ONE

The Evolution of Corruption: From “Honest Graft” to Conflicts of Interest

Supposin' it's a new bridge they're going to build. I get tipped off and I buy as much property as I can that has to be taken for the approaches. I sell at my own price later on and drop some more money in the bank. Wouldn't you? It's just like lookin' ahead in Wall Street or in the coffee or cotton market. It's honest graft and I'm lookin' for it every day of the year.

George Washington Plunkitt, as quoted in William L. Riordon, *Plunkitt of Tammany Hall*

To understand the evolution of the anticorruption project, it is necessary to begin with some observations about corruption itself. This chapter deals with four basic issues: the subjectivity of the definition of corruption, the increasing gap between expectations of official behavior and actual behavior, the special politics of scandal and reform, and the difficulty of measuring corruption.

**Defining Corruption**

Corruption is neither a single form of behavior nor an obvious species of conduct. Corruption is the name we apply to some reciprocities by some people in some contexts at some times. The popular use of the term does not require that the conduct labeled corrupt be illegal; it is enough that the labeler thinks it is immoral or unethical. Since people's views about moral and ethical conduct differ in important respects, corruption is often a contested label. Indeed, these days public servants are admonished not only to adhere to the skein of laws prohibiting a wide variety of conduct, but to avoid "the appearance of corruption." Such a warning recognizes that the term corruption refers to more than just positive law, but fails to recognize that appearance of corruption is in the eyes of the beholder. When the beholder is a mass audience and a muckraking press, it is a hard admonition to heed.

Even if the use of the term corruption is limited to conduct which has
been expressly prohibited by law, much doubt and ambiguity remains. While the definitions of all crimes (even murder, rape, and theft) differ to some extent from time to time and place to place, there are major differences in what counts as corrupt conduct across different societies and over time in the same society. To begin, corruption itself is not a legal term of art and does not appear in the criminal code. All state criminal codes contain such offenses as bribery, extortion, and theft, but not all define them the same way and certainly not all have identically defined offenses of fraud, accepting unlawful gratuities, conflicts of interest, false statements, and illegal campaign financing and spending.

Bribery is the quintessential form of corruption.\(^2\) People pay officials to exercise their authority and influence in a desired way. Sometimes the impetus for the bribe comes from the official (soliciting a bribe and extortion) and sometimes from a private individual who wants special favors (offering a bribe). Either way, money passes from private citizens to officials.

Payoffs can take different forms, some very complex; an envelope bulging with cash is the most crass example. Money, however, can be transferred to government officials as a gift, honorarium, or investment opportunity. Payoffs need not be pecuniary. They can involve sexual favors, campaign support, or promises of high-paying jobs or run-of-the-mill favors. The favor need not be bestowed on the official personally; it may be given to a member of the official’s family or to a friend or lover. Accordingly, the norms of a free enterprise, democratic society encourage wheeling and dealing and give and take. They support negotiation and persuasion. This can mean some persons back into committing technical violations without the intention to commit a crime. For elected officials, the line between political contributions and buying favors and extortion can be thin.\(^3\)

Consequently, there is a great deal of uncertainty involved in labeling some exchanges and reciprocities bribes and others lawful reciprocities or gifts.

Bribery is just one form of official corruption. Public officials, depending upon their positions, can convert public office into private gain in many ways.\(^4\) Legislators can sell their votes. Bureaucrats sell their discretion over licenses, permits, franchises, and so forth. Procurement officers extract kickbacks. Inspectors solicit or extort payoffs.

There are many other types of corrupt conduct: thievery, for example. Government employees steal or misuse government property (computers, cars, furniture, food, etc.). They defraud the government and the taxpayers by arriving late, leaving early, doing private work on the job, or not working at all. Officials pad expense accounts, expropriate subordinates’ labor for their private use, and make personal use of government cars, phones, and duplicating machines. Strictly speaking, every unauthorized phone call, expropriation of office supplies, private use of a government vehicle, and short working day is an act of corruption.

In all public and private organizations, certain derelictions are tolerated as de minimis. However, when a government agency is the focus of a corruption inquiry or scandal, de minimis is not a defense, at least not one accepted by the media and the general public.\(^5\) Conduct which previously was tolerated becomes actionable, even indictable. Thus, abusing sick leave or using the agency computer for personal business become matters for investigation rather than for managerial action.

Public officials control the treasury, which derives revenue from taxes, licenses, and fees. Money can be siphoned off in numerous ways—simply embezzled, paid to dummy employees or contractors, paid to no-show employees or cronies who actually do not perform (or underperform) government business, paid to confederates or alter egos through phony invoices, and so forth.

Officials can enrich themselves by taking advantage of insider knowledge and opportunities; this is what Plunkitt meant by “honest graft.” For example, they can purchase land that, in their official capacities, they expect later to condemn for a road or public building (at an exorbitant profit), or they can award lucrative government contracts to a company in which they have an interest. Some government and even political party officials can exploit their public offices via influence peddling, affiliating themselves with law firms, insurance brokers, or public relations firms. Not surprisingly, businesses and individuals assume that they are likely to get better results from the government if they hire firms that are “connected.” With respect to being labeled corrupt, this kind of conduct still represents contested terrain.

This book focuses on official corruption, not on fraud by private citizens against the government, but these two species of crime are often connected. For example, officials may conspire with private parties to defraud government social welfare programs. Some anticorruption measures are implemented to prevent the government from being victimized either by private parties or by government officials.

**Heightened Public Morality**

Whether defined in terms of criminal law categories or ethical standards, the concept of corruption has expanded over the twentieth century to em-
bracing more types of conduct. What political scientists Edward Banfield and James Q. Wilson identified as the moral values of the turn-of-the-century Protestant elite have become the prevailing public norms. In the early decades of the century, Tammany Hall politicians in New York City bragged about their ability to use government power to help themselves and their friends flourish financially; indeed, they ridiculed the Progressives who demanded high standards of integrity for public office. In those days, certain forms of what we now regard as corruption were considered legitimate.

Over the course of some fifty years, there has been a big change. Much conduct that was legal a generation ago is now corrupt; yesterday’s “honest graft” is today’s illegal conflict of interest. An official of the New York City Department of Investigation explained that the Department’s definition of corruption since the 1970s has included the “subversion of fairness, of distributive and common justice, and of equal opportunity.” Under this definition, even acknowledged error leading to waste would be corrupt.

Most states have expanded the concept of bribery to cover gifts and payments to public officials whether or not there was an intent to corrupt or a provable quid pro quo (so-called antigratuity statutes). Politicians have been indicted for using their employees to provide personal services and even to work on their campaigns. Officeholders have been convicted for using campaign funds for personal use. Former public employees have been branded corrupt for engaging in lobbying and other private business after they left office. Low-level employees have been dismissed for petty thefts and even for doing personal business during work hours. Conflict-of-interest laws, supplemented by extensive financial disclosure requirements, have proliferated. Today, it is considered corrupt just to be in a decision-making role when one could be affected financially by the decision, regardless of the decision actually rendered. Federal and other government officials face disciplinary action if they violate prohibitions against conduct that creates the “appearance of impropriety.”

Our entire political system is embroiled in a battle over the legal and moral status of campaign financing. A generation ago, few people would have questioned the propriety of contributions to political candidates; the dominant belief used to be that those who felt strongly about electoral outcomes were entitled to contribute time, resources, and funds to get their candidates elected. Indeed, some theorists saw this as a unique strength of the American political system. Public attitudes and norms have changed so much that politicians, for fear of appearing corrupt, are unwilling to acknowledge that large campaign contributors receive special favors or consideration. The politically correct position is that large contributors only obtain greater “access” to the candidate/politician. Sweeping “revolving-door” prohibitions now bar government officials from taking certain private-sector jobs after leaving government service. A whole regulatory regime surrounds campaign contributions: failure to follow procedures, to account for contributions, to make full disclosures, and so on are illegal. The Supreme Court has upheld the constitutionality of these measures on the ground that they serve the state’s compelling interest in preventing corruption. For example, in Austin v. Michigan Chamber of Commerce, the Supreme Court upheld a Michigan law prohibiting corporations from using corporate treasury funds to make independent expenditures in support of or in opposition to any candidate running for state office. The Court stressed the dangers of corruption stemming from “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s ideas.” In dissent, Justice Scalia warned that “[u]nder this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically ‘corrosive,’ which is close enough to ‘corruptive’ to qualify.”

The trend toward ever-higher official conduct norms was discerned as early as 1964 with remarkable prescience by Bayless Manning, then Dean of the Stanford Law School. In “The Purity Potlatch,” a splendid essay on emerging conflict-of-interest prohibitions, he wrote:

To the extent that our politics partake of the nature of a Morality Play, they have inevitably required, and generated, a set of theatrical conventions as arbitrary, and as acceptable, as those of any dramatic form. The vocabulary of our politics conforms to its role as a national Morality drama. That vocabulary is formal, dogmatic, simplified, symbolic, repetitive and goal-setting; it is not descriptive and should not be thought of as being descriptive. And the actors in the political drama must, as in epic drama, appear as more than life-size, establishing, declaring, and appearing to live in accordance with standards that are not of this world. We therefore demand ultimate moral pronouncements from our parties and our officials.

We know of no systematic scholarship devoted to explaining why norms about government ethics became stricter in the 1960s and 1970s in the United States and throughout the world. Indeed, while we were writing this book, corruption scandals toppled the governments of Japan, Brazil, and Italy.

In the United States, the escalation of official morality is no doubt linked
to wider cultural shifts: for example, the war on drugs, the rise of the religious right, and diminished public confidence in public officials. In addition, the Watergate scandal (1972–73) triggered waves of media and public denunciations of “politics as usual” and demands to close the gap between what Michael Reisman calls the “mythical” and “operating” systems of government.

Congress responded to the scandal by passing the Ethics in Government Act of 1978, the purpose of which was not only to “deter and punish exploitation of positions of public trust, but also to foster public confidence in the integrity of government employees.” Among other things, the Act established the Office of Government Ethics (OGE), which was given the task of developing ethical rules and standards of conduct and enforcing these standards for federal employees. In a 1989 executive order outlining the principles of ethical conduct for government officers and employees, President George Bush mandated that federal employees “endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.” The OGE was assigned the task of issuing standards of conduct to help federal employees avoid the “appearance of impropriety.”

In the 1980s and 1990s, what Bayless Manning called a “purity potlatch” became more widely noticed. Suzanne Garment’s 1991 book, Scandal: The Culture of Mistrust in American Politics, argued that there was an “overproduction” of political scandal:

Still, our time is different from the decades preceding it. Political scandal has proliferated, and this proliferation reflects not so much an increase in corruption at the federal level as it does our growing capacity and taste for political scandal production.

The resulting culture of mistrust has made the always difficult job of governing measurably harder. The climate of sensationalism has contributed to public cynicism and to the fact that symbolic issues and public funding for offensive art shoot more speedily than ever to the top of the public agenda.

Political scientist Larry Sabato sees a new style of “attack” journalism reflecting and contributing to the new politics of scandal and reform:

[S]candal coverage is no longer restricted to misuse of public office, incompetence in the exercise of public responsibilities, or some other inadequacy or malfeasance in a public role; it extends to purely private misbehavior, even offenses, some of them trivial, committed long before an individual’s emergence into public life.

At times, according to Sabato, public officials become subject to a “feeding frenzy [whereby] . . . a critical mass of journalists leap to cover the same embarrassing or scandalous subject and pursue it intensely, often excessively, and sometimes uncontrollably.”

We have created a system that is constantly on the lookout for scandals and susceptible to reform proposals. Perhaps this is the intent. Demands for higher levels of job-related and personal morality in public officials inevitably lead to disappointment, public accusation, scandal, hand-wringing, righteous indignation, and reform. One cannot help but think that such calls for morality serve a social function. Perhaps Americans derive some perverse satisfaction or sense of self-righteousness from exposing hypocrisy and dishonesty in government. Michael Reisman believes that periodic crusades and reforms bolster the power of elites who, in carrying out such rites, demonstrate that they adhere to the proper norms and that their authority is legitimate.

In any event, the expanded definition of corruption and the concomitant growth of the anticorruption project have not convinced the citizenry that government officials are more honest than their predecessors. Quite the contrary, as political scientist Norman Ornstein points out:

One fact is unmistakable: To an overwhelming majority of Americans, our political process, especially in Washington and especially inside the first branch of government, Congress, is morally bankrupt in a fashion worse than at any time in recent memory.

ABC News asked voters in mid-1992, “Do you think the overall level of ethics and honesty in politics has risen, fallen, or stayed the same during the past ten years?” A full 60 percent said it had fallen; only 9 percent believed it had risen.

These survey findings . . . show a high level of public hostility toward Washington, Congress, and politicians in general. Finding a public consensus on any major issue of public policy these days is difficult, but there is a clear consensus that Washington has lost its moral moorings, that public corruption is endemic, that the system is not working as it is supposed to.”

Scandal and Reform

Corruption, scandal, and reform have always counted in American politics and public administration. According to Ornstein,
Allegations of corruption are a regular feature of American political campaigns; challengers to incumbents often define themselves as anticorruption reformers. Large numbers of Americans have always regarded politicians and police as corrupt, although tolerance for different kinds of corruption has varied over time and in different social groups.

A comprehensive history of corruption in American government would require an encyclopedia, and that would only cover corruption that had somehow been exposed, which is a mere fraction of all corrupt transactions. Indeed, Walter Lippmann once stated that “[i]t would be impossible for an historian to write a history of political corruption in America. What he could write is the history of the exposure of corruption.” In the United States, the exposure of corruption dates back to the nation’s formative years. As early as 1795, our young nation was riddled with corruption scandals. Four companies, whose investors included high-ranking state and federal officials, judges (among them a Supreme Court Justice), and fathers of the Constitution, bribed Georgia legislators to pass a bill conveying title to 35 million acres of land known as the Yazoo River, and which today comprises Alabama and Mississippi. After the bribery came to light in a great scandal, the sale was revoked.

Corruption pervaded the 1824 presidential election. Because neither candidate obtained a majority of the electoral votes, the House of Representatives had to choose between the three finalists—Andrew Jackson, John Quincy Adams, and William Crawford. Ultimately, it was a contest between Jackson and Adams because Crawford was debilitated by a stroke. Each state was allowed to cast only one vote. Adams met with key members of several state delegations in order to secure votes. Although it has not been proven, inferences that Adams bribed his way to the presidency can be drawn from entries in Adams’ diary and by a letter written by Henry Clay, who initially opposed Adams.

Even the passage of a revised Thirteenth Amendment, which abolished slavery, involved possible bribery. After the Amendment was defeated in the House in 1864, President Abraham Lincoln told his fellow Republican Congressmen that the two-thirds vote needed to pass the Amendment “must be procured.” Supposedly, Congressman Ashley of Ohio was dispatched to secure the needed votes by whatever means necessary.

