INTRODUCTION

American politics consists largely of pressures and deals. Certain of these pressures and deals are prohibited under the name of bribery, a particularly heinous offense. This Article asks: which ones, and why?

A. Intermediate Political Theory

What are the ends of the state? When is authority legitimate? What is a representative, and how should a representative act? These are among the loftier questions of political theory that have received and continue to receive scholarly attention. Let us refer to these and similarly broad "theoretical" questions as primary questions.

Much less frequently considered are questions like these: Given that most public officials are neither saintly nor depraved, how should we like them to behave? Given that public officials have ambitions, desires for security, and other personal goals, to what reasonable standards should we like them to adhere? Of the many types of pressure to which public officials are subjected, which are so legitimate that officials should be encouraged to respond af-

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Earlier versions of this Article were presented to the Twelfth World Congress of the International Political Science Association in 1982 and to the Law and the Political Process Study Group at the Annual Meeting of the American Political Science Association in 1983. Professors Marlene Arnold Nicholson and Booth Fowler were discussants at the latter event and provided numerous helpful comments above and beyond the call of duty. In addition, the earlier versions have been presented to enough other groups less formally and have been read by enough individuals that I cannot name here everyone who has provided me with useful suggestions. Nevertheless, I am grateful to all of them. I will single out Steven Shiffrin and Stephen Yeazell, two of my colleagues, who read earlier versions with particular care. In the spirit of the subject matter of this Article, I value so highly the generosity of all those who provided suggestions that in return I have been influenced to absolve them from blame for the errors and weaknesses that no doubt have survived their scrutiny and therefore remain in these pages.
firmatively? Which pressures are tolerable? Which are improper? To what extent does the structure of incentives and disincentives created by our political system channel official behavior in the preferred direction?

Questions of this sort fall between the primary questions of political theory and the specific questions of political reform, such as how campaign finance should be regulated, how legislative district lines should be drawn, or our present concern, what kinds of political pressure should be proscribed as bribery. Answers to the intermediate questions must be informed by theories developed at the level of the primary questions, but require more by way of empirical inquiry into the specifics of the governmental system and the society of which it is a part. In turn, the answers to the intermediate questions may provide criteria for assessing existing political institutions, and may identify possible improvements.

In my opinion, American political theorists and political scientists have failed to give adequate attention to the intermediate questions.1 The consequences of this inattention are evident in the confusion surrounding the subject of this Article, the law of political bribery.2

B. Bribery's False Image

It often has been said that social scientists have given too little attention to official bribery and corruption.3 Whatever may be the sins of omission of the social scientists in this regard, they pale beside those of the legal scholars, who have ignored the subject almost entirely.4 This neglect cannot be excused on the ground that acts of

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1. I do not claim to demonstrate this assertion in this Article. I do make these claims: 1) The theories discussed infra notes 174–226 and accompanying text do not solve the problem of political bribery; and 2) If there is extant a body of theory that can solve the problem, it has not yet found its way into the literature on political corruption.

2. Whereas the paradigm case of a "bribe" ordinarily involves a payment to induce an officer to neglect more or less clearly defined duties, as in a law enforcement situation, here we are concerned with "political bribery." This is not a term of art, but simply a phrase I have coined to suggest a different paradigm, involving a policy-making official, especially an elected official, with broad discretion. I will focus almost exclusively on problems having a direct bearing on political bribery.


4. A few student comments are exceptions. Note, Campaign Contributions and
bribery or prosecutions for bribery are rare. They are not.\(^5\)

One explanation for the absence of legal scholarship may be the widespread view that the crime of bribery covers only the most obvious instances of corrupt conduct. For example, in its famous campaign finance decision, the Supreme Court alluded to bribery laws and stated that they deal with "only the most blatant and specific attempts of those with money to influence governmental action."\(^6\) In the common conception, reflected in this statement by the Supreme Court, the crime of bribery is the black core of a series of concentric circles representing the degrees of impropriety in official behavior. In this conception, a series of gray circles surround the bribery core, growing progressively lighter as they become more distant from the center, until they blend into the surrounding white area that represents perfectly proper and innocent conduct.

The crime of bribery is regarded as having fixed, clear boundaries.\(^7\) These boundaries may be inadequate, in the sense that they do not encompass all improper conduct. On the other hand, they surely do not penetrate far into "grey areas" of conduct regarded as questionable, much less into the white area of clearly proper conduct. In short, the bribery laws are not supposed to be dangerously broad.\(^8\) In particular, the bribery laws are supposed to require a

\(^5\) See, e.g., J. NOONAN, BRIBES, supra note 4, at xvi; Siegel, FBI Probe Unraveling Scandal in Oklahoma, L.A. Times, Oct. 11, 1981, § 1, at 1, col. 2; M. Pinto-Duschinsky, Theories of Corruption in American Politics 1-5, 29-43 (Sept. 5, 1976) (unpublished paper prepared for delivery at the 1976 Annual Meeting of the American Political Science Association, on file at the UCLA Law Review). It may be assumed safely that acts of bribery themselves occur more frequently than prosecutions for bribery.

\(^6\) Buckley v. Valeo, 424 U.S. 1, 28 (1976).

\(^7\) See, e.g. infra notes 56–59 and accompanying text.

\(^8\) Professor Reisman distinguishes conduct condemned both by the "myth system" and the "operational code" from conduct condemned by the former but approved by the latter. W. REISMAN, supra note 4, at 15. It seems to me that the image in the text of a range of conduct extending from the most corrupt to the most innocent better
quid pro quo—an explicit exchange of a specific benefit for a specific official action (or inaction)—a requirement that is evaded easily, and is difficult to prove even when it has not been evaded. Thus, the difficulty with bribery laws is supposed to be ineffectiveness rather than uncertainty. Perhaps it is understandable that legal scholars have devoted their efforts to the presumably more difficult intellectual and legal questions to be found in the grey area. Witness, for example, the voluminous amount of legal writing on campaign finance.

This conception of the crime of bribery as narrow and sharply circumscribed may explain the lack of legal scholarship; it cannot serve as a justification, however, because it is false. Most American bribery statutes and many of the judicial decisions interpreting them do not require a quid pro quo in the sense described above. More generally, the statutes as interpreted are susceptible of being applied, and occasionally have been applied, to situations that occur on an everyday basis in American politics. Nor are the legal questions necessarily limited to whether an activity is within the “blackness” of bribery or the “dark greyness” of conduct that is still clearly less than proper. In the recent case of Brown v. Hartlage, the Supreme Court was faced with the question of whether promises made to voters might consistently with the Constitution be treated as bribery of the voters. The Court described the problem as one of distinguishing “between those ‘private arrangements’ that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system.” While Brown v. Hartlage is atypical in that it deals with bribery of voters rather than bribery of public officials, it illustrates that nice distinctions determining what violates a bribery statute and what does not may not divide shades of grey, but instead may separate the darkest black from the brightest white.

Since some of the early discussion in this Article considers bribery in the abstract, a preview of the type of concrete problems captures both the complexity of the subject and the way people think about it. “Greyness” may be a function of either an ambivalent view of a practice held throughout the society or approval of a practice by some and condemnation by others.

12. Id. at 56.
13. See also People v. Brandstetter, 103 Ill. App. 3d 259, 430 N.E.2d 731 (1982), in which the court said of a bribery defendant whose conviction it affirmed: “[H]er conduct differed only subtly from that which is either statutorily permitted or constitutionally protected.” Id. at 261, 430 N.E.2d at 733.
that will be considered later may be helpful. Such a preview also provides an opportunity for the reader to test his or her intuitions regarding bribery and corruption before delving into the analytical portions of this Article.

Consider, then, whether you believe a bribe has occurred in the following specific situations:

1. A member of Congress agrees to introduce a private immigration bill to benefit relatives of a union leader in exchange for the leader’s agreement that the union will endorse the member in his reelection campaign.¹⁴

2. A city council member agrees to support a zoning variance in exchange for the benefited landowner’s agreement not to run against the member at the next election.¹⁵

3. A, a state official, accepts money in exchange for trying to influence the official acts of B, another official, over whom A has political influence but no legal authority.¹⁶

4. A trade association official announces publicly that contributions will be made to incumbent legislators if and only if they oppose a particular bill. A legislator votes against the bill, in part out of a desire to receive the contribution.¹⁷

C. Scope and Methodology

This Article has two interrelated purposes. The first is to elucidate aspects of the law of bribery in the manner more or less traditional to legal scholarship: the elements of the crime are set forth, problems appurtenant to each element are identified, and authorities and analysis are brought forth to clarify or solve the problems. Very little, however, can be accomplished by traditional legal analysis alone. What I shall refer to as the “descriptive” elements of bribery do not and cannot identify the specific types of actions that constitute bribery. Rather, the distinguishing of bribes from nonbribes requires the application of more general standards distinguishing corrupt official conduct from proper conduct. Accordingly, the second purpose of this Article is to explore some of the intermediate questions of political theory that, it will be shown, must be resolved if we are to create a coherent law of bribery.

With respect to the first purpose, this Article does not purport to be a comprehensive treatise on the law of bribery. The underlying purpose is one of political theory: to get at one aspect of the question of what pressures brought to bear on officeholders are regarded as improper. The bounds of the present inquiry into the law

¹⁴. See infra notes 92–99 and accompanying text.
¹⁵. See infra notes 100–02 and accompanying text.
¹⁶. See infra notes 118–25 and accompanying text.
¹⁷. See infra notes 170–72 and accompanying text.
of bribery are determined by this underlying purpose. Matters that in practice admittedly are likely to be of considerable importance in actual bribery prosecutions but that are peripheral to this purpose are not considered. The Article gives occasional attention to statutes that exist in some jurisdictions making it a lesser offense to give or accept "unlawful gratuities." This Article examines the law of bribery as a case study in normative politics. Although I hope it is informed by a sense of the realities of our political process, the Article is not an empirical consideration of how the law of bribery is administered or enforced. Indeed, let it be clear at the outset that many of the transactions identified in this Article as definite or likely bribes are engaged in by public officials and those who deal with them on virtually a daily basis, with only the remotest chance of triggering a bribery prosecution.

Prosecutors nevertheless must make decisions about when to prosecute, and when they decide to go forward their cases come before judges who must decide them. For these officials, the question addressed in this Article—what counts as a bribe?—is of immediate practical importance. But perhaps the best way to think of the point of view of this Article is to put oneself in the position of a conscientious individual in public life who may wish to act within the law (or an attorney advising such an individual), whether or not prosecution is a realistic possibility.

18. Thus, this Article does not consider defenses to the crime of bribery, either the general defenses of the criminal law or special defenses that may have special pertinence to some bribery prosecutions, such as the defense based on the speech or debate clause of the federal Constitution. U.S. Const. art. I, § 6, cl. 1; see United States v. Helstoski, 442 U.S. 477 (1979); United States v. Brewster, 408 U.S. 501 (1972).

For the most part we shall not be concerned with whether a transaction is initiated by the official or by the briber, and therefore we shall not inquire into the distinctions between bribery and the related crime of extortion. Broadly speaking, extortion differs from bribery in that in the former the party to the transaction who is not a public official is regarded as a victim rather than a perpetrator. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171, 1173-1201 (1977); Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall L. Rev. 1 (1971).

Nor shall we consider possible vagueness problems raised by bribery statutes. Numerous vagueness challenges to bribery statutes have been rejected by both state and federal courts. For discussion and references to federal cases, see Comment, Cautious Revision, supra note 4, at 1034-35. It is possible that some courts will give a narrow construction to bribery statutes because of vagueness concerns, but I have not found an instance in which a court has done so expressly. See Note, Campaign Contributions, supra note 4, at 453-54.

Finally, we do not consider matters of evidence or of prosecutorial discretion. For a discussion of prosecutorial discretion in cases of local corruption, centered around considerations of federalism, see Ruff, supra, at 1201-21.


20. Once in my professional career I have been asked by a public official if a pro-
With respect to the second purpose of this Article, I shall consider three major schools of thought regarding representation and the public interest in American political theory. I shall demonstrate that for different reasons, none of them takes adequate account of the public official as an individual with personal and political goals as well as public responsibilities. Accordingly, these schools of thought are of little assistance in resolving the problem of defining political bribery. This is a troubling conclusion because, as has been shown, bribery is thought of as occupying one end of the spectrum extending from propriety to impropriety in official conduct. If political theory cannot help identify a bribe, there is little ground for supposing that it can help sort out other important and possibly more subtle problems of political ethics, such as those posed by conflicts of interest or various sorts of lobbying practices.

The methodology will be straightforward. To illustrate how intermediate political theory might be helpful in resolving practical questions, I shall begin in Part I with a fairly simple problem posed by a specialized type of bribery statute, involving inducements to potential candidates not to run for public office. I shall show that the descriptive elements are not by themselves sufficient to define this offense, but that the generally accepted conception of a political party system can lend substantive content to an additional element—that the proscribed actions must be performed "corruptly"—and thereby can assist in the interpretation of these statutes. Even if the reader disagrees with the specific conclusion that I reach, the connection between the interpretation of the statute and conceptions of political competition should be clear.

In Part II I shall turn to the elements of the general bribery statutes. As stated above, the focus will be on questions relating directly to political bribery. Again it will be seen that the descriptive elements must be supplemented by a requirement of "corrupt" intent, but finding substantive content for that requirement in the general bribery context will be more difficult than in the case of the specialized statutes considered in Part I.

21. See infra notes 25-38 and accompanying text.
22. See infra notes 39-168 and accompanying text.
23. See supra note 2.
In Part III I shall consider political bribery and the requirement that proscribed conduct be "corrupt" in light of contemporary theories of representation and the public interest.

I. Bribery of Candidates

Suppose a lawyer is consulted by Arturo, a member of the State Assembly and the favored candidate in his party's primary for an open State Senate seat. On the previous day, Arturo had a meeting with Barbara, the only potential candidate capable of giving Arturo a tough race. During the meeting Barbara offered to run in the primary for the Assembly seat that Arturo will be vacating instead of challenging Arturo for the Senate seat, if Arturo would agree to support Barbara in the Assembly primary and to help her raise money. Since Arturo anticipates a tough general election contest, he would like to avoid strong opposition in the primary. He has no strong feelings one way or the other about Barbara as a candidate for the Assembly. Accordingly, he would like to accept Barbara's offer if he may do so without violating the state's bribery laws. How should the lawyer advise him?

The proposed arrangement will not violate a general bribery statute because it involves no official act. However, some states have what I shall call "candidate-bribery" statutes, such as the following California provision:

A person shall not . . . pay, solicit, or receive . . . any money or other valuable consideration . . . in order to induce a person not to become or to withdraw as a candidate for public office . . .

The question raised by Arturo's situation is whether, for purposes of such a statute, political benefits like campaign support and fundraising assistance should count as a candidate-bribe. The New York Appellate Division, apparently the only court to have been presented with this question, seems to have answered in the affirmative.

24. See infra notes 169–242 and accompanying text.
25. An "open" seat is a seat for which no incumbent is running for reelection.
26. See generally infra notes 118–25 and accompanying text.

In New York, there is no candidate-bribery statute with specific terms similar to the California statute quoted in the text. However, N.Y. ELEC. LAW § 17-102(5) (McKinney 1978) (previously numbered as § 421(5)), which prohibits "fraudulently or wrongfully [doing] any act tending to affect the result of any primary election," has been construed to prohibit bribing a potential candidate not to run. People v. Lang, 36 N.Y.2d 366, 329 N.E.2d 176, 368 N.Y.S.2d 492 (1975).
Straightforward consideration of the elements of the offense, as described in the California statute above, suggests that if Arturo accepts Barbara's offer, he will be guilty of candidate-bribery. His agreement to support Barbara and raise money for her constitutes "valuable consideration," and the support and fund-raising assistance unquestionably will be provided "in order to induce [her] not to become . . . a candidate" for the state Senate. Nevertheless, this conclusion is, I contend, harmful for the political system and contrary to the probable purpose of the statute.

Although the framers of the United States Constitution may have had a negative view of political parties, parties became a central part of the American political system early in our history. During the past century, American commentators and political scientists almost universally have agreed that parties are desirable and perhaps essential to democratic practice. The "essence" of this agreement has been described as the "theory . . . that voters should be able to choose between recognizable competing leadership groups." That is, if elections are to provide voters with even a semblance of choice between competing policy orientations, like-minded individuals who seek office must be able to form coalitions in seeking voter support. The broadest coalitions of this sort in American politics are the major political parties.

If parties and other political coalitions are to compete against each other effectively, they must be permitted some ability to coordinate their own efforts. If there are two strong potential candidates within a single party and two offices for which they might run, the overall effectiveness of the party is strengthened if an accommodation is reached that prevents them from engaging in self-destructive conflict over one of the offices. Such an accommodation will include, at a minimum, the agreement of each candidate not to run for the office allocated by the agreement to the other candidate. If the candidate-bribery statute is interpreted to prohibit political benefits to induce withdrawal, such a reciprocal agreement would vio-


30. L. Epstein, supra note 29, at 3.

31. The conflict is self-destructive in two senses. First, assuming that the candidates are the two strongest available, the party will be forced to field a weaker-than-necessary candidate for the other office. Second, as has been supposed in Arturo's problem, the conflict between the two strong candidates may weaken the position of the primary election winner in the general election contest.
late the statute, since the agreement of each candidate to defer to the other as to one of the offices is a significant political benefit and therefore "valuable consideration" to the other.\textsuperscript{3}\textsuperscript{2} Even if the agreement includes additional political consideration, such as financial support of one candidate by the other, it is difficult to see how the public is harmed. Because such accommodations enhance the ability of the party to present an effective choice to the voters, the accommodations should not be regarded as violative of the candidate-bribery statutes.

Even if the foregoing analysis is accepted, does the language of the statute permit a construction that it will not prohibit a deal like Barbara's and Arturo's?\textsuperscript{3}\textsuperscript{3} As will be seen in Part II, a requirement that the act of bribery be performed "corruptly" or with a "corrupt intent" has been read into a general bribery statute when such a requirement has not been set forth explicitly in the statutory definition.\textsuperscript{3}\textsuperscript{4} The present discussion of candidate-bribery illustrates a difficulty present on a much larger scale in the case of the general bribery statutes: A nonliteral interpretation of the statutes is necessary, because the descriptive elements of the crime, taken alone, cover too many actions that generally are regarded as proper conduct beneficial to the overall operation of the political system.

Once it is accepted that an element of "corruption" must be read into the candidate-bribery statute, the question arises, on what basis can Arturo's agreement to provide campaign support and financial assistance to Barbara's Assembly race in order to induce her not to run for the Senate be judged corrupt or not corrupt? The previous analysis suggests that the body of intermediate political theory relating to political parties and coalitions provides an an-

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\textsuperscript{3}\textsuperscript{2} This can be seen more clearly by altering the facts in Arturo's case. Suppose there is an open seat for the House of Representatives as well as for the State Senate, and that at an early stage Arturo and Barbara are contemplating running for either office. They meet and agree that it is in their mutual interest for them not to seek the same office. Then, by whatever method, they agree who will run for the Congressional seat and who will run for the State Senate. Under the broad interpretation of the candidate-bribery statute, each has provided a benefit—not running for one office—in exchange for the other's not running for a different office.

