone for income tax evasion, philosophers shouldn't confuse this with the mob boss' real criminality.

Prophylactic anti-corruption laws must also be weighed against the positive good that campaign spending does, in educating voters about public officials. For this reason, the Supreme Court has limited how far Congress may go in regulating political speech without intruding on First Amendment rights to free speech and to petition the government. Restrictions on campaign spending were struck down in the seminal case of *Buckley v. Valeo*[27]; but for this, the outsider might find it difficult to bring his campaign to the attention of the voters. That would serve to insulate incumbent officials, who would enjoy higher name recognition.

[26] 18 U.S.C. § 201(c)(1)(A), 5 U.S.C.S. § 7353.
[27] 424 U.S. 1 (1976).

The *Buckley* Court did hold, however, that Congress might limit donor contributions to politicians. Why the difference? Campaign spending gives voters more information, and that's not corruption. Voters are free to believe or not believe what they're given, and there wasn't any evidence that money bought electoral victories in 2016. But with contributions there's a donor-official nexus, and that makes it different. Like bribes, campaign contributions can result in a quid pro quo, and influence official decisions.

That would seem to require a judgment call about what the right contribution level might be. If the limit were set too low, this would deprive political parties of needed funds and serve to protect corrupt incumbents from challengers. This isn't a problem today, however, because contribution limits have been effectively abolished. First, sophisticated donors found a way to amass large amounts of moneys by bundling contributions from groups of friends, with each individual donor adhering to a $5,000 limit. More recently, the limits on presidential campaign contributions have been raised to $366,100 per year.[28]

Second, donors can contribute unlimited amounts of money to independent expenditure Super PACs that call for the election or defeat of a particular candidate but do not coordinate with a political party. At $1.1 billion, 2016 Super PAC spending began to approach the $1.5 billion of official party spending in the presidential election.[29] What has happened is what in the business world is called "disintermediation," where the middleman is cut out. Instead of dealing with a travel agent, for example, one can now book flights or hotel rooms through websites such as Kayak. Similarly, instead of relying on a political party to pick candidates or finance campaigns, one can donate through a Super PAC more reliably aligned with one's political preferences.

In addition to contribution limits, the *Buckley* Court also upheld donor disclosure requirements. That might not sound terribly burdensome, when the alternative is the much-lamented "dark money" of anonymous contributions. But it is a real burden, in the global village in which we now live. Today, with only a few clicks, we can find out who has made a campaign contribution, to whom, and where they live. Our private space has shrunk, and our public face is visible anywhere in the world; and this has made it easier to target political foes. We do all this in the name of purity, but it's really about intimidation from a New Media mob.[30] That's why campaign donors should be allowed to remain anonymous, as they are under section 501(c)(4) of the Tax Code for social welfare organizations. And indeed as people are in their decisions about whom to vote for.

[28] Mattea Gold and Tom Hamburger, "Political Parties Go after Million Dollar Donors in Wake of Looser Rules," *Washington Post*, September 19, 2015.

[29] Matea Gold and Anu Narayanswamy, "Bigger Role for Donors this Year," *Washington Post*, October 6, 2016.

[30] See Kimberley Strassel, *The Intimidation Game: How the Left is Silencing Free Speech* (New York: Twelve, 2016).

IV. Conclusion

Crony capitalism, the public corruption of our public officials, imposes a substantial burden on our economy, and we should seek to rein it in as best we can. However, we're unlikely to do so by banning log-rolling or by stiffening our campaign finance laws. Instead, the work of policing American public corruption is best left to smaller initiatives, such as closing the revolving door between Congress and K Street, where a retiring legislator takes a job as a lobbyist. We should also restrict lobbyist campaign contributions, as recommended by a committee of the American Bar Association.[31] These are technical proposals, however, and beyond the scope of this essay. Other than that, it's very possible that campaign finance "reforms" would only make things worse. The optimal level of corruption is not zero, for this would require a Robespierre to weed out those who fail to live up to the most exacting standards of civic virtue.

Law, George Mason University

[31] "Lobbying Law in the Spotlight: Challenges and Proposed Improvements—Report of the Task Force on Federal Lobbying Laws," American Bar Association Section of Administrative Law and Regulatory Practice, January 3, 2011.