During the twentieth century, the 1922 Teapot Dome scandal led to the conviction of the Secretary of the Interior, Albert Bacon Fall, for accepting a bribe from two companies to which he granted the rights to drill for oil in the Navy’s oil reserves. And in 1939, Judge Martin T. Manton was convicted of bribery for accepting payments from litigants to “fix” cases.

Contemporary politics is punctuated by scandals like Watergate, Abscam, Operation Greylord, the jailing of Syracuse Mayor Lee Alexander for taking kickbacks on contracts and all sorts of other schemes, the imprisonment of Tennessee Governor Ray Blanton for selling pardons and paroles, and the conviction of House Ways and Means Chairman Dan Rostenkowski for converting public funds to private use. From 1970 through 1977, one thousand public officials, from county sheriffs to the Vice-President of the United States, were indicted or convicted. During the eight-year Reagan administration, over one hundred federal officials were either indicted or convicted. Several members of President Clinton’s administration (e.g., Agriculture Secretary Mike Espy and former Associate Attorney General Webster Hubbell) have seemingly been felled by charges of corruption.

Corruption is hardly a phenomenon unique to the national administration. Scandals occur in small towns, suburbs, and large cities in all areas of the country. Corruption is a fact of life in rural Oklahoma as frequent as in Boston, Newark, and Reading, Pennsylvania. Nearly every day, the media carry a corruption story about federal, state, or local officials. A few of these stories blossom into national soap operas lasting for weeks and months.

The media play a crucial role in the politics of corruption reform. Corruption sells. Exposing hypocrisy and wrongdoing among those sworn to create, administer, or enforce the law makes for compelling reading or viewing. The higher the rank of the corrupt official, the greater the human drama and spectacle. Once the media get hold of a corruption story, they are reluctant to let it go, some journalists perhaps harboring the hope that they will uncover the next Watergate, “Keating Five,” or Wedtech. But journalists (as well as prosecutors and other investigators) are in a delicate position with regard to high-level corruption—they must proceed cautiously lest they antagonize the very establishment that they depend upon for news (or, in the case of prosecutors, for political and budgetary support).

The anticorruption project ebbs and flows with the politics of corruption and reform. During episodes of scandal, massive attention is devoted to formulating and implementing anticorruption innovations. As scandal recedes in memory, some recommendations go unimplemented, and those that are implemented become routine. Predictably, when the next scandal breaks
open, leaders will label the existing anticorruption apparatus inadequate and urge more and better controls. Thus, there is an inexorable tendency to ratchet up the intensity and comprehensiveness of anticorruption strategies.

A frequent component of anticorruption politics is the impaneling of a "nonpolitical" independent commission to conduct an investigation and make recommendations for change; appointment of a nonpartisan blue-ribbon panel is meant to calm public indignation and legitimate the authority of the government and political system with its integrity under attack. The commission, staffed by lawyers, often with prosecutorial experience, frames the problem in terms of inadequate rules and/or enforcement mechanisms. It inevitably proposes new laws to increase the costs of corrupt behavior and to make corruption more difficult to carry out. It often recommends the creation of new agencies or the reorganization of old ones.

Social problems increasingly are approached as puzzles to be solved through comprehensive legal strategies. Currently, these strategies include prohibiting innocuous activities that are believed to provide the means or stepping stones to corrupt behavior. When corruption recurs, failure is attributed to poor drafting and not enough law; typically the solution is "smarter" legal interventions. Some reformers have an extraordinary belief in the efficacy of legal threats to deter corrupt behavior; others cynically recognize that the best way to deal with scandals is to paper them over with ineffective laws that are not meant to be enforced.

In addition to being propelled by scandals, the anticorruption project is furthered by a good government constituency whose membership and power vary over time.47 That constituency was quite powerful during the heyday of the Progressive Era, and it is again powerful today. As the anticorruption establishment has become more professionalized and self-conscious, it has generated its own momentum; in effect, it has become an interest group with components outside and inside government. Some politicians, anxious to appear morally pure, support dubious and cumbersome "reforms," regardless of the possible effects of those reforms on public administration. Moral entrepreneurs are likely to be so consumed with stopping corruption, or at least with appearing that way to the media and to the public, that they give slight, if any, thought to the costs of implementing their vision. In the aftermath of serious scandal, concerns about guaranteeing integrity and about the appearance of integrity trump efficiency. Rarely is the integrity/efficiency trade-off even considered. Anticorruption reformers, including prosecutors and journalists, are neither trained nor temperamentally inclined to be sensitive to problems in public administration that are inevitably complex, tedious, and seemingly intractable. In any event, it is convenient for anticorruption reformers to assume that the medicine which prevents or cures corruption must also nourish the processes and institutions of governing.

The politics of corruption and reform ensure that, over the long run, the trend toward a larger, more intensive anticorruption project is inexorable. The anticorruption project, like the law-enforcement apparatus itself, continues to spawn new techniques and strategies. It is more relentless than ever, even inventing scandal (e.g., the House of Representatives bank scandal) if none is conveniently available.48

Just as the criminal law and its corresponding law-enforcement machinery have expanded and intensified over the course of the century, so has the anticorruption project. At the same time that the criminal law has expanded into new areas, the anticorruption project has encompassed more aspects of official conduct. New offices, practices, and laws aimed at corruption control have been added. Some of these have been borrowed directly from law-enforcement agencies, and some have been invented as corruption-specific remedies. Furthermore, there has been slow but steady penetration of government by the law-enforcement establishment itself.

While the anticorruption project seems to expand over the long term, there are short-term contractions. Fiscal crisis and competition for scarce resources impose limits on the creation and maintenance of anticorruption mechanisms. However, scarce resources do not limit the proliferation of new laws and rules. It is always possible, and even advantageous, for politicians to throw law at a problem. By so doing, they can make a symbolic statement without expending significant resources. Agency reorganization has many of the same advantages.

In recent years, prosecutors have become an increasingly important force in exposing political corruption. In 1976, as a response to the Watergate scandal, the U.S. Department of Justice established its Public Integrity Section to counteract corruption at the local, state, and federal levels.49 Many U.S. Attorneys' offices established similar units. Using mail fraud and other federal criminal statutes, federal prosecutors investigated and charged state and local officials who previously had little need to worry about being investigated because the leaders of local law-enforcement agencies were members of the same political party or machine.

The rise of a larger and more independent law-enforcement establishment has had an important impact on the politics of corruption control. Prosecutors can make their reputations by bringing down important political figures. Denouncing government has become politically popular. Even prosecuting low-level government officials can bolster a prosecutor's claim
to be a corruption fighter and a person of the highest principle. Suzanne Garment has hypothesized, quite sensibly in our view, that the generation of prosecutors who came of age in the 1970s is more idealistic, more passionate about moral values, and more relentless than its predecessors.

Measuring Corruption

We undoubtedly will disappoint many readers by not offering an opinion on whether there is more official corruption today than there was in the past, or whether there is more corruption in New York City than in other cities. Unfortunately, there are no adequate crime statistics from which to draw such conclusions. When experts discuss the nation’s crime rate, corruption is not considered. It is usually not seen or heard about by anyone other than the participants. Although suspected, it is rarely reported to the police. If it is reported, it is unlikely to be investigated, “solved,” and punished. Furthermore, in attempting to estimate the amount of corruption, we find no victim surveys or self-report studies on which to rely.

The difficulties in detecting corruption, coupled with the term’s changing definition, make it unwise to speculate as to whether there is more official corruption today than there was in the past or whether there is more corruption in one city or county than in another. Simply discovering more corruption in a particular city at a particular time does not mean that corruption is on the rise; it may indicate only an increased effort to ferret out corruption in that place and at that time. However, since we are so often pressed for an opinion on the matter, we wish to bolster our case for agnosticism by pointing out even more obstacles to comparing corruption over time or across jurisdictions.

What kind of statistic would we need in order to plot the corruption rate? Our first challenge would be to agree on a definition of corruption that could be held constant over time or across jurisdictions. As we have previously noted, the term corruption means something different today than it meant fifty years ago.

Assuming we could hurdle this definitional obstacle, we would need to measure the frequency of corruption. The kind of victim surveys that are used to count burglary and robbery would not work for corruption offenses (the victim may not see the behavior as corrupt); nor would self-reporting studies be feasible. We probably would have to look to arrest and conviction statistics that are very unreliable because so little corrupt behavior comes to the attention of law enforcement and because governmental units vary so much with respect to the resources they put into corruption investigation and enforcement.

Even if we could solve the empirical problem, it would make no sense to compare the total amount of corruption one hundred years ago with today’s total amount because the nation, states, and cities are not the same as they were a generation ago. Government is larger today. It engages in far more activities and spends vastly more money. Thus, a comparison requires some kind of “normed” statistic—a percentage of corrupt government agencies or officials. But what would that mean? The percentage of government acts or decisions that are illegal? The percentage of governmental units or agencies in which there is (any? some? much?) corruption on any given day or over the course of some extended time period? The percentage of government officials who act corruptly (even once) each month, year, and so on? The percentage of government budget lost through corruption?

Some readers, although by now perhaps convinced that it is impossible to come up with a hard statistical basis for determining or even estimating whether corruption in this generation is greater than in previous generations, might suggest that we compare the scandals of one time period with those of another. A moment’s thought, however, reveals the infeasability of this suggestion. The occurrence of a scandal often depends upon chance. The magnitude and depth of a scandal depend upon the reactions of a whole range of actors, from reformers and the media to politicians and the police. All these players determine how a scandal is revealed and presented. The magnitude of a scandal is heavily dependent upon the resources committed to unearthing it. Moreover, as time passes, our perceptions of yesterday’s scandals are profoundly affected by those journalists and scholars who have chosen to write about them. Each author presents a distinctive interpretation. Much of what we know about a particular scandal comes from the contemporaneous commissions, muckraking journalists, and reformers. However, years later, “revisionist” scholars sometimes question the motives and biases of those contemporaneous writers. For example, there is now a considerable difference of opinion about the nature and magnitude of corruption in the regime of Boss William Marcy Tweed during the 1870s. Even a corruption scandal in our own day, such as the Parking Violations Bureau debacle that occurred during the regime of Mayor Edward Koch, is fraught with interpretational difficulties. The only book on the subject was written by two long-time Koch critics, whose goal was to tie Koch (by action and inaction) to wrongdoing by officials, high and low, connected to New York City government and/or the Democratic Party. Writers sympathetic to Koch could have produced a much different book, emphasizing
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his strong support for professional administration and the anticorruption project.

Perhaps it will be suggested that we ought to focus on a city's reputation for corruption in different eras. But "reputation" is not easy to pin down. Reputation among whom? Reputation for what? As we have already seen, to some people patronage and large campaign donations are corrupt. Others equate corruption with diverse criminal offenses. Should we compare the reputation that currently exists about past corruption, or should we compare the reputation of one city for corruption according to opinions at one point in time with the reputation of another city for corruption according to opinions at a different point in time? If so, at what points in time?

We do not believe it possible to estimate reliably whether there is less official corruption today than in previous generations. If the corruption rate has fallen, it would run counter to the upward trend of most other crimes. Our operating assumption is that corruption, especially in light of the expanding definitions, remains a common phenomenon today that can be found in every level of government and (if one scratches hard enough) in practically every agency. In this book, we are interested in how policymakers and policy shapers define and react to corruption and the fear of scandal, the institutions they create for preventing corruption, and the impact of those institutions on the organization and operation of public administration. These responses to corruption are easier to measure, or at least to describe, than corruption itself.

Conclusion

Corruption is a social, legal, and political concept laden with ambiguity and bristling with controversy. Conceptions about what is corrupt are constantly evolving. In the last several decades, the public standard of morality has become much more strict, and the gap between the mythical system and the operating system much wider. Previously acceptable conduct (e.g., favors for campaign contributors) is now deemed unethical, and previously unethical conduct is now deemed criminal (e.g., taking certain private employment or lobbying after leaving government service). Consequently, the politics of corruption have become more unsettled, unpredictable, and intense.

Corruption is a major issue for politics. It is always advantageous for a political aspirant to stigmatize a politician or political candidate as corrupt and to raise the smell of scandal about an officeholder and his or her administration. The media and the public enjoy the sport of exposing hypocrisy among those who make and implement the law. Denunciation of corruption and calls for reform, ever-present features of American politics, become most salient when popular opinion becomes focused on a scandal.

Scandals vary in important ways. Some scandals are contained by politicians, while others are taken over by reformers who operate "outside the system." Sometimes reformers are fully or partially neutralized by being placed on commissions whose work product consists of comprehensive recommendations which, at most, are only partially implemented. At other times, however, reformers are able to force change on the government. Even when changes are imposed, however, there is no guarantee that they will be effective. To the contrary, they are frequently blunted, distorted, and subverted so that what remains is form rather than substance—government reorganization, agency reshuffling, new layers of oversight. Ironically, such reforms often generate incentives and opportunities for corruption.

Large governmental organizations, such as New York City's, are loaded with anticorruption mechanisms. As years pass, however, the origins and purposes of these mechanisms are forgotten; they become permanent features of the government and its bureaucracy and contribute very little, if anything, to the prevention or detection of corruption.
Two

The Evolution of the Anticorruption Project:
From Virtue to Surveillance

All sovereigns are suspicious of their servants. . . . How is suspicion to be allayed by knowledge? Trust is strength in all relations of life and, as it is the office of the constitutional reformer to create conditions of trustfulness, so it is the office of the administrative organizer to fit administration with conditions of clear-cut responsibility which will insure trustworthiness.

Woodrow Wilson, "The Study of Administration"

The currently prevailing anticorruption project is the product of several generations of reform ideas and reform efforts. This history of anticorruption reform in public administration can be conceptualized in terms of four visions of corruption control—antipatronage, Progressive, scientific administration, and panoptic. By *vision*, we mean a paradigm or *weltanschauung* (worldview) that includes assumptions about human behavior and social control by government institutions. The first three visions of corruption control—antipatronage, Progressive, and scientific administration—correspond roughly to parallel stages in the history of American public administration theory, but the most recent vision of corruption control, the panoptic vision, deviates significantly from conventional wisdom about public administration. The political agenda of the antipatronage, Progressive, and scientific administration reformers addressed more than corruption control; these reform movements sought to transform and improve the efficient functioning of government. By contrast, the panoptic vision is not concerned with efficient governing, but with control alone. Each vision has built on those that have come before, and thus one ought to think of the process of reform as adding one coat of paint on top of another. Nonetheless, we think that distinguishing these visions as ideal types helps to explain the evolution of anticorruption reform over the last hundred years.