\textsuperscript{3}\textsuperscript{3} When I discuss this problem with my students, some who initially believe that Barbara's proposal constitutes bribery adopt a different opinion when the facts are changed so that the deal is first proposed not by Barbara but by the state party leader. Intuitively, this makes sense, because the arrangement appears to have been initiated out of concern for the well-being of the party rather than the individual candidates. But the change in the facts is irrelevant so far as the literal language of the candidate-bribery statute is concerned.

\textsuperscript{3}\textsuperscript{4} See State v. Alfonsi, 33 Wis. 2d 469, 147 N.W.2d 550 (1967), discussed infra notes 46-48 and accompanying text. The New York statute that has been construed as prohibiting candidate-bribery applies by its terms only to fraudulent or wrongful acts. See supra note 28.
swer, namely that the transaction is not corrupt and therefore not a bribe.

Admittedly, it is possible to construct an argument to support the seemingly contrary result reached in People v. Hochberg, the New York case referred to earlier. Primary elections are held because of the belief that nominations should be decided by the electorate rather than within a party's inner circle. To the extent that agreements among candidates avoid contests, the choice might be said to be taken away from the voters, contrary to the intent of the statutes establishing primary elections. This might be regarded as particularly serious where, as in Hochberg, the partisan makeup of the district was sufficiently one-sided to insure victory in the general election to the winner of the primary.

This argument in favor of applying the candidate-bribery statutes to cases involving political rather than personal benefits to the withdrawing candidate depends on an unnecessarily atomistic conception of an electoral system. It does not follow from the statutory grant to the electorate of ultimate control over the nomination process through primary elections that all working coalitions within the party are bad. The existence of candidate coalitions does not deprive the electorate in primary elections of ultimate control over candidate selection. No coalition can be successful in a primary unless its members enjoy support among the party electorate, and nothing other than strong voter support for one coalition prevents an opposing coalition from being formed.

The existence of a candidate-bribery statute suggests a legislative judgment favoring electoral competition. There admittedly can be times and places where one party dominates and one coalition dominates within the dominant party. In such situations, accom-

35. 62 A.D.2d 239, 404 N.Y.S.2d 161 (1978). Hochberg's holding is equivocal because the defendant in that case offered more than campaign support. Hochberg was a member of the State Assembly who wanted to be reelected with as little difficulty as possible to strengthen his position when running for a judicial post the following year. In order to induce one Rosen not to oppose him in the primary, Hochberg offered to contribute $5,000 to Rosen's campaign to fill the Assembly seat after Hochberg vacated it. In addition, however, he offered a legislative staff position for a stand-in to be named by Rosen. If the offer of a staff position had been legitimate, a reversal of Hochberg's conviction would have been appropriate, because like-minded individuals should be able to form coalitions for obtaining appointive as well as elective positions, subject to constitutional limitations on patronage. See Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). However, in Hochberg the stand-in apparently was not expected to provide more than token services, and the salary was to be passed on to Rosen. The job offer was therefore a personal payoff to Rosen rather than part of a political accommodation, and the fact that the payoff would have come from public funds hardly mitigated Hochberg's wrongdoing. The result in Hochberg thus seems correct, but under the position advanced here, the court should have distinguished in its analysis between the job offer and the campaign contribution.

36. See supra text accompanying note 28.
modations among office-seekers within the ruling coalition will reduce rather than enhance competition. On the other hand, where intraparty or interparty competition between coalitions exists, the ability to reach accommodations within each coalition will enhance competition. It is debatable which situation is more prevalent, but the goal of making elections an occasion for policy choices by the voters is furthered by promoting competition between coalitions. For this reason, candidate-bribery statutes should be interpreted, in the absence of clear legislative intent to the contrary, not to include the provision of political benefits.\footnote{37}

The most important point for present purposes is not whether this conclusion is correct, but whether it has been shown that intermediate political theory provides a basis for reaching a conclusion. A belief that political coalitions are necessary or desirable as an everyday part of the political process entails the conclusion that offering political benefits in exchange for an agreement not to run for a particular political office should not constitute a candidate-bribe. On the other hand, a belief that each declared or potential candidate for office should operate independently of all other potential candidates would support a broader interpretation of a candidate-bribery statute. The voluminous scholarly work, almost universally supporting the formation of coalitions among candidates, is thus directly relevant to the resolution of a seemingly difficult legal question.\footnote{38}

II. THE ELEMENTS OF BRIBERY

This part of the Article considers the elements of the crime of bribery. Though the wording of American bribery statutes varies considerably, the crime as defined in the federal and most state statutes consists of the following five elements:\footnote{39}

\footnote{37. If this reasoning is accepted, then the lawyer may advise Arturo that he can enter into the agreement with Barbara. But given the unclear language of the statutes and the decision in Hochberg, the lawyer could give no assurance that the courts would accept his conclusion in the unlikely event of a prosecution for candidate-bribery.}

\footnote{38. See supra note 29. I do not claim to have made, in this section, a rigorous argument in favor of coalitions of candidates. To do so would carry us far afield. I have attempted to indicate the outlines of such an argument in order to illustrate how intermediate political theory can be applied to a specific problem of political law and policy.}

\footnote{39. The federal statute, 18 U.S.C. § 201 (1982), is representative. The statute defines bribery and acceptance of a bribe, respectively, in subsections (b) and (c):

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official . . . to commit . . . any fraud . . . on the United States; or}
1. There must be a public official.\textsuperscript{40}
2. The defendant must have a corrupt intent.
3. A benefit, anything of value, must accrue to the public official.
4. There must be a relationship between the thing of value and some official act.
5. The relationship must involve an intent to influence the public official (or to be influenced if the defendant is the official) in the carrying out of the official act.

Of these five elements only the first, that the person bribed must be a public official, is relatively straightforward.\textsuperscript{41} The sections that follow in this part will consider the remaining four elements.

First, however, the elements of bribery should be contrasted with those of a lesser offense that exists in federal law and in some states: giving or receiving an unlawful gratuity.\textsuperscript{42} A comparison of

\begin{verbatim}
(3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty, or
   (c) Whoever, being a public official . . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
       (1) being influenced in his performance of any official act; or
       (2) being influenced to commit . . . any fraud . . . on the United States; or
       (3) being induced to do or omit to do any act in violation of his official duty;

   Shall be fined . . . or imprisoned . . . or both . . .
\end{verbatim}

\textsuperscript{40} In the federal statute quoted in the previous footnote, the words "or person selected to be a public official" appear in each subsection immediately after the words "public official."

\textsuperscript{41} The boundary between the public and private sectors is sometimes unclear, and there can be difficult questions as to whether officials in entities that straddle the boundary are "public officials" within the meaning of the bribery statutes. See, e.g., Dixon v. United States, 104 S. Ct. 1172 (1984) (employees of non-profit corporation that serves as a subgrantee under a federal block grant program held to be public officials subject to 18 U.S.C. § 201); United States v. Hollingshead, 672 F.2d 751 (9th Cir. 1982) (official of a federal reserve bank held to be a federal official subject to 18 U.S.C. § 201). In addition, some state bribery statutes apply to persons who are not public officials, such as party officials, see, e.g., W. VA. CODE §§ 61-5A-2(3), 61-5A-3 (1984), or candidates for public office, see, e.g., W. VA. CODE § 61-5A-2(2) (1984). In the occasional case in which this element of the crime is in issue, it does not raise the conceptual questions surrounding political bribery with which this Article is concerned.

\textsuperscript{42} The federal statute, contained in the same section of the Penal Code as the main bribery statute, is again representative. 18 U.S.C. § 201 (1982):

\begin{verbatim}
(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . ; or
   (g) Whoever, being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or indi-
\end{verbatim}
the elements of the unlawful gratuity offense with bribery yields the following:

1. The requirement that there be a public official is substantially the same. A transaction involving a former official, however, can be an unlawful gratuity but not a bribe. This is because a bribe must be made in contemplation of a future official act, whereas an unlawful gratuity may be made in contemplation of an act in the future or the past.\(^4\)

2. The offense of bribery must be committed "corruptly." There is no such requirement for an unlawful gratuity.

3. The requirement that a benefit, "anything of value," must accrue to the official is identical for bribes and unlawful gratuities.

4. The requirement of an official act is identical for bribes and unlawful gratuities.

5. For an unlawful gratuity there must be an intent that the benefit pass to the official "for or because of" the official act. Unlike bribery, however, there need be no intent that the official act be influenced by the benefit.

This part will demonstrate that the general bribery statute has an ill-defined but potentially broad scope. Where, as under federal law, there is also a separate unlawful gratuity offense, the definitional difficulties are compounded. Rather than having to define one difficult boundary (between a bribe and a lawful act) it is necessary to define two such boundaries (between a bribe and an unlawful gratuity and between an unlawful gratuity and a lawful act).\(^4\)

rectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; Shall be fined . . . or imprisoned . . . or both.

Omitted portions make these subsections applicable to former public officials and persons selected to be public officials.

43. But see State v. Brown, 364 Mo. 759, 267 S.W.2d 682 (1954), in which the court upheld a conviction for bribery based on a gift made almost a year after the official action. However, the portion of the bribery statute under which the conviction was obtained resembled an unlawful gratuity statute.

In United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), bribery convictions were affirmed even though the defendants had solicited the bribe from a loan applicant after the loan guarantee in question had already been approved, unbeknownst to the applicant. There is some force in the dissenting judge's contention that although the defendants' actions were fraudulent, they did not constitute bribery. Id. at 658 (dissenting opinion). The solicitation of a bribe, however, is itself a bribe under the federal and many state statutes (and not merely an "attempt" or "solicitation" offense). Given the loan applicant's lack of knowledge, the solicitation was unquestionably corrupt, as the majority asserted. Id. at 654. In any event, the majority made it clear that there could be no bribe in connection with an official act known by all parties to have been completed. Id. at 655–56.

The bribery statutes apply to a promise of something of value, as well as a transfer of the thing itself. Accordingly, if the promise is made before the official act, it is immaterial that the payment itself occurs after the act, or even after the official leaves office.

A. Corrupt Intent

1. The Lack of a "Legal" Definition

To constitute a bribe, the prohibited acts must be performed "corruptly." Most statutory definitions of bribery make this element explicit. Even if the statute does not require a corrupt intent, the courts may require it anyway.

Certainly the bribery statutes are intended to proscribe corrupt activity, but it is not easy to discern what, if anything, the concept of acting "corruptly" adds as an element of the crime of bribery. If the other elements are present, a public official is offered, seeks, or accepts an individual benefit that is intended to influence the recipient's official actions. What more is needed to make the offering, seeking, or accepting "corrupt"? If nothing, then the word "corruptly" as used in the statutes is redundant. Its purposeful omission would not be a "cataclysmic" alteration, as one court supposed. To the contrary, such a change would have no significance.

In Part I, in the analysis of a candidate-bribery statute, it was necessary to add the requirement that the acts constituting the offense be engaged in corruptly to save the statute from prohibiting legitimate political activity. The following sections will show that the need is as great in general bribery statutes. Therefore, in this section I shall argue that "corruptly" need not be regarded as a redundancy, but that it functions differently from the other elements, which describe "factual" aspects of actions constituting bribes. The element of corrupt intent requires that the facts described by the other elements be subject to characterization as

45. E.g., 18 U.S.C. § 201(b)-(c) (1982). For an interesting discussion of the means by which the word "corruptly" was inserted in the federal bribery statute, see Comment, Cautious Revision, supra note 4, at 1037 n.54.

46. Wisconsin's bribery statute, like most others, originally required actions to be engaged in "corruptly," but the statute was rewritten and the new version omitted the word "corruptly." Nevertheless, the Wisconsin Supreme Court reversed a bribery conviction of the minority floor leader of the state assembly because the trial judge had failed to instruct the jury that a corrupt intent was required. State v. Alfonsi, 33 Wis. 2d 469, 147 N.W.2d 550 (1967). Although the dropping of a word in a statutory amendment ordinarily would be regarded as purposeful, see generally Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 IND. L.J. 515 (1981-82), the Wisconsin court declined to conclude that the legislature intended to repeal the requirement of a corrupt intent, 33 Wis. 2d at 475-76, 147 N.W.2d at 555.

Where there is no statutory definition of bribery, the courts include "corruption" as an element of their own definitions. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

47. Alfonsi, 33 Wis. 2d at 475, 147 N.W.2d at 555.

48. This is the position taken by the Louisiana Supreme Court in State v. Smith, 252 La. 636, 647-49, 212 So. 2d 410, 414-15 (1968). See also United States v. Isa, 452 F.2d 723, 725 (7th Cir. 1971) (finding that the addition of "corruptly" to 18 U.S.C. § 201(b) did not change the meaning of the intent requirement).
wrongful, and thus requires the application, implicitly or explicitly, of normative political standards.

In order for the requirement of a corrupt intent to be more than surplusage, meaning must be assigned to the word "corrupt." Conventional legal sources are of little help. No judicial decision that I have found contains a definition or explanation of "corruptly" that adds significantly to the other elements of bribery, and most of the bribery statutes themselves do not attempt to define "corruptly." 49

2. Social Science Definitions

Some social scientists and other writers have proposed to define corruption by describing the types of actions that may be characterized as corrupt. These descriptive definitions typically more or less parallel the descriptive elements of the crime of bribery. For example, W.F. Wertheim has written, "we call corrupt a public servant who accepts gifts bestowed by a private person with the object of inducing him to give special consideration to the interests of the donor." 50 Such definitions support the suggestion that the word "corruptly" in a bribery statute is a redundancy.

49. An exception worth considering is the California statute. The definition of "bribe" is unexceptional: "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion, in any public or official capacity . . . ." CAL. PENAL CODE § 7(6) (West 1970). However, the same section defines the word "corruptly" as "a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person . . . ." Id. § 7(3) (emphasis added). Under the California definition of "bribe," the intent to influence an official must be "corrupt." Under the definition of "corruptly," there must be a "design" for the official to receive a "pecuniary or other advantage." But this requirement is expressly set forth in similar language in the definition of "bribe." The word "corrupt" in the definition of "bribe" is redundant, unless we give meaning to the word "wrongful" in the definition of "corruptly." But what meaning?

In fact, the California Supreme Court may regard the word "corrupt" as surplusage. In People v. Diedrich, 31 Cal. 3d 263, 643 P.2d 971, 182 Cal. Rptr. 354 (1982), the court quoted from CAL. PENAL CODE § 165 (West 1970), a bribery statute that sets forth the elements of the crime (without any express element of corruption), although § 165 is also governed by the general definition of "bribe" in § 7(6), quoted supra. The court then stated, "Somewhat redundantly, Penal Code section 7 defines a 'bribe' for the purposes of the Penal Code . . . ." 31 Cal. 3d at 272 & n.5, 643 P.2d at 974-75 & n.5, 182 Cal. Rptr. at 357 & n.5. But since § 7 contains the element of "corrupt intent" and § 165 does not, § 7 is not redundant unless the "corrupt intent" requirement is redundant. In addition, the Diedrich court set forth the elements of bribery without mentioning corrupt intent. Id. at 272, 643 P.2d at 975, 182 Cal. Rptr. at 358.

50. Wertheim, supra note 3, at 196. By far the most serious effort in the social science literature on corruption to break the concept down into its elements and to give careful attention to each element is Peters & Welch, supra note 3. Unaccountably, however, this otherwise excellent article does not consider as one of the elements of corruption the "intent to influence," or any other connection between the benefit to the public official and the official act. Useful social science inquiries such as that of Professors
Other definitions are broader. For example, Gunnar Myrdal used "corruption" to include "all forms of . . . improper or selfish exercise of power and influence attached to a public office . . . ."\(^{51}\) It might seem that such a definition tends to provide further support for reading "corruptly" in a bribery statute as surplusage. Conduct that satisfies the other elements of the offense will come within such a broad definition of "corrupt," as will much other conduct, such as embezzlement of public funds. Myrdal's definition, and other similarly broad definitions, however, contain a normative element.\(^{52}\) To be corrupt an action must be wrongful, improper, or contrary to the public interest. Does this save the requirement of corrupt intent in the bribery statutes from redundancy? Can an action satisfy the descriptive elements of bribery without being wrongful? What ethical criteria should be used in applying such a concept, and what should be the source of such criteria?

James C. Scott and other writers, believing that answers to these questions cannot be found, have rejected definitions of "corruption" cast in terms of morality or the public interest.\(^{53}\) Scott suggests there are two other possible sources of standards for defining corrupt conduct.\(^{54}\) Scott rejects the first of these, public opin-

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51. Myrdal, Corruption as a Hindrance to Modernization in South Asia, in Political Corruption: Readings, supra note 3, at 229.

52. E.g., C. FRIEDRICH, THE PATHOLOGY OF POLITICS 127 (1972) ("behavior which deviates from the norm actually prevalent or believed to prevail"); Bayley, The Effects of Corruption in a Developing Nation, in Political Corruption: Readings, supra note 3, at 521, 522 ("misuse of authority"); Brasz, The Sociology of Corruption, in Political Corruption: Readings, supra note 3, at 41, 41 ("perversion of power"); Brooks, The Nature of Political Corruption, in Political Corruption: Readings, supra note 3, at 56, 58 ("the intentional misperformance or neglect of a recognised duty, or the unwarranted exercise of power, with the motive of gaining some advantage more or less directly personal"); Huntington, Modernization and Corruption, in Political Corruption: Readings, supra note 3, at 492, 492 ("behavior . . . which deviates from accepted norms"); Payne, Devices and Desires: Corruption and Ethical Seriousness, in Public Duties: The Moral Obligations of Government Officials 175 (J. Fleishman, L. Lieberman, & M. Moore eds. 1981) ("illegal or irregular acts by public officials, motivated by their own pecuniary or political self-interest, and at odds with prevailing conceptions of public interest").

53. J. SCOTT, COMPARATIVE POLITICAL CORRUPTION 3–4 (1972); see also M. JOHNSTON, POLITICAL CORRUPTION AND PUBLIC POLICY IN AMERICA 5–6 (1982); Peters & Welch, supra note 3, at 975.

54. J. SCOTT, supra note 53, at 3. Scott's typology includes only those definitions of corruption that contain a normative element. It does not include definitions cast in terms of descriptions of corrupt conduct, see supra note 50 and accompanying text, nor does it include economically-oriented definitions, which eschew normative considerations but are too general to give operative significance to the term "corruptly" as it is used in bribery statutes. E.g., Tilman, Black-Market Bureaucracy, in Political Corruption: Readings, supra note 3, at 62 ("a shift from a mandatory pricing model to a free-market model"). For a useful taxonomy of definitions of corruption, more comprehensive than Scott's, see Heidenheimer, supra note 9, at 3–8.
ion, because of the difficulty in identifying precisely the "public" whose opinion is to be decisive.55 Accordingly, Scott joins a number of scholars in defining the normative element of corruption as a deviation from legal or formal norms of official conduct.56 Such a definition is said to be "operational,"57 because bribery laws are relatively "precise and consistent,"58 or "generally clear-cut."59

It is a central contention of this Article that, at least as far as political bribery is concerned, the law of bribery is neither "precise," "consistent," nor "clear-cut." What is curious, however, is that while Scott and the others have insisted on the legally-based definition of corruption because they assert it can be made operational, they have made no visible effort to make it operational. Social science writings on corruption have centered on such issues as the causes and consequences of corruption in various settings and the connection between corruption and other social phenomena, such as economic development. The typical article or book begins with a definition of corruption and then proceeds to the empirical questions without reference to the definition. The writers who insist that a corrupt act must be illegal make no effort to ascertain what the law of bribery actually prohibits.60

55. Michael Johnston also presents a cogent argument against defining corruption by reference to public opinion. M. JOHNSTON, supra note 53, at 7.
57. Nye, supra note 3, at 566. William E. Connolly describes the "doctrine of operationalism" as holding "that each concept in political inquiry must be associated with a precise and definite testing operation that specifies the conditions of its application." W. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 15 (1974). Professor Connolly goes on to criticize political scientists who engage in an illusory and misleading effort to comply with the doctrine. The unavailing efforts by some writers to establish a legally-based definition of corruption provide excellent support for Professor Connolly's criticism.
58. M. JOHNSTON, supra note 53, at 8.
59. Peters & Welch, supra note 3, at 974. While Peters and Welch accept Nye's assertion that a definition of corruption cast in terms of illegal conduct has the advantage of being operational, they reject this type of definition for other reasons. Id. at 974–75.
60. Admittedly, if any of them made any such efforts, they would find precious little assistance in the law reviews.

In most cases the failure of social scientists to pay attention to their own definitions of corruption has been harmless. But in some cases the confusion engendered has been significant. For example, in G. BENSON, S. MAARANEN, & A. HESLOP, POLITICAL CORRUPTION IN AMERICA (1978) [hereinafter cited as POLITICAL CORRUPTION IN AMERICA], corruption is defined as covering certain types of "illegal or unethical" conduct. Id. at xiii. One page later the authors say that their definition excludes campaign contributions, because although such contributions can resemble bribes, corruption as the authors use the term "is limited to actual illegalities." Id. at xiv. The authors ap-
While no one seems to have noticed the failure of even proponents actually to apply their own legally-based definitions of corruption, such definitions have been criticized on other grounds. For example, Larry L. Berg, Harlan Hahn, and John R. Schmidhauser have argued that legally-based definitions entail a conservative bias because powerful groups are able to influence the content of the law, and are likely to do so to legalize the practices on which their power depends, thus exempting themselves from charges of corruption if the term is limited to violations of law. But even if a legally based definition should prove useful for some purposes in social science, it can be of no help in the present inquiry, the purpose of which is to elucidate the content of the law itself.

3. “Corruption” as Harm to the Public Interest

It follows that the lawyer, and perhaps the social scientist as well, must return to the idea of finding the normative element of “corruption” in some conception of being wrongful or contrary to the public interest. This is not a surprising conclusion, in view of the purpose a word such as “corruption” serves in the English language. The descriptive element of the word cannot be isolated by apparently assume that as a matter of law campaign contributions cannot constitute bribes, an assumption that the next section reveals as false. See infra notes 86-90 and accompanying text. In any event, there is no explanation why campaign contributions that function in a manner similar to bribes are necessarily excluded from a definition that includes “illegal or unethical” conduct. The confusion is compounded by the fact that throughout their book the authors cite transactions involving campaign contributions as examples of corruption, e.g., POLITICAL CORRUPTION IN AMERICA, supra, at 179, 191, 211, and that at one point they seem to recognize that campaign contributions may in fact constitute illegal bribes in some situations, id. at 227.

Susan Rose-Ackerman also seems to make the incorrect assumption that campaign contributions cannot be bribes. S. ROSE-ACKERMAN, supra note 56, at 7. Her analysis does not contain inconsistencies of the sort just discussed, but her assertion that limiting the size of campaign contributions might increase the amount of corruption by diverting money from lawful means of influencing policy to unlawful means, id. at 57, is incorrect if the campaign contributions can constitute bribery and therefore can be regarded as corrupt under her legally-based definition. A more serious problem with her statement is that even if her legal assumption were correct, the statement that regulating campaign contributions could increase corruption would be trivial and misleading since it would be true only because of a truncated definition of corruption. To make the statement a significant and relevant one, it would have to be argued that campaign contributions intended to influence official decisions are not wrongful in the way that personal payments made with the same intent are deemed to be. This is surely not Rose-Ackerman’s position, for she argues that legislative decisions should be motivated by “moral principles and a belief in majority rule” rather than simply “a desire for income and reelection.” Id. at 57-58.

61. CORRUPTION IN THE AMERICAN POLITICAL SYSTEM, supra note 3, at 5. The same point is made, perhaps to the point of exaggeration, by Amitai Etzioni. A. ETZIONI, CAPITAL CORRUPTION 18 (1984) (“the beneficiaries of corruption have managed to legalize most of it”). For additional arguments against a legally-based definition, see Peters & Welch, supra note 3, at 974-75.

62. Carl Friedrich has observed that a generalized notion of corruption as moral
removing the normative element. The word’s very function is to group together actions and situations that generally have a certain descriptive character and that are regarded as seriously wrong.63

The demonstration that the idea of wrongfulness (which I am equating with being contrary to the public interest) is intrinsic to the concept of corruption, even if it is accepted,64 does not in itself respond to the critics’ assertion that the idea of corruption, so con-

degeneracy was a persistent feature of the Western intellectual tradition, found in writers as diverse as Augustine, Machiavelli, Montesquieu, and Rousseau, but that the rise of modern bureaucratic systems engendered the modern, more specific conception of corruption. C. FRIEDRICH, supra note 52, at 127-41. The use of the word in its modern, specific sense is no doubt colored by the broader historic usage, as well as by the still current meaning of decay or rottenness. See J. NOONAN, BRIBES, supra note 4, at xvii–xviii; POLITICAL CORRUPTION IN AMERICA, supra note 60, at xiii; A. BICKEL, THE MORALITY OF CONSENT 11 (1974).

63. I am greatly influenced here by William E. Connolly, who has described the function of words such as corruption as follows:

[T]o say that someone has lied, promised, threatened, or murdered, or has acted violently, courageously, cowardly, rudely, or is innocent, negligent, [or] corrupt is to describe a variety of acts, practices, and dispositions from a moral point of view. These notions enter into description in that certain specified conditions must be met before each applies to a situation, but they also appraise or evaluate the conduct and practices described in the light of those conditions.

These concepts describe from a moral point of view, not in the sense that to say one has broken a promise is always to conclude that the described act must be wrong, but in the sense that the concepts themselves would not be formed, would not combine within one rubric a set of features, unless there were some point in doing so—unless we shared a moral point of view that these concepts concretize and reflect. Is the concept of a mistake . . . either “descriptive” or “normative” in the way that those who draw a dichotomy between the two would understand that question? Hardly . . . . [It is] from the point of view of the kind of conduct we deem excusable that the concept “mistake” is formed, and it is because an act meets these specifications that we say we have a reason to excuse the agent when he makes a mistake. If someones doubts this we must ask: What role, then, does “mistake” play for us? Why does the concept have these particular contours in our language and not others?

W. CONNOLLY, supra note 57, at 24 (emphasis in original).

64. In an influential passage originally published in 1949, Robert K. Merton described functional aspects of corruption within the context of American political machines of the turn-of-the-century variety. R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 124–36 (3d ed. 1968). Merton did not purport to weigh these functions against the dysfunctions of corruption, see id. at 126 n.92, but some later writers, influenced by Merton, went further and argued that corruption was beneficial in some societies. A lively debate ensued. For a variety of viewpoints, see C. FRIEDRICH, supra note 52, at 170; Abueva, The Contribution of Nepotism, Spoils, and Graft to Political Development, in POLITICAL CORRUPTION: READINGS, supra note 3, at 534; Bayley, supra note 52, at 521; Greenstone, Corruption and Self-Interest in Kampala and Nairobi, in POLITICAL CORRUPTION: READINGS, supra note 3, at 459; Huntington, supra note 52, at 492; Leff, Economic Development through Bureaucratic Corruption, in POLITICAL CORRUPTION: READINGS, supra note 3, at 510. But as Benson et al. point out, even the writers who defend corruption do so in discussing old-time machines or developing nations. POLITICAL CORRUPTION IN AMERICA, supra note 60, at 187–89. No one seems to espouse the cause of corruption in contemporary America.
ceived, is too general and too controversial to be serviceable.\textsuperscript{65} In particular, some writers have argued that if such a public interest definition of corruption is accepted, the determination of whether a particular policy-influencing action is or is not corrupt will depend on whether the direction in which it seeks to influence policy is or is not desirable. Not only will such judgments nearly always be controversial, it is argued, but the whole approach suggests that the end justifies the means, so that what appears to be bribery will be exonerated from the charge of corruption if only the parties can persuade us that the substantive policy they are seeking is in the public interest.\textsuperscript{66}

Although applying a public interest definition of corruption is no easy task, this specific objection misconceives the nature of such a definition. To say that a policy-influencing action of a certain descriptive character is corrupt because it is contrary to the public interest can mean either that actions of its type lead to policy decisions that are substantively contrary to the public interest, or that the occurrence of the action is itself contrary to the public interest, without regard to the substantive direction of its influence on policy. The argument stated in the previous paragraph is directed only to the first of these possibilities, and even there it is wide of the mark. Actions of a type that tend to have a bad influence on policy over the long run may be deemed corrupt for that reason. One need not believe that the governmental process as it operates in the United States or in any other democracy is a perfect machine for generating policies in the public interest in order to believe that that process tends in the long run to produce better policies than would a system in which all decisions are made according to the wishes of the highest bidder. If we accept this, it becomes immaterial for purposes of determining whether an action is corrupt that the direction in which it seeks to influence policy is believed to be in the public interest.

The argument that a public interest conception of corruption must be contingent on the substantive policy issue is even less applicable to the second sense in which policy-influencing events can be regarded as contrary to the public interest, which is without regard to the substantive direction in which policy is being influenced. To the extent that policies frequently are formed by processes contrary to the processes sanctioned by the overall political system, the system may break down.\textsuperscript{67} If we agree that the system as a whole is preferable to a breakdown of the system, it would then follow that actions seeking to influence policies in ways endangering the system

\textsuperscript{65} See supra note 53 and accompanying text.
\textsuperscript{66} See M. Johnston, supra note 53, at 5; Peters & Welch, supra note 3, at 975.
\textsuperscript{67} See A. Etzioni, supra note 61, at 81.
are contrary to the public interest. But perhaps the system is sufficiently stable that such a fear is too remote to be of concern. Even so, to the extent that we regard being governed by democratic processes as a good, we are harmed each time policy choices are made outside those processes. If it could somehow be shown that corrupt political pressures cancel each other out or that for some other reason policy outcomes resulting from corrupt pressures are the same as they would be without those pressures, the corruption still would impair the benefits that citizens obtain from participation in politics. As Fred Hirsch has pointed out, "bought sex is not the same," and neither is bought representative government. Alexander Bickel wrote that it was consent that made government "morally supportable." Consent, to Bickel, did not mean simply accepting outcomes, but "the sense of common venture fostered by institutions that reflect and represent us and that we can call to account." Whether or not the briber can defend his preferred policy as being in the public interest, we can condemn his conduct as corrupt if the method that he employs renders the policy decision morally insupportable, in Bickel's sense.

4. The Need For Intermediate Political Theory

The argument that a public interest definition of corruption requires a substantive evaluation of each policy that might have been influenced corruptly has been shown to be fallacious. On the other hand, if the conclusion that an action is corrupt is to turn on the assertion that such actions over the long run will tend to produce bad policies, in hard cases the conclusion must be based on a reasonably specific conception of what processes tend to produce satisfactory results, and why some pressures introduced into the process will tend to be harmful, while others may be beneficial or at least acceptable. And to the extent that the normative element of corruption is based on the assertion that departures from democratic processes are intrinsically harmful, there must be a reasonable specification of which pressures are consistent with the processes that are to be protected. In short, if the idea of corruption is to be a serviceable one, it must rest on intermediate political theory.

69. It makes no difference for purposes of this analysis whether one takes a consequentialist position for evaluating political arrangements, or regards such arrangements as ends in themselves.
70. F. Hirsch, Social Limits to Growth 87 (1976).
72. See supra note 66 and accompanying text.
73. Such a body of theory, because it must be attentive to a society's actual institu-
The requirement of a corrupt intent in bribery statutes adds nothing by way of description to the definition of the crime of bribery. If the requirement means anything, it is that to constitute a bribe, the conduct that satisfies each of the descriptive elements also must be wrongful conduct. The legislative and judicial persistence in treating corrupt intent as a separate element of the crime is in part a reflection of the role served by bribery statutes in the criminal law. Bribery is “worse” than other crimes. It is “a crime akin to treason,” a “despicable act.” Those who, having voluntarily assumed public office, set aside the public trust for private advantage (and those who tempt public officials to do so) engage in morally reprehensible conduct by striking at the roots of fairness and democracy. We want a special crime, with a special stigma, for such conduct. We want to be sure that the crime reaches conduct, and only conduct, that is wrong in this special way. The presence of the word “corruptly” in most bribery statutes reflects these desires. As the following sections will show, the term plays more than a symbolic role. The descriptive elements of bribery are not sufficient to distinguish innocent from criminal conduct. Conduct that satisfies the descriptive elements may be regarded as bribery only if it is “corrupt.” The analysis of that term in this section demonstrates the need for intermediate political theory to help decide, in hard cases, what counts as a bribe.

B. Anything of Value

The standard bribe, as it is usually thought of, consists of a payment of money to a venal official. It is clear, however, from the language of the statutes (“anything of value”) and judicial decisions and to the consequences of specific practices, surely will reflect the society within which it exists. Accordingly, practices that rightfully are regarded as corrupt in one society may be acceptable in another. See, e.g., R. Goodin, Manipulatory Politics 176–78 (1980). As John Noonan has written, there is an “element of convention in the definition of bribery.” Noonan, The Setting of a Standard, supra note 4, at 1114. In this very general sense, there is a valid insight contained in definitions of corruption that refer to public opinion. See supra note 55 and accompanying text.

Some social scientists have been reluctant to accept conceptions of corruption that are relative to the particular society, on the ground, not relevant here, that such conceptions render comparative studies of corruption difficult or impossible. See generally Moodie, On Political Scandals and Corruption, 15 Gov’t & Opposition 208 (1980).

74. See supra note 48 and accompanying text.
75. W. Reisman, supra note 4, at 2.
78. E.g., 18 U.S.C. § 201 (1982). Sometimes different phrases, but usually to the
sions that bribery is not limited to this "standard" case. Still within
the category of venality, loans to an official,79 business transactions
resulting in a sales commission for an official,80 illicit sexual fa-
vors,81 and "numbers" for an official in an illegal lottery82 have all
been held to be things of value for purposes of bribery statutes.

For present purposes, the crucial questions regarding the bene-
fit to the official as an element of bribery involve political rather
than personal benefits. By a "political" benefit I refer to a benefit
the advantage of which lies chiefly in the advancement of the indi-
vidual's career as a public servant. By a "personal" benefit I refer
to any other type of individualized benefit.83 I use "individualized
benefit" as a generic term to include either a personal or political
benefit, but only something valued by an individual because of its
direct effects on himself or on other specific persons84 whose welfare

same effect, are used. E.g., W. VA. CODE § 61-5A-3 (1984) ("any benefit"); WIS. STAT.
ANN. § 946.10 (1982) ("any property or any personal advantage").
(1980).
(1980).
82. Zalla v. State, 61 So. 2d 649 (Fla. 1952). The value of these numbers was
enhanced by assurances to the police officers who were the subjects of the attempted
bribe that they would win about $70 per week for allowing the defendant to operate the
lottery. The defendant argued unsuccessfully that these assurances were unenforceable
and thus worthless.

83. Michael Johnston classifies corrupt practices according to whether their pur-
pose is "to attain or augment power, or to obtain material benefits such as money." M.
JOHNSTON, supra note 53, at 11. But he does not explain his apparently arbitrary sort-
ing of corrupt acts within these two classifications. For example, he classifies nepotism
as power-seeking, but bribery and extortion as the seeking of material benefits. My
contention here is that bribery (and probably most of the other corrupt practices that
Johnston mentions) can be engaged in to enhance either one's material wealth or one's
power. See also J. SCOTT, supra note 53, at 4.
84. Some statutes, including the federal bribery statute, 18 U.S.C. § 201(b)-(c)
(1982), expressly include benefits provided to third persons. On the other hand, the
federal unlawful gratuity statute requires a benefit for the official "himself," 18 U.S.C.
§ 201(g) (1982), and has been interpreted as not covering benefits to a third person
unless that person is an alter ego of the official, United States v. Brewster, 506 F.2d 62,
81 (D.C. Cir. 1974). The purposes of an unlawful gratuity statute presumably include
assuring the impartiality of government services and law enforcement. It is difficult to
see why impartiality is any less threatened by an official who directs payments to, say,
a relative or a political party than by one who accepts payments directly. The word
"himself" in the federal statute may be intended simply to exclude from the statute's
coverage payments received by the official for the government. In any event, both bri-
ercy and unlawful gratuity statutes should be read to cover payments to third persons
in the absence of language thought to preclude such an interpretation.

In one case a city councilman required a contractor to pay commissions to a third
person as a condition of being awarded city contracts. The court held the councilman
committed no bribe unless he himself received something of value "as that term is gen-
erally understood," which did not include "the sentiment that comes from conferring a
kindness upon another." Commonwealth v. Albert, 310 Mass. 811, 40 N.E.2d 21, 26
(1942). This approach is regrettable because the relevant standard is whether the offi-
he values. 85

I shall show in this section that at least some transactions involving political benefits are bribes, while other such transactions are both routine and either beneficial or, at least, acceptable practices in American politics. Words such as “anything of value,” appearing in bribery statutes, do not help us in drawing the necessary distinctions.

1. Campaign Contributions

Of central importance among political benefits are campaign contributions. Numerous courts have held that campaign contributions may be bribes. 86 In other cases bribery convictions based on campaign contributions have been affirmed without discussion of the question. 87 In addition, the possibility of a campaign contribution being a bribe was implicit in the Supreme Court’s campaign finance decision, Buckley v. Valeo. 88 In that case the plaintiffs, chal-

dened, 449 U.S. 983 (1980). Since the requirement of payments to the third person was imposed by the councilman, he apparently perceived some benefit to himself, and the public trust was violated whether that perceived benefit was material, philanthropic, or of some other type. On the other hand, in People v. Hyde, 156 A.D. 618, 141 N.Y.S. 1089 (1913), the court was probably correct to reverse a conviction of bribery when the payment to a third party was at least arguably for the benefit of the city rather than for the defendant’s benefit. See id. at 633–34, 141 N.Y.S. at 1100–01 (concurring opinion).