One other preliminary point is worth noting: The anticorruption project has never been monolithic. It does not represent a coherent, coordinated effort or platform of a single group, but the ideas and strategies of different interest groups. Some of these could be characterized as "moral entrepreneurs" predominantly concerned with governmental morality and some as administrative reformers predominantly concerned with making government more rational and efficient.

The Antipatronage Vision of Corruption (1870–1900)

The movement to end the spoils system and to create an American civil service began during the Reconstruction Era. The spoils, or patronage, system was one of the hallmarks of "machine party politics," which flourished in urban areas during the late nineteenth and early twentieth centuries. Patronage involved the dominant political faction doling out jobs and benefits in urban areas during the late nineteenth and early twentieth centuries. Patronage was finely organized and articulated to maximize its electoral support.3 The spoils system "was finely organized and articulated to maximize its electoral support."3 The attack on the spoils system was the second phase of a powerful movement that began with the drive to abolish slavery.4 The reformers believed that replacing the spoils system with morally exemplary elected officials and public servants would revitalize democracy. To that end, "elections had to be freed from purchase or covert control and . . . government officials had to be made responsive to the public interest."5 This revitalization would be brought about by a civil service merit system characterized by political neutrality, tenure in office, recruitment and appointment through special training or competitive exams, and standards for promotion, discipline, salary, and retirement.6 Senator Carl Schurz’s support for civil service reform makes this point:

"The question whether the Departments at Washington are managed well or badly, is, in proportion to the whole problem, an insignificant question after all. Neither does the question whether our civil service is as efficient as it ought to be, cover the whole ground. The most important point to my mind is, how can we remove that element of demoralization which the now prevailing mode of distributing office has introduced into the body politic?"7
According to Schurz, “demoralization,” or the debasement of the public sector due to patronage, made changing the nature of leadership in American government a moral necessity. Creating a civil service would “make active politics once more attractive to men of self-respect and high patriotic aspirations.”

Julius Bing, another important proponent of civil service reform, clearly saw the antipatronage campaign as a moral imperative:

At present, there is no organization save that of corruption; no system save that of chaos; no test of integrity save that of partisanship; no test of qualification save that of intrigue. We have to deal with a wide-spread evil, which defrauds the country in the collection of taxes on a scale so gigantic that the commissioners of revenue, collectors, assessors, and Treasury officers—at least those of them who are honest—bow their heads in shame and despair. We have to deal with an evil that is manifest here and there and everywhere.

The mugwumps and other civil service reformers in the last quarter of the nineteenth century believed that government could be returned to honesty if run by virtuous officials motivated by the public interest rather than by patronage, cronyism, and graft. The reformers thought that patronage was imimical to everything public service should be and that it corrupted the moral fiber of government.

Corruption and graft, in the view of Carl Schurz and other civil service reformers, resulted from the party-dominated organization of public administration. In essence, corruption and patronage were synonymous. They believed that public service should be a “calling” and the repository and showcase of the highest moral principles, and that public servants should be exemplary citizens. According to civil service reformers, the ideal public servant “was a good citizen, loving liberty but preferring the public welfare to his private well-being. He put policy above party, and where virtue was at stake, maintained his independence. He loved his country, desired security, and was content with a modest salary, since merit brought advancement.”

The Progressive Vision of Corruption Control (1900–1933)

The second stage of the anticorruption project was the Progressive reform movement, which dates approximately from the turn of the century to the New Deal, although the Progressive tradition remains powerful to the present day. To Progressives, the key to rooting out corruption was complete reform of the political system. Corruption control was a condition precedent to government efficiency and democratic accountability. By studying European administration, scholars like Woodrow Wilson came to believe in the possibility of a system of public administration completely separate from party politics, the root cause of corruption.

Wilson and the Progressive reformers adhered to a vision of a politically independent, corruption-free administration, but they lacked a fully developed plan. As Wilson noted, “the object of administrative study is to rescue executive methods from the confusion and costliness of empirical experiment and set them upon foundations laid deep in stable principle.” The details of human governance, great and small, would be filled in by wedging American democracy’s moral superiority to European administration’s scientific superiority. The result would be honest, democratic, and efficient administration.

Wilson proposed integrity as the first principle of public administration. Similarly, Frank Goodnow, a professor of administrative law, argued that politics had debased administration and limited its efficiency. Professor Goodnow’s solution was to separate politics from administrative functions and to centralize government so that procedures and rules of conduct might be standardized. In other words, Goodnow wanted to take politics out of city government. These reforms, in his view, would make public administration responsive to the public interest rather than to party bosses.

The Progressives aimed to establish an autonomous public sector by insulating administration from politics and staffing government with apolitical experts. Expert administrators themselves might be politically appointed, but their tenure was to outlast the appointing politician’s term of office, and they were not to be removed without cause.

For the Progressives, corruption inhered in the cronyism of machine politics. In what was perhaps the first major expansion of the definition of corruption, the Progressives labeled as corrupt any practices or activities associated with the political machine, including public contracts awarded without competitive bidding, ward-level hiring of day laborers, and party control of police precincts.

The Progressive’s professionalization agenda was never fully instituted. Public administration did not become professionalized like law and medicine. In the largest cities, reform was minimal. In New York, each reform administration was followed by the Tammany Hall machine’s return to power.
The Scientific Administration Vision (1933–1970)

Several decades of Progressive reform and municipal civil service did not eliminate corruption. Repeated episodes of scandal undermined the belief that civil service personnel would be self-policing. The antipatronage and Progressive reform visions were supplanted, or at least supplemented, by a new vision that sought to control officials' behavior through scientific administration, which aimed to improve government by applying principles of economy and efficiency. Beginning around 1938, all sorts of organizations, from schools to hospitals, were influenced by the so-called scientific administration movement. In the public sector, efficiency was only one goal of scientific administration; another was corruption control.

The scientific administration reformers emphasized bureaucratic control over political reforms. They considered the Progressives' strategies to be "outmoded and insufficient to meet the problems of an industrialized, urbanized world power." They argued that corruption in complex administrative agencies could not be controlled by informal means and professional norms, and that peer pressure, which is so effective in small groups, could not be effective in bureaucracies. They approached corruption as a problem in the structural design of organizations, rather than as a problem of politics or ethics. Public officials did not fail to act honestly and ethically because of faulty character, but because of failure in "the proper machinery of government." The scientific administrators added an organizational dimension to the definition of corruption. They defined corruption to include waste and mismanagement, noting that a lack of hierarchy, standard operating procedures, and adequate supervision contributed to corruption. "Corrupt men stole money; moral men, in innocence and ignorance, wasted it. The difference could come to be negligible." The "science" of administration moved from theory to practice, as public administration emerged as a professional discipline. Professor Leonard White of the University of Chicago and Professor Frank Goodnow of Columbia University brought the principles of scientific administration to the public sector.

The public sector embraced scientific administration theory, optimal spans of control, perfection of hierarchy, and new auditing and accounting techniques as means for corruption control. They believed that government integrity would flow from sound organization. Their basic premise was that the correct deployment of administrative authority, coupled with comprehensive monitoring and evaluation, would prevent corruption or quickly bring it to light.

White expressed the scientific administration vision as follows:

Out of reform, moral in its motivation, came reorganization, technical and managerial in connotation. Expertness, once assured its place, could continue a steady drive for better standards from within rather than from without.

[We] note the further development of the technique of large-scale management, especially overhead direction, long-range planning, and the effective coordination of the parts of a constantly expanding machine. Here government may learn from the methods of great industrial organizations, where similar problems exist.

Of course, scientific administration had goals other than corruption control, namely, organizational efficiency and economy. Nevertheless, this vision was based on the belief that administrative integrity could be achieved through administrative control. Luther Gulick, a public administration scholar, expounded this belief:

If government is to advance with modern science, if it is to keep pace with the efficiency of modern business, government cannot stand aside from the current of progress. . . . In public administration, not less than in other realms of human endeavor, we need to substitute for ignorance, competence; for the amateur, the professional; for the jack-of-all-trades, the expert; for superficial facility, increasing differentiation and specialization; and for the untutored novitiate, the systematically trained executive.

Gulick argued for an administrative strategy called "external control," which he defined as investigative evaluation of government operations by specialized officials located in units outside the operating agencies. Gulick identified external control as a central component of scientific administration in his introduction to Harold Seidman’s 1941 study of the New York City Department of Investigation. He praised the Department of Investigation as an agency capable of providing the kind of scrutiny and oversight required to ensure efficient government operations. Gulick and Seidman saw no contradiction between corruption control and efficiency; indeed they saw external control as a prerequisite for efficient public administration.

The Panoptic Vision (1970–present)

Since the early 1970s a panoptic vision has dominated corruption control. This vision assumes that officials will succumb to corrupt opportunities, and advocates comprehensive surveillance, investigation, and "target-hardening" strategies. It is built on one hundred years of ideology, rules, law-enforcement techniques, and reformist ideas. While the beefed-up
law-enforcement techniques that characterize the panoptic vision are a qualitative change from earlier anticorruption efforts, they build upon the goals that were articulated by the Progressives and elaborated and expanded by later reformers. Like its predecessors, the panoptic vision has critical implications for government organization and public administration. Indeed, its implications are even more significant for public administration, because its adherents urge a much broader definition of corruption and much greater authority for corruption-control personnel, agencies, and institutions.

The panoptic vision regards public employees as akin to probationers in the criminal justice system. Their routine is governed by a comprehensive system of administrative/criminal laws and enforced by law-enforcement agencies using a full array of investigative tools, including covert operations. This system is backed by threats and sanctions, including jail, fines, and job and pension forfeiture. The panoptic vision has led to the expansion of anticorruption institutions and strategies, and to enhanced authority for anticorruption units and personnel.

Our use of the term panoptic is taken from Jeremy Bentham, who envisioned a “panopticon” prison whose ingenious architecture featured a control tower at the center of a circular cell house. From this tower, the cells, inmates, and staff would be completely visible to the watchers. In *Discipline and Punish*, Michel Foucault argues that the panopticon’s architecture and operation were paradigmatic of a nineteenth-century vision of a “disciplinary society” in which surveillance, monitoring, and control would make undetected deviance impossible. The panopticon operates like a one-way mirror; the controller can continuously monitor the prisoner, worker, or subject, but these subjects do not know when the controller is watching, since the tower is shaded or covered with louvers. The controller’s omnipresence, according to Foucault, transforms mere organizational routine into conformity. The pervasive gaze itself creates less need for coercive control as subjects internalize the expectations of the controllers. Under the panopticon, management and control merge. Each administrative routine has its place in the scheme of observation. The business of control becomes the everyday business of governing. 29

Two major events strengthened the anticorruption project. First, the Watergate scandals sparked a round of federal anticorruption laws which, in turn, led to the passage of similar state and local laws. New federal and local prosecutorial units specifically devoted to corruption were created. Second, the fiscal crisis of the mid-1970s in New York and other large cities added fiscal accountability to the purview of anticorruption fighters. Incompetence, indifference, negligence, and nonfeasance came to be included under the anticorruption mandate in the federal inspector-general law, which aimed to prevent “fraud, waste, and abuse.” Command and control mechanisms of all types were strengthened; public managers became subject to stringent ethics laws and financial controls.

If the antipatronage reformers generated moral theory and scientific administrators engineered organizational structure, contemporary corruption controllers emphasize law-enforcement strategies and punitive sanctions. They have gone beyond the political, legal, and institutional legacies of their predecessors, searching out corruption vulnerabilities that can only be addressed by comprehensive administrative, organizational, and law-enforcement initiatives. The contemporary reformers adopt or invent technologies, institutions, and routines to monitor public employees closely. The panoptic vision embodies a comprehensive system of control based on surveillance, massive information gathering, auditing, and aggressive enforcement of a wide array of criminal and administrative sanctions. While these techniques are clearly successors to external control and other earlier approaches, when taken together they constitute a wholly different regime of control. What is more important, the personnel who sponsor and operate these techniques constitute a self-conscious interest group within government.

Rather than theorists like Woodrow Wilson, or New York City Department of Investigation Commissioner William Herlands, the central figures in the contemporary war on corruption are prosecutors, inspectors general, corruption-vulnerability experts, auditors, and antifraud specialists. Their anticorruption project is extraordinarily ambitious; they have radically expanded the definition of corruption to include the appearance of conflict of interest, failure to disclose financial interests, misstatements on job applications, unauthorized use of government telephones, leaving work early, accepting favors and gifts, and entering into public contracts with morally tainted private companies.

With each scandal, the corruption-hunting cadre lobbies both for greater resources and for an expanded definition of its mission. 31 The inevitable result is that more corruption is uncovered. Thus, the panoptic vision of corruption control feeds on corruption scandals and generates initiatives that have profound effects on public administration.

According to the panoptic vision, corruption is not primarily attributed to incompetence, absenteeism, laziness, and partisan influence, or even to inadequate organization and administration, but to insufficient rules, controls, and deterrence. This vision of corruption control de-emphasizes issues of governmental accountability, recruitment, and training. It views
The Evolution of the Panoptic Vision: A Case Study of the New York City Department of Buildings

To demonstrate how the panoptic vision has built and expanded upon the earlier visions of social control and corruption control, it is useful to examine the way in which the anticorruption project has unfolded in an area where both corruption and anticorruption reform have persisted throughout the century: construction regulation in New York City. The panoptic approach to corruption control has not been applied to all parts of public administration at the same time and with the same intensity. While some innovations, like civil service regulation and program auditing, have been applied across the board, others, like internal investigations and contract regulation, have been applied selectively. We will see that one layer of anticorruption reform after another has been added to construction regulation until, at the present time, the whole process is so mired in monitoring, audits, investigations, and checks and balances that the basic regulatory mission has almost become ancillary to corruption monitoring and control.

State legislative hearings at the turn of the century revealed that Department of Buildings (DOB) officials were taking payoffs to ignore violations of building and sanitation codes. The Progressives blamed the corruption on patronage and passed new legislation that aimed to replace party hacks with physicians and public health specialists. They also implemented a series of anticorruption initiatives based upon technical expertise and professional discretion. Department of Buildings reports began to refer to the growing body of knowledge concerning health and safety issues in the construction and maintenance of housing. The reformers proclaimed success in transforming a city function that had been ripe with corruption into a model of integrity and professional efficiency. Further, the reformed department added city planning and improving living standards to its mission.

In the 1930s, construction regulation was again the focus of scandal. Reformers, following the teachings of Frank Goodnow and Leonard White, responded by centralizing administration and implementing principles of scientific administration. The Department of Housing and Buildings would no longer rely on individual officeholders’ professionalism and good moral character as a prophylactic measure against corruption.