A more difficult case would arise if a payment were made to a third person such that the official had no power to accept or reject it, and the official neither instigated the payment nor agreed with the donor that his official actions would be affected. The payment might, nevertheless, have been made with the intent of influencing the official and in fact might influence him. It would be harsh to hold the official guilty of bribery under these circumstances, since the situation would be beyond his power to avoid. The case would be more like a conflict of interest than a bribe. Albert does not avoid this potential problem, because the official might derive an indirect tangible benefit from the payment to the third person if, for example, the third person were a business in which the official had an interest. Under Albert such a payment would be sufficient to constitute a bribe.

85. “Individualized benefit” thus does not include something valued by an individual because it accords with his notions of the public interest, or furthers the interest of the government or any government agency, or because he regards it as part of his responsibilities as a public official to value the thing. The definitions in the text are not so sharply drawn that in every case it will be evident whether a particular thing is an “individualized benefit,” and if so whether it is “personal” or “political,” but the general thrust should be clear enough for present purposes.


lenging the campaign contribution limits in the Federal Election Campaign Act, argued that bribery laws were a less restrictive means of preventing corruption arising out of campaign financing than were contribution limits. The Court rejected this argument, reasoning that bribery laws deal with "only the most blatant and specific" instances of corruption. Neither the plaintiffs' argument nor the Court's response would have been coherent unless plaintiffs and the Court assumed that a campaign contribution could be a bribe. It is therefore evident that a campaign contribution is a "thing of value" for bribery purposes, but the result is that the potential sweep of the bribery statutes is enormous. This point will become clearer in Section II.D.

2. Endorsements

There are many political benefits besides campaign contributions that may be bestowed upon an office holder or candidate. Can such benefits be bribes? As a matter of logic, it would seem so. We have already seen that personal benefits other than money can be bribes. A campaign contribution benefits the recipient by enhancing the probability of his winning or holding public office. If something besides money is provided to the official that enhances his chance of winning an election, just as a campaign contribution would, why should there be any doubt whether a "thing of value" has been provided?

A moment's reflection will show that there must be very grave doubts indeed. Consider, for example, an organizational endorsement. It might be of electoral benefit to the official, under some circumstances even more than a substantial contribution of money. As a result, the official's desire to obtain the endorsement may enable the organization to exert considerable pressure on the official. If the endorsement is given in exchange for an official action that

89. Id. at 27-28.
90. I have talked with lawyers who strenuously maintained that a campaign contribution could not be a bribe, and as has been shown, some social scientists writing on corruption have shared this belief. See supra note 60. I have found no authority supporting their position.

Some social scientists have recognized that there is nothing in the nature of a campaign contribution that prevents it from being a bribe. Perhaps surprisingly, one of these was David Truman. D. TRUMAN, THE GOVERNMENTAL PROCESS 308-09 (2d ed. 1971) (originally published in 1951). Nevertheless, the belief that campaign contributions cannot be bribes may be fairly widespread, as is indicated by the common statement that some contributions amount to "legalized bribery." See, e.g., A. ETZIONI, supra note 61, at 22; Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 618 (1982). On the other hand, there seems to be widespread agreement that campaign contributions can be corrupt. For example, in a survey of state senators in 24 states, 91.9% said that a legislator who accepted "a large campaign contribution in return for voting 'the right way' on a legislative bill" acted corruptly. Peters & Welch, supra note 3, at 978-82.
furthers the organization's goals, the elements of a bribe seemingly are present. Nevertheless, such a transaction cannot be regarded as a bribe. The elected official's responsiveness to constituents, and the rewards bestowed on responsive officials through endorsements and votes, are basic to representative democracy.\(^9\)

It appears, then, that some political benefits, such as endorsements, cannot be regarded as things of value for purposes of the bribery statutes. It will prove difficult, however, to determine what types of political benefits can be bribes and what types cannot. Even the case of endorsements may not always be as simple as I have assumed. Suppose, for example, Charles is the president of an influential labor union local in Diane's district. Diane is a member of Congress. Charles tells Diane that the union will endorse her in the next election if and only if she introduces a private bill permitting the immigration of one of Charles' relatives.\(^9\) Charles, of course, is abusing his union office. Does that result in his and Diane's (if she introduces the bill out of a desire for the endorsement) being subject to prosecution for bribery?

Such occurrences probably are not widespread, at least in such an aggravated form, but they can happen. The National Conservative Political Action Committee (NCPAC) is an ideological group that is regarded as a potent political adversary by many Democratic members of Congress.\(^9\) In 1981 it was reported that NCPAC was quietly but strenuously lobbying for favorable tax treatment for certain commodities dealings known as "straddles." Apparently this lobbying was done at the behest of a partner in a major commodities trading firm who also was on the executive committee of NCPAC.\(^9\) It is unlikely that more than a handful of NCPAC's contributors were aware of the commodity straddle issue or knew that NCPAC had taken a position on it.

Suppose (this is hypothetical) NCPAC had told members of Congress that NCPAC's endorsement would be conditioned on support of the NCPAC position on commodity straddles. Would a bribery prosecution be appropriate? Shortly after the commodity straddle incident was reported, a member of Congress accused

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91. Under the "Burkean" theory of representative democracy, which I shall consider later, see infra notes 174–81 and accompanying text, it would be the duty of the representative to ignore such pressure, and perhaps wrong for an organization to impose the pressure in the first place. But is there a Burkean so intrepid that he will condemn such pressure not only as improper but also as bribery?

92. Cf. Political Corruption in America, supra note 60, at 243 ("[a] number of bills banning deportation of gangsters have quietly passed through Congress.").

93. As a UCLA Law Review editor appropriately observes, NCPAC is no doubt regarded as especially potent by certain former Democratic members of Congress.

NCPAC of bribery because its chairman had sent the member a letter saying in part:

If you will make a public statement in support of the president's tax-cut package and state that you intend to vote for it, we will withdraw all radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes.\textsuperscript{95}

The tactics here were undoubtedly heavy-handed, much more so than anything reported in connection with the commodity straddle issue. On the other hand, the tax issue involved was a legitimate and visible part of NCPAC's ideological program. When, as in the case of Charles and Diane, the issue is of individual rather than of organizational concern and the possibility of endorsement clearly is used to influence an official decision on the issue, the impulse to regard the transaction as a bribe is strongest.

One approach to this problem is to invoke the element of "corrupt intent" to identify endorsement offers that are bribes.\textsuperscript{96} But as the previous section demonstrated, at most this will tell us that endorsement offers that are wrongful or contrary to the public interest under some accepted body of intermediate political theory may be regarded as bribes. In the absence of an accepted body of theory, the element of corrupt intent cannot provide a means of distinguishing bribes from innocent acts.\textsuperscript{97}

As a practical matter, the absence of cases raising these issues suggests that in the "law" as applied, at least at the prosecutorial level, endorsements cannot be bribes.\textsuperscript{98} This probably is for the best, but the cost is that some violations of the public trust, including the case of Charles and Diane, are exempted from the legal condemnation they would merit if they could be treated in isolation or if intermediate political theory were able to provide useful evaluative standards in accordance with widely shared moral intuitions.\textsuperscript{99}


\textsuperscript{96} If this approach were taken, endorsements generally would be treated as "things of value," but neither the endorser nor the person endorsed would be regarded as acting "corruptly" except in circumstances comparable to those discussed in the text.

\textsuperscript{97} An alternative approach would be to define "anything of value" narrowly to exclude those endorsements and other political benefits not regarded as harmful. Such an approach shifts but does not avoid the necessity of making a normative judgment.

\textsuperscript{98} If, as is sometimes the case, the endorsement were a prerequisite to a campaign contribution from the organization, prosecution ought to be a more realistic possibility.

\textsuperscript{99} It might be argued that a public official is entitled to assume that an organization's leaders speak for the membership and therefore the official is justified in seeking the organization's support in whatever ways the leaders request. This argument is valid up to a point, since public officials are under no duty to second guess the leaders of organizations. But the argument is specious when it is plain that the leaders do not speak for the membership in a particular case. If anything, an official such as Diane who accepts what is ethically, if not legally, a bribe, knowing that it derives from an
3. Agreements Not To Run for Office

Campaign contributions, we have seen, are a type of political benefit that can constitute bribes. Endorsements are probably the type of political benefit least likely to be treated as bribes. Other types of political benefits fall between these extremes. One of these is illustrated by the following problem. Elizabeth, a well-known businesswoman who would be a strong challenger for a city council seat, tells Frank, the incumbent council member, that she will agree not to run against him if he helps her obtain a zoning variance for a commercial development that she wants to build. Has Elizabeth offered Frank a bribe?

It may seem, at first blush, that this problem is similar to the cases considered in Part I. But in Part I, the bribe was intended to influence the decision whether or not to be a candidate. Here the decision not to be a candidate is the bribe, a benefit to the incumbent intended to influence some official decision. In *People v. Hochberg*, discussed in Part I, both of these situations were present, since Hochberg was accused not only of bribing a potential candidate not to run against him, but also of soliciting a bribe by offering to make a legislative staff position available (official decision) if the potential candidate agreed not to run (thing of value). The court held that the agreement of the potential candidate not to run was a "thing of personal advantage" within the meaning of the New York bribery statute.

Presumably the *Hochberg* court would hold that Elizabeth's offer in our hypothetical case constituted a bribe. In both *Hochberg* and the hypothetical case the official received a political benefit and the person who was induced not to run received an individualized benefit from the official decision. In such a case it is at least plausible to view the conduct as bribery.

But suppose now that Elizabeth is the head of the local chamber of commerce and has no direct interest in the commercial project for which a variance is being sought. In urging that the variance be granted, she reflects the prevailing business sentiment abuse of trust by the bribing organization's leadership, is even more blameworthy than if the individual offering the bribe were using his own resources.

100. Manipulation of candidacies as an underhanded method of obtaining other objectives is not unknown in politics. Many years ago I heard (secondhand, but I believe reliably) of an instance in which a group urging a particular position on a local official threatened that if they were not satisfied, an individual with the same name as the official would become a candidate in the official's next election, thereby presumably costing the incumbent some votes intended for him. There also have been incidents in which major-party candidates secretly have underwritten minor party candidates whose ideological position could have been expected to draw votes from the opposing major-party candidate. See Walters, *Dirty Tricks*, 12 CAL. J. 160, 161 (1981).


102. *Id.* at 247, 404 N.Y.S.2d at 167.
that Frank has generally been too stringent in his land use policies and that the project in question is important for business generally in the area. Under these circumstances, would it be a bribe offer for Elizabeth to threaten to run against Frank if he votes against the variance? Surely it is acceptable in a democracy for individuals or groups to decide whether to challenge incumbents based on whether they approve of the official decisions made by the incumbents.

On the other hand, if one accepts this conclusion and also accepts the result in Hochberg, the factor determining whether a potential candidate is guilty of bribery in the type of case under consideration is whether the potential candidate is motivated by receipt of what I am calling an "individualized benefit" from the official act. This could be a difficult determination to make. Suppose, for example, Elizabeth is head of the chamber of commerce and has a clear history of supporting more lenient land use policies, but that the project in question in this particular case is her project. Whether she is guilty of bribery could turn on whether she is motivated by her policy views or by self-interest. It is unlikely that she herself, much less others, could separate these motives entirely. Once again we encounter a hazy boundary between bribery and conduct that is expected, even applauded, in a democracy.

4. Logrolling and "State-Bribery"

Often a public official derives a political benefit from the official acts of other officials. Can an official act then be a thing of value under a bribery statute? In People ex rel. Dickinson v. Van de Carr, an old New York case, the defendant, a New York City alderman, wrote this letter to the commissioner of street cleaning:

If you will reinstate Antonio Covino, who I think was too severely punished by being dismissed from your department, I will vote and otherwise help you to obtain the money needed for a new plant in Brooklyn.

The letter was held to be a sufficient basis for prosecution for soliciting a bribe.

Now it is well known that American legislators at all levels see it as one of their primary functions to intercede in behalf of constituents in their dealings with executive agencies of the government. Whether or not they are usually as direct in their negotiations as

103. 87 A.D. 386, 84 N.Y.S. 461 (1903).
105. 87 A.D. at 388, 84 N.Y.S. at 462.
was the defendant in *Van de Carr*, there is never any doubt that the basis of the legislator's influence lies in the legislature's control over each agency's budget, programs, salaries, governing statutes, and the like.\(^\text{107}\) If the letter in *Van de Carr* supported a bribery prosecution, there must be thousands of bribes committed daily in Washington, in state capitol's, and in city halls across the United States.

Equally remarkable as *Van de Carr*’s holding was the following dictum:

> The interests of the public service require that public officers shall act honestly and fairly upon propositions laid before them for consideration, and shall [not] ... enter into bargains with their fellow-legislators or officers or with others for the giving or withholding of their votes conditioned upon their receiving any valuable favor, political or otherwise, for themselves or for others.\(^\text{108}\)

The clear implication of the italicized words is that ordinary logrolling—vote trading by legislators—constitutes bribery, at least if one or more of the traders foresees a political benefit for himself from the trade.\(^\text{109}\) In *People v. Montgomery*,\(^\text{110}\) the only decision I have found involving legislative vote-trading, the defendant was a member of a city council whose members elected the city's mayor from their own number. The defendant, hoping to use the mayoralty as a springboard to Congress, agreed to give favorable consideration to another member's preferred projects in return for the other member's vote for the defendant for mayor. The appellate court affirmed the defendant's conviction for bribery, remarkably, without even considering whether such vote-trading could constitute bribery.

Perhaps *Montgomery* is distinguishable from the typical case of logrolling on the theory that the benefit sought by the defendant—a vote for himself for mayor—represented a more immediate political benefit for himself than, for example, a park in his district that would make him more popular among his constituents. Similarly, the *Van de Carr* result might be more acceptable if the defendant alderman's benefit had been more direct—for example, if the defendant had sought a part-time job with the agency for himself.\(^\text{111}\)

These distinctions, however, are not easily drawn. A legislator might trade a vote for appointment to a legislative committee, but his reason for wanting to serve on the committee might be to further some substantive policy view that he holds. More fundamen-

107. See Getz, Congressional Ethics and the Conflict of Interest Issue, in POLITICAL CORRUPTION: READINGS, supra note 3, at 434, 438.

108. 87 A.D. at 389–90, 84 N.Y.S. at 464 (emphasis added).

109. This is hardly a proviso that is likely to provide an escape in many cases.


111. One study, now somewhat dated, showed that nearly one-third of the members of a state legislature were either employed by or received business from government agencies. Hagensick, *Flouting Their Own Law*, 53 NAT'L CIVIC REV. 479 (1964).
tally, to the extent that an official is influenced by a decision's political consequences to himself, there is no obvious reason why vote-trading for "direct" benefits is worse than vote-trading for "indirect" benefits.

Mutual back-scratching between legislators and executive agencies, as in Van de Carr—what V.O. Key called "state-bribery"—no doubt is abused in individual instances, and may have adverse systemic consequences. At the same time, it is widely perceived that there are benefits from having the ombudsman function performed by legislators, precisely because their power makes the agencies responsive to them. Similarly, legislative vote-trading has its good and bad sides. It undoubtedly facilitates wasteful pork-barrel projects, but it is also part of the process of compromise that often is necessary if legislatures are to act at all.

Both state-bribery and logrolling are likely to satisfy the descriptive elements of a bribery statute: The legislator, a public official, receives a vote from a colleague or a favorable action from an agency, which the legislator perceives will enhance his electoral prospects. In return, the legislator performs his own official function in the manner desired by the agency or colleague.

But are such exchanges "corrupt"? Again, the element of "corrupt intent" can pose the question whether the conduct is wrongful. We must depend on intermediate political theory to provide criteria for answering it. Most people probably believe that some instances of state-bribery and logrolling are wrong, some are at least tolerable, and others may be desirable, even instances of high statesmanship. But the grounds for such categorizations probably would be subtle and would take into account a variety of considerations that could not be formulated easily into a concise set of rules. Furthermore, there probably is a broad range of cases over which reasonable people would disagree.

113. See, e.g., M. Fiorina, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); see also S. Rose-Ackerman, supra note 56, at 74–79.
114. Compare D. Truman, supra note 90, at 368 (logrolling has been condemned because of its "grosser forms," but fundamentally it is "a technique for the adjustment of interests" and is the "very essence of a legislative process") with T. Lowi, THE END OF LIBERALISM 76 (1969) (logrolling is a necessary evil).
116. I shall show in Part II.D, see infra notes 126–68 and accompanying text, that a specific exchange of favor for favor may be unnecessary, but it probably is present in a substantial number of "state-bribery" and logrolling situations.
5. The Potential Breadth of the Bribery Offense

The varieties of political benefits and favors that are given and received every day in American politics are nearly endless. The examples discussed in this section suggest that the potential sweep of the bribery statutes within the political system is much greater than is usually supposed. The only thing that may take many everyday political practices out of the literal coverage of the statutes is the element of corrupt intent. Assuming that element is more than a redundancy, it removes reciprocal political favors from the bribery statutes if what is done is not wrongful. But many common political practices are wrongful, or are so regarded by many people. The trouble is that it is difficult to agree on criteria that will distinguish proper from wrongful practices, and therefore it is difficult to be sure what counts as a bribe.

C. Official Acts and Influence-Peddling

Gloria, the governor of a state, makes an agreement with Herman, a contractor who is under investigation for fraud in the performance of several state construction contracts. The investigation is being conducted by Irene, the state attorney general, and it is clear under the state constitution that the decision whether to prosecute Herman is within the sole discretion of the attorney general, who is an elected official independent of the governor. However, Irene and Gloria are members of the same political party and Irene is seeking Gloria's endorsement in next year's primary election for the United States Senate. Herman agrees to pay Gloria $25,000 if she can arrange for the investigation to be called off. Gloria tells Irene that she can vouch for Herman's honesty and that it is very important to her that Herman not be prosecuted. After talking to Gloria, Irene calls off the investigation. Herman pays $25,000 to Gloria.

The question, of course, is whether under these facts Herman has made and Gloria has received a bribe. Perhaps surprisingly in light of the relatively expansive readings that have been given to other elements of the bribery statutes, most of the few courts that have construed the phrase "official act" in comparable circumstances have defined the term so narrowly that neither Gloria nor Herman could be convicted of bribery.

In one case, two Arizona state legislators accepted money from one of thirty-five persons seeking a liquor license. Eleven

117. See R. Dahl, A Preface to Democratic Theory 150 (1956): "Decisions [in the American political system] are made by endless bargaining; perhaps in no other national political system in the world is bargaining so basic a component of the political process."

licenses were available. The legislators accompanied the applicant to a meeting with the superintendent of the licensing agency, who did not know that they had been paid, and vouched for the applicant's character. The appellate court reversed a bribery conviction of the two legislators because, although their actions constituted "inherent impropriety," they were not performed by the legislators in their official capacity. The court accepted the prosecution's assertion that an action could be "official" even if it was prescribed by "usage and custom" rather than by law, but it held that there had been no showing of a usage or custom of legislators influencing decisions of the licensing agency.

In another case, involving an offer to pay a state assemblyman to influence a local government decision in his district, the court dismissed the indictment because the assemblyman had "no official power, authority, or responsibility" over the local matter. The court did not even suggest, as had the Arizona court, that it would make a difference if it were customary for legislators to influence this type of decision.