Mayor Fiorello H. LaGuardia, who championed scientific administration in the fight against corruption, reformed the city charter and pushed through a modern municipal administrative code that sought to utilize procedure and routine to control opportunities for corruption in all areas of city government. The comprehensive New York City Code covered such matters as the proper procedures for residential sewer connections, civil service grievances, and procedures for resolving disputes between contractors, vendors, or citizens and city agencies. Procedure and routine were designed to permit managers and administrators to monitor actively their subordinates’ discretionary decisions.

To enforce the new administrative code and to ensure public probity, LaGuardia appointed William Herlands in 1938 to be commissioner of the Department of Investigation (DOI), an agency which was beginning to play a central role in the anticorruption project. With its investigatory and research capabilities and authority over all government agencies, the DOI epitomized the scientific administration reformers’ ideal of an external control agency. Herlands, a former chief assistant to then United States Attorney Thomas E. Dewey in the racketeering investigations unit, focused on dishonesty, waste, inefficiency, and neglect of duty.

By the 1970s, when recurrent scandals revealed the same old corruption in the construction industry, the DOI became a laboratory for the panoptic vision of corruption control. DOI agents posing as contractors offered bribes to city inspectors to overlook violations or to expedite code approvals. Time and again the inspectors flunked these “integrity tests.” The DOI promulgated scores of recommendations for reorganizing and administering the Department of Buildings; so did the New York State Comptroller and the New York State Organized Crime Task Force. The DOI suggested twenty specific “corrective actions,” including everything from the establishment of an independent, professional reinspection unit, to increased staffing of the Department’s disciplinary unit. Similarly, the Organized Crime Task Force recommended an array of changes, including the wholesale reform and revision of the City Building Code, measures to encourage whistleblowers, and tougher administrative sanctions, especially pension forfeiture. Pursuant to the recommendations, the department instituted “double checks” and rotation of inspector routes. By the 1980s the top...
management in the Department of Buildings was thoroughly preoccupied with external criticism and corruption prevention.

The most recent anticorruption protocol, pursuant to a City Comptroller’s audit, requires all field inspectors to return to borough headquarters at the end of the day, instead of leaving for home from the last inspection site. The policy is meant to ensure that personnel do not leave work early. While no one knows how much, if any, corruption has been prevented, there has been a nearly 30 percent reduction in inspector productivity because of the time consumed in returning to the office. This policy perfectly illustrates how the Progressive vision of virtuous public professionals has been superseded by panoptic control.

**Conclusion**

Over the course of the century, each new stage of the anticorruption project has served to proliferate corruption controls. Reformers cite each new corruption scandal as evidence that additional controls are needed. Likewise, reformers argue that the absence of scandal is proof that extant anticorruption controls are necessary. New corruption controls do not displace old ones; rather, they supplement them. Thus, public agencies are layered with organizational structures and roles, and with policies and procedures originally instituted to prevent corruption, or at least to create that impression.

Since the 1970s the panoptic vision of corruption control held by prosecutors, inspectors general, and other law-enforcement and quasi-law-enforcement personnel has become the dominant approach in municipal governments like New York City’s. This anticorruption vision currently has unprecedented influence on public administration. Under the panoptic vision of corruption control, investigating, preventing, and deterring corruption have become ends, rather than means, to more effective governing.

The panoptic vision of corruption control does not parallel the dominant paradigm in public administration, which emphasizes systems. Rather, panoptic corruption control focuses on people, investigations, multiple layers of monitoring, and masses of rules and regulations. While many modern public administration specialists advocate an antibureaucratic philosophy of public administration that includes downsizing, privatization, and a reduction of internal regulations, the managers of the anticorruption apparatus recommend more command and control, even at the expense of administrative efficiency.
THREE

Civil Service and the Anticorruption Project:
Bondage to a Principle

The truth of the matter, I think, is that an entirely objective view of political life at its base where political organization is in direct contact with the population, would show that corruption in some form is endemic. I do not mean that everybody is bribed. I do mean that the exchange of favors is the elemental and essential motive power which operates the semi-private machinery inside the political parties which in their turn operate the official machinery of government. . . . [O]rganizations like Tammany, which bind together masses of people in a complex of favors and coercions, are the ancient form of human association. They might be called natural governments.

Walter Lippman, "A Theory about Corruption"

Since the last quarter of the nineteenth century, patronage has been widely defined as a species of corruption for which the civil service system is the antidote.¹ This was not always the case. Earlier in the nineteenth century, the moral status of patronage was less clear. President Andrew Jackson extolled the patronage system as a democratic alternative to an insulated governing elite unrepresentative of the majority of citizens and unresponsive to the wishes of the electorate and its representatives.²

In the view of its opponents, there was nothing democratic about patronage. To the contrary, they believed that patronage produced politicians and administrators who placed their parties' interests and their own self-interest above the public interest. According to the mugwumps, patronage was corrupt in itself. Moreover, it caused other forms of corruption: the election and appointment of self-serving officials who embezzled taxpayer money and looted the public coffers; a contracting system marked by favoritism for party potentates and their friends; a personnel system which made government jobs dependent upon party sponsorship and the job seeker's willingness to work for and contribute to the party.³

This chapter sketches the growth of the civil service movement in New
financing practices, the city's contracting process, the use of public authorities, and other practices and operations of city and state government. In conformity with tradition, the members of the commission were chosen for their ethical credentials rather than for their expertise in public administration. The commission was chaired by John Feerick, Dean of Fordham Law School, and included a civil rights attorney, two former prosecutors, a former judge, an Episcopal bishop, and a former U.S. Secretary of State (Cyrus Vance). The commission's primary concern was the "degradation of public service by the wrongdoing of public servants and party leaders,"11 (i.e., corruption), not the deplorable state of New York City government, which by the 1980s seemed incapable of efficiently delivering services or maintaining the infrastructure.

Based on a whistleblower's tip, the commission began investigating the Talent Bank, a job-referral office created by Mayor Koch in 1983 to recruit minorities and women into city government. The investigation revealed that the office was a conduit for patronage in an administration that publicly shunned patronage politics.

The Feerick Commission spent a great deal of time and resources investigating the Talent Bank, examining dozens of witnesses under oath, collecting thousands of documents, and conducting public hearings in January and April 1989 that dominated the coverage of city politics for weeks. The commission concluded that the Talent Bank, directed by special mayoral assistant, Joseph DeVincenzo, had been transformed from an affirmative action job bank into a "patronage mill." According to the commission, the Talent Bank controlled several hundred positions over which the mayor had discretionary appointing authority (in effect, patronage positions) and several hundred "provisional," or temporary, appointments. DeVincenzo, known around City Hall as "Joe D," reputedly exercised great influence over hiring and promotions. While virtually unknown to the general public, Joe D was "the man to see if someone wanted a City Hall office painted or a parking sticker for the City Hall lot."12 The commission found that he had final authority over hiring, promotion, transfer, and termination of discretionary and provisional personnel. Witnesses testified that a "Joe D" letter was commonly required before an agency could fill a vacancy.13 Further, DeVincenzo and his staff purportedly pressured agencies to hire Talent Bank applicants referred by politicians, and required an agency to submit a written explanation if it did not hire the politically referred applicant.14

During the hearings, whistleblower and former Talent Bank director, Nydia Padilla-Barham testified that computer printouts of politically referred Talent Bank resumes were kept in a binder called the Black Book, which indexed the pending and hired referrals according to political sponsor.15 Resumes were placed in color-coded files representing political sponsors—"hot" or important political referrals were kept in red folders; pink folders denoted political referrals of less importance; and green folders held "street," or unsolicited, resumes.16 DeVincenzo and his assistant, James G. Hein, denied knowledge of the Black Book. Hein explained that colored files had been adopted to boost morale because employees "were tired of filing the same drab folder."17 Witnesses testified that in February 1986, Hein, carrying out instructions from DeVincenzo, ordered Talent Bank employees to purge the computers of all references to political sources and to destroy the colored files and resumes containing the names of political sources. Both Hein and DeVincenzo testified that purging stale resumes was routine and not a cover-up of patronage. Following an eleven-count perjury indictment, DeVincenzo admitted he lied to the commission. Michael Cherkasky, head of the Manhattan district attorney's investigation unit, explained that "while patronage itself is not illegal and there exists in this case no underlying crime, the grand jury found that DeVincenzo lied to cover up the patronage system."18

The Feerick Commission treated the Talent Bank as an instance of gross corruption. The commission and the media expressed shock and indignation over the revelation that political influence played any role in filling government positions, even non-civil service positions explicitly within the mayor's discretion. The voice of the Feerick Commission echoed those of previous generations of reformers, especially the Committee of Seventy (the Tweed Ring scandals) and the Seabury Commission (the scandals of Mayor Jimmy Walker's administration). The commission affirmed the moral necessity of civil service and demanded that it be extended to more city employees.

By injecting ulterior and illegitimate influences in place of formal standards and procedures, patronage impairs the integrity of government. Involving as it does the deploying of public resources to serve private political objectives, patronage though it may not be unlawful or invidious in intent, is itself a breach of the public trust. It simply has no legitimate place in a personnel system.19

The media's moral indignation over the Talent Bank scandal surpassed that of the Feerick Commission. The New York Times demanded that the commission press its investigation to the very top of city government.

Why not hear from Koch administration members who had responsibility for the Talent Bank, including First Deputy Mayor Stanley Brezenoff, John
LoCicero, a political adviser who has only testified in private, and the Mayor himself.20

In a classic “feeding frenzy,” the New York Times printed the names of those public employees who allegedly had obtained their jobs through the Talent Bank.21 This attack on the character of public employees against whom there were no allegations of incompetence or venality indicates how pernicious the Times editors considered the Talent Bank scandal. The following letter to the editor of the New York Times from Brooke Trent, deputy commissioner of the Human Resources Administration, whom the New York Times named as a Talent Bank appointee, clearly illuminates the politics of the scandal.

The fact is, I got my job through the New York Times. I guess Nathan Leventhal, then a Deputy Mayor, put the resume I sent him (during a job search) in the Talent Bank, but that did not get me the position; the resume I sent in response to a June 21, 1981, ad in your paper did.

But what if I had got that job through the Talent Bank? By 1981, I had 12 years of public sector experience—federal, state, and city. I entered city government in Mayor John V. Lindsay’s administration and took a Civil Service exam for that job. As a manager, I have occasionally tapped the Talent Bank for resumes of qualified candidates, particularly women and minority-group members, and I also place ads in your paper and others, remembering my own story. I have told it many times to encourage qualified people to come into government, assuring them that you don’t have to ‘know someone.’

I guess you have destroyed my credibility and that of others. Too bad for government, whose professionals and managers seem relentlessly and often inaccurately criticized by the news media, further discouraging talented people from entering its ranks and staying.22

The Talent Bank scandal drove mayoral aides James Hein and Joe DeVincenzo from office for having made “contradictory” statements at public hearings. DeVincenzo was sentenced to five years probation after pleading guilty to one count of perjury based upon misstatements to the Feerick Commission. Hein was demoted and testified against DeVincenzo before the grand jury under a grant of immunity. Mayor Edward Koch was blamed for ignorance. Shortly thereafter, he dismantled the Talent Bank. Nevertheless, the scandal was a major blow to his reelection efforts. Patronage was equated with not knowing about the patronage mill and for not accepting blame for his ignorance. Shortly thereafter, he dismantled the Talent Bank. Nevertheless, the scandal was a major blow to his reelection efforts. Patronage was equated with not knowing about the patronage mill and for not accepting blame for his ignorance. Shortly thereafter, he dismantled the Talent Bank. 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The complex process of testing and audits done by various agencies leaves the hiring agency without needed personnel for extended periods. The audits
proceed in three stages. First, the Department of Personnel conducts an audit to assure that the agency has complied with all relevant state and local laws and regulations. Second, the Office of Management and Budget conducts a fiscal audit to certify that adequate funds are available to pay salary and benefits. Third, the Mayor’s Office of Operations conducts a final audit of all procedures, and issues certification for employment.

- **Testing does not assess relevant abilities.** The tests are antiquated, uniformly too easy, and do not provide grounds for distinguishing among candidates. It would be better in most cases to award jobs on the basis of a lottery, according to one manager. Most managers consider themselves better judges of candidates than the testing process.

- **Promotion is not controlled at the agency level and so deprives managers of a basic incentive.** The civil service promotion tests are given on an erratic schedule. In some agencies the waiting list for the promotion exam is 5–10 years old. Even when a position opens up, those wishing to compete for it must wait for the depletion of a preference list of those laid off from similar positions.

- **Job descriptions are so technically and narrowly written that a minor internal transfer becomes a major bureaucratic issue.** Managers found that the obvious talents of employees were being wasted because of confining definitions of duties.

- **Discipline, punishment, and removal have been made all but impossible by civil service protections.** Protections written into the civil service law serve to shield unproductive workers. Managers admit that the cumbersome and lengthy process required to remove poor performers makes it unlikely that they will do so. “He [the Inspector General] asked each of the four ACs [Assistant Commissioners] to identify their ten worst employees—a total of 40 out of 4,000 . . . . When their files were pulled, not one of them had a single unsatisfactory performance evaluation.” When the protections afforded by union contracts are added, managers found that there was too much job security in the civil service.

More than half of the high-level officials surveyed by the Columbia group favored complete elimination of promotional and hiring exams. When managers mentioned patronage, it was to suggest that they be given some of their own so they could override the civil service system to recruit and develop a staff that was competent, efficient, and motivated.

Our own interviews reinforce the Columbia team’s findings and conclusions. The commissioners and assistant commissioners whom we interviewed regarded the Talent Bank as a tempest in a teapot. They opposed the idea of centralized hiring and personnel administration because it empowered persons other than agency heads to select, promote, and make disciplinary decisions concerning agency employees. In their view, reformers have a simplistic view of patronage. More than any other component of the anticorruption project, civil service limits and prevents public-sector managers from implementing their policies and improving their operations.

### Counterreforms and Adaptations

The negative impact of civil service on competency, efficiency, and flexibility, and the inability to reform the system that itself stands as the quintessential reform in the history of public administration have inspired some theorists and politicians to propose reforms and end runs around civil service. No mayor since World War II has proposed eliminating or even limiting mayoral appointments to any significant extent. Mayor John V. Lindsay (1966–73) argued that the mayor’s patronage was necessary in order to assert governing authority over a large and fractious government. For Mayor Lindsay, who was without ties to a political machine, the amount of patronage available was too small, and he criticized the so-called merit system as an impediment to the mayor’s achieving control over the bureaucracy.

The 1975 Charter Revision Commission’s studies of the civil service system concluded that “many features of the system, as it is now structured, do not promote ‘merit and fitness’ in city service. Rather they fuel a negative philosophy and practical rigidities that make it difficult for the City to manage its multi-billion dollar operations.” The commission highlighted the need to move beyond the traditional negative rationale for personnel management—to insulate public administration from political manipulation and patronage. Specifically, the commission proposed that the charter should (1) delegate substantial responsibilities to operating agencies for personnel administration; (2) create a Management Service to bolster the middle-management corps; and (3) make the Civil Service Commission an affirmative force in personnel management. The commission also proposed new roles for the personnel director, the Civil Service Commission, and the agency heads. The personnel director was to be separated from the Civil Service Commission and was to assume administrative duties and rule-making authority. The director was given sole responsibility for position allocation and classification, severely restricting the Bureau of Budget’s role in personnel classification. All of these proposals were implemented.

The agency heads obtained enhanced responsibilities for personnel management functions such as position classification and assignment, appointments, performance evaluation, disciplinary actions, merit increases and incentive awards, equal opportunity, and record keeping. Personnel func-
Robert Moses and Civil Service

Robert Moses (1888–1981), New York City’s master builder, started his career as a good government reformer and civil service crusader. When it came to implementing vast public works projects in the New York metropolitan area, he employed creative techniques to bypass the civil service system, which he in part helped to create. The man whose organizational genius created dozens of parks, bridges, tunnels, highways, dams, beaches, and stadiums began his public career at age twenty-five as Mayor John Purroy Mitchel’s (1914–17) expert consultant on civil service reform. Having written a doctoral thesis at Columbia University on the civil service in Britain and the potential for a professional, efficient public workforce in the United States, Moses was a logical choice for the job. In his Detailed Report on the Rating of the Efficiency of Civil Service Employees, Excepting United States, Moses was a logical choice for the job. 37

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In his view the idea that patronage can and should be completely eradicated is unrealistic and unwise. One modern-day proponent of patronage explained that “political appointees are often necessary to build the kind of public consensus that any effective government needs. A trusted friend in a key post may also be able to get the ear of the mayor in important policy disputes. Problems arise only when patronage appointments are excessive, incompetent, or outrageously camouflaged.” 35

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came up with the idea for a new form of governmental unit: the “public authority,” which as a public service corporation would be exempt from civil service and other intragovernmental regulations.

With Moses' prodding, the legislature established the Triborough Bridge Authority (TBA), which became an independent colossus that built roads and bridges virtually anywhere in the metropolitan area. Not only did the TBA have unlimited bonding authority, it was also permitted to retain and reinvest the enormous revenues generated by tolls on the Triborough and later the Whitestone and Throgs Neck bridges. Moses had a secure stream of funds, independent control over the TBA's agenda, and freedom from burdensome regulatory requirements like those of the civil service. He defined jobs to suit his needs, set pay scales to attract the best talent, and hired and fired whom he pleased, all in the name of “getting things done.” He did not need to eliminate the civil service; he just made it meaningless for his purposes. Moses, frequently regarded as the most successful administrator in New York City history, was successful largely because he circumvented civil service.

The Feerick Commission even attacked the use of public authorities (like the TBA) on the ground that they provided inadequate protection against patronage, despite the time-proven ability of these public authorities to “get things done.” The commission argued that “[t]he proliferation of these bodies with fragmented, weak or non-existent oversight, has important implications for the integrity of government. . . . This is a situation with potential to breed favoritism, abuse of power, and even corruption.” The commission recommended that lawmakers impose “the same ethical standards and oversight on all governmental bodies,” including

- at a minimum, public disclosure of their transactions; contracting based on procedures designed to ensure competition; employment decisions based on merit and fitness; decision-making by leaders who are not subject to conflicts of interest; documentation of all decisions, sound internal controls, and periodic audits of their books and records.

Conclusion

Civil service reform was founded on and is still driven by an antipatronage ideology that equates patronage with corruption. Many reformers' abhorrence of patronage is so strong that it blinds them to the needs and complexities of public administration. Reformers strove unceasingly to expand and strengthen the civil service in order to break the patronage system that was the backbone of the political machine which they despised and called “corruption.” In spite of their excellent motives, the reformers' neglect of the needs of public administration. Civil service historian Paul Van Riper's critique of the reformers' overarching emphasis on destroying patronage also applies to the Feerick Commission:

It is quite clear that only secondarily . . . were the reformers interested in efficiency and economy. . . . They mentioned these things, but they almost invariably referred to the "greater" moral issues. . . . [I]ficiency in administration was but a corollary to [their] major purpose: the achievement of a new morality in public affairs.

A similar point is made by political scientist William Munro:

In implementing and perfecting a comprehensive civil service system, reformers believed that they were creating a professional government service with high standards of ethics and integrity. Unfortunately, it has not turned out that way. Civil service reform has rendered a great service in debunking the clearly unfit from appointive office, and the merit system probably offers the most practicable method of getting the best men into some administrative positions; but to insist that it is the only practicable method of securing competent men for all appointive posts, whether high or low, and irrespective of the qualities needed—to press the point thus far is to give a typical example of the reformers' bondage to principle.

This principle is as strong (if not stronger) today as it ever was. The Feerick Commission viewed the Talent Bank as an example of rank corruption, and made public hearings on this scandal the centerpiece of its work. A whiff of patronage constituted a scandal. That the Talent Bank dealt with merely several hundred discretionary appointments in a municipal workforce of almost 400,000 made no difference in the social construction of that scandal. The mainstream media define morality, not administration, as the most important priority of governing.

While the Feerick Commission railed against the Talent Bank, it did not offer any criticism of civil service; indeed, it enthusiastically recommended its expansion. This view starkly contrasts with the Columbia study's indictment of civil service for its negative impacts on New York City government. The Columbia group found that public managers were deeply dissatisfied with the personnel system. But managers cannot change things under current regulations. Advocating overthrow of civil service is not only regarded as heresy, but as being soft on corruption. Thus, managers must struggle to gain control over agencies with incompetent employees whom they cannot fire, demoralized and underpaid professionals whom they cannot reward,
and vacant positions which they cannot fill unless they are fortunate enough to get approval to hire "provisional" employees.

Managers, not surprisingly, search for ways around this dilemma. In New York City, a major end run around civil service is the proliferation of provisional employees, whose appointments are only temporary but can be renewed indefinitely, and who can be fired for any lawful reason. The ability to appoint such employees provides administrators with much-needed flexibility. Nevertheless, the Feerick Commission predictably denounced provisional employment and recommended that practically all positions be swept under the civil service umbrella. An even more striking illustration of a civil service end run, as we saw in the example of Robert Moses, is the creation of public authorities, which are completely exempted from civil service rules.

Competency, efficiency, and motivation cannot simply be assumed. Managers need authority and incentives to manage their agencies. Instead of recognizing the political and problematic nature of administration, as successful private-sector organizations have, civil service reformers have tried to bury politics.

FOUR

Conflicts of Interest and Financial Disclosures:
The Pursuit of Absolute Integrity

Today's appearance ethics so richly compensates correct appearances (e.g., by advancing careers) and so harshly punishes incorrect ones (e.g., by killing careers), that the easiest, safest, and most rewarded strategy for career advancement is to devote far more of one's efforts to maintaining appearances than to actually doing one's job.

Peter W. Morgan, "The Appearance of Propriety: Ethics Reform and the Blifil Paradox"

Laws prohibiting conflicts of interest and requiring disclosure of personal finances and investments aim to prevent government officials from having their decision making distorted by the potential for personal gain or loss. Conflict-of-interest and financial disclosure laws constitute a specialized administrative/criminal code that applies only to public officials. Laws prohibiting conflicts of interest consist of a list of "shall nots." Conflicts of interest are created simply by being a public official and, at the same time, a stockholder, someone's daughter, or a member of the board of a charitable organization. Financial disclosure provisions constitute affirmative obligations analogous to the reporting requirements of the Internal Revenue Code. Together, the two sets of rules envelop public officials in a fog of potential liability.

At the end of the nineteenth century and the beginning of the twentieth century, corruption was not understood as embracing certain types of exploitation of public office for private gain. The colorful George Washington Plunkitt openly bragged that he sought opportunities for "honest graft." Likewise, some government officials have steered insurance and law business to firms in which they or their family members are owners or partners, and some have awarded contracts to companies in which they hold an interest or at least an expectation of future employment. Patronage—hiring supporters, friends, and relatives—constitutes a conflict of interest that has been acted upon.
It is important to note that some instances of self-interested wheeling and dealing do not necessarily involve an economic loss to the government entity. The government, for example, may get insurance coverage for a reasonable price even when a high-level official gets a kickback. Nevertheless, by today's standards, such conduct is deemed corrupt because all private gain from public service is said to be at least unethical and to undermine the public's confidence in the integrity of government. The definition of corruption includes placing oneself in a conflict-of-interest situation, even if one's decision has not yet been rendered or has been rendered contrary to self-interest. The most recent major extension of the anti-conflict-of-interest norm is the prohibition of the appearance of conflict of interest or the appearance of impropriety. In 1989 President Bush issued an executive order adopting appearance of propriety as a standard of conduct for federal employees, and authorized the Office of Government Ethics (OGE) to promulgate rules incorporating this standard. As President Bush's Commission on Federal Ethics Law Reform put it, situations "that create the appearance of a conflict of interest do undermine public confidence in the integrity of government, and we thus suggest that the avoidance of appearances of impropriety remain as one of the broad principles of government ethics." Thus, conflict-of-interest laws aim to increase the public's confidence in the integrity of government. "[D]emocracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." Conflict-of-interest and financial disclosure laws have their work cut out for them. Public opinion polls reveal that most Americans have little confidence in public officials. A 1989 USA Today poll found that 54 percent of the public believe that one out of every three members of Congress is corrupt. Similarly, a 1989 Washington Post-ABC News poll found that more than 50 percent of the public believe that members of Congress profit improperly from their office.

The Association of the Bar of the City of New York explained the need for conflict-of-interest regulation as follows:

The evil . . . . [of conflicts of interest] is risk of impairment of impartial judgment, a risk which arises whenever there is temptation to serve personal interests. The quality of specific results is immaterial. . . . Like other fiduciaries . . . the public trustee has a duty to avoid private interests which cause even a risk that he will not be motivated solely by the interests of the beneficiaries of his trust. Properly conceived, conflict-of-interest regulation does not condemn bad actions so much as it erects a system designed to protect a decision-making process. Financial disclosure requirements are meant to reinforce conflict-of-interest prohibitions. As late as 1969, only eleven states required public financial disclosure. By 1977, more than 38 states had such laws. In 1978, the federal Ethics in Government Act mandated financial disclosure for a significant proportion of federal employees. The disclosure requirements are an anticorruption measure one step removed from actual corruption. They focus on perception, that is, the appearance of impropriety. Disclosure requirements and conflict-of-interest laws are preventive and prophylactic. They aim not to detect and punish wrongdoing, but to provide "safeguards which lessen the risk of undesirable action." Generally, financial disclosure forms oblige designated public employees to list (and make public) all their own (and their family's) financial assets and obligations as well as their organizational memberships and affiliations. The theory is that such disclosure will (1) deter them from placing themselves in conflict-of-interest situations, and (2) focus their attention on organizing their financial arrangements to avoid inadvertent conflicts of interest. Withholding or distorting information on the forms is itself a criminal offense.

This chapter first details the development and operation of ethics laws and financial disclosure requirements as they apply to public officials in New York City. Second, it examines the impact of these laws on corruption and public administration.

**Background**

The antipatronage and Progressive reformers believed that the elimination of patronage and the creation of a professional, merit-based civil service would eliminate the use of public office for private gain as a serious problem; professional public servants could be relied upon to police their own behavior. They would pursue the public good without regard to the effect of their decisions on their own self-interest, financial and otherwise.

The scientific administration reformers emphasized optimal "spans of control" and enhanced auditing and accounting. They believed that government integrity would flow from sound organization. Correct deployment of administrative authority, coupled with comprehensive monitoring and evaluation, would prevent corruption or quickly bring it to light. Because they believed that scientific administration itself would prevent corruption, the 1930s reformers did not propose comprehensive ethics codes to regulate public employees' financial affairs.
During the 1950s, reformers began proposing more elaborate conflict-of-interest laws as a strategy of corruption control. The National Municipal League produced a Model State Conflict of Interest and Financial Disclosure Law, which required disclosure to a superior of a situation that could “cause financial benefit or detriment to [the public official].” The 1960s and especially the 1970s saw the triumph of comprehensive ethics codes supplemented by comprehensive financial disclosure laws. These codes are not simply hortatory; they are made up of prohibitions and sanctions that resemble criminal law. Indeed, New York City’s financial disclosure law makes it a misdemeanor to fail to file or to misstate assets and liabilities, and it imposes a $100 fine for a late filing. These laws demonstrate the panoptic vision of corruption control that relies heavily on rules, threats, surveillance, and coercion. Law professor Robert Vaughn has noted that the result of equating ethics with respecting criminal prohibitions is to undermine the concept of ethics.

Too great a reliance on legal regulation can have side effects, like a drug too frequently used. By converting ethical problems into legal ones, the law becomes the sole judge of propriety. What can be done becomes what should be done. If what is legal continues to seem improper, additional conduct is made illegal, reinforcing the perception that what is legal constitutes what is proper. Soon ethics has limited significance apart from legal command and enforcement structures and sanctions become increasingly important.

**The Politics of Current New York City Ethics Laws**

There was nothing subtle about the politics that led to passage of recent ethics legislation. A particularly egregious conflict of interest brought to light during the Parking Violations Bureau (PVB) scandals involved Bronx party boss, Stanley Friedman, who pushed the PVB and the Board of Estimate to award a contract for hand-held computers to Citisource, a company with no assets and one employee. Friedman, the largest stockholder of Citisource, became a millionaire virtually overnight when the value of Citisource stock increased as a result of its contract with PVB. Mayor Koch attempted to distance himself from the scandal that was enveloping his administration by stating, “I am embarrassed, I am chagrined, I am absolutely mortified that this kind of corruption could have existed and that I did not know.” The columnist Murray Kempton suggested that “I am shocked” ought to be made the city motto since Mayor Koch said it so often. In the wake of the scandal, city and state politicians competed over who could most strongly express moral indignation and outrage toward corruption, including conflicts of interest.

The U.S. Senator from New York State, Daniel Patrick Moynihan, declared, “[P]ublic corruption is more than a crime; it is betrayal and is contemptible and unforgivable.” Governor Mario Cuomo demonstrated his concern by appointing two blue-ribbon commissions: The New York State City Commission on Integrity in Government (the Sovern Commission), and the New York State Commission on Government Integrity (the Feerick Commission). Both commissions waxed indignant about corruption and generated recommendations to close the legal loopholes that allowed corruption to breed. These recommendations included financial disclosure, prohibitions against participating in decisions from which the public servant stood to benefit financially, and the establishment of a commission to enforce ethics legislation. While neither commissions’ recommendation was immediately enacted, in 1987 a new state ethics law emerged as a hard-fought compromise between the governor and the legislative leadership. Some provisions seemed to impose stringent ethical requirements on state employees, but others arguably weakened prior standards. According to one critic of the Act,

> [the conflict of interest provisions enacted by the new ethics code fail to regulate a wide range of conduct that would appear to constitute a conflict between a state official’s or legislator’s public duty and her private interest. For example, while a public official cannot receive compensation for appearances or services rendered before state agencies, the Act expressly allows any firm, association or corporation of which the public official is a member to charge fees for such appearances or services, provided the public official does not share in the net revenues. This restriction does not eliminate the rewards that may accrue to a public official for improperly influencing an agency or the Legislature.]