These are unfortunate decisions. As I observed in the previous section, it is a widely recognized function of legislators, whether or not it is part of their "official" duties, to intercede on behalf of constituents who have problems with the government. And it is the fact that they are legislators that makes them influential. Whether bribery is regarded as harmful for its effects on policy or harmful in itself, "influence peddling"—acceptance of something of value for the official's intercession—creates the harm that the statute is intended to proscribe. The intervention of a highly placed official can have a significant effect on policy outcomes even when the official has no official role in the decision. There is no reason to suppose that the effect of an individualized benefit on the decision-making process is less likely to be harmful if it brings about a successful intervention than it would be if the official making the decision were receiving the benefit himself. In the hypothetical case, for example, there is no reason to believe that Herman's cash payment to

119. Id. at 442, 427 P.2d at 934.
120. Id. at 442-44, 427 P.2d at 934-36.
123. If the individualized benefit provided to the official for exercising influence over another agency is a political benefit, the problems discussed in this part in connection with the other elements of bribery of course will need to be resolved. But the fact that the alleged bribe is for influence peddling rather than for a direct official action should not be a major consideration in the resolution.
Gloria is more likely to have influenced Irene in the direction of a just decision than would have been the case if Herman had bribed Irene directly. Finally, if we recognize that Gloria’s influence derives from the office that she holds, then exercise of that influence for an individualized benefit is an abuse of the public trust no less harmful to democratic values than a direct bribe of the decisionmaker. Courts have rejected other technical defenses based on the assertion that an action influenced by a payoff is not “official.” 124 They should be at least as willing to do so in cases of influence peddling. 125

124. United States v. Isa, 452 F.2d 723, 725 (7th Cir. 1971) (“it is entirely immaterial that it be subsequently determined that the agent sought to be influenced by the tender of a bribe could not have brought about the result desired by the person offering the bribe.”); People v. Patillo, 386 Ill. 566, 54 N.E.2d 548 (1944) (parole officer who accepted money from a parolee for not reporting certain information was guilty of bribery even though the information did not actually constitute a parole violation); People v. Ritholz, 359 Mich. 539, 103 N.W.2d 481 (defendant board member guilty of bribery notwithstanding that the board was subsequently declared unconstitutional), cert. denied, 364 U.S. 912 (1960); State v. Stanley, 19 N.C. App. 684, 200 S.E.2d 223 (1973) (defendant who offered money to a policeman to do things he had no authority or ability to do was guilty of bribery), cert. denied, 284 N.C. 622, 201 S.E.2d 692 (1974).

125. The approach recommended here is exemplified by United States v. Carson, 464 F.2d 424 (2d Cir.), cert. denied, 409 U.S. 949 (1972). The defendant, an administrative assistant to a United States Senator, was paid to use his influence to avoid Justice Department prosecution of certain individuals, or to get leniency for them after they were indicted. In affirming the defendant’s bribery conviction, the court wrote:

That administrative assistants as part of their “duties” exert the influence inherent in their employment relationship with members of Congress appears “clearly established by settled practice,” in the language of United States v. Birdsall, . . . 233 U.S. at 231 . . . [T]he determinative factor is that the primary source of any conceivable influence on the Justice Department was the official position held by appellant, enhanced as it was by the status of his employer’s membership in the one most powerful congressional committee affecting that Department’s operations.

Id. at 434.

In New Jersey the bribery statute has been applied broadly to influence peddling, State v. Sherwin, 127 N.J. Super. 370, 317 A.2d 414, cert. denied, 65 N.J. 569, 325 A.2d 703, cert. denied, 419 U.S. 801 (1974), but the New Jersey cases may be sui generis since the statute has been interpreted not to require that the bribe recipient be a public official so long as he is in “an apparent position of access to a public official.” State v. Ferro, 128 N.J. Super. 353, 350, 320 A.2d 177, 180, cert. denied, 65 N.J. 566, 325 A.2d 700 (1974).

To assert that the courts should read the “official act” element of bribery broadly enough to include cases of influence peddling is not to deny that there can be hard cases. The hard cases may arise because officials have private lives and because it is implausible to regard them as always having special influence over other officials. Public officials could be asked not to accept payment for influencing other officials. But in some cases, this would be a hardship, especially for the many part-time officials in state and especially local government who practice professions, such as law, calling for representation of clients in their dealings with government agencies. If the mayor of Los Angeles, New York City, or Chicago were paid to influence a decision of the state legislature, it would be reasonable to assume it was a case of influence peddling. But would we want to make the same assumption about the mayors of Watsonville, California; Old Forge, New York; or Macomb, Illinois? Whether or not a public official retained as an advocate
D. Intent to Influence

Jim is a well-known Republican Party activist and contributor to Republican candidates. Katherine is a Democratic member of the state legislature who is expected to face a strong Republican challenge in the fall election. A bill has been introduced that would subject Jim’s business to higher state taxation. Katherine has been planning to vote in favor of the bill, which is expected to be approved by the committee on which she sits by a margin of one vote. Jim visits Katherine’s office, urges her to vote against the bill, and hands her a campaign contribution of $1,000, the first he has ever given to a Democrat. He does so solely in the hope that it will influence her to vote against the bill. Katherine assumes this is his motive, and although nothing has been said, she hopes he will give her more money if she votes as he wants. Because of her urgent need for campaign funds, she votes against the bill, causing its defeat. Jim gives her an additional $3,000 contribution in the general election campaign. Has a bribe occurred?

Bribery often is assumed to require a *quid pro quo*, an agreement that in exchange for such and such a benefit, the official will perform (or omit) such and such an official act in the desired manner.\(^\text{126}\) It is because it is often easy to accomplish a corrupt purpose while avoiding an express agreement, as in the case of Jim and Katherine, and because it is difficult to prove the existence of such an agreement even if it has occurred, that bribery has a reputation as a crime of narrow scope.

This section will demonstrate, however, that the supposed *quid pro quo* requirement is equivocal. With emphasis on the case of special interest campaign contributions, I shall inquire into the extent to which an agreement is required and the extent to which it ought to be required in order for a bribe to occur.

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\(^{126}\) See supra note 9 and accompanying text. 

The potential difficulty perhaps is illustrated by United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), in which the alleged bribe recipient was the vice-chairman of a city’s parking authority. He led a publicity and political campaign against zoning variances for a shopping center near the condominium in which he lived. The court said this was not done “in his capacity as a public official,” *id.* at 45, without explaining just what this meant or how one could tell. The developers later agreed to buy the defendant’s condominium at a price well above market and to pay him additional money for his agreement to drop his opposition to the project and to take active steps to secure its approval. *Id.* at 45. The Third Circuit reversed the defendant’s conviction under the Travel Act based on bribery charges because it had not been shown that he had any actual or apparent ability to influence zoning decisions in his official capacity. *Id.* at 49–50. Although the result in *Dansker* is defensible, the court offers no suggestions for determining whether influence, where it exists, is based on one’s official position or on other qualities and characteristics.
1. Is an Agreement Required?

On its face the typical bribery statute does not require an agreement. There are some statutes that require the benefit to be given as “consideration” for the desired official act.127 This language could support an interpretation that an agreement is required.128 Most of the statutes, however, require only that the benefit be given (or received) with an intent to influence (or to be influenced regarding) the official action.129

No court requires an actual, bilateral agreement for a bribe.130 A bribe can occur even if it is intended only by the briber or only by the recipient.131 Since the statutes prohibit not only giving and re-

129. E.g., CAL. PENAL CODE § 7(6) (West 1970), set forth in pertinent part supra note 49. The federal statute applicable to the briber is typical in that it requires an “intent to influence.” 18 U.S.C. § 201(b) (1982). In the case of the recipient of the bribe, he must seek or accept the benefit “in return for . . . being influenced . . . .” Id. § 201(c). The phrase “in return for” could be read to require an agreement, but it would be a peculiar agreement because the official does not need to agree to do what the briber wants, but merely to agree to be influenced. A better interpretation would treat the definition of the crime for the recipient as neither broader nor narrower than for the briber. As the text in this section indicates, there is considerable uncertainty about the “intent to influence” requirement. However that uncertainty is resolved, the “being influenced” requirement should be interpreted accordingly. Thus, to the extent that “intent to influence” is held to require an intent that an agreement be reached, the same degree of agreement should be required for “being influenced.” It is more intelligible to think of the agreement as one to perform the official act in the manner sought by the briber than as an agreement that the official will be influenced. On the other hand, if “intent to influence” is read not to require any agreement, “in return for . . . being influenced” should be interpreted as requiring the official to seek or accept the thing of value with knowledge or notice that it is provided with the intent that he be influenced. See United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

130. United States v. Brewster, 408 U.S. 501, 526 (1972), contains language that seems to indicate that such a requirement exists: “The illegal conduct is taking or agreeing to take money for a promise to act in a certain way.” But this statement was made in the context of deciding whether or not charging a member of Congress with bribery violated the speech or debate clause. The Supreme Court was not concerned primarily with defining the elements of bribery. That the Court was not speaking with precision regarding the requirements of the bribery statute is evident from the reference in the quotation to taking “money,” when it is clear that the thing of value may consist of things besides money. In the passage quoted the Court was not defining the requirements of bribery, but simply presenting a paradigm case for analysis of the speech or debate clause issue. At least, so the lower federal courts seem to have assumed. The circuit court decisions discussed below make few references to the Supreme Court’s decision in Brewster.

131. E.g., Slaughter v. State, 99 Ga. App. 239, 108 S.E.2d 161 (1959); People v. Lyons, 4 Ill. 2d 396, 122 N.E.2d 809 (1954). Lord Mansfield reached the same conclusion in one of the leading common law bribery cases, Rex v. Vaughan, 4 Burr. 2494, 2500-01, 98 Eng. Rep. 308, 311 (K.B. 1769). Of course, the recent Abscam prosecutions would have been impossible if this principle were not accepted. United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980).
receiving bribes but also offering and soliciting them, what ordinarily would be an “attempt” in criminal law is itself bribery. There is some controversy as to precisely what is required to meet the element of “intent to influence,” short of an actual, bilateral agreement, but it is difficult to separate substantive disagreements on this issue from mere differences in verbal formulations.

A person who provides a thing of value to a public official plausibly might hope to influence the official's decisions in any of three ways: 1) by conditioning the gift on the official's agreement to do or not to do something in a particular manner; 2) by causing the official to believe that his chances of receiving similar benefits in the future will be enhanced by acting favorably toward the donor; and 3) by stimulating gratitude or some kindred emotion that influences the official to act favorably toward the donor. In the hypothetical case, Katherine has been influenced (and Jim intended to influence her) in the second way. However, the narrowest reading of the bribery statute requires that the intent to influence employ the first means. As I have shown, even this narrow reading does not require an actual, bilateral agreement. The mere offer or solicitation of a benefit tied to a condition constitutes a bribe, as does an action taken in the mistaken belief that there is an agreement; for example, when one party is secretly cooperating with law enforcement officials. The narrowest reading does require, however, that there be at least an intent to act under an agreement or a belief that one is so acting. (Henceforth, for purposes of brevity, I shall omit the qualification and refer to the narrow reading as one requiring an agreement.) On the other hand, the language of the statutes and many of the decisions suggest that an intent to exercise influence in any of the three ways is sufficient to constitute bribery.

The polar positions taken in judicial decisions are represented, respectively, by United States v. Arthur and United States v. L'Hoste. The defendant in Arthur was a bank official who used bank funds “to entertain, do favors and buy gifts for state and local officials who might be influential in securing government deposits for the bank.” The Fourth Circuit panel wrote:

"Bribery" imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted . . . .

[T]he traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential


133. See cases cited supra note 131.

134. 544 F.2d 730 (4th Cir. 1976).

135. 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980).
customers [does not become] bribery merely because the potential customer is the government. Such expenditures ... are in no way conditioned upon the performance of an official act ... 136

In L'Hoste, the defendants were convicted of federal conspiracy and racketeering offenses based on charges that they obtained numerous no-bid, cost-plus sewer contracts in violation of the Louisiana bribery statute. The Fifth Circuit panel rejected the Arthur analysis:

The inquiry under the Louisiana statute ... is whether the gift is made, not as a quid pro quo for specific action, but with the intent to influence the conduct of the public servant in relation to his position, employment, or duty.137

At first blush, it may seem clear that in our hypothetical case, Jim and Katherine are guilty of bribery if L'Hoste is followed, but not if Arthur is followed. The poles, however, may not be as far apart as they seem. For one thing, the Arthur holding was based in part on the West Virginia bribery statute, which requires a benefit as "consideration" for the official act,138 unlike the more typical statute that requires an "intent to influence." In addition, the Arthur court may have been reluctant to hold that bribery had taken place in a case involving what the court apparently regarded as insubstantial gifts.139

Although other decisions have contained language similar to that used in Arthur, they too are equivocal. Best known is United States v. Brewster,140 which is often cited as requiring an agreement for satisfaction of the "intent to influence" element because of the following language:

The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.141

136. 544 F.2d at 733-34.
137. 609 F.2d at 807. L'Hoste also specifically rejected the idea, seemingly accepted in Arthur, that gifts to government officials could not be bribes if they were intended to cultivate good will in a manner similar to gifts customarily given in the private sector. Id. at 808.
139. Similar types of benefit have been found to be unlawful gratuities. E.g., State v. Prybil, 211 N.W.2d 308 (Iowa 1973). Cumulatively, they can be substantial. For example, it has been reported that over a five-month period the Chairman of the House Ways and Means Committee was treated to trips to various resorts. The value of the trips totalled $10,000. Gup, Golfing No Handicap For Rostenkowski, Wash. Post, June 6, 1982, § 1, at 1, col. 2.
140. 506 F.2d 62 (D.C. Cir. 1974).
141. Id. at 72.
While the reference to an "explicit quid pro quo" seems to contemplate an agreement, the Brewster court probably did not intend to rule that an agreement is necessary. The quoted passage occurs in a section of the decision in which the court explained its conclusion that the unlawful gratuity offense is a lesser included offense under the bribery statute. The point was simply to show that the intent requirement is greater for bribery than for unlawful gratuity, not to elaborate in detail precisely what intent bribery requires. In a later portion of the opinion, where the Brewster court was more directly concerned with the substance of the bribery offense, it described the intent requirement in terms of the bribe as "prime mover or producer" of the act, as it had done in the passage quoted above, but it made no mention of any requisite quid pro quo, explicit or otherwise. And in a related case decided by the same panel a few months later, the court again described the intent requirement purely in terms of intent to influence, without reference to a quid pro quo requirement.

Even to the extent that there is authority supporting the requirement of an agreement for a bribery conviction, it is not clear how stringent the requirement is, for at least two reasons. First, the agreement need not be specific. In United States v. Isaacs, a federal court construing the Illinois bribery statute wrote:

[B]ribery occurs when property is accepted by a public official with knowledge that it is offered with intent to influence the performance of any act related to his public position. No particular act need be contemplated by the offeror or offeree. There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary.

Second, the agreement need not be explicit. The finder of fact is

\[\text{Id. at 82. The court in United States v. Niederberger, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978), declared that it is "clear . . . that [the federal bribery statute] requires as one of its elements a quid pro quo," and cited Brewster as support for this proposition. Aside from the view stated in the text that this is a misreading of Brewster, the conclusion in Niederberger is dictum, since the only question before the court involved an application of the unlawful gratuity statute.} 44


144. 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

145. Id. at 1145 (emphasis added). To the same effect, see United States v. McManigal, 708 F.2d 276, 282 (7th Cir.), vacated, 104 S. Ct. 419 (1983). Neither Isaacs nor McManigal requires an agreement. These cases therefore might be regarded as irrelevant to the question of what is meant when an agreement is required. But since the Arthur court maintained that its position was consistent with the language from Isaacs, 544 F.2d at 734, the position that a quid pro quo is required may not be as stringent as it seems.
free to infer an implicit agreement from the gift to the official and from other relevant circumstances.\textsuperscript{146}

In sum, under the narrowest reading of the "intent to influence" element, a defendant must have intended to form an agreement, but the agreement need not have been made verbally explicit and need not have been related to any particular official act. Under a broader reading no agreement is necessary, so long as the briber made the gift with the intention of influencing the official or the official received it with knowledge, notice, or belief that the donor had such an intention.

In practical terms, in a jury room for example, the difference between these two views is probably insignificant. In the hypothetical case I have not stipulated any actual agreement, but a jury surely could infer that an implicit agreement existed. Given the surrounding circumstances, such a finding would not be reversed on appeal. Conceptually, however, the difference is not trivial. If the question is how many events that occur in politics really are bribes, as opposed to how many are likely to result in prosecutions or convictions, the difference is probably considerable. We therefore turn to the question, which view is preferable?

2. Should an Agreement Be Required?

Whether one takes the view that corruption is bad because it leads to bad decisions or that it is bad in itself, what is opposed is the influencing of decisions by means that are regarded as improper.

\textsuperscript{146} In state bribery cases in which the question of intent has been raised, the appellate courts commonly have affirmed convictions by declaring that the jury reasonably could infer the intent to influence an official decision, without suggesting that an agreement is necessary but without discussing the question. State v. Clark, 34 Wash. App. 173, 659 P.2d 554 (1983), and People v. Diedrich, 31 Cal. 3d 263, 643 P.2d 971, 182 Cal. Rptr. 354 (1982), are recent typical examples.

A revealing federal case is United States v. Johnson, 621 F.2d 1073 (10th Cir. 1980). At the outset the court in Johnson relied on Arthur for the proposition that in order to be a bribe an offer to an official must be made with the intent to influence official action "in exchange for" a thing of value. Id. at 1076. However, the evidence, held sufficient to support a bribery conviction, as summarized by the court, consisted only of testimony that the defendants paid money "in expectation of" favorable official action, and some unspecified circumstantial evidence. Id. at 1076-77. The court concluded its opinion by saying, "the evidence is sufficient to support a jury verdict that the money was offered . . . with the corrupt intent to influence official action." Id. at 1077. The court described no evidence demonstrating the existence of an agreement, despite its earlier reference to an "exchange" requirement. The decision can be interpreted in three ways: 1) There was evidence of an agreement and the court was inept in describing it; 2) The jury is allowed great leeway to draw an inference of such an agreement, and the affirmance is based on an assumption that the jury inferred an agreement; or 3) The reference to exchange in the first passage quoted above is not to be taken literally, and all that is required is an intent to influence, as the last sentence of the opinion, quoted above, suggests.
Influence is a matter of probabilities. The briber influences the official if the gift increases the probability that the official will act as the briber hopes. The existence of an express agreement may increase this probability, but it is only one of the many factors that determine the effectiveness of the proffered or solicited bribe. The presence of an agreement is neither necessary nor sufficient to bring about the kind of influence bribery laws seek to prevent. If an agreement is to be an essential element of bribery, it cannot be because the agreement is essential to or necessarily connected with the harm committed against the public interest.