Overall, the 1987 Act significantly bolstered New York’s ethics laws by requiring financial disclosure, prohibiting appearances or lobbying by a public servant on behalf of a private individual or entity doing business with the government, and regulating the receipt of gifts by public servants.

In New York City, ethics reform followed a path that did not involve the legislative process. The main forum for debate over anticorruption reform was the Charter Revision Commission, which Mayor Koch appointed in 1981 after a federal court declared the city’s upper legislative chamber, the Board of Estimate, to be in violation of the constitutionally required principle of “one person, one vote.” After the PVB corruption scandals
erupted, however, the Charter Revision Commission gave anticorruption reform top priority. The Charter Revision Commission's recommendations did not have to go through a legislative process of compromise or revision; they became law via referendum.

Like most other New York City anticorruption reforms of the modern era, the Charter Revision Commission's ethics provisions were not cut wholly from new cloth. Many key provisions were based on a body of national conflict-of-interest legislation and jurisprudence that had developed since Watergate. They enjoyed the vigorous advocacy of good-government groups and scholars around the country.2! The commission sought advice and testimony from organizations such as the Citizens Budget Commission and the Institute for Public Administration, and from scholars like political scientist Aaron Wildavsky.

Conflict-of-Interest Laws

The 1989 New York City Charter's Ethics Code (Chapter 68) establishes comprehensive standards and prohibitions for public employees' financial conduct and relationships that occur on and off the job. It also outlines behavior, activities, and relationships appropriate for public servants' spouses and minor children. Violation of these rules is punishable by both civil and criminal sanctions, including forfeiture of office, fines, and incarceration.22

This comprehensive web of prohibitions is applicable to all city employees and elected and appointed city officials (including former officials). The prohibitions address a wide variety of self-dealing, including investments in or ties to companies doing business with the city, spousal interests in businesses doing business with the city, receipt of gifts worth more than fifty dollars, volunteer or paid work with not-for-profit organizations, and restrictions on employment following government employment.

Further, Chapter 68 prohibits council members or any salaried city employees from having a direct or indirect financial interest in any business dealings with the city or its agencies; nor can a council member or any city employee act as an attorney, agent, broker, or consultant for any person, firm, corporation, or other entity interested directly or indirectly in any business dealings with the city. In short, it is illegal for public officials to profit in any way from city contracts.

Chapter 68 attacks the patronage system that enabled Donald Manes, Queens party boss and Queens Borough President, to function as a power broker who could convert influence to cash, by prohibiting elected officials (except for city council members) and some appointed officials from holding high political party offices. Similarly, Bronx party boss Stanley Friedman wielded enormous political control without holding any public office which would have required him to comply with conflict-of-interest and financial disclosure laws. The state's 1987 Ethics in Government Act sought to change all that by expanding the scope of conflict-of-interest and financial disclosure provisions to cover party leaders. Further, party leaders in New York City are prohibited from doing business with the city, except bidding for contracts, and from representing clients before city agencies.23

In another provision, Chapter 68 aims to protect public employees from being forced to donate to political parties by making it unlawful for any public servant to compel, induce, or request any person to pay any "political assessment," or kickback. It is also an offense to solicit or receive a "political assessment."

The conflict-of-interest rules also regulate employment following government service. Former city officials, such as agency heads, are barred for three years from private employment with companies involved in matters in which they worked while in city government.24 Further, for one year after leaving the government, public employees may not appear before their former agencies,25 and elected officials and other specified appointed officials are barred from appearing before the entire branch in which they served.26

In addition to prohibiting specific conflicts of interest, Chapter 68 contains several catch-all prohibitions:

No public servant shall engage in any business transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with proper discharge of his or her official duties.27 No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege, or other private personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.28

Public officials are also prohibited from entering into a business or financial relationship with superiors or subordinates while employed by the city.29 These provisions cast a long shadow over public service. What counts as using one's position to "secure an advantage," directly or indirectly, for a friend or child? What about a call to another government employee to enquire about an agency opening for a friend, or what about a letter of recommendation? Can public officials be confident that in their financial arrangements and in all their actions, public and private, grounds will not be found to charge an illegal conflict of interest?
Each year the Conflict of Interest Board responds to approximately four hundred formal requests for opinions and one thousand phone calls seeking informal confidential advice. This indicates that many public employees are anxious about and confused by the rules. Indeed, anxiety and paranoia may plague city employees trying to grapple with potential conflict-of-interest situations because, as one employee of the Conflict of Interest Board explained, "substantively it's a good ethics law [Chapter 68], but no one can understand it. It's completely unintelligible." As a result, public employees who would rather be safe than sorry may feel compelled to check with the board before their spouses start a business or accept a job offer, engage in volunteer work, or accept part-time teaching positions.

As illustrated by the board’s advisory opinions, Chapter 68's reach could be interpreted to extend far beyond concerns about self-dealing and corruption. A city employee checked with the Conflict of Interest Board before attending (for free) an annual golf and tennis outing sponsored by an organization which does no business with the public servant's agency. The board permitted the public servant to attend the golf outing, even though several firm members of the sponsoring organization did business with the city, including the public servant's agency. Employees of a city agency, concerned that a possible conflict of interest might arise, checked with the board before soliciting donations "from firms engaged in a trade that falls within the agency's jurisdiction" on behalf of a colleague who was seriously injured in a car accident. Similarly, employees of the Police and Fire Departments inquired whether their children could apply for merit scholarships awarded by a not-for-profit trade association whose for-profit member companies were subject to some safety monitoring by the Fire Department. The board ruled that the public servants' children could apply for the scholarships.

Even where Chapter 68 prohibits certain conduct, the board may in some circumstances issue a waiver if it finds that the conduct would not conflict or interfere with the effective performance of official duties. In order to obtain a waiver, however, the employee's agency head must provide written approval stating in detail why the conduct would not conflict with official duties. Typically, waivers are sought where a public servant wants to teach a course at a college or university which has financial transactions with the city. Without a waiver, compensation for teaching would violate Chapter 68 §2604a(1)(b), which provides that no employee whose primary employment is with the city may have an interest in a firm which the employee knows does business with the city. The board issues "bucketfuls" of waivers for public servants who want to teach, as long as the course does not concern subject matter "which directly involve[s] his official duties." This is certainly an odd caveat since the public servant's specific expertise is likely to be what the college finds attractive. Given the increasing demand for advice by the board, delay is inevitable, despite the routine nature of these waivers. Thus, Chapter 68's broad reach probably discourages public servants from seeking out adjunct teaching positions.

**Financial Disclosure Requirements**

New York City enacted its first financial disclosure requirements in 1975 and expanded them in the 1980s to cover more public employees and require more extensive disclosure. In addition, many city employees are also covered by the financial reporting requirements of the 1987 New York State Ethics in Government Act. The consequence is that some employees have to fill out a number of disclosure forms when they first take a city job and then on an annual basis ever after. In order to prevent conflicts of interest from even arising, the ethics law regulates the economic life of not only the covered employees, but also members of their nuclear families as well. One city official told us that when he joined city government at a senior level, he had to fill out three sets of disclosure forms: (1) a terms and conditions-of-appointment form for the New York City Department of Investigation (DOI), complete with fingerprints, photos, tax returns, and a twenty-five-page questionnaire; (2) a disclosure form for the Conflict of Interest Board comprising sixteen pages of requests for financial information; and (3) an annual financial disclosure form amounting to a twenty-four-page questionnaire plus requests for receipts. These intimidating forms demand comprehensive financial information and require the disclosing individual to trace his or her job history back to high school. The amount of time and effort required to fill out disclosure forms, in itself, may act as a disincentive for qualified individuals.

New York State’s Ethics in Government Act requires government employees to do the following:

- List any office, trusteeship, directorship, partnership, or position of any nature including honorary positions, if known, held by the reporting individual, his or her spouse or unemancipated children. If the entity had any significant business or activity with a state or local industry, the reporting individual must name the agency.
- List the name, address, and description of any occupation, employment, trade, business, or profession engaged in by the reporting individual, his or
Part Two: Sanitizing the Personnel System

her spouse or unemancipated children. If such activity was licensed by or had business or had matters before any state or local agency, name the agency and describe the matter.

- List any interest in excess of $1,000, excluding bonds and notes, held by the reporting individual, such individual's spouse or unemancipated minor child in any contract made by a state or local agency and include the name of the entity which holds such interest and the relationship of the reporting individual, spouse, or child to the entity.

- List any position the reporting individual held as an officer of any political party.

- If the reporting individual practices law, is a real estate agent, or other licensed professional, describe the principle subject areas undertaken by the individual.

- List the name, address, and general description or the nature of the business activity of any entity in which the reporting individual or the individual's spouse had an investment greater than $1,000 excluding investments in securities and interests in real property.

- List the identity and value of each interest in a trust or estate or other beneficial interest.

- List the amount and nature of any income in excess of $1,000 from each source for the reporting individual and the reporting individual's spouse.

- List the sources of any deferred income in excess of $1,000 to be paid at the end of the calendar year for which this disclosure statement is filed.

- List the type and market value of securities held by the reporting individual or such individual's spouse from each issuing entity at the close of the taxable year.

- List the location, size, general nature, acquisition date, market value, and percentage of ownership of any real property in which any vested or contingent interest in excess of $1,000 is held by the reporting individual or the reporting individual's spouse. 38

The demand for so much detailed financial data makes it likely that many forms will contain purposeful or inadvertent misstatements, errors, inaccuracies, and omissions. Intentional misstatements or omissions are punishable by imprisonment for up to a year, a fine not to exceed $1,000, or both. One former New York City commissioner told us that, throughout her tenure in office, she regarded the financial disclosure forms "as a way of holding us hostage." In other words, an investigating agency that wanted to "get" a particular individual but couldn't find evidence of serious corruption could comb the disclosure reports for a conflict of interest or for a distortion or omission that could be used to force the official from office or at least place the taint of corruption on him or her.

Despite the millions of dollars spent on setting up the financial disclosure apparatus in New York City, only three public officials have ever been caught for intentional violations! The ritual performance of filling out disclosure forms on an annual basis has become a symbolic act. Due to budget cuts, the Conflict of Interest Board does little more than babysit the filed disclosure forms, which accumulate at the rate of two million pages per year. Of the more than 12,000 forms filed in 1994, only 1,000 were reviewed for conflicts of interest. Critics of annual disclosure claim that even a substantive review of all forms would not necessarily reveal any conflicts of interest, because there is no database of companies that do business with the city to which the completed forms may be compared. According to Professor Joseph Little, a critic of financial disclosure,

[The general goal of financial disclosure] is honest service. The specific plan is to prevent corruption in governmental decisions and operations, to promote neutrality in these activities, to make government decisions and operations more credible in the eyes of the governed people, and to enhance the accountability of those in service to the electorate. Financial disclosure is ill equipped to serve any of these purposes. 40

Campaign Finance and Conflict of Interest

The New York State Ethics in Government Act of 1987 imposes upon candidates for elected office another layer of financial disclosure: campaign finance laws. These laws regulate who may make contributions, when contributions may be made, how much money can be donated, and when campaign contributions must be disclosed. They are animated by the same concerns over self-dealing and improper influence that are deployed in behalf of financial disclosure and conflict-of-interest laws. The Feerick Commission nicely summarized these concerns:

[The political action committees and businesses which pour money into state and city elections see their contributions, not as an expression of ideological support, but as a way of influencing elected officials, who are expected to favor contributors out of either appreciation for past contributions or a desire for future ones.]

It has become increasingly common for charges of corruption in campaign financing to make newspaper headlines following elections. During the 1993 elections, incumbent city comptroller, warrior in the anticorruption battle, and former Brooklyn District Attorney Elizabeth Holtzman was
accused by the DOI of being "grossly negligent" in failing to ensure that a $450,000 loan from Fleet Bank to finance her unsuccessful campaign for United States Senate did not create a conflict of interest. Although Holtzman complied with campaign finance laws and there were no allegations that she had violated them, conflict-of-interest problems arose when it was discovered that Fleet Financial Group (FFG), a subsidiary of Fleet Bank, had done business with the city and had recently been awarded a bond underwriting contract.

Holtzman denied knowledge of awarding the contract to FFG, and she stated that a subordinate, who was unaware of the campaign loan by Fleet Bank, recommended FFG as the most qualified underwriter (FFG had sold more city bonds in the previous two years than any of the other companies that applied for the contract). In order to save face and possibly save her reelection campaign for city comptroller, Holtzman apologized, saying she made a "mistake" when she permitted her office to award the contract to FFG. Although there were never any allegations that the city or the taxpayers had been cheated, or that FFG was unqualified or had received a sweetheart deal or unreasonable compensation, the mere hint of favoritism was enough to cast the shadow of scandal over Holtzman's campaign. She was soundly defeated in the primary.

Impact on Corruption

Do the conflict-of-interest and financial disclosure laws reduce bribery, criminal frauds, conflicts of interest, and influence peddling? There are no data to answer this empirical question, but we believe that with respect to hard-core criminality, the answer is probably no. Bribery and fraud have long flourished despite their being illegal and subject to severe punishment. The ethics laws do not enhance sanctions against the most venal and corrupt forms of behavior, which are already prohibited and punished by the criminal code. Nor do ethics laws substantially enhance the risk of getting caught; public employees who are willing to solicit or accept bribes will probably have no compunction about lying on financial disclosure forms. In theory, perhaps those lies would be detected by investigators who routinely scrutinize the forms. In practice, however, there are no such routine investigations. The completed forms are only examined when an individual is under scrutiny for some other reason. Even if forms were audited, only conflicts that were apparent on the forms themselves would be discovered; lies and omissions would not be detectable without substantial investiga-

tion. The accumulation of tens of thousands of financial disclosure forms that will never be read is an example of the overreach of the panoptic vision of corruption control.

Although the ethics laws are comprehensive, they are only minimally enforced. In the first instance, enforcement is assigned to a three-member Conflict of Interest Board and the DOI. However, the board is essentially not an enforcement agency, but focuses on policy making, issuing interpretative guidelines and advisory opinions, and overseeing the publication and dissemination of the ethics rules. Indeed, the board views its primary purpose as education, not enforcement.

The board is authorized to receive complaints of misconduct against public servants, to refer appropriate cases to the DOI's commissioner of investigation, and when probable cause exists, to hold hearings to determine whether the conflict-of-interest rules have been breached. The board, however, has only three unpaid (except for per diems) commissioners, four attorneys, and four other staff, but no auditors or investigators.

The Bcrard each year receives complaints from others of possible violations of Chapter 68, including referrals from other agencies such as the Department of Investigation. Fifty such complaints have been received since the Board's inception: 8 in 1990; 20 in 1991; and 22 in 1992. Of the 50 complaints, 24 were dismissed as unsupported by evidence or not stating a claim; one was disposed of by stipulation; 18 are under active investigation; seven are the subject of enforcement proceedings.

Perhaps the ethics law has the potential to have a greater effect on Plunkitt's "honest graft"—those kinds of previously lawful self-dealing and opportunity-taking that flowed from governmental position and insider knowledge—than on hard-core graft. Two types of public employees might be affected: (1) those who previously lived by the credo that everything is permissible except that which is clearly prohibited, and (2) those who did not realize that there was anything wrong with personally benefiting from economic opportunities that arise in the course of public employment. The process of filling out the financial disclosure forms will force, or at least
provide an opportunity for, both types of public employees to think about conflicts of interest and the legality of their financial arrangements and dealings.

Undoubtedly, there are public servants who, though unwilling to solicit or take bribes, are willing to cut corners or turn a blind eye to ethical norms as long as their wheeling and dealing is not explicitly prohibited. However, public employees who fall into this category will continue to look for loopholes, just as some taxpayers look for loopholes in the tax code. To close every possible loophole is impossible and even undesirable, because it would make public administration more muscle-bound.

A second category of public employees, those who previously were confused about the boundary between the permissible and impermissible and who may have inadvertently violated ethical standards, will now be alerted that something is or may be wrong with a contemplated business arrangement or transaction. They may change their financial relationships accordingly.

**Impacts on Public Administration**

Ethics legislation represents an effort to translate the “mythical code” of governmental integrity into a positive code that governs day-to-day conduct. This genre of legislation, in the words of Bayless Manning, is “prescriptive, not descriptive.” It sends a message from legislators to their constituencies that the government abides by the highest standards of morality, much higher than the standard to which private employees would normally be expected to adhere.

To suggest that governmental ethics legislation must be understood in terms of symbolic politics is not to deny its impact on the real world. The 1989 New York City Charter includes a complex personnel code that has practical consequences for the lives of tens of thousands of New York City employees and for public administration. If an account of such consequences were possible, it would probably show that these administrative consequences are more significant than the impact of the ethics laws on reducing corruption.

Comprehensive ethics legislation will surely prevent some qualified people from entering public service. Some individuals, especially those with substantial wealth, do have financial holdings and relationships that raise actual or potential conflicts of interest, especially when conflicts of interest are broadly defined. In particular, the New York City Charter increases the probability that a conflict of interest will arise by defining the public official’s “interests” to include his or her spouse’s and unemancipated children’s personal finances, economic activities, memberships, and investments.

Ethics legislation may do more than discourage qualified individuals from entering public service. In some circumstances it may force qualified individuals to resign. Chapter 68 provides that a public servant may not have an “ownership interest” in a firm that does business with the city. An ownership interest is defined as managerial control over the firm or an interest held by the public servant, his spouse, or unemancipated children which exceeds $25,000 or 5 percent of the firm. The practical consequence of this provision is that if a public servant’s spouse is promoted from an employee to a partner in a firm that does business with the city, the public servant is left with a Hobson’s choice—either the public servant must resign because of the so-called conflict of interest, or the spouse must resign in order to eliminate the conflict of interest (of course, they could divorce). The language of Chapter 68 does not permit the board to grant a waiver or an order requiring the public servant to recuse himself from matters involving the spouse’s firm.

The stringent conflict-of-interest rules also create governing problems for public officials. A good example is the 21 April 1990 disqualification of the mayor and city council president from voting on renewal of a cable television franchise for Manhattan. The Conflict of Interest Board barred Mayor David N. Dinkins and City Council President Andrew J. Stein from voting on the renewal because their relatives owned stock in companies that were partners in separate ventures with Time Warner, the media giant that owns interests in the two competing firms. The city’s chief lawyer ruled that the two officials could delegate others to vote “independently” in their place. Despite doubts about how anyone in his employ could be independent, Mr. Dinkins named his Deputy Mayor for Public Safety to act in his stead. Mr. Stein began searching for an outsider with no conflict, but he struck out on his first five tries. Floyd Abrams, the noted First Amendment lawyer, declined because his firm represented The American Lawyer, a magazine owned by Time Warner. Cyrus R. Vance, the former Secretary of State, passed because his firm represented a Time Warner competitor. Joan Ganz Cooney, the creator of Sesame Street, was ruled out because a relative had previous dealings with Time Warner. John Brademas, the president of New York University, was ineligible because some NYU board members and friends had ties to Time Warner. Stein’s fifth choice, Michael I. Sovern, the
president of Columbia University, declined because Time Warner contributed to Columbia. “The problem,” Mr. Stein said, “is Caesar’s wife didn’t have to run New York.” He added, “I’m still searching.”

Successful citizens working in the private sector, who constitute a valuable pool from which to recruit commissioners and other key personnel, are especially likely to have real or perceived conflicts of interest. If such individuals are disqualified or scared away from public employment by the disclosure requirements and the “revolving-door” restrictions, public administration will lose a valuable source of recruits. This is especially true of individuals asked to serve on important boards which are not remunerated at all (e.g., the Civilian Review Board).

Further, it would not be surprising if many people decided not to seek or accept a tour of duty in the public sector because they objected to revealing their family’s investments, bank accounts, and organizational affiliations. The added burden of being forced to divest an ownership interest (a spouse may have to resign from a partnership or sell a business) presents another disincentive to public service.

After New York City passed its first financial disclosure requirements in 1975, some public employees filed a class action, challenging the law as an invasion of privacy. The trial court held that the disclosure requirements could not pass constitutional muster as long as they failed to provide a way for the disclosing employee to claim an exemption from disclosure of a particular item on privacy grounds. The New York Court of Appeals affirmed.

Following this litigation, the City Council passed an amended disclosure law which, while requiring full disclosure to the board, permits the disclosing employee to flag certain items as arguably exempted from disclosure to the public; the board must rule only if and when there is a request from a member of the public to see the disclosure form. In response, a group of fire fighters went to court arguing that requiring financial disclosure by public employees with little or no policy-making authority adversely affects privacy while serving no substantial public purpose. In Slevin v. City of New York, Judge Abraham Soafer upheld the requirement that disclosure be made to the Board of Ethics, but struck down a portion of the law permitting members of the public to see the disclosure form. In a companion case brought by New York City police officers, the Second Circuit Court of Appeals reversed Judge Soafer and upheld the public disclosure requirement. The Second Circuit explained that in light of the extensive police corruption revealed by the Knapp Commission, “the City’s interest in public disclosure outweighs the possible infringement of plaintiffs’ privacy interests.”

On the federal level, the Supreme Court recently struck down as unconstitutional a portion of the 1989 Ethics in Government Act which prohibited high-level federal executive branch employees from accepting compensation for any speeches or articles, even if unrelated to their work. Justice Stevens criticized the law as a “crudely crafted” piece of legislation riddled with arbitrary distinctions (a public official may accept compensation for poems, but not a speech about poetry), and unsupported by any evidence of conflicts of interest or impropriety by public officials. The plaintiffs in the suit included a Food and Drug Administration microbiologist who is also a dance critic, a Goddard Space Flight Center engineer who also lectures on black history, and a Nuclear Regulatory Commission attorney who also writes about Russian history. The Court could not identify how this “blanket burden on the speech of nearly 1.7 million Federal employees” served the goals of preventing corrupt or unethical behavior.

The increasingly stringent restrictions on what jobs public officials can take after they leave public service is bound to have negative effects on both recruitment and retention of individuals. Passage of a New York State ethics law in May 1991 precipitated a rash of resignations among local officials all over the state (except in New York City, which had its own law). The New York State Association of Counties reported over one hundred resignations from county government positions, especially from county health boards, zoning and planning commissions, and community college boards.

Even if these laws do not deter people from seeking or accepting public office, public administration may still suffer if ethics legislation negatively affects morale or if it makes decision making more defensive and slower. The negative impact of ethics laws on morale has been discussed by commentators who argue that public employees perceive comprehensive ethics legislation as presuming their venality and guilt until (continually) proven otherwise. It would hardly be surprising if public employees who feel this way were unenthusiastic and ineffective in carrying out their responsibilities. In addition, the large and increasing number of requests to the Conflict of Interest Board for opinions has led to a significant case backlog; months can go by before the inquiring employee gets an answer, which in itself entails costs. An individual waiting for a decision from the Conflict of Interest Board prior to accepting an offer of employment from the city may decide the hassle is not worth the price and seek opportunities elsewhere. Additionally, a public servant may forfeit an opportunity to
teach, lecture, or do volunteer work because of delays in receiving advisory opinions.

**Conclusion**

The modern-day panoptic reformers view public officials as seekers of corrupt opportunities and government as an organizational form that generates rich opportunities for corruption. Consequently, the panoptic approach to controlling corruption treats public employees like probationers in the criminal justice system. Their routine is governed by increasingly comprehensive administrative/criminal laws, backed by threats of sanctions, including jail, fines, and job and pension forfeiture. These laws have expanded the definition of corruption to cover a broad spectrum of conflicts of interest and even the appearance of conflicts of interest. Moreover, codes restrict non-governmental employment opportunities and investment decisions. The companion financial disclosure requirements seek to deter conflicts of interest by opening up public officials’ financial affairs to public scrutiny.

According to the modern-day architects of the anticorruption project, financial disclosure by public officials must be exhaustive and ongoing. Review must be entrusted to an agency situated outside operational lines of authority. Rather than relying on credentials or professional norms, the crime-control strategy relies on deterrence, surveillance, and investigation.

New York City’s ethics legislation has profound implications for public employees and public administration. Some qualified people will be deterred from taking government jobs. Perhaps more important, financial disclosure undermines trust in public administration and public officials. Instead of strengthening public service, ethics legislation might negatively affect morale. Public officials may resent legislation that they perceive to be directed at them or because they have to expose their family finances to public scrutiny. Indeed, they are likely to feel as if others regard them as potential criminals who seek opportunities to enrich themselves and their friends, rather than as trusted public servants who have made financial sacrifices to serve the public.

**FIVE**

**Whistleblowers: Uncovering Wrongdoing at Any Price**

The Congress must also weigh the objective of stronger protection for whistleblower disclosures against the objectives of management authority and accountability. Unrestrained whistleblowing could raise levels of dissidence and insubordination to the point where efficiency could be affected.

Comptroller General’s Report, Hearings Before the House Subcommittee on Civil Service, 15 May 1985

Encouraging public employees to disclose information (“blow the whistle”) to officials outside their own agencies, to politicians, or even to the media about their supervisors’ corruption and misfeasance is another important component of the modern day anticorruption project. A strategy for encouraging “whistleblowing” emerged in the 1970s; it was predicated on the belief that public employees could and would expose a great deal of corruption and other wrongdoing if they were guaranteed protection from reprisals by their supervisors. Consequently “whistleblower laws” seek to protect employees who disclose wrongdoing to persons outside the bureaucratic chain of command by giving outside investigators and agencies the power to look into the employees’ complaints and to prevent the employees from being disciplined or disadvantaged in any way. While the contribution of whistleblowers to detecting corruption is not measurable, they certainly have direct and indirect effects on public administration; most important, they undermine the disciplinary authority of agency heads and supervisors over their subordinates.

Since the early 1980s, twenty-one states have enacted whistleblower protection laws. The proliferation of these anticorruption laws serves two purposes: (1) to encourage disclosure of wrongdoing; and (2) to act as a deterrent. According to the Feerick Commission, new whistleblower rules and regulations help to create an environment in which opportunities and incen-
tives for public officials to abuse the public trust are reduced. The deterrent purpose neatly supports the panoptic vision of corruption control—public officials will be less likely to behave corruptly if they fear that any colleague or subordinate is a potential whistleblower.

**The Federal Whistleblowing Initiative**

The federal Civil Service Reform Act of 1978 (CSRA) marked the emergence of the whistleblower protection movement. The CSRA created three new organizations: the Office of Personnel Management (OPM), the Merit System Protection Board (MSPB), and the Office of Special Counsel (OSC). The OPM is the general administrator of the civil service system and has no direct responsibility for enforcing whistleblower protections. The MSPB is authorized to hold hearings and appeals of federal employees' grievances. The OSC, an external control agency, is charged with investigating whistleblower allegations of waste, fraud, and abuse, and complaints by federal employees claiming to have suffered reprisal for the lawful disclosure of information that the employee reasonably believed evidenced: (1) a violation of any law, rule, or regulation, or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The law protects the whistleblowing employee from such negative personnel actions as demotion, termination, and transfer, and also from negative inactions such as failure to promote. Proponents of increased whistleblower protection argue that more law is required because it is not unusual for whistleblowers to experience adverse consequences following a disclosure. Lobbying for a more comprehensive whistleblower law, Senator David Pryor stated that "in the cruel world of the bureaucracy, most Government whistleblowers can expect extraordinary efforts by their own agency to shut them up, to discredit them, or to eliminate them."3

A decade later, Congress held hearings on the effectiveness of the Civil Service Reform Act's whistleblower protections. Many people, both for and against increased whistleblower protections, testified, including members of Congress, whistleblowers, OSC and MSPB officials, and representatives of organizations like the Whistleblower Coalition and the Government Accountability Project. Some witnesses charged that the CSRA provided inadequate protection to whistleblowers. Most of the blame was laid at the OSC's doorstep. Senator Carl Levin called the attitude of former special counsels "lackadaisical," claiming that one of them warned potential whistleblowers, "[u]nless you are in a position to retire or are indepen-

dently wealthy, don't do it. Don't put your head up because it will be blown off."4 Moreover, Harold Hipple, a former Veteran's Administration employee who claimed he had been fired after blowing the whistle on a supervisor, testified that it took the OSC four months to schedule an interview. Hipple stated that the OSC took no written statements during his interview and interviewed no witnesses to the police brutality he had alleged.5 Witnesses from the Government Accountability Project and the Whistleblower Coalition offered similar examples of OSC apathy.