Limiting bribery to cases involving express agreements would have an evidentiary advantage, to the extent it is easier to determine the existence of an express agreement than an intention, but this advantage, of whatever magnitude, is lost if implicit agreements are regarded as sufficient. Requiring agreements also would narrow the scope of the bribery statutes to some degree, a goal that the reader of this Article may be finding increasingly attractive. But the fact that even those courts that purport to require an agreement regard implicit and very general agreements as sufficient suggests that the narrowing of the statutes would be arbitrary: It would not distinguish transactions that are less corrupt or harmful from those that it continues to regard as bribes. Corrupt arrangements in the most conventional sense and in the most conventional settings often are carried out without express quid pro quo agreements. Indeed, students of power and influence have observed that the most effective pressure may be that which evokes an anticipatory response on the part of the pressured individual without even an explicit request on the part of the person exercising the pressure, much less an explicit agreement. To read a quid pro quo element into the major-

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147. See W. Murphy, Elements of Judicial Strategy 8 (1964).
148. The well-known joke that an honest politician is one who stays bought suggests that, even when an agreement has been reached, the probability that the briber will get what he wants may be less than certain. For an account of a notorious incident in which legislators collected money from both sides in a legislative battle and voted for the side that had given them the most, see S. Rose-Ackerman, supra note 56, at 26 n.22. A bribe involving an agreement also may have little effect on the outcome in the reverse circumstance, where the official is likely to act as the briber wants even if no bribe occurs.

On the other hand, one easily can imagine situations like the case of Jim and Katherine in which a gift from an interested person is intended to be and clearly is the major factor in causing an official to act in a manner favorable to the donor, although no agreement has been sought. See R. Axelrod, The Evolution of Cooperation 180 (1984) ("Unfortunately, the very ease with which cooperation can evolve . . . suggests that the prevention of collusion is not an easy task. Cooperation certainly does not require formal agreements or even face-to-face negotiations . . . . Cooperation based upon reciprocity can emerge and prove stable . . . .").
149. See A. Etzioni, supra note 61, at 58.
151. See W. Connolly, supra note 57, at 90.
ity of bribery statutes that do not contain such a requirement would be to reward deviousness and hypocrisy. Even if it would simplify the law of bribery, it would do so in an entirely arbitrary manner.

It should be possible, and under most statutes probably is possible, to commit bribery without attempting to reach an agreement, so long as the briber intends the gift to influence the official either with respect to a specific official action or, in the words of Isaacs, "when necessary." Nevertheless, it must be admitted that the implications of this conclusion are far-reaching, particularly with respect to political benefits, at least some of which, we have seen, can be bribes.

3. Campaign Contributions and Bribery

In this section I shall consider the implications of the "intent to influence" element in the context of special interest campaign contributions. By "special interest campaign contributions" I refer to contributions of substantial size from groups engaged in concerted lobbying activity.\(^{152}\)

It is widely believed, at least among "sophisticated" observers of American politics, that explicit *quid pro quo* arrangements involving specific, identified official actions, such as legislative votes, given in exchange for campaign contributions, are rare.\(^{153}\) While this view may be too optimistic,\(^{154}\) it is unquestionably true that such arrangements are regarded as bad form,\(^{155}\) and it is difficult to discover or assemble direct proof of their existence when they do occur. On the other hand, almost no one denies that special interest campaign contributions usually are intended to influence the official actions of recipients.\(^{156}\) Some common types of contributions—such as (1) those given to members of legislative committees important to the contributor without regard either to ideology or to electoral need, and (2) those given to a candidate after he is elected

\(^{152}\) Aside from whatever may be said regarding their use of contributions to influence official decisions, no pejorative connotation is intended to attach to the term "special interest."

\(^{153}\) As Berg et al. have argued, the mistaken assumption that a specific agreement is a prerequisite for a bribe has obscured the study of corruption in American politics. *Corruption in the American Political System*, supra note 3, at 88.


\(^{155}\) In Reisman's terms, such arrangements violate the "operational code." W. Reisman, *supra* note 4, at 1.

\(^{156}\) For a concise presentation of some of the evidence, see Wertheimer, *The PAC Phenomenon in American Politics*, 22 Ariz. L. Rev. 603, 607–11 (1980); see also *Corruption in the American Political System*, supra note 3, at 27, 90.
when the contributor did not support the candidate or even supported his opponent before the election—can hardly be explained otherwise.157 There is also ample anecdotal evidence158 and some quantitative evidence159 that contributions do in fact influence official actions.

Even defenders of special interest contributions do not generally deny that such contributions are intended to influence official actions.160 The most common assertion is that a contributor to a legislator seeks nothing more for the contribution than assured access to a legislator when important issues arise.161 No evidence is cited to support this assertion of universal self-restraint on the part of special interest campaign contributors.162 Even if the assertion is accepted it does not contradict the conclusion that contributions are intended to and do influence official actions. Apologists for the existing system of campaign finance, who often identify themselves with the pluralist school of thought in American political science,163 should ponder what one of their pioneers, David Truman, had to say about access:

[P]ower of any kind cannot be reached by a political interest group, or its leaders, without access to one or more key points of decision in the government. Access, therefore, becomes the facilitating intermediate objective of political interest groups.

157. See, e.g., E. Drew, supra note 10, at 68–69; Fialka & Carrington, Wall Street’s Firms Broaden Gift Lists For Congress Members, Wall St. J., Oct. 17, 1983, at 1, col. 6; Governor’s Post Cost White $8.9 Million, Denton Record-Chronicle, Jan. 19, 1983, at 8A, col. 1 (successful Democratic candidate for governor received ninety contributions in amounts from $10,000 to $50,000, after the election, from contributors who had supported his Republican opponent before the election); Hamilton, White’s Deficit Erased, Dallas Times Herald, Dec. 11, 1982, at A-1.


160. When the California Marshals Association was accused of making unethical contributions to the speaker of the state assembly, the president of the association responded, “We’re just participating in the legislative process.” Fairbanks, Marshals, Sheriffs Feuding Again, L.A. Times, Mar. 11, 1982, § 1, at 23, col. 3. A naive observer might have imagined that campaign contributions were part of the electoral process.

161. See, e.g., Fialka & Carrington, supra note 157, at 18, col. 1; Luther, Doctors’ Political Leansings Reported, L.A. Times, May 7, 1982, § 1, at 3, col. 5; H. Alexander, The Case for PACs 16–18 (undated monograph published by the Public Affairs Council, apparently in 1983). Anyone who participates regularly in discussions of campaign finance has heard this line more times than he can count.

162. The evidence is to the contrary. See sources cited supra notes 157–58.

... Toward whatever institution of government we observe interest groups operating, the common feature of all their efforts is the attempt to achieve effective access to points of decision.

... To describe the relative ease with which various groups gain access to such points of decision and to analyze the exploitation of such access through time is another way to describe the governmental institutions involved. ¹⁶⁴

In short, a legislator's time is so limited that the decision to listen to one person's arguments and information¹⁶⁵ on an issue and not another's is itself an official action. Furthermore, the purpose of seeking access is to present arguments that the contributor hopes will be persuasive and therefore will influence the official's ultimate actions on the merits of the issue. So it is that successful Washington lobbyists say that "[n]inety-nine per cent of lobbying in this city is now fund-raising,"¹⁶⁶ or refuse even to accept clients who do not make contributions.¹⁶⁷

What ought to be done about special interest campaign contributions is a controversial issue at state and national levels. No one doubts the enormously important role such contributions play in our political system. The legal status of these contributions is surely a matter of interest, even as the reader recalls the admonition in the Introduction that the "law on the books" is not likely to produce widespread prosecutions and convictions. There have been some differences in judicial interpretations of the "intent to influence" element of bribery, but the differences may be more verbal than substantive.¹⁶⁸ Under most bribery statutes as they have been interpreted by most courts, most special interest campaign contributions are bribes.

III. Bribery and Intermediate Political Theory

The foregoing account of the elements of bribery shows that the crime is not narrowly bounded. Bribery prosecutions and convictions based on facts far removed from the "standard" bribery paradigm—a specific agreement involving personal rather than political benefits to the official—are not everyday events, but neither are they rare. Given the present state of the law, the potential for new applications of bribery statutes is enormous.

¹⁶⁴. D. TRUMAN, supra note 90, at 264.
¹⁶⁵. Sometimes, in the real world, the only argument or information provided is that the contributor favors a particular course of action. But for the moment I am indulging the assumption that the contributor wants his contribution to count for nothing more than getting in the door.
¹⁶⁶. E. DREW, supra note 10, at 58.
¹⁶⁷. See id. at 59.
¹⁶⁸. This position is strongly asserted in Comment, Cautious Revision, supra note 4, at 1037–40, but it is not clear precisely what the comment-writer's substantive position is.
These conclusions raise many questions. What should be done about the bribery statutes? Should they be confined, either by legislative amendments or narrow judicial interpretations, to facts closely resembling the "standard" paradigm case? If this were done, would the coverage of the statutes more closely coincide with the set of practices that deserve the special stigma of being characterized as bribes? If the laws are not so drastically narrowed, are there concepts or guidelines that can help clarify what counts as a bribe? What trade-offs are involved in expanding or contracting the coverage of the bribery statutes? And why is it that a statute that is supposed to reach only the most corrupt and wrongful acts seems to cover so much of the routine activity of American politics?

In this part I shall consider and then reject the suggestion that requiring secrecy as an additional element of bribery could appropriately limit the scope of the crime of bribery statutes. Then, I shall examine bribery in the context of three major streams of American thought regarding political representation: the "trusteeship" and "mandate" theories in the Burkean debate, and the theory of pluralism. I shall discuss the deficiencies of each of these theories as guides for interpretation of bribery statutes. In the final section, I shall offer some concluding remarks and suggest one possible approach to bribery, pending the development of a more satisfactory body of intermediate political theory.

A. Is Secrecy The Missing Element?

The easiest way to solve the problem of political bribery would be to find some additional descriptive element or elements that, when added to the existing elements, would limit the scope of the bribery statutes to comport with widely held intuitions about which transactions really are corrupt. The only serious candidate for this role that emerges from the literature or the cases is secrecy: A transaction would be a bribe if it met each of the requirements described in Part II of this Article and if it were carried out in secret, but not otherwise.

Suppose Larry, head of the state Widget Association, issues a

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169. In 1975 the Texas bribery statute was rewritten. Among the changes was a new provision that "contributions made and reported in accordance with law" cannot be bribes. TEX. PENAL CODE ANN. § 36.01 (Vernon Supp. 1985). A student commentator has recommended that the federal statute be applied as though it contained a similar provision. Note, Campaign Contributions, supra note 4, at 465-70.


171. See supra notes 39-49 and accompanying text.
public statement, reported in the press, to the effect that the most important item on the widget industry's agenda is the defeat of bill number 100 and that, accordingly, the association will support and contribute to legislators if and only if they vote against the bill. Maria is a legislator who has been uncommitted publicly on bill number 100 and who is in a difficult struggle for reelection. She considers her need for a contribution from the Widget Association as well as many other factors, including the merits of the bill. She would like to vote against the bill and accept the contribution. So would Nora, another legislator, who was publicly and firmly opposed to the bill prior to Larry's statement. If they do so, will they and Larry be guilty of bribery?

An unscientific survey of students, colleagues, and others with whom I have discussed this problem indicates a sharp difference of opinion over whether a bribe has taken place, especially in Maria's case. Regardless of which answer the reader may favor, the problem does show that the secrecy or openness of the transaction can be a useful indicator of the presence or absence of a corrupt state of mind. This is true because most people, especially politicians, prefer that any wrongful acts they perform remain unknown to other people. In the problem, it is the openness of Larry's offer that makes many people reluctant to characterize the transaction as a bribe. If Larry had "spread the word" privately that contributions would be made to those who voted against the bill, the case for bribery would be considerably stronger.

Secrecy, however, should not be regarded as an element of bribery. If it were, it would not solve the problems encountered in Part II. First, although those who engage in corrupt activities ordinarily try to keep them secret, this is not always the case. It would be anomalous to conclude that an official with enough chutzpah to take bribes openly should thereby become exempt from prosecution. In the problem, for example, if Larry's offer were to make personal payments to legislators who voted against the bill, would anyone suggest that the public nature of the offering would save it from being a bribe?

Second, even if it were true that corrupt activities invariably were carried out in secret, the converse would not follow. That is, even if it could be said that an open act could never be a bribe, no one would argue that all secret acts are corrupt. To the extent that the "anything of value" and "intent to influence" elements of bribery are potentially too broad or too uncertain, adding secrecy to the

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172. See Noonan, The Setting of a Standard, supra note 4, at 1097 ("That there has been a corrupt payment is established by its size, its anonymity, and the payee's attempts to disguise its purpose.").
elements of the crime would be of no help in narrowing or clarifying the statutes as applied to acts carried out in secrecy.

Third, it would not be easy to make the secrecy criterion operational. Must the parties take affirmative steps to keep their relations secret, or will mere nondisclosure suffice? To avoid prosecution is publicity necessary, or is it sufficient that the relevant information is on the public record?

Finally and most fundamentally, the secrecy requirement is presumably directed at the benefit to the official, and, in some cases, at the official act. But the ultimate issues in a bribery case are issues of intent. There must be some connection between the thing of value and the official act, and the connection involves states of mind. It is not clear how we could possibly subject the intent issues to a test of secrecy.

It appears then that there are no short-cut solutions to the problem of political bribery. At least none that have been discovered so far. In order to find a solution, we must enter the realm of political theory, and there is ample warrant in the statutes for our doing so. In my analysis of the two most difficult descriptive elements—"anything of value" and "intent to influence"—I concluded that these terms were broad enough to include improper conduct, ambiguous conduct and probably some conduct that is unquestionably proper. No clear way to apply these terms in an adequately discriminating manner was apparent, unless the element of "corrupt intent" could be used to separate proper from improper conduct.

But in my consideration of "corrupt intent" it appeared that the only plausible way to construe this element as more than a redundancy was to read it as a requirement of wrongfulness, which was equated with contravention of the public interest. Therefore, it seems not merely permissible but mandatory to look to political theory to provide substantive content for the concept of corruption.

B. The Burkean Debate

The Burkean debate is described by Hanna Pitkin as "the central classic controversy in the literature of political representation." She poses the question as follows:

Should (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to act as seems best to him in pursuit of their

173. Reisman asserts that violations of the "operational code" will always be secret, whereas violations of the "myth system" will be merely "discreet." W. REISMAN, supra note 4, at 184 n.34. But he does not tell us in practical terms how to distinguish secrecy from discretion.

The debate is named for Edmund Burke, who championed the trusteeship position in his famous *Speech to the Electors of Bristol.*

Each side of the Burkean debate confronts well-known difficulties. Perhaps the most difficult problem for the Burkean (trusteeship) position is that even a believer in the possibility of discovering an objective divine or natural law may have difficulty in reconciling the Burkean position with notions of popular sovereignty.

The most difficult problem for the mandate theorist, on the other hand, is determining which constituents the representative should follow when they do not all agree, and then justifying the determination. Among the many plausible possibilities are: a majority of the entire constituency, a majority of the constituents who elected him, or a majority of those most affected by the decision in question. There are variant versions in which the representative must follow the commands of his party, on the theory that the constituents who voted for him did so because they supported the party platform, or in which he should consider national public opinion as well as that in his local district. Another drawback of the mandate theory is that if the decision in question turns on the probable consequences of alternative courses of action, it is difficult to find any reason for the representative to follow his constituents' opinions rather than his own if he is confident that he is better informed as to the probable consequences than they are.

Probably not many theorists are followers of either the pure trusteeship or pure mandate theory. There have been attempts to combine or find a compromise between the two poles of the Burkean debate. For example, Pitkin argues that the debate is overstated because the constituents' desires normally will coincide with their interests so that the representative faces no Burkean dilemma. She argues that when the representative believes there is a disparity between the desires and interests of the constituents, the proper resolution of the problem will depend on the reason for the abnormal...

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175. *Id.* For Pitkin's enlightening commentary, see *id.* at 144–240.

176. 1 *BURKE'S WORKS* 442–49 (London 1854). A vast amount has been written about this controversy since the eighteenth century, and not everything ascribed here to the "Burkean" position can be attributed to Burke himself.


178. *See, e.g., id.* at 43.

179. *See generally sources cited supra note 29.*

180. *See Sobolewski, supra note 106, at 100–02. Contemporary political scientists tend to be skeptical of the idea that there is any meaningful public or majority opinion at most times on most issues. This skepticism led to Robert Dahl's well-known characterization of our political system as one of "minorities rule."* R. DAHL, supra note 117, at 132. *For a more recent discussion, see C. GREENWALD, GROUP POWER: LOBBYING AND PUBLIC POLICY* 92–95 (1977).
situation.\textsuperscript{181}

1. Bribery and the Trusteeship Theory

For present purposes resolution of the Burkean debate is less important than discovering the implications of the respective positions in that debate for the concept of corruption in the law of bribery. For the Burkean trusteeship theorist, it is the representative's function to ignore all considerations except those that truly are relevant to the public interest. The public interest is defined in an objective sense,\textsuperscript{182} determined neither by public opinion nor by the distribution of political power. Under this conception, any sort of political pressure interferes with the proper functioning of the representative. The only activity on the part of constituents or interest groups designed to influence a representative's decisions that is consistent with the Burkean conception of representation is the transmittal of information.\textsuperscript{183} What is wanted is the representative's judgment and wisdom. Outside pressure is likely to interfere with the exercise of these faculties.\textsuperscript{184}

It follows, then, that the Burkean theorist must condemn all the bargaining, all the wheeling and dealing, and all the consciously applied pressure that characterizes American politics, at least insofar as the bargaining and the pressure involve individualized benefits for the representatives whose decisions others seek to influence.\textsuperscript{185} The Burkean therefore must condemn all the activities

\textsuperscript{181}. H. Pitkin, \textit{supra} note 174, at 162–67; see also B. Seltser, Embattled Illusions: Principles of Compromise in American Politics 40 (unpublished manuscript, on file at the UCLA Law Review) (expressing skepticism about the relative practical importance of the Burkean debate in American legislative politics).

\textsuperscript{182}. This is not to say that each Burkean theorist necessarily will have the same conception of what the objective public interest is. See G. Schubert, \textit{supra} note 177, at 79.

\textsuperscript{183}. This would include information about public opinion. The Burkean representative takes public opinion into account in determining what is in the public interest. See 1 Burke's \textit{Works}, \textit{supra} note 176, at 446–48. For example, a particular state of public opinion might affect the likelihood of a given policy being carried out successfully. In addition, a representative who is aware of his own fallibility might have reason to consider an issue more carefully when he finds that public opinion is contrary to his own. But the Burkean representative is not bound by public opinion.

\textsuperscript{184}. \textit{Cf.} United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979) (Governor of Maryland had a duty to render “honest, faithful and disinterested service” (emphasis added), cert. denied, 445 U.S. 961 (1980).