The OSC representative admitted that the agency had not yet lived up to expectations, but attributed its shortcomings to inexperience. OSC Special Counsel William O'Connor urged Congress to maintain the status quo now that the OSC had become "a properly disciplined investigative and prosecu­tive force... More law is not what makes the country work better."6

There was never any doubt that the hearings would result in a recommendation for greater whistleblower protections. Supporters of increased protections cited a 1983 MSPB study which found that 37 percent of federal employees would not blow the whistle for fear of reprisal.7 Opponents of stronger whistleblower laws questioned the importance of the study:

It's in the nature of all of us to be reluctant to come forward, and I suspect whatever bill is passed, if you go out and take a survey of the federal workforce, or a corporate workforce for that matter, you're going to get probably the same minimal percentage of people saying they are concerned about coming forward. I don't know that you can ever address that legislatively.8

Nonetheless, the Whistleblower Protection Act of 1989 strengthened the whistleblowing machinery in five ways:

1. It made the OSC more independent of the MSPB so that it would be an advocate for self-proclaimed whistleblowers, rather than a watchdog for the merit system.
2. It permitted whistleblowers the option of bypassing the OSC entirely and taking their complaints directly to the MSPB.
3. It lowered the standard of proof necessary to make out a case of protected whistleblowing. The employee must show that his or her disclosure of information was "a factor" (rather than the predominant or motivating factor) in the subsequent negative personnel action or inaction.
4. It provided that once an employee showed that the disclosure was a factor in the negative personnel action or inaction, the burden of proof shifted to the agency, which must prove that it would have taken the same personnel actions regardless of the disclosure.
5. It authorized lawyers' fees in the event that the whistleblower prevailed before the MSPB.
The apparent premise underlying the 1989 Act is that whistleblowers’ allegations are generally true. Therefore, the OSC must operate under the assumption that any change in employment status or the work environment following a disclosure is more likely than not a reprisal.

In 1994, the Senate introduced a new anticorruption law (the Anticorruption Act) designed to expand the federal government’s role in punishing and preventing public corruption at the federal, state, and local levels. One section of the proposed Act provided for greatly expanded whistleblower protection, which significantly departed from current state and federal whistleblower laws. Most existing whistleblower laws contain a reporting requirement, which specifies to whom the whistleblower must report wrongdoing, whether agency heads or supervisors must be notified of the wrongdoing before an external agency can be notified, and the standard of wrongdoing covered by the law (e.g., gross mismanagement, waste, abuse of authority, or “reasonable belief” that the law has been violated). The proposed Anticorruption Act contained no reporting requirement. Furthermore, while most existing whistleblower laws provide for backpay and reinstatement, the proposed Act authorized treble backpay and up to five years imprisonment for retaliating employers.

The proposed expansion of whistleblower protections ignores the importance of management control and efficiency in the workplace. Some public employees facing layoffs or legitimate discipline will surely be tempted to claim whistleblower status. An employee may report accusations regarding virtually anything (use of government word processors for personal matters) to virtually anyone (a tabloid), and, in the event of a disciplinary retaliation, he or she obtain substantial damages. The proposed Act provides no safeguards, such as reverse attorney fees or penalties, to prevent bad-faith whistleblowers from flooding the OSC, the Department of Justice, or other government agencies with insignificant, unlawful, or fabricated managerial “retaliation.”

**New York City’s Whistleblower Law**

The federal legislation in 1978 and 1989 triggered a slew of state and local whistleblower laws. New York City’s whistleblower law 12 was passed in 1983 in the wake of a small scandal involving disciplinary action against an analyst who reported mismanagement of the city’s medicare program. When the media exposed this retaliation, it triggered a call for remedial legislation. Mayor Koch reinstated the employee and proposed an ordinance patterned after, but even stronger than, the federal whistleblower law. One extraordinary provision, which did not pass, would have required, on pain of dismissal, city employees to report any evidence of corruption or conflicts of interests that came to their attention. This proposal would have gone far toward institutionalizing the kind of pervasive monitoring and reporting that Foucault anticipated.

The New York City whistleblower law prohibits retaliatory personnel actions against employees who disclose information to the Department of Investigation or the City Council about “corruption, criminal activity or conflict of interest by another city officer or employee, which concerns his or her office or employment, or by persons dealing with the city, which concerns their dealings with the city.” This law was designed to encourage city employees who previously were afraid to come forward with evidence or suspicion of corruption, or who were reluctant to take complaints outside the agency’s chain of command in order to communicate directly with the Department of Investigation.

While other cases are investigated by the DOI’s inspectors general (IGs), who are assigned to specific agencies and are therefore reasonably familiar with agency procedures and operations, whistleblower cases are investigated by the DOI’s central staff. Most DOI personnel, and almost all central staff investigators, are recruited from outside city government. It is almost inevitable, and in fact part of the law’s design, that there will be an adversarial and even hostile relationship between the DOI and the executive agencies in whistleblower cases.

Once a city employee claims to have suffered retaliation for whistleblowing, the DOI must investigate. As a matter of course, DOI personnel interview the whistleblower’s supervisor and colleagues. When the investigation is completed, which can take months, the DOI issues its report and recommendations to the whistleblower’s agency head. The agency head must accept or reject the findings of the investigation without benefit of the interview transcripts. While the DOI cannot compel an agency head to follow its recommendations, it may be professionally risky to reject a DOI recommendation that favors the whistleblower, since this could be interpreted as “being soft on corruption” or, even worse, as corrupt in itself.

One New York City department’s experience with whistleblower cases illustrates the kind of tensions that this anticorruption strategy can generate. G. P. (not the individual’s real initials), accused coworkers of corruption at around the same time that the agency attempted to fire him for poor work. Because the complaint of corruption came first, the DOI investigated the situation and declared the employee a whistleblower. The agency’s case against G. P. included a long list of complaints from citizens about arbitrary
and abusive treatment. The agency also had considerable documentation of G. P.’s poor work record. According to the commissioner, his productivity was less than half of the average for workers in his job category.

The DOI investigators sought to determine who, if anyone, was responsible for unlawfully retaliating against G. P. Once the DOI became involved, the operating agency had to suspend its disciplinary action against G. P.; it could neither remove nor transfer him while the investigation was pending. The DOI’s investigative posture presumes retaliation and shifts the burden of proof to the agency to show a legitimate reason for the negative personnel action. Because interview transcripts and other evidence are not available to the agency, the DOI’s presumption of retaliation is difficult to rebut. In the G. P. case, it took the DOI four years to close its investigation and approve his termination. By this time, the agency head refused to act for fear of triggering criticism. According to an agency administrator, “paranoia was pervasive. DOI was running scared because of its reputation in the 1980s, and our commissioner was afraid of appearing to approve of retaliation, even after DOI relented.” It took two more years, a change of leadership in the agency and in the DOI, and a full hearing by the Office of Administrative Trials and Hearings (OATH), to finally remove G. P. In the meantime, the productivity of other employees in G. P.’s unit plummeted. Morale, a supervisor noted, hit an all-time low.

A second case in the same agency involved P. P., who reported an incident of corruption to the agency IG. The IG found the allegation baseless. P. P. then falsely told his coworkers that he had filed corruption complaints against them. When his supervisor reprimanded him for spreading disinformation, P. P. again complained to the DOI, which now labeled him a whistleblower. He began skipping work and neglecting duties. The agency head demoted him. P. P. filed yet another complaint with the DOI. More than six months later, the DOI agreed with the agency and withdrew the whistleblower designation. Then P. P. sued the city for violating its whistleblower law. The corporation counsel decided that fighting even a defrocked whistleblower would look bad and agreed to a monetary settlement.

In yet a third incident involving this same agency, an investigator in the agency’s disciplinary unit correctly anticipated that he was about to be fired. He told the DOI that personnel in his unit had covered up certain cases that would have embarrassed the agency. During the investigation, which dragged on for two years, the disciplinary unit all but ceased to function. Its managers spent much of their time consulting lawyers about DOI’s investigation. Finally, the DOI withdrew the presumption of retaliation and the cover-up charge.

A top DOI official estimates that not more than a dozen employees a year file whistleblower claims with the DOI about retaliation for whistleblowing, but nobody at the DOI or any other city agency has tried to determine what percentage of whistleblower cases have produced credible information about corrupt or other illegal activity. That fact alone testifies to the failure to integrate corruption control with public administration.

Effects on Public Administration

The Senate Committee which drafted the 1989 federal whistleblower law recognized that protecting whistleblowers could conceivably provide a cover for incompetent employees who might falsely claim whistleblower protection in order to fend off legitimate disciplinary action.

The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in an action which would constitute grounds for dismissal for cause, the fact that the employee “blows the whistle” on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action.

While the Senate Committee spotted the problem, it offered no remedies for avoiding it. Rather, the senators simply reasserted their confidence in the value of this anticorruption control.

Protecting employees who disclose government illegality, waste, and corruption is a major step toward an effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses.

Inevitably, some disgruntled, incompetent, or otherwise poorly performing employees will file whistleblower claims in order to keep their jobs as long as possible or simply to harass their supervisors. Interestingly, when an evaluation showed that the OSC rejected the vast majority of whistleblower claims for being ill-founded, Congress interpreted this as a failing on the part of the OSC rather than as evidence of complainants’ misuse of the whistleblower machinery. Thus, the whistleblower law was amended to further protect complainants, and the OSC was reorganized into an agency whose
sole mission is to protect whistleblowers, rather than to protect the integrity of the civil service merit system. Further, the law was amended to remove almost completely the agency head from participation in the investigation. Thus, Congress has indicated its belief that top officials in the executive branch not only refuse to take seriously complaints of wrongdoing and mismanagement in their agencies, but commonly retaliate against those who make such allegations.20

It is worth asking whether and to what degree the encouragement of whistleblowing undermines authority and efficiency in public agencies.21 Top public-sector managers worry about the consequences of firing or otherwise disciplining disgruntled employees.22 The employee may level spurious charges against her supervisors, claim that the disciplinary action is a reprisal for whistleblowing, and at no expense to herself can generate a time-consuming and resource-draining investigation that will drag on for months or even years.23 During this time her supervisors' authority over her will be very limited. If the disciplinary action is ultimately reversed on the grounds that it was retaliatory, the supervisor loses face and authority, while the agency suffers from lowered productivity and morale. This may deter the agency's managers from attempting to discipline poorly performing employees in the future.

A New York City agency administrator, a former IG, assessed the whistleblower program as follows:

The whistleblower laws are so broad and give investigators so much power that they are easily abused, and they have been abused. There are simply no checks. In all areas of litigation, lawyers will pore over materials to be sure that there is nothing they might have missed that will be picked up by the other side. In whistleblower proceedings there is no other side, so it has not been necessary for the DOI to be very careful about who it backs or what kind of evidence allegations are based on. There's a real need for some neutral arbiter in the process. It is commonplace, currently, for people's reputations to be impugned in press releases before those people have had a chance to respond or are even aware of what's been said about them.

Whistleblower rules reinforce centralized public administration. By definition, whistleblowing calls the honesty and legitimacy of agency management into question. Creating mechanisms by which employees can lodge complaints and charges outside the chain of command may bring to light more high-level corruption, but the evidence is inconclusive. Of practical concern is whether managers will be deterred from enforcing discipline. The three cases discussed above are widely known and serve as cautionary tales for New York City managers. It has become rational for a manager to tolerate an ineffective or abusive employee, given the enormous trouble that will result if the employee impugns the manager's honesty with a whistleblower complaint. Without speedier determination of the validity of whistleblower claims, false claimants will remain on the job poisoning the atmosphere and undermining the manager's authority.

Conclusion: The Politics of Whistleblower Legislation

Anticorruption reformers focus on the corrosive effects of corruption on governing; they do not deal with, or even admit, the negative impacts of anticorruption controls on public administration. The politics of corruption and reform inevitably spawns proposals for more and tougher anticorruption controls. Yet there has been a steady stream of recommendations to pass legislation that is increasingly protective of the whistleblower. For example, Elizabeth Holtzman, New York City comptroller from 1989 to 1993, labeled the city's law totally inadequate and recommended legislation that would create a new corruption-fighting agency, the Office of Special Counsel (OSC), which "would not be controlled by anyone." Holtzman's proposals are similar to the federal Anticorruption Act, which has been considered and rejected by Congress each year since 1991. They are also consistent with many contemporary proposals to create completely independent monitoring agencies. According to Holtzman's vision, "the OSC would investigate allegations of retaliation, defend whistleblowers against retaliation at no cost to them, and receive and investigate disclosures of improper government actions from public employees."24 She proposed that public employees be authorized to make disclosures of "misdeeds" to law enforcement agencies or the media, not just to the DOI and the City Council as current law provides. Moreover, under Holtzman's proposal, if the disclosure results in a cost savings to the public, the whistleblower is eligible for a $2,000 reward.

The Feerick Commission pointed out that the Talent Bank (discussed in chapter 3) might never have been uncovered had not a courageous public employee come forward to the commission. According to the commission, this showed the critical importance of mobilizing rank-and-file public employees to help control corruption.

Having been struck by the frequency with which public employees evinced concern that they would be punished for undertaking what the Commission regarded as an important civic responsibility—namely, the disclosure of possible government misconduct to the appropriate public authorities—we
Part Two: Sanitizing the Personnel System

turned our attention to the New York State whistleblower law. We examined
the law to determine whether it is adequate to discourage and remedy wrongful
retaliation against those who disclose misconduct by government officials (or
whether, to the contrary, the widespread concern of public employees is rea­
sonable). We have concluded that the protection provided to public employees
who reveal wrongdoing is too limited to reduce the legitimate fear of reprisal
that employees experience.25

Although it had no empirical information on reprisals against state em­
ployees who disclosed evidence of fraud, waste, and abuse to their super­
visors or others, the commission offered sweeping recommendations
similar to Holtzman’s. The Feerick Commission advocated: permitting pub­
lic employees to complain directly to an outside agency rather than trying to
resolve the matter through agency channels; freezing any adverse employ­
ment action from the time a complaint is lodged until the investigation is
completed; and expanding the type of “improper governmental actions”
covered by the whistleblower laws.26

The protection and encouragement of whistleblowers is one facet of the
emerging panoptic vision of corruption control. It encourages all employees
to be investigators and activists in the anticorruption project. The whis­
tleblower machinery itself is a good example of the entrenchment of ex­
ternal control mechanisms. This machinery is predicated on the belief that
the bureaucracy cannot effectively police itself. It assumes that anticorrup­
tion responsibility can only be effectively discharged by those who are inde­
pendent of and have no stake in the target agency’s reputation. However,
such people are also likely to have little information about the agency’s op­
erations and no interest in whether the agency achieves its goals. Further­
more, this whistleblowing machinery empowers the rank and file at the
expense of their managers and encourages an agencies’ most disgruntled
employees to come forward with even spurious complaints. Undoubtedly,
some of the whistleblowers’ complaints will have merit, but the overall
value of this corruption control must be weighed against the direct and indi­
rect costs to effective public administration.