\textsuperscript{185}. Logrolling in a situation that does not involve individualized benefits for the representative poses a more difficult problem for the Burkean. Suppose there are two policy questions pending, and the representative's views on each favor X and X', respectively, over Y and Y'. Suppose the representative's assessment is that if he does not bargain, X will pass but X' will lose. Suppose also that if he must choose, he regards the passage of X' as far more important for the public interest than X. Finally, suppose he is offered a deal under which he will cast a decisive vote for Y in exchange for votes sufficient to adopt X'. Presumably, the Burkean representative regards logrolling as an evil, but there is nothing in the Burkean theory itself that tells him whether it is a
that might be swept within the broadest reading of the bribery statutes. Of course, a Burkean might believe that the bribery statutes should be given a narrower scope for prudential reasons, or that some forms of bringing pressure, although harmful to the representative function, must be protected for other reasons, such as freedom of speech. But the Burkean theory of representation does not by itself provide any ground for discriminating between corrupt and noncorrupt political pressures. Proper representation for the Burkean is unpressured representation.

2. Bribery and the Mandate Theory

The mandate theorist will not condemn political pressure as uniformly as will the Burkean. The mandate theorist is less concerned with the wisdom and judgment of the representative than with decisions that are in accord with public opinion. If it takes pressure to assure such decisions, the mandate theorist should welcome such pressure. On the other hand, pressure that does not reflect popular preference will interfere with the mandate theorist’s conception of proper representation.

The goals of those who offer personal benefits to officials to influence their decisions are unlikely to reflect public opinion. The mandate theorist therefore should be willing to treat the element of “corrupt intent” in bribery statutes as a redundancy in cases involving personal benefits. Since the goals of persons willing and able to make campaign contributions large enough to influence official decisions also are unrepresentative of public opinion, the mandate theorist should be willing to treat such contributions as bribes.

On the other hand, the mandate theorist will regard pressure resulting from some political benefits as perfectly proper. An organizational endorsement, for example, has significance only to the extent that substantial numbers of voters wish to support the goals of the organization. The official who responds to pressure caused by the desire to obtain the endorsement is responding to the pres-

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greater evil than the defeat of X’. Such a determination depends on the substantive conception of the public interest that is held within the Burkean framework, and on the legitimacy of compromise within that substantive conception. See generally Seltser, supra note 181.

My colleague, Steven Shiffrin, has raised this question: Will the Burkean theorist condemn constituent pressure aimed at forcing the representative to act more like a Burkean? Since Professor Shiffrin has been gracious enough to raise the question, I graciously shall leave it for him to answer. The problem is an example of the paradox of self-reference. See Lowenstein, California Initiatives and the Single-Subject Rule, 30 UCLA L. REV. 936, 941 n.19 (1983).

186. This point is demonstrated in the context of contributors to ballot proposition campaigns in Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. REV. 505, 570–78 (1982). The analysis is equally applicable to candidate elections.
sure of public opinion, which is what the mandate theorist wants him to do.\textsuperscript{187} Similarly, the mandate theorist may assume that other political benefits, such as those derived from bargains with other elected officials or with executive agencies, or bargains with groups and individuals to avoid opposing candidacies, will benefit the official to the extent that they promote what the electorate wants.

If he accepts this analysis, the mandate theorist may argue that the bribery law as it stands more or less incorporates his conception of representation. Thus, when private benefits are involved, it is difficult to find in the law any independent meaning in the element of "corrupt intent." Equally consistent with the mandate theory, the courts uniformly have held that campaign contributions are things of value for bribery purposes,\textsuperscript{188} with no extra requirements imposed on the prosecution. While there is little case law that precludes finding bribery in cases involving other types of political benefit, the mandate theorist can point out that the case law is sparse, suggesting that, at least at the prosecutorial level, such benefits are not regarded as bribes, and leaving open the possibility that the courts will reach similar conclusions if prosecutions become more common.

The mandate theory of representation comes closer to explaining the actual law of bribery than either its Burkean counterpart or the pluralist theory considered in the next section. The mandate theory, however, is no panacea for the problems involved in refining the law of bribery. Many readers will find unacceptable its conclusion that all campaign contributions intended to influence the beneficiary's official conduct are bribes. I shall defer that question to the final section, and consider instead the other forms of political benefit that might be regarded as bribes. The assumption, indulged in in the previous paragraphs, that political pressures generally reflect public opinion is naive.\textsuperscript{189} The assumption ignores the extremely limited information that most voters have regarding most subjects.\textsuperscript{190} Even when voters know that a question exists and that

\textsuperscript{187} If the official knew that the leader of the organization was abusing his position by conditioning an endorsement on some private goal of the leader rather than on the public goals of the organization, as in our hypothetical case of Charles and Diane, see \textit{supra} text accompanying note 92, then pressure would be improper under mandate theory, and a bribery conviction would be appropriate.

\textsuperscript{188} See \textit{supra} notes 86–87 and accompanying text.

\textsuperscript{189} Any reader who needs persuasion on this point will find David Mayhew's superb book on Congress profitable reading. \textit{D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION} (1974).

\textsuperscript{190} Another reason that political pressures may pull politicians away from majority-held views is that in a given instance minority sentiment may be more strongly held than majority sentiment. For example, the failure of legislatures to pass gun control legislation in the face of polls showing heavy majority support is usually explained, at
they have an opinion on that question, they are unlikely to be aware of their representative's actions with respect to it. 191 It is the interest group directly affected, whose interest may be directly opposed to that of the mass of voters, that is most likely to be aware of what the representative is doing and to put pressure on the representative. The mandate theorist may respond that it then merely becomes necessary to determine which types of political pressures tend to be positively correlated with public opinion, and exempt those from the bribery laws. In practice, however, making such a determination and getting widespread agreement on it would be as difficult as deciding which types of pressures are wrongful or contrary to the public interest.

3. The Inadequacy of the Burkean Debate

At bottom, the mandate and trusteeship theories suffer from the same deficiencies as guides to determining what political pressures are corrupt. Each theory begins and ends with an abstract conception of the representative's duty. Neither theory says much about intermediate questions such as how things are likely to turn out in a specific political system and situation if representatives actually do what the theory prescribes; what incentives are or might be built into the system to encourage or discourage the representative from doing what the theory prescribes; or how important the value of the sort of representation posited by the theory is compared to other values, such as attaining policies that are regarded by one standard or another as desirable, encouraging widespread participation in politics, preserving freedom of speech, and a host of others.

Our society is organized on the premise that most individuals most of the time are motivated in significant part by self-interest. There is little reason to doubt that this premise is valid for elected officials, for whom self-interest typically consists of enhancement of the prospects for reelection and advancement. The law of bribery ought to be a small part of a political process that, taken as a whole, seeks to encourage elected officials to pursue their interests in a manner that also serves the public interest. A law of bribery that condemns much of what a politician needs to do on a daily basis cannot serve this purpose, because it cannot be obeyed or en-

191 The representative's final vote on an issue is relatively easy to discover, but this does not mean that more than a small fraction of voters discover it. Often preliminary votes and other activities besides voting are of more practical importance than the representative's final vote on the issue, but these may be difficult for anyone but an insider to discover.
forced. The contending theories of representation in the Burkean debate are at once too broad and too narrow. They are too broad in the sense that they are too abstract and thereby make no concessions to the realities of the system and the society within which they are to be applied. They are too narrow in the sense that the values they embody do not come close to capturing all the needs that must be served by an actual political system.

C. Pluralism

The theories in the Burkean debate fail to provide specific guidance for identifying corrupt political pressures, in part because they are too purely prescriptive. It might seem, therefore, that pluralist theory is just what the doctor ordered. Pluralist theorists have eschewed concentration on formal obligations in favor of studying the system "as it really operates." At the core of the "real" system, according to pluralist theory, is pressure exerted by interest groups.

192. J. Roland Pennock has attempted to incorporate the desire for reelection into the framework of the Burkean debate by considering the ethical obligations of a representative who believes that he will lose his seat if he follows the course on a particular substantive issue that is dictated by the position he takes on the trusteeship-mandate spectrum. For example, a representative who believes in the trusteeship theory might believe he will be defeated if he votes on an issue in the manner he believes is right but unpopular. A believer in the mandate theory might anticipate defeat if his vote on an issue will be in accord with public opinion but will offend important campaign contributions. Pennock concludes that "the only rational way for him to go about answering this question would be to estimate the alternative to his occupying the seat and the balance of representativeness for the constituency, on all issues, if his opponent held it." Pennock, Political Representation: An Overview, in NOMOS X: REPRESENTATION, supra note 106, at 1, 19. Pennock's proposal is excellent logic but naive political theory. The proposed standard, calling for the representative to weigh the harm to the constituency of losing his services, would be so vague in practice that it is tailor-made for self-deception and hypocrisy.

193. There is a striking parallel between the three theories of representation discussed in this part, and the three conceptions of "corruption" found in the social science literature and discussed in Part II.A, see supra notes 53–56 and accompanying text. The Burkean or trusteeship position corresponds to the morality or public-interest-based definitions of corruption. The mandate theory of representation corresponds to public-opinion-based definitions of corruption. The correspondence between the third conception of corruption, based on legal norms, and the third theory of representation, pluralism, is not as obvious. However, to the extent that one accepts the pluralist description of law and government policy as purely the outcome of the group struggle, the correspondence between the legally based definition of corruption and the pluralist theory of representation is perfect.

The three theories of representation also correspond closely to the three public interest theories identified by Glendon Schubert. He denominates these the Rationalist, Idealist, and Realist theories, and they correspond respectively to the mandate, trusteeship, and pluralist theories of representation. G. SCHUBERT, supra note 177, at 26.

194. As Nicholas R. Miller has recently pointed out, the word "pluralism" has been used to describe a number of related but distinct schools of political thought. I am using the term to describe what Miller calls "Pluralism as Group Politics".
1. Pluralist Theory and Pluralist Ideology

American pluralist theory traces its origins to Arthur F. Bentley's writings during the Progressive Era, but pluralism did not become a dominant school of thought in political science until the 1950's, when David Truman's book, *The Governmental Process*, prompted renewed interest. My consideration of pluralist theory will concentrate on Truman's work. Because for a time pluralist theory enjoyed ascendancy in American political science, pluralism became an ideology with a content of its own sometimes rather different from the ideas put forth by its original proponents. In this section I shall attempt to distinguish, where necessary, pluralist ideology from Trumanesque pluralist theory.

An important element of the pluralist ideology is the idea that government officials are essentially nullities. Their sole function is to register the opposing strengths of the competing interest groups and to record the result in the form of government policy. In this view, the political process "is a purely mechanical one, reflecting the Weltanschauung of Newtonian physics rather than that of the age of nuclear fission." The public official is seen as a purely passive agent, who responds more or less perfectly to group pressures. Under this conception, preoccupation with the integrity of representatives is beside the point, and there is little sense in a concept like corruption, at least at the policy-making level. Any practice that seriously interferes with the accuracy with which officials register the strength of contending forces is perhaps a source of concern, but the pluralist conception of policy as the outcome of a mechanical process provides no basis for assessing the accuracy of the registering of group forces. Accuracy is assumed.

This conception of government officials passively registering the force exerted by contending groups and translating group forces into public policy is part of the pluralist ideology but is not the conception that has been advanced by the serious pluralist writers. Truman, for example, repeatedly insisted that government officials

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Pluralism often refers to the "group basis of politics" and more specifically to the notion that the raw material of politics consists of the demands of organized interest groups (and perhaps "potential groups" as well), and that "what may be called public policy is actually the equilibrium reached in the group struggle at any given moment". Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 735 (1983) (references omitted).

196. D. TRUMAN, supra note 90.
197. The ideology has been propounded and criticized under various names. Theodore Lowi, for example, attacks it under the name "interest group liberalism." T. LOWI, supra note 114, at 71.
198. G. SCHUBERT, supra note 177, at 139.
199. See id. at 202.
themselves constitute interest groups, and that public policy is produced by dynamic interaction between interest groups inside and outside government. Viewing representatives as active participants is quite different from regarding them as passive indicators of the progress of the group struggle, and is no doubt more plausible. But Truman’s conception may seem even less helpful than the mechanistic conception for purposes of elucidating the concept of corruption. If public officials constitute contending interest groups no different from those in business, labor, and other sectors of the society, it may seem that all is fair. This is not a correct conclusion, however, because of a curious but fundamental aspect of Truman’s theory, which he referred to as “the rules of the game.”

Truman and the other pluralist writers recognized that not all interests were well-organized. They contended that organized groups had to be wary of disregarding unorganized interests. Otherwise, the unorganized interests would become organized, to the ultimate detriment of the original organized groups. Truman wrote:

Government is not simply a neutral force, . . . moved this way and that solely by the relative vigor with which competing organized groups are able to assert themselves. Such an explanation is much too simple; the functions of government cannot be described in such narrow terms without ignoring significant aspects of its operations.

D. TRUMAN, supra note 90, at 106; see also id. at 351 n.53. Twenty years after the publication of his book, Truman introduced the second edition by again deriding as a “weakness,” a simplistic conception of the process, one that assigns to interest groups a monopoly of political initiative. In this view governmental actors, whether individuals or collectivities, are no more than referees of group conflict, registers of group demands, or ratifiers of the outcomes of intergroup contests. The initiative for action (or inaction) is regarded as being exclusively with the groups, and governmental actors are assigned an almost wholly passive role. The obvious error of this superficial viewpoint is that it treats an extreme situation as if it were typical and in consequence neglects or ignores all the rich complexity of relations between interest groups and governmental actors in any developed political system.

Id. at xxv.

Passages can be found in the work of Earl Latham, another influential pluralist writer, that seem to endorse the mechanistic view. In particular, Latham described the legislature as the referee in the group struggle, and defined public policy as the equilibrium reached in the struggle. E. LATHAM, THE GROUP BASIS OF POLITICS 35, 36 (1952). But Latham’s conception was fundamentally similar to Truman’s, as is evidenced by his derision of the idea that the legislature plays the inert part of cash register, ringing up the additions and withdrawals of strength, a mindless balance pointing and marking the weight and distribution of power among the contending groups. For legislatures are groups also and show a sense of identity and consciousness of kind that unofficial groups must regard if they are to represent their members effectively.

Id. at 37.

201. The assumption that unorganized interests would become organized simply because they suffered harm at the hands of organized groups was refuted by Mancur Oi-
sometimes referred to these unorganized interests as "potential groups." 202 One form of potential group consists of discrete interests that for one reason or another are not as well-organized politically as other discrete groups. 203 More important in Truman's conception, however, is another form of potential group, variously referred to as "widely dispersed values," 204 "socially determined behavioral norms," 205 "unorganized interests," 206 or "rules of the game." 207 The rules of the game are majority interests, and actors in the political process must avoid at least conspicuous violations of these norms for fear that the majority will become mobilized. 208 "[T]he 'rules of the game' are interests the serious disturbance of which will result in organized interaction and the assertion of fairly explicit claims for conformity," 209

The "rules of the game" are associated with moral codes and include broad principles such as basic civil liberties and "the orderly procedures of political settlement." 210 The "rules of the game" also include shared attitudes about the means by which influence may be exerted by interest groups upon the government decision-making process. For example, one of the widespread unorganized interests capable of mobilizing when the need arises is an opposition to "corruption" (placed in quotation marks by Truman) in the awarding of public contracts. 211 It is this latter set of "rules of the game," those that bear more or less directly on influencing official decisions, that is of greatest interest for the present study of bribery. But they also are of central importance to Tru-
man's model of government, and his failure to give them adequate attention is a major deficiency in his theory.

2. The Incompleteness of Pluralist Theory

For Truman, government policy results from the interaction between nongovernmental interest groups and public officials. That interaction consists primarily of attempts to influence the officials and of responses of the officials to these attempts. This is the keystone, the crucial process in Truman's political universe. The beehive of group organization and activity that Truman describes has no significance except as it is directed to influencing public officials. Yet Truman is surprisingly casual about the techniques of influence. There is an anecdote here and there, an occasional generalization made in passing, but little more. A group-based theory of politics that does not seriously explore the techniques of influence is like a theory of chemistry that does not seriously explore molecular structure.

For present purposes, however, the most important thing is the "rules of the game," which, according to Truman, regulate the interaction between interest groups and government officials. Here again Truman's presentation is strikingly incomplete. There can be no doubt of the importance of the "rules of the game" in Truman's system. They are "not neutral." They are controversial, and they can be used effectively by the "propagandist." They affect the relative power of interest groups, especially when they are embodied in legal requirements and restraints. Truman, how-

213. Consider the following passage, for example:

"[P]ressure," conceived as bribery or coercion in various forms, is scarcely the distinguishing feature of interest groups in the legislative process. Such coercion is frequently attempted, of course, and it often has an observable effect. "Pressure" of group upon legislator, however, is at most one aspect of technique, one among many different kinds of relationships that exist within the lawmaking body. Id. at 351.

Considering the centrality of these ideas to Truman's overall theory, the passage is remarkably incomplete. Exactly what does Truman mean by "bribery" and "coercion"? Elsewhere Truman describes as "simple bribery" an incident that requires the most expansive reading of the typical bribery statute to be considered a bribe. Id. at 341. Are bribery and coercion the only techniques of influence that come within the term "pressure"? If "pressure" is not "the distinguishing feature of interest groups in the legislative process," what is? And if "pressure" is but "one aspect of technique," what other techniques exist and how effective are they compared to "pressure"?

214. Id. at 347.
215. Id. at 347-48.
216. Id. at 231.
217. Id. at 259. Truman asserts that the "rules of the game" create a "discount rate" applicable to the conversion of economic power into political power. See also id. at 349.
218. Id. at 237. Truman's example involves a corporation restrained by the Federal
ever, gives only the vaguest indication of the specific content of the
"rules of the game." Neither does he give any detailed account of how the "rules of the game" acquire their content, in what ways they might plausibly be different, or what the consequences of changes in the "rules of the game" would be. Since, by his own account, the "rules of the game" have an important effect on the group struggle and its outcomes—perhaps they can even be said to shape the group struggle—the failure to do much more than posit their existence leaves a vacuum at the core of Truman's theory.

Of course, an attempt to deal seriously with the "rules of the game" might have filled another book the length of The Governmental Process, and no doubt one with a very different thrust. Although Truman's book is justly celebrated as a work of scholarship and his ideas transcend the simplistic pluralistic ideology, it is possible that Truman subscribes to the ideology just enough to prevent him from engaging in that thoroughgoing normative evaluation of interest groups and their techniques that would have been necessary for a serious consideration of the "rules of the game." Truman treats superciliously those "who are preoccupied with moral judgments of group politics," and those who display "uncritical anger" at political techniques used by interest groups. Because Truman himself is insufficiently concerned with moral judgments, he provides his readers with little guidance for channeling their anger in a more discriminating manner.

Many writers following Truman in the pluralist tradition, or sharing some common ground with the pluralists, have included in their theories concepts similar to Truman's "rules of the game," under various names such as "minimal consensus" or "method of democracy." Unfortunately, they also have followed Truman in describing these concepts in very general terms—at most describing the type of values they embody—but not specifying what values are

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219. E.g., id. at 347-48.

220. Latham asserts "the rules by which groups live with each other and according to which they will compete" are themselves determined by the group struggle. E. LATHAM, supra note 200, at 33; cf. T. LOWI, supra note 114, at 49 ("Rules convert conflict into competition. But rules and their application imply the existence of a framework of controls and institutions separate from the competition itself. Whether we call this a public or not, there is a political context that is not itself competition within which political competition takes place" (emphasis in original)).

221. D. TRUMAN, supra note 90, at 334.

222. Id. at 12.


and are not included, and why.225

The theory of pluralism tells us little about how to identify political practices that can be regarded as corrupt within the meaning of the bribery statutes. This is not because, as one might suppose from the pluralist ideology, pluralist theory is unconcerned with the rules and norms governing political influence. To the contrary, such rules and norms are central to serious pluralist theory. It is simply that the pluralist theorists have left this part of their theory blank.226

D. The Author Takes a Stand

The reader may imagine that what I have written so far is a prologue to the Revealed Truth, and that the authoritative solution to the problem of political bribery is about to be presented. But although the Truth has indeed been revealed to the author on a great many subjects,227 bribery, alas, is not among them. This Article’s twofold purpose has been to bring to light some problems in the American law of bribery and to demonstrate gaps in the mainstream of American political theory that impair its ability to help resolve such concrete difficulties. I add the present section out of a sense that the author of such an Article may have some obligation to “take a stand” on the issues he has raised.

Political bribery may be regarded as harmful in itself, or as harmful because it tends to lead to bad substantive decisions.228 A

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226. Pluralist theory has come under heavy criticism and no longer enjoys the unquestioned prestige it once held in political science. Most of the criticism is levelled at the unfairness that results from the group struggle, and might be termed “macro-criticism.” E.g., M. Edelman, The Symbolic Uses of Politics (1964); G. McCon nell, Private Power and American Democracy (1966); M. Olson, supra note 201; E. Schattschneider, The Semisovereign People (1960). For discussion of much of this literature, see McFarland, Public Interest Lobbies Versus Minority Faction, in INTEREST GROUP POLITICS 324 (A. Cigler & B. Loomis eds. 1983); A. McFarland, Recent Social Movements and Theories of Power in America (Aug. 31, 1979) (unpublished paper prepared for delivery at the 1979 Annual Meeting of the American Political Science Association, on file at the UCLA Law Review). The macro-critics, because they are concerned primarily with the outcomes of the group struggle rather than with the techniques of influence, have little of use to add to the present inquiry.

A partial exception is Theodore Lowi. See T. Lowi, supra note 114. Lowi’s views on representation appear to be more or less Burkanian. His primary emphasis is on interest group participation at the implementation stage of government policy, which he generally opposes. He is less clear about the legislative stage. He seems to acknowledge that interest group pressures are inevitable in the legislature and perhaps even desirable, yet he wants the policy-making process to stake out moral positions. In any event, he offers no detailed account of how legislators do or should respond to interest group pressures.

227. See, e.g., Lowenstein, supra note 186.

228. See supra text accompanying notes 64–71.
complete conception of political bribery therefore would require a political theory capable of (1) explaining why certain types of political pressures are harmful per se, or (2) providing criteria for evaluating decisions substantively, together with empirically plausible generalizations about what types of pressures tend to lead to bad decisions, or (3) both. I shall not attempt to present such a theory here. But normative judgments must be made, even when they cannot be grounded firmly in comprehensive political and ethical theories.

1. Bribery as Harmful in Itself

Let us first assume bribery is opposed on the ground that it is harmful, without regard to the substantive policies it produces.

Even if it were desirable for officials always to make unpressured decisions, it would be impossible to achieve this desideratum in a free and democratic society in which officials are permitted to seek reelection or advancement. Aside from this consideration, I do not believe, as some Burkeans may, that decisions by elected representatives are tainted unless they are unpressured or “disinterested.” On most issues of importance, there are conflicting interests within the constituency or society that the representative is serving. Recognizing this does not necessarily lead to denying the existence of a useful concept of the public interest, but it casts doubt on whether a representative can claim to have made a good-faith effort to find the public interest if he has not taken into account each of the conflicting interests. The ability of groups to bring political pressure to bear on the official provides some assurance that their interests will be considered.

There is still another point. Even if it were somehow possible to shelter officials from political pressure, it would be undesirable to do so for the same reason that it would be a mistake to shelter a child from all the world’s temptations and problems. The capacity to make responsible and conscientious decisions in difficult situations, like other human faculties, must be exercised in order to develop. Politics is a rough trade. Its practitioners cannot stand above the conflicts and calmly resolve them; they must find their way to serving the public interest from within the conflict, absorbing blows with every step. If they are to have any chance of developing the strength of character we need them to have, they must

229. See supra note 184. By “unpressured” and “disinterested” decisions, I mean decisions not foreseeably connected to some individualized benefit for the decision-maker. An official plausibly could describe himself as feeling “pressured” to decide a matter one way in order to serve one public goal whereas a different decision would serve other public goals. I am not using the term to include such a case.

230. It may lead one to that conclusion, however. See G. SCHUBERT, supra note 177, at 220-24.
learn to contend with their fears and ambitions, not be sheltered from them. To paraphrase Harry Truman: if they are to stay in the kitchen they must learn to stand the heat.

Political pressure, then, is not always wrongful in itself. Perhaps we can distinguish between political pressures that are useful or intrinsic to our system, and those that exist solely to corrupt officials. If so, we can then condemn political pressure that takes a form appealing more or less exclusively to the official's self-interest, and tolerate pressure that appeals to an official's self-interest primarily as a by-product of an interest group's pursuing its goals within the general framework of the political system.231

Stated generally and abstractly, this distinction is no doubt somewhat obscure. Let me clarify it by applying it to concrete situations. The easiest case is the pressure generated by provision of purely personal benefits to an official in order to influence an official decision. The action has no meaning except as an appeal to the official's self-interest and may therefore be condemned as corrupt. In contrast, although many political benefits involve equally strong appeals to the official's self-interest, the benefits occur in the course of events that have a broader significance. In the case of an organizational endorsement, for example, the endorsement may be so important to the official that his official acts will be influenced for selfish reasons, and the endorsing organization may have intended that the official's desire for the endorsement would have precisely that effect. But it is also true that the representational system is based on the assumption that individuals and groups will support or oppose candidates depending on whether they approve or disapprove of the candidates' actual or proposed conduct in office. The political pressure generated by the desire of officials to obtain endorsements from organizations perceived as influential is inextricably tied to a fundamental part of our system, and, therefore, should not be regarded as corrupting. It is the kind of pressure that makes diverse viewpoints salient to officials and the kind that they must be

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231. Some ungrateful reader will probably ask why we should draw such a distinction. One answer is that we simply cannot afford to call corrupt those pressures that are inevitable by-products of valued features of the system. Perhaps a better answer is that there is a difference in the psychology of the official who succumbs to these respective types of pressure. If the pressure arises as a by-product of legitimate political activity, the official can explain his behavior to himself and others, with some element of truthfulness, as influenced not merely by self-interest, but by the underlying political force—public opinion, for example. Call this hypocrisy or trimming if you will, but I dare say that occasional rationalization may be less damaging to the moral character than the outright deception (of others and, perhaps, of oneself) that is likely to be needed when the official succumbs to pressure arising solely out of self-interest.

If the skeptical reader still is not satisfied, I must parry the thrust by repeating my previous admission that in the absence of a satisfactory body of intermediate political theory I doubt whether any approach to political bribery can be grounded satisfactorily.
able to cope with as politicians. A similar analysis is applicable to the withholding of potential competing candidacies as a device for exerting pressure.

In the cases of logrolling and "state-bribery," there may again be a strong element of self-interest involved in the official's decision making, if he stands to gain politically by receiving credit for bringing benefits to his constituency. Generating benefits for constituents is not as unambiguously approved in our society as is the practice of organizations endorsing candidates whose conduct they approve. The tendency of logrolling and state-bribery to serve parochial interests has caused considerable scorn to be placed on these practices. Nevertheless, it generally is recognized that these practices may lend some flexibility to the overall political system, and for better or worse, they are tolerated. Thus, the political pressures generated by the opportunities that exist for logrolling and state-bribery ordinarily should not be condemned as corrupt.

This leaves what may be the most difficult case, special interest campaign contributions. One can argue that the above analysis of organizational endorsements is applicable to campaign contributions as well. Whether groups manifest their support through endorsements or contributions, it is natural for them to favor the officials whose actions they favor. Although it seems to follow that the support will be used to influence official action, is not the pressure a by-product of an accepted feature of our political system?

There is a crucial difference between endorsements and contributions in what determines the value of the benefit provided to the official. An endorsement has value only to the extent that voters identify with or approve of the endorser. A candidate in Oklahoma might work hard for the endorsement of the oil industry, while his counterpart in Massachusetts might regard such an endorsement as a disaster. In Fresno endorsements from farm organizations are highly valued, while in San Francisco they might be irrelevant at best. On the other hand, substantial contributions from the oil industry or farm groups would be of virtually equal value to candidates running anywhere.

This difference between endorsements and contributions is significant in evaluating the acceptability of the political pressures they generate. Pressure generated by potential endorsements is more consistent with democratic values than is pressure generated by contributions. Because the value of an endorsement is limited by the regard in which the endorser is held by voters, the endorsement

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232. See supra notes 112-15 and accompanying text.
233. The point is mitigated, but only slightly, by required disclosure of campaign contributions. See generally D. ADAMANY & G. AGREE, POLITICAL MONEY 83-115 (1975).
cannot be used primarily as a device for influencing official conduct. There must be some plausible connection between a group's ideology and the performance of its endorses. Therefore, the endorsement's purpose in general must be to affect elections. The endorsement is also useful as a device to influence official conduct, but this use never can be more than ancillary to its main purpose. In contrast, contributions of money can be transformed into whatever resources the official's campaign advisers find most effective, with no connection to the donor's ideology. Accordingly, contributions intended to influence official decisions can be and routinely are made to officials to whose electoral prospects the donor is indifferent or even hostile.

Contributions intended to influence official conduct and accepted with the knowledge that they are so intended therefore may be regarded as corrupt. The political pressure that they generate appeals solely to the official's self-interest. This pressure is not a by-product of legitimate activity engaged in for reasons other than influencing official decisions. On the other hand, contributions intended solely to help the candidate get elected also might generate political pressure, but this pressure, like that generated by endorsements, is a by-product of the contributor pursuing his goals in a manner accepted within the system.

234. For example, an official might calculate that he could raise considerable amounts in small contributions by opposing legalized abortions. This prospect might affect his official conduct. However, no individual small contributor reasonably can expect that his contribution alone will influence the official's conduct. The contribution, therefore, cannot be regarded as a bribe under any reading of the statutes.

235. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court treated campaign contributions as a protected aspect of the right of association, of special significance because of the centrality of elections and politics within the values protected by the first amendment. No such protection was given to contributions intended to influence official conduct.

That same reader who caused so much trouble back in note 231 no doubt is now commenting that I have not addressed the case of a contribution made for the dual purpose of influencing official action and improving the official's electoral prospects. The logic of the present stage of the argument (considering bribery as harmful without regard to its effects on substantive policy) might suggest that pressure resulting from such a contribution would be a by-product of legitimate action, as in the case of endorsements, and, therefore, would not be corrupt. This conclusion is contestable, however, and resolution of the contest requires a deeper consideration of the role of campaign contributions in a democracy than I can pursue here. See generally Wright, supra note 163. Conceding the point for present purposes, I contend dual-purpose contributions properly are regarded as corrupt because their harmful effect on the distribution of political power, discussed in the following section of the text, is sufficient to condemn them.

The point is of considerable practical importance since lobbying groups adopt diverse strategies along a spectrum ranging from supporting candidates primarily to affect election outcomes to investing in candidates expected to win in the hope of receiving favorable treatment. For an overview, see Pressman, Special Report: Lobbyists and the Elections, CONG Q. WEEKLY. REP., Feb. 18, 1984, at 295.
It is true that under the present system of campaign finance, many groups have little choice but to make, and many politicians have little choice but to accept, contributions intended to influence official conduct. This is an important and appropriate point for prosecutors and courts to consider in individual cases, but I believe that it should not control the general question of whether and when a contribution is a bribe. This is not a neutral political question. It is a significant and politically relevant fact that under our present system of campaign finance, politicians and interest groups engage routinely, not in "legalized" bribery, as is commonly supposed, but in felonious bribery that goes unprosecuted primarily because the crime is so pervasive. I believe the appropriate response to this troubling fact is not to adopt more convenient definitions of bribery but, instead, to reform the campaign finance system. This is not the place to argue the feasibility of effective campaign finance reform, but we must recognize that suggestions to exempt campaign contributions from the bribery statutes, however well-intentioned as attempts to correct anomalies in the law of bribery, have a broader significance in the ongoing political struggle over campaign finance.

2. Bribery as Harmful Because it Results in Bad Decisions

In the previous section I assumed that political bribery is regarded as harmful in itself. In this section I assume bribery is regarded as harmful because of its results. Treatment of political bribery as harmful because it results in bad decisions is compatible with the conclusions already reached.

It may seem that identifying corrupt acts on the basis of the official policies to which they tend to lead requires some substantive standard for evaluating those policies. The distinction between substance and process is no less difficult in politics and government than it is in law, but in both fields it is useful for some purposes. In particular, a democratic society values the right to pursue a broad

236. See supra note 90.

237. On the other hand, I do not see how campaign contributions feasibly can be regarded as benefits within the meaning of unlawful gratuity statutes. The most innocent campaign contribution is presumably made "for" or "because of" official conduct favored by the contributor. But see United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974). A student commentator reaches the same conclusion by following a somewhat different analysis. See Note, Campaign Contributions, supra note 4, at 462–64, discussed further infra note 242.

The conclusion that a contribution cannot be a "thing of value" under an unlawful gratuity statute would be applicable in my view only if the official involved were an elected official or, perhaps, the policy-making appointee of an elected official. A campaign contribution made "for" or "because of" an action performed by a relatively ministerial official would be precisely the kind of act that the unlawful gratuity statute should prohibit.
range of substantive political goals. While it is an illusion to suppose that process can be neutral as to substance, we should avoid unnecessarily building substantive values into our procedures. Substantively biased procedure is the political equivalent of assuming the conclusion in logical argument. Accordingly, we should not attempt to identify conduct that is corrupt on the basis of some substantive evaluation of the policy results to which the conduct is likely to lead.

Equality is both a substantive and a procedural value. While substantive equality is highly controversial—in the economic sector, for example—there is probably some degree of consensus that equality is a worthy procedural ideal. The document that created our polity declares that all men are created equal. We do not recognize aristocracy, we extend the franchise broadly, and in other ways we seek to promote and carry out the idea that each human being is worthy of respect and ought to have as much of a voice as another in determining the political course of the community. Practices that tend to skew outcomes in favor of some groups and against others should be viewed with suspicion, especially if it appears that the direction of the skewing tends to reinforce political inequalities caused by other societal conditions.

The provision of personal benefits and campaign contributions to public officials in order to influence their decisions is clearly suspect under this criterion. Pressure generated by these devices favors those with large amounts of money available for use in pursuit of their political goals: wealthy individuals and, especially, interests situated or structured for ready pooling and concentration of their financial resources for political purposes. Many other features of our society create advantages for the wealthy and for well organized or concentrated interests. We can conclude that since personal benefits and campaign contributions as devices to influence official conduct are most available to the wealthy and well-organized, consideration of the direction in which these practices are likely to skew policies reinforces the conclusion in the previous section that the practices are corrupt.

The same line of argument may be pursued regarding political benefits other than campaign contributions, but not as forcefully. A certain degree of organization is needed to make and communicate an endorsement, but not nearly the amount of organization needed to play the campaign contribution game effectively. Logrolling and state-bribery no doubt are often employed to favor already powerful interests, but their use is not limited to those interests. Whatever benefits might derive from improving the distribution of political

238. See generally Baskin, supra note 223, at 90–93, 94–95.
239. See generally M. Olson, supra note 201.
power if political benefits such as these, intended to influence official
conduct, were declared corrupt, probably would be outweighed by
the loss in both accessibility of government officials and general flex-
ibility in the system.

3. An Interpretation of Political Bribery

My "stand" on bribery laws may be summarized as follows. When the benefit in question is a personal benefit to the official, the
element of "corrupt intent" in the bribery statute may be regarded
as a redundancy. That is, the provision of a personal benefit to a
public official with the intent of influencing the recipient's official
actions is corrupt in itself. A more cautious but still acceptable ap-
proach would start with this assumption, but would find that no
bribe has occurred if additional circumstances negate the character-
ization of the conduct as corrupt.240

When the benefit is a political benefit other than a campaign
contribution, the conclusion is precisely the opposite. Either the
provision of such benefits with intent to influence an official act
would be held ipso facto not corrupt and therefore not bribery, or
such conduct would be regarded as not corrupt in the absence of
other circumstances changing its character.241

Finally, so far as the meaning of "corrupt intent" is concerned,
special interest campaign contributions made wholly or in substan-
tial part for the purpose of influencing official behavior are the same
as personal benefits. There is one difference, however, that may af-
flect the assessment of individual cases. Barring special circum-
stances, the mere provision of a personal benefit by a person
interested in the recipient's official actions creates a strong inference
of an intent to influence because there is no plausible alternative
explanation of the gift. If the benefit is a contribution there is an
alternative explanation, namely that the donor wanted to influence
the outcome of an election. In each case an intent to influence an
official decision is needed for bribery, but in the case of the contribu-
tion more may be needed for assurance that such an intent is
present.242

240. I am unable to think of what the circumstances would be, but real life is consid-
erably more fertile than my imagination.

241. If the latter approach were taken it would be possible to find a bribe in the
hypothetical case of Charles and Diane, involving an endorsement conditioned on a
political favor for the head of the endorsing organization. See supra text accompanying
note 92.

242. This does not mean there must be an explicit agreement that a specific decision
will be made in a specific manner in exchange for the contribution. One student com-
mentator would impose such a requirement, but only in the case of contributions within
the limits of and reported properly under the Federal Election Campaign Act. See
Note, Campaign Contributions, supra note 4, at 464-66. This proposal would be of no
use in interpreting state statutes in states that do not impose limits on the size of cam-
CONCLUSION

Upon reading an earlier version of this Article, Professor Booth Fowler was good enough to suggest that corruption is perhaps an “essentially contested concept,” that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible. Ultimately, I believe this suggestion will prove correct. Certainly, I do not suggest the conception set forth in the previous section is incontestable.

I do not believe, however, that we should provide our political scientists and theorists with such a convenient escape hatch just yet. Even if the problem of political bribery will not be solved in the end, there is value in the attempt. We need to think more about the concrete situations in which actors in our political system characteristically find themselves, and what we reasonably can ask of them in order to have the kind of system and the kind of results we would like. Intermediate political theory will no more solve our problems than other varieties of political theory, but it may help us disagree more intelligently.

243. The idea was first expounded in Gallie, Essentially Contested Concepts, 56 Proc. Aristotelian Soc’y 167 (1955-56), and later was applied brilliantly to several important political concepts in W. Connolly, supra note 57, at 10-41, passim. For a more complete and formal definition of the term “essentially contested concept,” see id. at 10.